



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

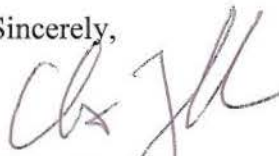
Re: Sergio Ochoa Tamayo, P-357-19
Response of the United States

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 22, 2019. The Petition, with exhibits, was submitted on behalf of Sergio Ochoa Tamayo and forwarded to the United States as Petition No. P-357-19. The Petition was submitted to the Commission on February 12, 2019. 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. People v. Ochoa, 26 Cal. 4th 398, 416 (2001).
2. People v. Ochoa, 2001 Cal. LEXIS 6367 (2001).
3. In re Ochoa, 2002 Cal. LEXIS 5710 (2001).
4. Ochoa v. California, 2002 U.S. LEXIS 3140 (2002).
5. Ochoa v. Davis, 2018 U.S. Dist. LEXIS 138260 (2018).
6. Order filed March 4, 2019, U.S. Court of Appeals for the Ninth Circuit, No. 18-99007; D.C. No. 2:02-cv-07774-RSWL.
7. Order filed July 3, 2019, U.S. Court of Appeals for the Ninth Circuit, No. 18-99007; D.C. No. 2:02-cv-07774-RSWL.
8. Gavin Newsom, Executive Order N-09-19 (2019).

SERGIO OCHOA TAMAYO
P-357-19
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-357-19 (“Petition”). The Petition was received by the Commission in February 2019 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 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 violations¹ of rights set forth in the American Declaration of the Rights and Duties of Man (“American Declaration”) and is manifestly groundless under Article 34(b). The Petition also fails to meet the Commission’s established

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. 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 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.

criteria in Articles 31 of the Rules. The Petition is inadmissible under Article 31 of the Rules because Petitioner has failed to pursue and exhaust domestic remedies in the United States. The Petition is further inadmissible because consideration of the claims contained in the Petition is barred by the 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 Petitioner's request for relief, as the Petition is without merit.

I. FACTUAL AND PROCEDURAL BACKGROUND

Mr. Ochoa was a member of the 18th Street Gang which was in a "war" with the Crazy Riders gang in late 1989 to early 1990, when the offenses for which Mr. Ochoa was charged took place.² Following a series of murders between the rival gangs, Mr. Ochoa was driving a truck and picked up several members of his gang, including one carrying a double-barreled shotgun.³ They then went looking for the Crazy Riders.⁴ Mr. Ochoa pulled up to a vehicle thinking it was the Crazy Riders and the driver was shot and killed by the shotgun.⁵

About two weeks later, Mr. Ochoa said to several others, "Let's go do a jack" (referring apparently to a car-jacking).⁶ They approached a car and Mr. Ochoa placed a gun in the face of the man sitting in the car.⁷ An eyewitness saw the driver shot and later identified Mr. Ochoa as the shooter.⁸ The driver died from a gunshot to the chest.⁹

In 1992, Mr. Ochoa was convicted after a jury trial for these two murders and attempted robbery and, following the penalty phase, sentenced to death. He subsequently benefited from extensive judicial review in both state and federal court. The Supreme Court of California affirmed Mr. Ochoa's conviction and sentence on appeal.¹⁰ He filed a petition for rehearing and writ of

² People v. Ochoa, 26 Cal. 4th 398, 416 (2001).

³ *Id.* at 417.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 418.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 419.

¹⁰ *Id.*

certiorari with the State of California, both of which were denied.¹¹ His writ of certiorari to the U.S. Supreme Court was also denied.¹² He filed a state habeas application that was denied in 2001.¹³ The court's opinion stated that "[a]ll claims are denied on the merits. Claim VII [on prosecutorial use of peremptory strikes] is denied on the additional ground that it could and should have been, but was not, raised on appeal."¹⁴

Mr. Ochoa then filed a petition for a writ of habeas corpus in federal court. This application raised, inter alia, claims of ineffective assistance of counsel, a violation of his rights to consular assistance, and unconstitutional delay. The U.S. District Court for the Central District of California denied his petition.¹⁵ He then filed a notice of appeal to the Ninth Circuit Court of Appeals, where he requested an extension of time to file the opening brief. He filed a second request for another 120-day extension during which time he filed this petition with the Commission. Petitioner's appeal to the Ninth Circuit Court of Appeals of denial of his habeas petition by the district court is therefore currently pending.

II. 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 Articles 31 and 34 of the Rules of Procedure ("Rules"). The 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 of rights set forth in the American Declaration, includes claims beyond the *ratione materiae* competence of the Commission, and is manifestly groundless under Article 34(b). Finally, consideration of the Petition would be inappropriate in light of the Commission's Fourth Instance doctrine.

