



United States Department of State

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

Washington, D.C. 20520

July 25, 2019

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

**Re: Eleven Children Detained at the Nixon Facility
Petition No. P-1994-15
Response of the United States**

Dear Dr. Abrão:

The United States has the honor of addressing the Inter-American Commission on Human Rights in regard to the above-referenced matter concerning eleven children detained at the Nixon Facility. By letter dated December 11, 2018, transmitted on December 18, 2018, your office forwarded the petition received by the Commission from representatives for the petitioners on November 25, 2015. Please find enclosed the United State's response to this submission. We trust the information provided 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 "Alexis Ludwig", with a large, stylized loop at the end.

Alexis Ludwig
Deputy Permanent Representative

Annexes:

Selected Documents Relating to Petitioners' Claims

- 1) 6 United States Code § 279(g)
- 2) *David Walding, et al. v. United States of America, et al.*, 955 F.Supp. 2d 759 (W.D. Tex. 2013)
- 3) *David Walding et al. v. United States of America, et al.*, Declaration of Ken Tota in Support of Defendant United States' Motion to Dismiss, U.S. District Court for the Western District of Texas, Case No. 5:08-CV-00124-XR (July 14, 2008)
- 4) Office of Refugee Resettlement, "Benefits at a Glance Fact Sheet"
- 5) *David Walding et al. v. United States of America, et al.*, Case No. 5:08-CV-00124-XR, Docket Report
- 6) *David Walding et al. v. United States of America, et al.*, Original Complaint, Case No. 5:08-CV-00124-XR (Feb. 15, 2008)
- 7) *E.A.F.F. et al. v. United States of America, et al.*, 955 F.Supp. 2d 707 (W.D. Tex. 2013)
- 8) *David Walding et al. v. United States of America, et al.*, Defendant United States' Reply Brief in Support of the United States' Motion to Dismiss and Motion for Partial Summary Judgment (Jan. 14, 2011)
- 9) *E.A.F.F., et al. v. Gonzalez et al.*, 600 Fed. Appx. 205 (5th Cir. 2015)
- 10) Federal Rules of Civil Procedure (Dec. 1, 2018)

ELEVEN CHILDREN DETAINED AT THE NIXON FACILITY
P-1994-15
RESPONSE OF THE UNITED STATES

The United States appreciates the opportunity to submit these observations on the petition submitted by representatives for eleven children (“Petitioners”) detained at a shelter for unaccompanied minors in Nixon, Texas to the Inter-American Commission on Human Rights (“Commission”) and forwarded to the United States as Petition No. P-1994-15 (“Petition”). The Petition, which was received by the Commission in November 2015 and forwarded to the United States in December 2018, asserts that the United States has “violated” certain provisions of the American Declaration of the Rights and Duties of Man (“American Declaration”).¹

The Petition is inadmissible because Petitioners have not exhausted the domestic remedies available to them in the United States. It is further inadmissible because the Petition does not in any way indicate even a potential failure on the part of the United States to live up to any commitment under the American Declaration. Moreover, insofar as it makes assertions and arguments submitted to and rejected by courts in the United States, it impermissibly seeks to place the Commission in the position of acting as a fourth instance review mechanism. 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 entirely without merit.

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.

A. FACTS AND PROCEDURAL HISTORY

Petitioners are eleven young men from Central America who were detained in the United States by U.S. Border Patrol agents as undocumented, unaccompanied alien children (UAC)² and placed in federal custody pending their immigration proceedings. Each individual was placed in a shelter located in Nixon, Texas and operated by Away From Home, Inc., which contracted with the U.S. government to house unaccompanied alien minors while they awaited the final adjudication of their immigration status.³ Petitioners allege that they were abused by staff members of Away From Home, Inc., at the Nixon facility sometime between September 2006 and February 2007.⁴ Although the abuse was committed by staff members of Away From Home, Inc., Petitioners seek to impute that conduct to the United States for purposes of the claims they make under the American Declaration.

