



**United States Department of State**  
***United States Permanent Mission to the  
Organization of American States***  
***Washington, D.C. 20520***

December 8, 2018

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

**Re: Children and adults with disabilities in the Judge Rotenberg  
Educational Center, MC-1357-18  
Response of the United States to Request for Information**

Dear Dr. Abrão:

We appreciate the opportunity to provide observations on the petition forwarded to the United States in the above-referenced matter on behalf of Disability Rights International (“DRI” or “Petitioner”) date-stamped November 13, 2018, which your office transmitted to the United States via a letter dated November 20, 2018.

The United States respectfully submits that the Commission should refrain from requesting precautionary measures in this case because the Commission lacks the authority to require such measures. Moreover, such measures are not warranted in any event for the reasons set forth below.

***Lack of competence***

The Petition is inadmissible under Article 34 of the Rules of Procedure of the Inter-American Commission on Human Rights (“the Rules”) because Petitioner has failed to state facts that tend to establish a violation of the American

Declaration of the Rights and Duties of Man (“American Declaration”). Petitioner has not invoked a single provision of the American Declaration, which is the instrument with respect to which the Commission has competence vis-à-vis the United States. Although Petitioner invokes Articles 4 and 5 of the American Convention on Human Rights (“American Convention”) as the basis for the Petition,<sup>1</sup> the United States is not a party to that instrument. It is therefore beyond the competence of the Commission to contemplate alleged violations of that instrument included in the Petition.

As noted in numerous prior submissions, the United States has undertaken a political commitment to uphold the American Declaration, a nonbinding instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of American States (OAS).<sup>2</sup> Article 20 of the Statute of the Commission sets forth the Commission’s powers that relate specifically to OAS member States that, like the United States, are not parties to the legally binding American Convention, including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make nonbinding recommendations to the State, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted. Moreover, the Commission lacks competence to review U.S. practice on matters arising under any other international instruments, including other international human rights treaties, whether or not the United States is a party, or under customary international law.

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<sup>1</sup> Petition at i.

<sup>2</sup> The United States has consistently maintained that the American Declaration is a nonbinding instrument and does not create legal rights or impose legal duties on member states of the OAS. U.S. courts of appeal have independently held that the American Declaration is nonbinding and that the Commission’s decisions do not bind the United States. *See, e.g.,* *Garza v. Lappin*, 253 F.3d 918, 925 (7th Cir. 2001); *accord, e.g.,* *Flores-Nova v. Attorney General of the United States*, 652 F.3d 488, 493–94 (3rd Cir. 2011); *In re Hicks*, 375 F.3d 1237, 1241 n.2 (11th Cir. 2004). As explained by the U.S. Court of Appeals for the Seventh Circuit in *Garza*, “[n]othing in the OAS Charter suggests an intention that member states will be bound by the Commission’s decisions before the American Convention goes into effect. To the contrary, the OAS Charter’s reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members. The language of the Commission’s statute similarly shows that the Commission does not have the power to bind member states.” *Accord* Commission Statute, art. 20 (setting forth recommendatory but not binding powers). For a further discussion of the U.S. position regarding the nonbinding nature of the American Declaration, *see* Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988, *available at* <http://www1.umn.edu/humanrts/iachr/B/10-esp-3.html>.

Moreover, even if Petitioner had invoked provisions of the American Declaration, the Petition does not allege any conduct attributable to the United States.

With few exceptions not relevant here, a human rights violation under international human rights law entails state action. The American Declaration contains no language indicating that Declaration commitments extend generally to private, non-governmental conduct—such as the allegations that the Judge Rotenberg Educational Center committed abuses—and no such commitment can be inferred. The United States thus may not be found to have failed to honor a commitment under the American Declaration based on the conduct of private individuals acting with no complicity or involvement of the government.