1. The Petitioner Has Not Exhausted Domestic Remedies

¹¹ Respectively, *People v. Ochoa*, 2001 Cal. LEXIS 6367 (2001) and *Ochoa v. California*, 2002 U.S. LEXIS 3140 (2002).

¹² *Ochoa v. California*, 2002 U.S. LEXIS 3140 (2002).

¹³ *In re Ochoa*, 2002 Cal. LEXIS 5710 (2001).

¹⁴ *Id.*

¹⁵ *Ochoa v. Davis*, 2018 U.S. Dist. LEXIS 138260 (2018).

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, the requirement of exhaustion of domestic remedies stems from customary international law, as a means of respecting State sovereignty. It ensures that the State on whose territory a human rights violation allegedly has occurred has the opportunity to redress the allegation by its own means within the framework of its own domestic legal system.¹⁶ A State conducting judicial proceedings for 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 resorting to an international body.¹⁷ The Inter-American Court of Human Rights has remarked that the exhaustion requirement is of particular importance “in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction.”¹⁸

The Commission has repeatedly made clear that petitioners have the duty to pursue *all* available domestic remedies.¹⁹ Exhaustion is only realized where such remedy has been pursued to the highest appellate level, resulting in a final judgment.²⁰ The arguments raised in the domestic

¹⁶ 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.

¹⁷ THOMAS HAESLER, *THE EXHAUSTION OF LOCAL REMEDIES IN THE CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS* (1968) at 18–19.

¹⁸ *Velásquez Rodríguez Case*, Judgment of July 29, 1988, ¶ 61, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988).

¹⁹ See, e.g. *Páez García v. Venezuela*, Petition No. 670-01, Report No. 13/13, Mar. 20, 2013, Analysis § B(1) & Conclusions ¶ 35 (finding petition inadmissible for failure to exhaust because petitioner did not avail himself of remedies available to him in the domestic system).

²⁰ 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 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

proceedings must be the same as those intended to be raised in international proceedings.²¹ 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.”²² And, as the Commission has stated, “[m]ere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies.”²³ 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.”²⁴ These reasonable requirements may include timeframes for filing certain types of claims.

The Petitioner in this case failed to exhaust all available domestic remedies in several ways. While Petitioner claims that “the procedural barriers erected by the U.S. Congress and the U.S. Supreme Court make it virtually impossible for a petitioner such as Mr. Ochoa to obtain meaningful review of claims that were treated as procedurally defaulted by the lower courts,” the Commission recognizes that reasonable domestic procedural requirements that are not satisfied by the Petitioner do not, contrary to what Petitioner asserts, “excuse[] the exhaustion” of domestic remedies. Therefore, Petitioner’s failure to appropriately raise his claims, resulting in procedural default, is insufficient to satisfy the Commission’s exhaustion requirement with respect to those claims; Petitioner certainly cannot now rely on such failure to excuse himself from his duty to pursue and exhaust domestic remedies.

Additionally, Petitioner continues to litigate his case in Federal court and, as such, has failed to exhaust his appeal before the Ninth Circuit. Instead, he has requested two extensions for

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.”).

²¹ 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.I (Part 2), art. 14, cmt. 6 (quoting *Elettronica Sicala 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’.”).

²² *Elettronica Sicala S.p.A. (ELSI)* (United States v. Italy), [1989] I.C.J. 15, 46.

²³ *Sánchez et al. v. United States* (“Operation Gatekeeper”), Petition No. 65/99, Inadmissibility (“Operation Gatekeeper Inadmissibility Decision”), ¶ 67.

²⁴ *Magi v. Argentina*, Petition No. 951-01, Report No. 106/13, Inadmissibility, Nov. 5, 2013, ¶ 33.

time to file his appeal with the Ninth Circuit, during which time he filed this petition with the Commission. Upon approval of the second extension for time to file the opening brief, the court noted, “[i]n light of the lengthy extensions of time granted, any further motion for an extension of time to file the opening brief is disfavored.”²⁵ Because these appeals are outstanding, due in part to Petitioner’s own requests for extensions of time, remedies have not been pursued to their highest appellate level, no final judgment has been reached, and exhaustion has not been realized. Petitioner maintains that not all of the issues were granted appeal but also concedes that he will “ask the Ninth Circuit Court of Appeals to expand the scope of the appeal to include additional claims,” and “will in due course file a petition for a writ of certiorari with the United States Supreme Court.”²⁶ Petitioner has himself identified two unexhausted avenues of judicial recourse that, at least at the time the Petition was filed, had yet to be pursued or exhausted. While Petitioner invokes the unlikelihood of success as a basis to be excused from his duty to exhaust all domestic remedies, it is well established that mere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies.²⁷