Away From Home, Inc. was a private company that in 2003 secured a contract with the Office of Refugee Resettlement (“ORR”), in the U.S. Department of Health and Human Services, to provide shelter care services for UAC who were awaiting a determination of their immigration cases.⁵ At the time, ORR was urgently seeking housing for such children because a recent change in the law had just transferred responsibility for the care of unaccompanied minors from the Immigration and Nationality Service (INS) to ORR as of March 1, 2003.⁶ ORR provides benefits and services to assist the resettlement and local integration into American life of specific eligible populations, including refugees, asylees, and other groups.⁷ ORR created the Division of Unaccompanied Children’s Services (“DUCS”) to carry out this new element of its mission.⁸

Not long after the March 2003 transfer of responsibilities, Away From Home, Inc. called Ken Tota at ORR to ask about providing shelter care services for ORR.⁹ Mr. Tota was a program specialist at ORR who had transferred from the INS, where he was the Senior Grants

² The term “unaccompanied alien child” means a child who – (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom – (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody. 6 United States Code § 279(g), Ann. 1.

³ See *David Walding et al. v. United States of America*, 955 F.Supp. 2d 759, 762 (W.D. Tex. 2013) (Hereinafter “*Walding*”), Ann. 2.

⁴ Petition at 3.

⁵ *Walding*, Ann. 2, 764-67.

⁶ See *David Walding et al. v. United States of America*, Declaration of Ken Tota in Support of Defendant United States’ Motion to Dismiss (July 14, 2008), para. 2 (hereinafter “*Tota Declaration*”), Ann. 3; see also 6 U.S.C. § 279, Ann. 1.

⁷ See ORR, “Fact Sheet - Benefits at a Glance,” Ann. 4.

⁸ *Tota Declaration*, Ann. 3, para. 2.

⁹ *Walding*, Ann. 2, 764.

Specialist overseeing grants for shelter care facilities for UAC.¹⁰ On April 16, 2003, Mr. Tota emailed Mr. Rains inviting him to submit an application to supply shelter care services for a one-year period.¹¹ Away From Home, Inc.'s Nixon facility was fully licensed, in excellent condition, had the potential to be expanded and was strategically located near San Antonio, Texas.¹² The Office of Planning, Research and Evaluation in the Department of Health and Human Services put together a panel to review Away From Home, Inc.'s unsolicited proposal.¹³ In July 2003, ORR notified Away From Home that its proposal had been approved, and a Financial Assistance Award was signed on July 16, 2003, providing a grant to Away From Home, Inc. for the period of July 1, 2003 to June 30, 2006.¹⁴ The award was subsequently extended for the period of July 1, 2006, to September 30, 2006.¹⁵

ORR decided to use a cooperative agreement with Away From Home, Inc. as the mechanism for structuring the award to the company. Because this type of agreement and ORR's responsibilities were new, negotiations took some time, and the Cooperative Agreement was not signed until March 2006.¹⁶ Under the Agreement, the company was to provide state-licensed shelter care and other child welfare-related services to children released to the company but technically in the custody of ORR.¹⁷

In August 2006, ORR learned that a child recently transferred from Away From Home's facility in Nixon reported that he had been sexually abused there, but did not identify the alleged perpetrator.¹⁸ In September 2006, ORR learned from the Texas Department of Family and Protective Services ("TDFPS"), which is responsible for child care licensing in Texas, that it had investigated an incident of sexual abuse at the Nixon facility in April 2006.¹⁹ Away From Home, Inc., had never reported the incident to ORR. According to the TDFPS report, which ORR subsequently obtained from TDFPS, a female Away From Home, Inc. employee had engaged in sexual misconduct with a boy at the facility; she resigned soon thereafter, and the child was no longer at the Nixon facility when ORR learned of the incident.²⁰ Because this was the first

¹⁰ Tota Declaration, Ann. 3, para. 1.

¹¹ *Walding*, Ann. 2, 764.

¹² *Id.* 765.

¹³ *Id.*

¹⁴ *Walding*, Ann. 2, 766.

¹⁵ *Id.* 767.