Petitioner attempts to bypass this basic tenet of human rights law by arguing that the United States has facilitated the alleged abuses. First, Petitioner does not, and cannot, cite to any provision of the Declaration that imposes on States an affirmative duty to prevent the commission of crimes or civil wrongs by private parties, even where these might undermine an individual's enjoyment of the rights in the Declaration. Petitioner relies on principles expounded in cases of the Inter-American Court interpreting provisions of the American Convention, most notably *Ximenes Lopes*. As noted above, the United States has not accepted the jurisdiction of the Inter-American Court, nor is it a State Party to the American Convention. Accordingly, the jurisprudence of the Inter-American Court interpreting the American Convention does not govern U.S. commitments under the American Declaration.

Because Petitioner has failed to state facts that tend to establish a violation of the American Declaration, or even to allege such a violation in the first instance, the Commission must find the Petition inadmissible under Article 34 of the Rules of Procedure.

### *Failure to Exhaust Domestic Remedies*

The Commission should declare the Petition inadmissible because Petitioner has not satisfied its duty to demonstrate that it 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. 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. 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.” The Commission has repeatedly made clear that the petitioner has the duty to pursue all available domestic remedies.

Petitioner alleges here that “domestic remedies to end” the alleged abuses “have failed,” and, in support of this assertion, provides a section in the Petition titled “Appendix 1.”<sup>3</sup> However, 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.”<sup>4</sup> Appendix 1 states that “[s]everal lawsuits have been filed and actions have been taken,” but this falls woefully short of the

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<sup>3</sup> Petition at 1.

<sup>4</sup> *Sánchez et al. v. United States* (“Operation Gatekeeper”), Petition No. 65/99, Inadmissibility (“Operation Gatekeeper Inadmissibility Decision”), ¶ 67.

well-established exhaustion requirement. There is no indication that Petitioner DRI has pursued *any* domestic administrative or judicial remedies in the present matter. Moreover, it is far from clear from the Petition that the proximate litigation with which Petitioner takes issue—a June 2018 ruling by a Massachusetts Probate and Family Court judge—has been exhausted.

Therefore, Commission should decline to recommend precautionary measures in this case because the Petition would be inadmissible for failure to exhaust domestic remedies. The Commission should not permit Petitioner to circumvent the U.S. domestic court system by petitioning for precautionary measures before it has exhausted domestic remedies.

### *Precautionary measures*

Even if the Petition were not inadmissible for the reasons described above, Petitioner has failed to justify its request for precautionary measures in this matter. Article 25(1) provides that precautionary measures “shall concern serious and urgent situations presenting a risk of irreparable harm.” Instead, Petitioner asserts that the Petition “point[s] to the existence of a situation of current risk [] likely to persist over time if immediate measures are not taken,”<sup>5</sup> however this mere possibility of persistence cannot satisfy the exigency required by a showing of “urgency” under Article 25(1) of the Rules; this interpretation would render the “urgency” showing effectively meaningless. Petitioner’s years of advocacy against the Judge Rotenberg Educational Center belie the urgency of their present request for precautionary measures. There is no basis for the Commission to issue precautionary measures in this matter.

Finally, we take this opportunity to reaffirm our longstanding position that the Commission lacks the authority to require that States adopt precautionary measures. We refer the Commission to past submissions, which state the reasons for the U.S. position on precautionary measures in detail.<sup>6</sup> Because the United States is not a Party to the American Convention, the Commission has only the authority “to make recommendations ... to bring about more effective observance

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<sup>5</sup> Petition at 8.

<sup>6</sup> See, e.g., Kadamovas et. al. v. United States, Petition No. P-1285-11, Response of the United States, Sept. 2, 2015, § D, available at <https://www.state.gov/documents/organization/258153.pdf>.

of fundamental human rights.”<sup>7</sup> As such, should the Commission adopt a precautionary measures resolution in the above-captioned matter, the United States will take it under advisement and construe it as recommendatory.

Please accept renewed assurances of my highest consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'CT' followed by a stylized flourish.

Carlos Trujillo  
Permanent Representative

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<sup>7</sup> Commission Statute, art. 20(b).