Petitioner also invokes the prospect that exhausting his domestic remedies may leave the Commission insufficient time to review his Petition before the state of California carries out the punishment to which Petitioner has been sentenced.²⁸ In support of his claim that the exhaustion requirement has been met, Petitioner also cites the Commission’s Report No. 16/12 where Ivan Teleguz’s petition was deemed admissible. Petitioner in that case asserted he should not be required to wait until his pending appeal was heard before the Commission could consider his petition. In that case, however, the Commission received the petition in November 2011 and Petitioner asserted he was likely to be executed in the spring of 2012. There are no similar circumstances present that would warrant bypassing the Commission’s exhaustion requirement for the instant Petition. Mr. Ochoa maintains that he is “in grave danger of execution.” However, about a month after Mr. Ochoa’s petition was filed, on March 13, 2019, the Governor of California, where Mr. Ochoa remains in custody, issued an executive order placing a moratorium on the death

²⁵ Order filed March 4, 2019, U.S. Court of Appeals for the Ninth Circuit, No. 18-99007; D.C. No. 2:02-cv-07774-RSWL.

²⁶ Petition at 7.

²⁷ *Sánchez et al. v. United States* (“Operation Gatekeeper”), Petition No. 65/99, Inadmissibility (“Operation Gatekeeper Inadmissibility Decision”), ¶ 67.

²⁸ Petition at 7.

penalty in California and granting a blanket reprieve to all of California's death row inmates.²⁹ The fact that Petitioner has been sentenced to death in the state of California is insufficient to relieve the Petitioner of his duty to exhaust domestic remedies.

For these reasons, the Petitioner has failed to exhaust his local remedies and the Petition is inadmissible under Article 31 of the Rules.

2. The Petition Fails to Establish Facts that Could Support a Claim of Violation of the American Declaration

The Petition is also inadmissible under Article 34 of the Rules because it does not state facts that tend to establish a violation of the American Declaration and it is manifestly groundless. The Petitioner alleges that the United States has violated Article I (Right to Liberty), Article XVIII (Right to Civil Rights), Article XXV (Right of Protection from Arbitrary Arrest or Detention), and Article XXVI (Right to Due Process) of the American Declaration. For the reasons described below, each of these claims is inadmissible under Article 34 of the Rules.

a. The Petition Fails to Establish Facts that Support Claims that the United States Violated Article XVIII and Article XXVI of the American Declaration

Petitioner alleges that California authorities violated the American Declaration by providing incompetent defense counsel to Petitioner. The United States interprets this claim to allege that the United States has violated its commitments under Articles XVIII (right to civil rights) and Article XXVI (right to due process of law) under the American Declaration.

Petitioner claims he received ineffective assistance of counsel due to deficient investigation and inadequate presentation of mitigating evidence. The investigation into Mr. Ochoa's

²⁹ See "IACHR Welcomes the Moratorium on Executions of Death Row Inmates in the US State of California," Press Release, March 20, 2019; Gavin Newsom, Executive Order N-09-19 (2019). Note that the State of California has not carried out an execution since 2006.

background for purposes of mitigation was, however, more extensive than Petitioner claims. As the District Court noted:

Contrary to Petitioner's allegations, counsel did not rely on cursory interviews primarily with Petitioner's immediate family members. Petitioner's investigator, Sheryl Duvall, M.S., interviewed at least twelve witnesses, including all of Petitioner's four siblings, his parents, his ex-girlfriend and mother of one of his two children, his former teacher at court-ordered juvenile camp, a principal at the juvenile camp, two long-time neighbors and close family friends, and a next-door neighbor of more than twenty-five years.³⁰

The court also described how:

The record belies Petitioner's allegation that defense counsel "apparently ignored" evidence of his "grossly ineffective parenting." To the contrary, it was part of defense counsel's express presentation to the jury. Counsel argued that Petitioner's parents were inadequate yet sympathetic, and Petitioner's life should be spared for their sake.³¹

Counsel also did provide in detail to the jury the circumstances of Petitioner's childhood. Petitioner's father testified that both he and his wife were away from the home from 5 am to 11 pm daily and Counsel argued to the jury that the siblings effectively tasked with raising the petitioner were ill-equipped to do so. Counsel painted a picture for the jury of Petitioner's early years, describing how as a three year old he was "getting hot water dumped on him, getting beat up by the neighborhood kids, getting his clothes stole[n] off the line and thrown away, getting his food stolen from him and nobody around to do anything about it."³²

It is also misleading to assert, as Petitioner does, that "[d]efense counsel presented nothing to rebut" the image of Mr. Ochoa as "an evil man without a conscience."³³ As just a few examples, the mother of Petitioner's daughter testified that he loved and played with his daughter and that he maintains close ties with his sister's children who visit him in prison and get excited when he calls.³⁴ His oldest sister testified that he draws and mails them cartoons.³⁵

While Petitioner raises these same claims of inadequate assistance of counsel before the Commission, it is clear they have already been addressed and rejected after investigation in

³⁰ Ochoa v. Davis, 2018 U.S. Dist. LEXIS 138260, 11-12 (2018).

