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

April 1, 2016

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

Re: Gary Resil et al., Precautionary Measures No. MC-5-11
Response to January 29, 2014, "Merits Petition" and
March 2, 2016, Precautionary Measures Request

Dear Mr. Icaza:

As you are aware, the above-referenced matter has been the subject of extensive correspondence, including several precautionary measures requests, over the past five years. Most recently, the United States received a letter from your office dated March 3, 2016, transmitting Resolution No. 6/2016, in which the Inter-American Commission on Human Rights ("Commission") extended the precautionary measures request in MC-5-11 to Rose Saint Jean Romeo. We also received from your office a letter dated February 4, 2015, transmitting a communication from various organizations titled a "Merits Petition" in the above-referenced matter, but directed specifically to six named persons allegedly removed to Haiti from the United States: [redacted].

We take this opportunity to remind the Commission and the petitioners' representatives that 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 recently stated in another matter:[1]

> … The practice of requesting precautionary measures is based on Article 25(1) of the 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

---

1 Kadamovas et al. v. United States, Petition No. P-1285-11, Response of the United States, Sept. 1, 2015, § D.

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.

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.[3] 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.[4]

As such, we have construed Resolution No. 6/2016 as a nonbinding recommendation that the United States take precautionary measures. We have taken due note of the recommendations, and have also forwarded them to the U.S. Department of Homeland Security (DHS).

With respect to the allegations in the Merits Petition, the United States has no record that the Commission has accepted this matter for consideration of its admissibility under the procedures in Articles 27 to 30 of the Rules, as further evidenced by the fact that the Commission has never, to our knowledge, assigned the matter a petition number. The United States also lacks any record indicating that the Commission has decided *proprio motu* under Article 24 to process as a petition the various communications submitted over the years. Without prejudice to any additional arguments the United States may eventually make regarding the admissibility or merits of this matter under the Rules and the American Declaration of the Rights and Duties of Man, we reiterate the observations in the numerous letters we have filed in this matter, especially those dated January 30 and May 31,

---

[3] Commission Statute, art. 19(c).

[4] *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 … .").

2012, and May 9, 2014; as well as our remarks at the working meeting of March 26, 2014.

Furthermore, as concerns case-specific information about these individuals, we repeat certain information about U.S. law and policy that we have provided in the past. In matters relating to the treatment of aliens in the United States, DHS is the custodian of the majority of records relevant to matters before the Commission. Specific statutes, regulations, and policies limit or preclude DHS's disclosure of personal information contained in its records absent a waiver executed by the subject of the record. The Privacy Act provides statutory privacy rights to U.S. citizens and lawful permanent residents of the United States (LPRs). Under the Privacy Act, subject to limited exceptions, "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." 5 U.S.C. § 552a(b). Although the Privacy Act does not directly apply to persons who are not citizens or LPRs, as a matter of DHS policy, any personally identifiable information that is collected, used, maintained, and/or disseminated in connection with a "mixed" DHS system of records—that is, a system that may contain information about citizens as well as LPRs and other non-citizens—is to be treated as a system of records subject to the Privacy Act.

In light of the privacy protections afforded to those who are not citizens or LPRs with regard to their personal information, waivers are necessary to permit the U.S. government to adequately respond to certain matters before the Commission. As such, in order to provide Privacy Act-protected records to the Commission, a properly executed release must be executed by the record subject that specifies release to the person's named representatives and the Commission. The Commission and the petitioners' representatives surely appreciate the human rights objectives that are furthered by extending the Privacy Act's safeguards to those who may not benefit from them under the letter of the law.

The Commission should also be aware that certain information would not be able to be provided, even upon the submission of a properly executed waiver. For instance, DHS does not provide information regarding the existence of scheduled dates of removal for individual aliens. This is information that DHS would

consider law enforcement sensitive, and providing such information in an individual case could compromise the law enforcement objectives of DHS's U.S. Immigration and Customs Enforcement. Additionally, any information relating to third parties contained in the individual's file would only be provided upon the submission of properly executed privacy waivers by those third parties.

Finally, we note with alarm the severe delay in the performance of the ministerial function of forwarding written filings in this matter from one party to the other, despite the Commission's belief that this matter presents a situation so serious and urgent that precautionary measures are needed. As one example, we filed a letter on May 9, 2014, that was only received by the other side nine months later, on February 5, 2015. The United States, in turn, received the resulting March 5, 2015, reply only on August 4, 2015, via a letter from your office dated July 28, 2015. In our conversations with civil society, we have heard numerous expressions of dismay and confusion at the lengthy delays in transmitting filings in other matters. In many cases, petitioners simply assume that the United States has not filed a response. We would therefore urge the Commission to expedite its procedures for transmitting the parties' filings to one another or explain the reasons behind such lengthy delays.

The Commission's strength and credibility in the region, especially in light of recent efforts by some States to undermine the Commission, depend in large part on its ability to operate efficiently and effectively under limited resources, and to demonstrate to States and civil society that it is an efficient and effective institution. The severe backlog of individual petitions on the Commission's docket, and the long amount of time that typically elapses between the filing of a brief or letter and its receipt by the other party, significantly diminishes this perception. In light of the United States' keen interest in maintaining a strong and effective Commission, we would once again urge the Commission to consider ways in which it might be able to better fulfill its mandate by reforming the individual petition process to make it more efficient and more manageable. We have shared our reform ideas in numerous other matters,[5] and stand ready to renew this critically important dialogue with the Commission should the Commission so desire.

---

[5] *See, e.g.*, Oszusamlar v. United States, Petition No. P-888-11, Response to Petition of June 29, 2011, Mar. 25, 2016, at 5.

Please accept renewed assurances of my highest consideration.

Sincerely,

Michael J. Fitzpatrick
Interim Permanent Representative