¹⁶ *Id.* 766

¹⁷ Cooperative Agreement 1.2(b).

¹⁸ *Walding*, Ann. 2, 767.

¹⁹ *Id.*

²⁰ *Id.*

reported incident of its kind at the Nixon facility and because the staff member had resigned, ORR concluded it could work with Away From Home, Inc., to prevent incidents of this nature in the future.²¹

At the same time, ORR solicited proposals for a new shelter care services grant to go into effect after Away From Home, Inc.'s award ended on September 30, 2006. The panel reviewing the proposals found Away From Home, Inc.'s to be the best of the five submitted, and ORR awarded a new cooperative agreement to Away From Home, Inc. on or about November 1, 2006.²²

In November 2006, ORR learned from Away From Home, Inc. that five children had left the Nixon facility without permission or supervision on November 5, 2006.²³ Off-duty staff who had been drinking were called to assist and residents were gathered together. In the ensuing confusion, some staff members inappropriately restrained and injured two residents, including one of the petitioners, J.M.R.²⁴ ORR immediately conducted a series of conference calls and instructed Away From Home, Inc., to provide training to its staff on ORR policies and procedures, state requirements, and the shelter policy on abuse and neglect. In addition, beginning on November 27, 2006, several ORR staff provided three days of intensive technical assistance to Away From Home, Inc., on the use of restraints, behavior management, and proper reporting of incidents.²⁵

On February 10, 2007, ORR became aware of the sexual assault of male residents of the Nixon facility by an Away From Home care worker, Belinda Leal.²⁶ On February 14, 2007, ORR suspended new placements at the Nixon facility and on February 28, 2007, the director of ORR informed Away From Home, Inc., that it was removing all children from the facility.²⁷ By March 7, 2007, all of the children had been transferred out of the Nixon facility.²⁸ ORR terminated its cooperative agreement with Away From Home, Inc., because of its failure to protect the children in its care on June 25, 2007.²⁹

²¹ *Id.*

²² *Id.* 767 n.9.

²³ *Walding*, Ann. 2, 768.

²⁴ *Id.*

²⁵ Tota Declaration, Ann. 3, para. 13.

²⁶ *Walding*, Ann. 2, 768. Ms. Leal later pled guilty to sexual assault and was sentenced to a seven-year prison sentence by a Texas federal court. *See* Tota Declaration, para. 14.

²⁷ *Walding*, Ann. 2, 768.

²⁸ *Id.*

²⁹ Tota Declaration, Ann. 3, para. 14.

In early 2008, petitioners filed civil claims in the U.S. District Court of the Western District of Texas against Nixon facility staff and administrators; employees of the TDFPS;³⁰ the United States; and several ORR and other U.S. government employees. Petitioners sought \$500,000 for numerous claims, including claims allegedly arising under the U.S. Constitution as a result of the conduct of Away From Home Inc.’s staff; claims against the United States allegedly arising under the U.S. Federal Tort Claims Act (“FTCA”); and claims against individual federal employees for alleged constitutional violations.³¹ In particular, Petitioners sought damages for alleged violations of their rights under the U.S. Constitution with respect to due process; freedom from cruel and unusual punishment; freedom of speech; and equal protection of the law. In addition, they asserted claims of negligence and emotional distress against the United States under the FTCA.³² Petitioners’ constitutional claims were based on the conduct of the staff of Away From Home and TDFPS and relied on Supreme Court jurisprudence allowing claims for damages – not against an official capacity Government defendant, but rather under a so-called *Bivens* action, which is against individual Defendant government employees in their individual or personal capacity. “Because vicarious liability is inapplicable to *Bivens* . . . suits, the plaintiff in a suit . . . must plead that each Government-official defendant, through his own individual actions, has violated the Constitution.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). Thus, Petitioners asserted that the staff of Away From Home, and Away From Home itself, were either “acting under color of federal law and as employees of the federal government,” or were acting in violation of the Constitution in their individual capacities, and could not receive the benefit of qualified immunity (which protects public officers from suit if their conduct does not violate any ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Bishop v. Arcuri*, 674 F.3d 456, 460 (5th Cir. 2012) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))).³³

In August 2012, Petitioners entered into a settlement agreement with Away From Home, Inc. and its staff.³⁴ This left only the *Bivens* claims against ORR employees, in their individual capacities, and the FTCA claim against the United States to be decided by the District Court.