³¹ *Id.* at 14.

³² *Id.* at 18.

³³ Petition at 11.

³⁴ Ochoa v. Davis, 2018 U.S. Dist. LEXIS 138260, 14-15.

³⁵ *Id.* at 17.

domestic proceedings that determined his rights were not violated (and, as discussed in greater detail below, the Fourth Instance doctrine precludes the Commission from reassessing these claims now). Petitioner received adequate representation and presentation of mitigating evidence. While Petitioner may in hindsight take issue with Counsel’s strategy, as domestic courts have repeatedly found, his representation was not constitutionally deficient. Nor do these facts establish a violation of the American Declaration. Consequently, the claim should be rejected as inadmissible under Article 34(a) and as baseless under Article 34(b) of the Rules.

b. Petitioner’s Consular Notification Claim is not Cognizable under the American Declaration

Petitioner contends that when he was arrested, California authorities failed to tell him that he had the option of requesting that they notify the Mexican consulate of his detention, and that this alleged failure violated the Vienna Convention on Consular Relations (VCCR).³⁶

This claim is inadmissible under Article 34(a) of the Rules for failure to state facts that tend to establish a violation of the rights in the American Declaration, and lacks merit in any event. While the United States acknowledges that the Commission has taken a different view on this issue,³⁷ we respectfully maintain our firm position that the Commission does not, in fact, have competence to review claims arising under the Vienna Convention. This lack of jurisdiction is not avoided by characterizing a claim as one arising under the American Declaration. Claims concerning consular notification do not give rise to a violation of a human right enshrined in any international instrument to which the United States is a party or has endorsed. Thus, Article 20 of the Commission’s Statute and Articles 23 and 27 of the Rules preclude their consideration here.³⁸

³⁶ Petition at 13–18.

³⁷ See, e.g., *Tercero v. United States*, Case 12.994, Report No. 79/15, Report on Merits (Publication), Oct. 28, 2015, ¶¶ 124–32 (reaffirming the Commission’s view that it has jurisdiction over Vienna Convention claims when interpreting and applying provisions of the American Declaration).

³⁸ 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

As the United States has emphasized in numerous previous submissions,³⁹ consular notification is not a human right. The Vienna Convention’s consular notification protections are based on principles of reciprocity, nationality, and function, and any rights arising from those protections attach to consular officers for the purpose of facilitating a foreign state’s information about—and access to—its nationals. Neither is consular notification a necessary component of the right to a fair trial or the right to due process in criminal proceedings. In the *Avena* case, the International Court of Justice noted that neither the text, nor the object and purpose, nor the *travaux* of the Vienna Convention support the conclusion that consular notification is an essential element of due process in criminal proceedings.⁴⁰

Moreover, the American Declaration’s due process rights are not defined by the provisions of the Vienna Convention. The availability of consular notification and access is premised on the existence of consular relations between governments. Consular access and assistance is thus undeniably a right exercised by the detained individual’s State of nationality, through its consular officers, in order to facilitate that State’s access to its national, as clearly stated in the introductory clause of Article 36(1) of the VCCR. As the plain text of Article 36(1)(c) provides: “*consular officers* shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation” (emphasis added). Nothing in this provision suggests that the right to access may be privately enforced by the detained individual.⁴¹

Furthermore, consideration of other VCCR clauses supports this view. The VCCR’s preamble states that “the purpose of [the] privileges and immunities [created by the treaty] is not to benefit individuals, but to ensure the efficient performance of functions by consular posts.” And the introductory clause to Article 36 states that it was designed “[w]ith a view to facilitating the

States. The United States is not a party to any of the other instruments listed in Article 23. Consequently, the Commission lacks competence to apply any instrument beyond the American Declaration with respect to the United States.

³⁹ See, e.g., *Kadamovas* U.S. Response, at 6–8.

⁴⁰ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, [2004] I.C.J. 12, ¶ 124.

⁴¹ This is also the prevailing view among U.S. courts that have examined this question. See, e.g., *Gandara v. Bennett*, 528 F. 3d 823, 827–29 (11th Cir. 2008); *Cornejo v. County of San Diego*, 504 F. 3d 853, 855 (9th Cir. 2007).

exercise of consular functions relating to nationals of the sending State.” Those clauses show that “the purpose of Article 36 was to protect a *state’s right* to care for its nationals.”⁴²

It is therefore up to representatives of the individual’s State of nationality to determine whether or not to provide assistance, and the VCCR does not provide the detained individual any right or authority to demand it. While the State of nationality may diplomatically protest any failure to observe the terms of the VCCR and attempt to negotiate a solution, the individual does not have a judicially enforceable right to compel compliance. To accept the argument that Petitioner’s consular notification claim amounts to a human rights violation under the American Declaration would require the untenable conclusion that any foreign national who is not given the option of consular notification at the time of arrest because of an absence of consular relations cannot receive a fair trial or due process of law.

