



THE PERMANENT REPRESENTATIVE
OF THE
UNITED STATES OF AMERICA
TO THE
ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C.

June 29, 2016

Mr. Emilio Alvarez Icaza
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

**Re: D.S.
Petition No. P-439-16, PM MC-152-16
Response to Precautionary Measures Resolution**

Dear Mr. Icaza:

The United States Government acknowledges the letter from your office dated April 11, 2016, which your office transmitted on the same date. That letter appended Resolution 21/2016, dated April 9, 2016, by which the Inter-American Commission on Human Rights ("Commission") requested that the United States adopt precautionary measures with respect to the above-referenced petitioner. On April 11, 2016, we forwarded Resolution 21/2016 to the U.S. Department of Homeland Security, of which U.S. Immigration and Customs Enforcement is a component, for whatever action it may deem appropriate.

As the Commission is aware, the United States does not consider this or other Commission requests for precautionary measures to be binding upon it under international law, because the Commission does not have authority to require that the United States adopt such measures. As we stated in another matter:¹

¹ Kadamovas et al. v. United States, Petition No. P-1285-11, Response of the United States, Sept. 1, 2015, § D.
D.S. v. United States, Pet. No. 439-16, PM MC-152-16
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... The practice of requesting precautionary measures is based on Article 25(1) of the Rules [of Procedure (“Rules”)], which states:

[T]he Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures. Such measures, whether related to a petition or not, shall concern serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the inter-American system.

Importantly, this rule was approved by the Commission and not by the Member States of the Organization of American States (OAS) themselves. Through this rule, the Commission apparently considers itself to possess not only the power to *request* that a State adopt precautionary measures—which implies that the State may choose to decline the request—but also to *require* the measures, in a manner akin to the Inter-American Court of Human Rights This is evident from terms used in other subparagraphs of Article 25, which speak of the Commission granting, extending, modifying, and lifting the precautionary measures—as opposed to making, modifying, or withdrawing a *request* for such measures. Communications sent by the Commission over the years also refer to precautionary measures with language evincing the belief that when the Commission requests precautionary measures, it is in effect imposing them and that their implementation is not optional.²

While the Commission’s arrogation of such a power is perhaps understandable, it is not within the mandate given to the Commission by the OAS Member States. Article 25(1)’s reference to purported sources of a precautionary measures power—Article 106 of the OAS Charter, Article 41(b) of the American Convention on Human Rights (“American Convention”), Article 18(b) of the Commission’s Statute, and Article XIII of the American Convention on Forced Disappearance of Persons—do not change this reality. Article 106 of the Charter established the Commission to promote the observance and protection of human rights, but makes no further mention of its specific powers. Article 41(b) of the American Convention and Article 18(b) of the Statute empower the Commission to make recommendations to OAS Member States “for the adoption of progressive measures in favor of human rights” and “appropriate measures to further the observance of those rights,” but are silent on precautionary measures, and *a fortiori* on any power to require them. Whatever precautionary measures power may have been sanctioned by States Parties to the American Convention on Forced

² See, e.g., *Gray v. United States*, PM-844-04, and *Several Other Matters*, Update on Precautionary Measures Granted, July 17, 2013, at 1–2 (with respect to several executed petitioners, Commission referring to precautionary measures previously “granted”; noting “that all the beneficiaries were executed while the precautionary measures were still in effect”; and deciding to “lift” the measures).

Disappearance of Persons in that treaty's Article XIII is not applicable to the United States as a nonparty to that Convention.³

The Commission's Statute does, in fact, refer to *provisional* measures, but only in the context of States Parties to the American Convention. Even there, it does not give the Commission the power to request or require such measures directly of a Member State. Instead, the Statute merely gives the Commission the power to request the Inter-American Court of Human Rights ("Inter-American Court") to take provisional measures in serious and urgent cases involving States Parties to the American Convention that have accepted the jurisdiction of the Inter-American Court, where the case has not yet been submitted to the Inter-American Court.⁴ Article 63(2) of the American Convention, in turn, empowers the Inter-American Court to act on such a request. There is no provision in the Statute or the American Convention that provides authority for the Commission to request the Inter-American Court to issue provisional measures with respect to a nonparty to the American Convention, for the Inter-American Court to do so, or for the Commission to itself require any OAS Member State—American Convention party or not—to take precautionary measures. For a nonparty to the American Convention the Commission is empowered, at most, to make a nonbinding recommendation that it take precautionary measures.⁵

As such, and as we have done in other Commission decisions requesting that the United States adopt precautionary measures, we have construed Resolution 21/2016 as a nonbinding recommendation that the United States adopt precautionary measures.

The United States also acknowledges the request in the April 11 letter that the United States provide a response to the petition in this matter within three months of that date. While we will not be in a position to provide such a response by July 11, we will endeavor to respond by August 11, 2016. Please inform us if there are any concerns with such an extension.

³ The reference to Article XIII of the American Convention on Forced Disappearances in Article 25(1) of the Rules is inapposite in this matter in any event, as there are no allegations of forced disappearance.

⁴ Commission Statute, art. 19(c).

⁵ *Id.*, art. 20(b) (Commission has power "to make recommendations" to nonparties to the American Convention "when it finds this appropriate, in order to bring about more effective observance of fundamental human rights ...").

Please accept renewed assurances of my highest consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael J. Fitzpatrick", with a long, sweeping horizontal stroke at the end.

Michael J. Fitzpatrick
Interim Permanent Representative