The United States and the ORR employees each countered the claims against them, and in July 2013, the District Court found in favor of both sets of Defendants, granting a motion for

³⁰ These claims were subsequently dismissed. See *David Walding et al. v. United States of America, et al.*, Case No. 5:08-CV-00124-XR, Docket Report, Item No. 107, Order Granting State Defendants’ Motion to Dismiss, Ann. 5.

³¹ *David Walding et al. v. United States of America, et al.*, Original Complaint, Case No. 5:08-CV-00124-XR, Ann. 6.

³² *Walding*, Original Complaint, Ann. 6.

³³ *Id.*, para. 105.

³⁴ See Petitioners’ Annex 12.7, Nixon Shelter Settlement.

summary judgment in favor of the individual-capacity Defendants for the *Bivens* claims, and granting the motion to dismiss in favor of the United States for the Federal Tort Claims Act claims. The Court further awarded costs against Petitioners.³⁵ Notably, the Court found that Away From Home, Inc. was not exercising sovereign functions and that its staff were not government employees.³⁶ Petitioners had argued that Away From Home staff were “performing an exclusive government function in detaining the minors on behalf of the United States” and that the United States government “supervised and controlled all aspects of the conditions and operations at the Nixon Facility and treatment of the minors detained there.”³⁷ The District Court rejected these assertions following extensive briefing by the parties and the production of over 425,000 pages of documents in discovery.³⁸ The evidence reviewed by the Court established that Away From Home functioned as an independent contractor, the conduct of which was not subject to day-to-day control by the United States.³⁹ While Away From Home was required to comply with certain federal regulations, as well as its Cooperative Agreement with ORR, that did not mean Away From Home or its staff were federal employees.⁴⁰ Nor was Away From Home acting as the agent of the United States in carrying out its obligations under the Cooperative Agreement.⁴¹

The key issue for the District Court concerning Petitioners’ claims against the United States was the effective control of the United States over the activities of the contractor, or in the District Court’s words, “the power of the federal government ‘to control the detailed physical performance of the contractor.’”⁴² The District Court explained that it was not sufficient for a contractor to receive government funding and to be required to comply with federal regulations in order to find that it was acting as an agent or employee of the United States; rather, its “day-to-day operations [must be] supervised by the Federal Government.”⁴³ The Court carefully examined the evidentiary record and the parties’ submissions on this issue and concluded that, while ORR oversaw the implementation of the Cooperative Agreement, it did not oversee day-

³⁵ See *Walding*, Ann. 2; *E.A.F.F. et al. v. United States of America*, 955 F.Supp. 2d 707 (W.D. Tex. 2013) (hereinafter “*E.A.F.F.*”), Ann. 7.

³⁶ See *Walding*, Ann. 2, 790-811.

³⁷ See *id.* 790.

³⁸ See *Walding*, Defendant United States’ Reply Brief in Support of the United States’ Motion to Dismiss and Motion for Partial Summary Judgment (Jan. 14, 2011), Ann. 8.

³⁹ See *Walding*, Ann. 2, 790-811.

⁴⁰ See *id.* 802-803.

⁴¹ See *id.* 808-11.

⁴² *Id.*, 792.

⁴³ *Id.*

to-day operations of Away From Home or the activities of its staff.⁴⁴ Away From Home's responsibilities under the Agreement, moreover, confirmed that it had substantial freedom to implement the grant. Among other things, Away From Home "was responsible for arranging for and providing services to the UAC, providing shelter care, ensuring that children followed an integrated and structured daily routine, creating and enforcing program rules and disciplinary procedures, designing and providing program content, counseling, education, recreation, and services, implementing and administering a case management system, and maintaining files."⁴⁵ Away From Home also "created its own written program design, and its manual covered education and vocational programs, library services, counseling, health screening, dietary allowances, recreation, religious services, volunteer program, mail and correspondence, visitation, and residential community meetings."⁴⁶ According to the District Court, "[t]here is no indication that ORR retained a right to daily detailed supervision of the physical performance of these activities."⁴⁷ In sum, while Away From Home had a contract to provide services and had to comply with applicable laws and regulations, it was free to design and implement its programming without being subject to the direct and detailed daily control of ORR.