Thus, because consular notification is not a right in the American Declaration, nor a component of any right therein, Article 34(a) of the Rules prevents the Commission from entertaining Petitioner’s consular notification claims, and any such claims are meritless for the same reason.

Although this claim is inadmissible and meritless, the United States wishes to emphasize once again that it takes its consular notification and access obligations under the Vienna Convention very seriously and has made significant efforts over the past several years, discussed in detail in several past proceedings before the Commission, to meet the U.S. goal of across-the-board compliance by domestic authorities. The United States has a robust outreach and training program on consular notification and access that targets federal, state, and local law enforcement, prosecutors, defense attorneys, and judges. The centerpiece of this outreach is the regularly revised *Consular Notification and Access Manual*, a one-of-a-kind public resource also utilized by governments of other States in seeking to improve their compliance with the VCCR’s obligations. Among other things, the *Manual* provides detailed guidance on the law, its application in a myriad of specific scenarios, and best practices. The *Manual* also contains sample consular notification statements in English, Spanish, and 20 other languages, sample fax sheets for providing notification, sample diplomatic and consular notification cards, and contact information for foreign

⁴² United States v. De La Pava, 268 F.3d 157, 165 (2d Cir. 2001).

embassies and consulates in the United States.⁴³ Since 1997, moreover, the U.S. Department of State has conducted nearly 1,000 training sessions and distributed millions of manuals and pocket cards so that police and other officials may have easy access to the basic consular notification and access requirements.

In addition, at the urging of the U.S. Departments of State and Justice, the Federal Rules of Criminal Procedure were updated in December 2014 to help facilitate compliance with U.S. consular notification and access obligations. Pursuant to these changes, under Federal Rules of Criminal Procedure 5(d)(1)(F) and 58(b)(2)(H), a defendant who is not a U.S. citizen and who has been charged with a federal crime shall be informed by a federal magistrate judge at the initial appearance that he or she “may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant’s country of nationality that the defendant has been arrested.”

In addition to ensuring prospective compliance with our consular notification and access obligations, the United States is committed to honoring its obligations under *Avena*. The Commission is likely aware of our ongoing, concerted efforts over several years, including before the U.S. Supreme Court, to give effect to the judgment. The U.S. government also continues to promote the enactment of legislation that would ensure compliance with *Avena*. The United States reiterates its willingness to provide the Commission, at the Commission’s request, further updates as to its robust consular notification outreach efforts.

c. The Petition Fails to Establish Facts that Support Claims that the United States Violated Article I, Article XVIII, and Article XXVI of the American Declaration

Petitioner alleges that his execution would violate a prohibition of executing persons with mental disabilities.⁴⁴ However, neither the American Declaration nor U.S. law prohibit capital punishment for individuals who are seriously mentally ill but whose mental condition does not rise

⁴³ The U.S. Department of State recently released a revised Fourth Edition of the *Consular Notification and Access Manual*. See UNITED STATES DEP’T OF STATE, CONSULAR NOTIFICATION AND ACCESS: INSTRUCTIONS FOR FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICIALS TO ASSIST THEM (4th ed. 2014), available at https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA_Manual_4th_Edition_August2016.pdf.

⁴⁴ Petition at 18–24.

to the level of insanity or mental incapacity. The U.S. Supreme Court has found that the Eighth Amendment to the U.S. Constitution, which forbids cruel or unusual punishment, does not prohibit capital punishment.⁴⁵ The majority of U.S. citizens favor the possibility of capital punishment in connection with the most serious crimes. As a consequence, the laws of a majority of the states (29 out of 50), as well as federal and military law, authorize capital punishment for such crimes. However, capital punishment can only occur in accordance with due process of law and stringent procedural safeguards guaranteed by the U.S. Constitution and relevant state constitutions and mirrored in international instruments to which the United States is a party.

International consensus and U.S. law condemn execution of insane persons and those who are intellectually disabled.⁴⁶ However, there is no similar consensus regarding the execution of seriously mentally ill individuals who are determined not to be insane or intellectually disabled. Indeed, there is no internationally agreed upon definition of “seriously mentally ill” individuals, and Petitioner acknowledges as much.⁴⁷ Petitioner cites no international instruments and provides no clear definition of this term. International instruments, including the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities and the United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, also fail to define what constitutes “serious mental illness,” further evincing the lack of international consensus—much less a rule of international law—regarding the class of persons to whom any alleged prohibition on executions would apply.

Petitioner has offered no evidence showing that he suffers from mental illness that rises to the level of insanity established in the U.S. Supreme Court opinion in *Ford v. Wainwright*, which bans the death penalty for those who are “[un]aware of [their] impending execution and of the reason for it.”⁴⁸ Petitioner has not shown that at any point in time during his trial and appellate

⁴⁵ *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion).

⁴⁶ *See, e.g.*, UN Economic and Social Council Resolution No. 1984/50, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, May 25, 1984, ¶ 3, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/DeathPenalty.aspx>; *see also* *Ford v. Wainwright*, 477 U.S. 399 (1986) (death penalty is impermissible for those suffering from insanity); *Atkins v. Virginia*, 536 U.S. 304 (2002) (death penalty is impermissible for those suffering from severe mental retardation). In this brief we intend the term “intellectually disabled” to have the same meaning as “mental retardation” as used by the U.S. Supreme Court in *Atkins*.

⁴⁷ Petition at 18 n. 67, 20 n. 79.

⁴⁸ *Ford*, 477 U.S. at 400.

proceedings he has not understood that he will be executed for the murder of two innocent civilians.

Nor has Petitioner claimed to suffer from mental handicap that would satisfy the standard in the U.S. Supreme Court's opinion in *Atkins v. Virginia*, which bans the death penalty for defendants that exhibit "not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18 ..." plus "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."⁴⁹ Petitioner has not shown that he exhibited subaverage intellectual functioning or significant adaptive limitations before the age of 18. Dr. Patricia Pérez-Arce, whose testimony was presented by Petitioner, concluded that he suffered from "Cognitive Disorder Not Otherwise Specified." As the court previously noted, "[s]he did not conclude that Petitioner suffered from what was then called Mental Retardation" and:

Even in light of the evidence of adaptive deficits Petitioner presents, Petitioner's IQ score during his developmental period, especially taken in the context of Dr. Pérez-Arce's expert opinion concluding that Petitioner suffered not from intellectual disability but from Cognitive Disorder Not Otherwise Specified, provides reasonable justification for the California Supreme Court to have found no onset of intellectual functioning deficits and adaptive deficits during Petitioner's developmental period or before the age of 18.⁵⁰

As a result, Petitioner offers no proof that he is mentally incompetent or that his mental condition has deteriorated to the point of insanity that would render application of the death penalty impermissible.

Petitioner acknowledges that his mental condition would not prohibit the imposition of the death penalty under current U.S. Supreme Court jurisprudence, and instead predicates his claim on the argument that the "United States' failure to ban the death penalty for persons with serious mental illness . . . violates international law."⁵¹ However, Petitioner identifies no international legal obligation prohibiting the imposition of the death penalty for persons with the mental condition Petitioner allegedly suffers from. The prior reports issued by this Commission and two

⁴⁹ *Atkins*, 536 U.S. 304.

⁵⁰ *Ochoa v. Davis*, 2018 U.S. Dist. LEXIS 138260, 193-94.

⁵¹ Petition at 20.

United Nations Commission on Human Rights Resolutions relied upon by the Petitioner do not reflect or establish obligations under international law.⁵² Indeed, the aspirational language of the two UNCHR Resolutions—which “urge” and “call on” states not to impose the death penalty on persons suffering from mental disorders—underscores the absence of any applicable international legal obligation.⁵³

Petitioner alleges that no court has ever given full and appropriate consideration to the evidence that he suffered from Post-Traumatic Stress Disorder (PTSD), but that claim is plainly refuted by the record. Petitioner’s counsel during trial retained Michael Maloney, Ph.D., a clinical psychologist and, at the time of trial, Clinical Professor of Psychiatry at the University of Southern California School of Medicine. Counsel also presented evidence by Dr. Pérez-Arce. The findings and determinations of these professionals were thoroughly made and well-considered by the courts. The fact that none of Petitioner’s mental health experts made determinations sufficient to foreclose a sentence of the death penalty does not compel the conclusion that the investigation was inadequate, much less a violation of Petitioner’s due process rights. His claim of unconstitutional execution based on his mental ability and competence has been carefully considered by both state and federal courts.

Petitioner seems to take issue with the weight granted to his claim of suffering from PTSD by U.S. courts, but mere disagreement with the decisions reached by U.S. courts on this point does not mean that his claim was not given full and appropriate consideration. And, in any event, it is insufficient for Petitioner to allege he suffers from a serious mental illness. His mental capacity was investigated and reviewed on multiple occasions where it was found not to meet the constitutionally required standard. Such disagreement is insufficient to articulate a violation of Petitioner’s civil rights or due process rights under Article XVIII and Article XVII of the American Declaration (and, as discussed in greater detail below, the Fourth Instance doctrine precludes the Commission from reassessing these claims now).