Based on this record, the District Court dismissed Petitioners' claims against the United States because Away From Home's conduct, and that of its employees, was not attributable to the United States under applicable domestic law.⁴⁸ The District Court also granted the ORR employees' motion for summary judgment dismissing the claims against them, finding that they were immune from suit because Petitioners had failed to establish that the ORR employees had deliberately disregarded a significant risk of abuse, noting among other things that the employees had in fact taken steps to protect the Nixon Facility residents once they learned of the abuse.⁴⁹

Petitioners chose not to appeal the District Court's dismissal of their Federal Tort Claims Act claims against the United States; indeed, the Petition does not appear to even acknowledge the existence of the Court's disposition of these claims. Instead, the Petition focuses on Petitioners' appeal of the civil rights claims against the individual ORR employees, leaving the misleading impression that this appeal encompassed Petitioners' claims against the United States.⁵⁰ In reality, Petitioners made the litigation decision to appeal only the claims against the

⁴⁴ *Id.*, 800.

⁴⁵ *Id.*, 801.

⁴⁶ *Id.*

⁴⁷ *Walding*, Ann. 2, 801.

⁴⁸ *Id.*, 811.

⁴⁹ *Id.*

⁵⁰ See Petition at 29. The Petition states that constitutional civil rights claims were brought against the United States in February 2008. *Id.* In fact, the initial complaint, as well as subsequent amended versions of the complaint, made allegations against the United States for purported violations of the Federal Tort Claims Act. Petitioners' civil rights claims were brought against Away From Home, its staff, and

individual ORR employees, apparently accepting the District Court’s dismissal of the claims against the United States.⁵¹ In January 2015, the United States Court of Appeals for the Fifth Circuit affirmed the District Court’s decision on summary judgment in favor of the ORR employees,⁵² and the Supreme Court declined to review the case.⁵³

In November 2015, Petitioners filed the Petition, seeking expedited processing of their claims. The Petition alleges numerous so-called violations of the American Declaration, including Article I (right to life, liberty and security of person); Article V (right to the protection of the law against abusive attacks upon honor, reputation, and private and family life); Article XXV (specifically, right to humane treatment); Article XVIII (resort to courts); Article XXIV (right to petition any competent authority).⁵⁴ Petitioners allege that they were abused “by United States agents”; that the United States failed to investigate their claims of abuse and provide redress through the domestic legal system; and that the United States retaliated against them by imposing costs on Petitioners when their claims were dismissed by the District Court.⁵⁵

Petitioners’ arguments turn on the same key contention that was rejected by U.S. courts: that “state actors” committed abuses. Just as they did in the U.S. proceedings, Petitioners suggest that Away From Home was exercising sovereign functions, stating that “a state is directly responsible for the actions of actors ‘empowered to act in a State capacity’” and that “[c]ontractors that execute functions of the state are...state actors.”⁵⁶ They then suggest that, because unaccompanied minors remain in the legal custody of ORR, ORR delegated certain of its governmental functions to Away From Home.⁵⁷ They further argue that ORR officials failed to take appropriate measures to address allegations of abuse by Away From Home staff.⁵⁸

THE PETITION IS INADMISSIBLE AND SHOULD BE DISMISSED

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

individual ORR employees as a so-called *Bivens* action allowing Petitioners to sue for damages. *See* Original Complaint, Ann. 6.

⁵¹ *See E.A.F.F., et al. v. Gonzalez et al.*, 600 Fed. Appx. 205 (5th Cir. 2015) 205 (“The plaintiffs appeal only from the judgment granting qualified immunity to the individual defendants”), Ann. 9.