⁵² Petition at 21 n. 80.

⁵³ See UN Commission on Human Rights Resolution 2003/67, U.N. Doc. E/CN.4/RES/2003/67 (Apr. 24, 2003), para. 4(g) (urging countries “not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person”) (emphasis added); Resolution 2005/59, U.N. Doc. E/CN.4/RES/2005/59 (April 20, 2005), para. 7(c) (calling on states “[n]ot to impose the death penalty on a person suffering from any mental . . . disabilities or to execute any such person”).

To date, the U.S. Supreme Court has not determined that execution of severely mentally ill individuals constitutes a due process violation. In recent cases on the subject, the Court has instead said that mentally ill individuals may be executed as long as they understand the reason for their execution (i.e., cannot make a showing of insanity).⁵⁴ The Court has also not yet found that U.S. public opinion overwhelmingly supports banning its application to the mentally ill. And while several states have banned execution of the severely mentally ill, others continue to impose death sentences to mentally ill individuals who have committed the most heinous crimes.⁵⁵ Petitioner's sentence cannot therefore be considered to violate a consensual international or constitutional standard banning application of the death penalty to mentally ill individuals, as no such standard on this issue currently exists. As such, Petitioner's claims in this regard fail to state facts that tend to establish a violation of the rights in the American Declaration.

d. The Petition Fails to Establish Facts that Support Claims that the United States Violated Article XXV and Article XXVI of the American Declaration

Article XXV of the American Declaration articulates a right of protection from arbitrary arrest.⁵⁶ Article XXVI of the American Declaration provides that “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.” Petitioner alleges that his incarceration while awaiting execution constitutes an independent violation of Articles XXV and XXVI of the American Declaration based on a theory referred to as “the death row phenomenon.”⁵⁷

⁵⁴ Panetti, 551 U.S. at 934.

⁵⁵ See, e.g., *State ex rel. Strong v. Griffith*, 462 S.W.3d 732 (Mo. Sup. Ct. 2015) (en banc); *Power v. State of Florida*, 992 So. 2d 218 (Fla. 2008); *Brannan v. State*, 275 Ga. 70; *cert. denied* 537 U.S. 1021 (2002) (upholding death sentence for inmate suffering from post-traumatic stress disorder and bipolar disorder).

⁵⁶ “No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.

No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character.

Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

⁵⁷ Petition at 26.

The United States' appellate process affords those convicted of capital offenses the highest level of internationally recognized protection. The U.S. appellate process provides avenues for both state and federal court review of every criminal conviction. In addition, federal habeas corpus procedures enable federal courts to review the substantive and procedural merits of every death penalty sentence imposed by state courts. Appellate review in the United States ensures that defendants' trials are fair and impartial, that convictions are based on substantial evidence, and that sentences are proportionate to the crime. It is an individual's right to take full advantage of mandatory and discretionary appeals at the state and federal level, and it is not uncommon that many years pass before this extensive appeals process is completed.

However, when lengthy delays between initial sentencing and execution are caused by a capital prisoner's utilization of the many appeal avenues open to him, he should not then claim that the conditions of confinement during that delay are cruel, infamous, or unusual punishment. The United States rejects the contention that the Declaration requires States to revise the conditions of detention, which may be mandated by the security risks posed by convicted prisoners on death row, so that they may avoid the hardship potentially associated with a prolonged detention.

Neither the Declaration nor customary international law maintains that capital punishment *per se* violates human rights. A number of countries retain the death penalty in one form or another. The Declaration is intentionally silent on the death penalty (in fact, language prohibiting capital punishment except in exceptional circumstances was deleted during the drafting process).⁵⁸ Because imposition of the death penalty does not violate the Declaration, the conditions of detention during what may be an extended delay between sentencing and execution, which exists to ensure the punishment is imposed fairly, follow as a consequence of lawfully-imposed capital punishment.

Courts in the United States have consistently rejected the argument that delay in execution can constitute cruel and unusual punishment under the U.S. Constitution.⁵⁹ The U.S. Constitution, along with federal and state laws, also establishes standards of care to which all inmates in the United States are entitled, and which are consistent with the rights recognized in the American

⁵⁸ Project of Declaration of the International Rights and Duties of Man, formulated by the Inter-American Juridical Committee, for consideration by the Ninth International Conference of American States, Pan American Union, Washington, 1948, Article I.

⁵⁹ See, e.g., *Foster v. Florida*, 537 U.S. 990 (2002); *Knight v. Florida*, 528 U.S. 990 (1999).

Declaration, as well as other principles of fair treatment of prisoners, such as those underlying the non-binding recommendations with respect to good principles and practices set forth in the UN Standard Minimum Rules for the Treatment of Prisoners. U.S. courts have interpreted the Eighth and Fourteenth Amendments of the U.S. Constitution as prohibiting the use of solitary confinement under certain circumstances. Specifically, under the Eighth Amendment’s prohibition against “cruel and unusual punishments,” correctional facility administrators may not subject inmates to solitary confinement with deliberate indifference to the resulting serious harms, including suicides, suicide attempts, and serious self-injury.⁶⁰

Under the Fourteenth Amendment’s Due Process Clause, prisoners have a protected liberty interest in avoiding certain types of solitary confinement.⁶¹ They cannot be subjected to solitary confinement absent an administrative hearing and other procedures protective of their right to due process. For certain violent inmates, maximum security facilities may be necessary, however, to protect the safety of the community at large and of other members of the prison population. In situations involving prisoners sentenced to death, serious considerations of safety to others within the prison, such as guards and other prisoners, are also present because such prisoners are less likely to be deterred from committing serious crimes because of the potential punishment that may be imposed, since they have already been sentenced to death.

Petitioner complains, as a general matter, that conditions on California’s death row are unacceptably harsh.⁶² Although it does not appear that Petitioner has pursued any particularized claims related to the conditions of his individual confinement, he does concede that conditions in the facility in which he is currently incarcerated “have improved.”⁶³

In sum, long periods of detention on death row are often the result of a constitutionally-mandated, exhaustive appeal process like what has taken place in this case where Mr. Ochoa has had numerous federal and states court reviews of his case. This process exists to ensure the protection of other human rights recognized by the Declaration – including the right to a fair trial, the right to life, freedom from arbitrary arrest and imprisonment, and the right to due process of

⁶⁰ See *Farmer v. Brennan*, 511 U.S. 825, 843 (1970).

⁶¹ *Wilkinson v. Austin*, 545 U.S. 209, 223-224 (2005).

⁶² Petition at 29.

⁶³ Petition at 30.

law. While detention on death row is likely physically and psychologically stressful for many capital prisoners, it is often lengthy because the capital prisoner has chosen to exercise his right to appeal his sentence and because the United States provides numerous opportunities for further review to ensure that appropriate issues get adequate review by the court system. A finding that conditions of detention of prisoners subject to the death sentence violate the Declaration would undermine the state's authority to take appropriate safety and security measures to protect other persons during this review period. In sum, Petitioner's claims in this regard fail to state facts that tend to establish a violation of the rights in the American Declaration.

3. The Commission Cannot Review the Merits of the Petition Without Running Afoul of the Fourth Instance Doctrine

Furthermore, the Petition plainly constitutes an effort by Petitioner to use the Commission as a fourth instance body to review claims already adjudicated 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."⁶⁴

The fourth instance doctrine recognizes the proper role of the Commission as subsidiary to states' domestic jurisdictions,⁶⁵ and indeed, nothing in the American Declaration, the Organization of American States 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."⁶⁶ It is not the Commission's place to sit in judgment as another layer of appeal, second-guessing the considered

⁶⁴ See *Marzioni v. Argentina*, Case No. 11.673, Report No. 39/96, Inadmissibility, Oct. 15, 1996, ¶ 51.

⁶⁵ See *Castro Tortorino v. Argentina*, Case No. 11.597, Report 7/98, Admissibility, Mar. 2, 1998, ¶ 17.

⁶⁶ *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 doctrine 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.").

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 criminal process, including the availability of appellate and collateral review of trial and sentencing proceedings, affords those convicted of serious crimes the highest level of internationally recognized protection. As demonstrated in detail above, Petitioner has availed himself of this legal framework to challenge his conviction and his sentence in multiple proceedings over a number of years. In each of these proceedings, the courts carefully reviewed the evidence and rejected Petitioner's arguments as meritless (or, as with Petitioner's current appeals to the Ninth Circuit, is still hearing his case). 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]."⁶⁷ The Commission has also reiterated that "the fact that the outcome [of a domestic proceeding] was unfavorable ... does not constitute a violation."⁶⁸

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.

III. CONCLUSION

In sum, Petitioner has failed to exhaust domestic remedies as required by Article 31 of the Rules of Procedure. Moreover, the Commission lacks the competence to consider matters arising under the Vienna Convention on Consular Relations, rendering the Petition inadmissible under Article 34(a) of the Rules; in the alternative, the Petition is inadmissible under Article 34(a) because it fails to state facts that tend to establish violations of Petitioner's rights, and contains claims that are manifestly groundless under Article 34(b) of the Rules. The Commission must also

⁶⁷ *Marzioni* Inadmissibility Report, *supra* note 38, ¶ 51.

⁶⁸ *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).

refrain from reviewing the merits of the case as a fourth instance body. 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 merits stage.