⁵² *Id.*

⁵³ *See* Docket Report, Ann. 5, Item no. 367.

⁵⁴ Petition 36.

⁵⁵ *Id.* 3.

⁵⁶ *Id.* 33.

⁵⁷ *Id.* 34.

⁵⁸ *Id.* 34-35.

Procedure (“Rules”). The Petition is plainly inadmissible under Article 34 of the Rules, as it fails to state facts that tend to establish violations⁵⁹ of rights set forth in the American Declaration; it is manifestly groundless under Article 34(b); and its consideration would be inappropriate in light of the Commission’s fourth instance doctrine. In addition, Petitioners have not exhausted the available domestic remedies available in the United States, as required by Article 31 of the Rules.

1. The Petition Fails To Establish Facts That Could Support A Claim Of Violation Of The American Declaration

The Petition is inadmissible under Article 34 because it is manifestly groundless and does not establish facts that even arguably could constitute a violation of the American Declaration. The conduct of which Petitioners complain cannot be attributed to the United States under international law, even assuming *arguendo* that the American Declaration could give rise to state responsibility under international law (which it cannot).

Just as in their domestic court claims, Petitioners seek to attribute responsibility to the United States for the conduct of individuals employed by Away From Home, Inc., a private company providing shelter care services pursuant to a contract with the United States. Petitioners offer no legal basis for such attribution, offering instead a handful of conclusory statements that Away From Home and its employees were “agents” of the United States.⁶⁰ Petitioners make no effort to ground this assertion in either the facts or the law.

International law, however, requires more. It is well established that State responsibility for the conduct of private actors is limited to certain specific circumstances, none of which is present here. In determining whether to attribute the actions of private actors to states, the International Court of Justice has articulated two different tests, one of which is sometimes called the “strict control” or “agency” test and the other of which has come to be known as the “effective control test.”⁶¹ The Court suggested that the strict control test would require the factfinder to determine “whether or not the relationship of” the private actor or actors to the State

⁵⁹ 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 an elaboration of the United States’ longstanding position on the non-binding 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.

⁶⁰ Petition at 3.

⁶¹ *See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports (1986) p. 14.

“was so much one of dependence on the one side and control on the other that it would be right to equate [them], for legal purposes, with an organ of the [State], or as acting on behalf of that [State].”⁶² Regarding the effective control test, the Court explained in the case of Military and Paramilitary Activities in and against Nicaragua that, “[f]or this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed,”⁶³ *i.e.*, that the United States had directed the conduct of the *contras*. Similarly, the International Law Commission, in its Draft Articles on State Responsibility, has stated that “[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”⁶⁴

Thus, for abuses by Away From Home staff to be attributable to the United States, Petitioners would have to show that each abuse occurred either as a result of control exercised or instructions given by the United States. Petitioners have shown nothing of the kind. In fact, the District Court’s analysis of Petitioners’ claims against the United States confirms that it exercised no such control over the actions of Away From Home or its staff. Based on a full evidentiary record that included substantial discovery, the District Court determined that Away From Home was an independent contractor that was not subject to daily control of its activities by the United States and that Away From Home did not function as an agent of the United States. Far from giving directions for or controlling the conduct of Away From Home, the United States generally supervised Away From Home’s implementation of its contract, but left the details of providing care for the children to Away From Home.⁶⁵ For the same reasons, the conduct of Away From Home and its staff cannot be attributed to the United States under international law. Petitioners’ claims are therefore inadmissible and cannot form the basis of any purported violation of the American Declaration.

2. Petitioner Has Not Exhausted Local Remedies

The Commission should declare the Petition inadmissible because Petitioners have not satisfied their duty to demonstrate that they have “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

⁶² *Id.*, para. 102.

⁶³ *Id.*, para. 115.

⁶⁴ International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Art. 8 (A/56/10).

⁶⁵ *See supra* pp. 6-7.

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.⁶⁶ It is a sovereign right of a State conducting judicial proceedings for its national system to be given the opportunity to determine the merits of a claim and decide the appropriate remedy before resort to an international body.⁶⁷ 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.”⁶⁸ The Commission has repeatedly emphasized that the petitioner has the duty to pursue *all* available domestic remedies.⁶⁹

Petitioners chose not to appeal the District Court’s dismissal of their claims against the United States, and instead chose to appeal only their claims against individual ORR employees. Moreover, they elected to settle their claims against Away From Home, Inc. and its staff, despite finding the amount of damages they could recover to be less than they had hoped. Petitioners are not entitled to pursue before the Commission claims they failed to exhaust domestically, or to seek recovery for damages arising from the same conduct for which it has already received compensation.

For the foregoing reasons, the Petition is inadmissible under Article 31.

3. Petitioner Seeks 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 by U.S. courts. The Commission has repeatedly stated that it may not “serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction,” a doctrine the Commission calls the “fourth instance formula.”⁷⁰

The fourth instance doctrine recognizes the proper role of the Commission as subsidiary to States’ domestic judiciaries,⁷¹ and indeed, nothing in the American Declaration, the OAS

⁶⁶ 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.

⁶⁷ THOMAS HAESLER, *THE EXHAUSTION OF LOCAL REMEDIES IN THE CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS* (1968), at 18–19.

⁶⁸ *Velásquez Rodríguez Case*, Judgment of July 29, 1988, ¶ 61, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988).

⁶⁹ 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).

⁷⁰ See *Marzioni v. Argentina*, Case No. 11.673, Report No. 39/96, Inadmissibility, Oct. 15, 1996, ¶ 51.

⁷¹ See *Castro Tortorino v. Argentina*, Case No. 11.597, Report 7/98, Admissibility, Mar. 2, 1998, ¶ 17.

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."⁷² 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 claimants with a variety of bases to seek relief for claims of abuse, and Petitioners availed themselves of some of these opportunities in a complex proceeding against multiples of defendants over seven years, from 2008 until 2015. The gravamen of Petitioners' claims in both fora is the same: that the United States is responsible for the actions of Away From Home and its staff. Petitioners litigated this theory in the District Court and lost at the jurisdictional phase based on the evidence it presented, notwithstanding the fact that it was given the opportunity to develop facts to support its theory via substantial discovery. Instead of appealing the decision in the Fifth Circuit, 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.⁷³ Moreover, if the Commission were to accept a petition based on the same argument that Petitioners have litigated and lost in U.S. courts, it would be acting precisely as the type of fourth instance review mechanism it has consistently refused to embody. 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. courts, conducted in conformity with due process protections under U.S. law and fully consistently with U.S. commitments under the American Declaration. The Commission has long recognized that "if [a petition] contains nothing but the allegation that the decision [by a domestic court] was wrong or unjust in itself, the petition must be dismissed under [the fourth instance formula]."⁷⁴ The Commission has reiterated that "the fact that the

⁷² *Macedo García de Uribe v. Mexico*, Petition No. 859-03, Report No. 24/12, Inadmissibility, Mar. 20, 2012, ¶ 40.

⁷³ 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 courts that have not been exhausted (i.e., appealed to the third (highest) chamber of appeal).

⁷⁴ *Marzioni* Inadmissibility Report, para. 51.

outcome [of a domestic proceeding] was unfavorable ... does not constitute a violation.”⁷⁵ The fourth instance formula precludes the review sought by Petitioner.

* * *

For all of the foregoing reasons, the Petition is inadmissible and should be dismissed.

B. THE PETITION IS MERITLESS

Even if the Commission could overcome these many barriers and proceeded to examine Petitioners’ allegations – which it plainly lacks the competence to do – it should find the allegations without merit and deny Petitioners’ request for relief.

Petitioners’ claims that the United States has failed to honor its commitments under Article VII of the American Declaration concerning the special care, protection and aid to be given to children; Article XXV regarding humane treatment; and Article V concerning abusive attacks on private life, are meritless. The very purpose of placing UAC in shelters while their immigration status is evaluated is to provide appropriate care and protection for them in the absence of family members to provide that care. ORR places the children in the least restrictive setting that is in the best interests of the child.⁷⁶ In this case, and as explained above, Away From Home, Inc. was evaluated and appeared able to provide excellent shelter services for UAC. The District Court found that ORR employees who worked with Away From Home took reasonable measures to protect the children in the company’s care. Indeed, ORR removed all the children from Away From Home within weeks of learning of the second allegation of sexual abuse and subsequently terminated its contract with Away From Home. The United States, through its criminal justice system, ensured that Belinda Leal, the Away From Home staff member accused of the abuse, was prosecuted for her crimes, and she was sentenced to seven years in prison following her guilty plea.

Petitioners’ claims of violation of Article I concerning the liberty and security of person are equally meritless. Petitioners were detained pursuant to applicable law after they entered the United States without appropriate documentation. As the Commission has acknowledged, international law recognizes the sovereign right of states to regulate the entry, residence, and expulsion of non-citizens into and out of their territory, subject to their international obligations.⁷⁷ Unaccompanied minor children who enter the United States may be lawfully

⁷⁵ *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).

⁷⁶ See <https://www.acf.hhs.gov/orr/programs/ucs>.

⁷⁷ See, e.g., *Mortlock v. United States*, Petition No. 12.534, Report No. 63/08, Admissibility and Merits (Publication), July 25, 2008 (“*Mortlock* Admissibility & Merits Report”), ¶ 78 (“The Commission acknowledges that Member States have the right, as matter of well-established international law, to control the entry, residence, and expulsion of aliens.”).

detained in a shelter to care for them while their immigration status is determined. The United States placed Petitioners in a shelter that was meant to provide the least restrictive environment in light of the children's best interests. Care and custody of children in need of such care is not a violation of liberty and security of person.

Finally, Petitioners' claims under Articles XXIV and XVIII concerning the right to a fair trial and the right to petition a competent authority are plainly groundless. Petitioners pursued a variety of claims against not only the United States, but also against Away From Home, Inc.; employees of Away From Home; the Texas Child Welfare Services; individuals employed by Texas; and individuals employed by ORR. Petitioners voluntarily settled their claims against Away From Home and its staff in exchange for monetary compensation. Their other claims were carefully and fully examined by the District Court. Ultimately, Petitioners' claims were dismissed because Petitioners had not established the facts required to sustain those claims beyond the jurisdictional phase of the proceedings. Petitioners chose not to appeal the Court's decision as to the claims made against the United States (although they did pursue appeals of claims made against individual ORR employees). Nothing in the record suggests that Petitioners' were denied their rights to a fair trial or rights to petition a competent authority. The District Court assessed costs against Petitioners consistent with Rule 54, Federal Rules of Civil Procedure, which provides that costs other than attorney's fees "should be allowed to the prevailing party."⁷⁸ Assessment of costs against the losing party in a dispute, often described as "the costs follow the event," is a common rule in both domestic and international fora, particularly where, as here, claims are dismissed at the jurisdictional stage – and not, as Petitioners argue, a form of "retaliation" against them for pursuing their claims.⁷⁹ Awarding costs to a prevailing party in litigation is not a violation of the right to a fair trial or right to petition a competent authority.

Accordingly, Petitioners' claims are meritless and should be denied.

C. CONCLUSION

For the foregoing reasons, the Petition fails to pass the threshold for consideration under Articles 31 and 34 of the Rules, as well as under the Commission's fourth instance doctrine. Should the Commission nevertheless find the Petition admissible and proceed to examine its merits, it should find the Petition meritless in light of what is explained above. While the United States reserves the right to provide further views on the merits in such an eventuality, it reiterates that none of the conduct alleged in the Petition suggests that the United States violated any of the rights set forth in the American Declaration.

⁷⁸ See Federal Rules of Civil Procedure (Dec. 1, 2018), Ann. 10.

⁷⁹ See, e.g., UNIDROIT Principles of Transnational Civil Procedure, available at <https://www.unidroit.org/instruments/transnational-civil-procedure>.