



THE PERMANENT REPRESENTATIVE
OF THE
UNITED STATES OF AMERICA
TO THE
ORGANIZATION OF AMERICAN STATES

WASHINGTON, D.C.

January 31, 2014

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

Re: Edgar Tamayo Arias

Dear Mr. Icaza:

The United States acknowledges the receipt of Report No. 1/14, addressing the merits of the case of Edgar Tamayo Arias, and the Commission's letter of January 15, 2014, in which it requests that the Government of the United States inform the Commission of the measures taken to comply with the recommendations set forth in the report within two weeks of that letter. The United States has the honor to provide the following response to that request.

Prior to addressing the recommendations in the report, however, the United States wishes to take this opportunity to address its serious concerns regarding the Commission's unwarranted conclusions that carrying out Mr. Tamayo's death sentence "is contrary to the fundamental human rights obligations of an OAS member states pursuant to the Charter of the Organization and the instruments deriving from it." Para. 195, Report No. 1/14. Moreover, despite the Commission's admonition that the State may not publish the report, which contains the basis for its position on this matter, the Commission asserted this incorrect proposition publicly in a press statement released on January 17, 2014 by stating that "that noncompliance with precautionary measures seriously contravenes the United States' international legal obligations and undermines the effectiveness of the Commission's procedures." IACHR Press Release 2/14, January 17, 2014.¹

As provided in detail below, the United States has consistently explained to the Commission why precautionary measures for states like the United States that do not belong to

¹ The Inter-American Commission urges the State to ensure full compliance with all the recommendations and in this way to remedy the violation of Edgar Tamayo Arias' fundamental rights. Should the state of Texas carry out the execution of Mr. Tamayo, it would be committing a serious and irreparable violation of the basic right to life recognized in Article I of the American Declaration. The IACHR further reiterates that noncompliance with precautionary measures seriously contravenes the United States' international legal obligations and undermines the effectiveness of the Commission's procedures.

the American Convention on Human Rights are only requests, and are not legal binding. The United States has not violated and cannot violate any legally binding obligations by not accepting the Commission's precautionary measures requests. Asserting these incorrect statements, without explanation or context, undermines the Commission's legitimacy, and unfairly castigates the United States, which strongly supports the rule of law within the United States and throughout the world. With all due respect for the Commission's serious concerns about the use of the death penalty in the United States, such unsubstantiated and incorrect conclusory statements and their further publicity do not advance the Commission's purposes with law enforcement, judicial, and legislative authorities in the United States, nor ultimately do they benefit those persons within the United States whom the Commission seeks to assist.

Precautionary measures issued by the Commission, as explained in the provision of the Rules of Procedures which provides for such measures, are "requests" and cannot bind or legally constrain the State to which they are made. (*See* Article 25.1 of the Rules of Procedure of the Inter-American Commission of Human Rights.) The sources for this function are itself stated in the rule. For the United States the relevant cited sources are Article 106 of the Charter of the Organization of American States, which creates the Commission as body to promote the observance and protection of human rights, and Article 18.b of the Statute of the Commission, which provides that the Commission shall have the power "to make recommendations to the governments of the states on the adoption of progressive measures in favor of human rights in the framework of their legislation, constitutional provisions and international commitments, as well as appropriate measures to further observance of those rights." (Emphasis added.)

Under Article 19.c. of the Statute, the Commission also has the enhanced power to request the Court to issue provisional measures against States-Parties to the American Convention. Because Court-ordered measures are sanctions designed to support its authority to issue legally-binding judgments, in order to comply with the meaning of the text on its face, the authority of the Commission to make recommendations under Article 18.b, and in turn, Article 25.1 of the Rules, cannot be equal to those Court-ordered measures; that is, the power of the Commission is non-binding. To find otherwise would conflict with the role of the Court to issue provisional measures against States-Parties to the American Convention.

The Commission's Report states that carrying out a death sentence against a beneficiary of precautionary measures would deny Mr. Tamayo's right to petition the Inter-American human rights system. Mr. Tamayo, however, fully exercised his right to petition the system, as is shown by the Commission's adoption of a report on the merits of his petition on January 15, 2014. The Commission further asserts that carrying out of a death sentence "is contrary to the fundamental human rights obligations of an OAS member states pursuant to the Charter of the Organization and the instruments deriving from it." The Charter of the Organization of American States, however, does not provide for any specific human rights obligations. Its references to human rights relate to the Inter-American Commission of Human Rights, which is established in Article 106 of the Charter, and which states, in full: "There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters. An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters." There are no

instruments derived from the Charter that impose any binding obligations on human rights on the United States. The American Declaration is not a source of binding obligations, and the United States is not party to any OAS instruments on human rights that are binding.

The Commission refers, in footnote 140,² to several sources for its proposition that precautionary measures addressed to the United States are binding, but none of these sources support the proposition. None contain a substantive discussion regarding why precautionary measures addressed by the Commission to a non-party to the American Convention would constitute a binding obligation. Nor do any of these sources, in turn, refer to any other source for the purported binding obligation cited.

The first source cited is to the IACHR's own report on Jeffrey Timothy Landrigan and simply reiterates what the Commission states in this case: "The Inter-American Commission must remind the State that carrying out a death sentence in such circumstances causes irreparable harm to the person and also denies his right to petition the inter-American human rights system. Such a measure is contrary to the fundamental human rights obligations of an OAS member state pursuant to the Charter of the Organization and the instruments deriving from it." The footnote in the Landrigan report cites the same sources as are repeated in footnote 140 to the present report.

The second source cited (in both reports), the Juan Paul Garza report, states in the relevant paragraph discussing precautionary measures that the Commission "requests" precautionary measures. It does not establish that the Commission has the authority to issue binding measures:

The Commission recognizes and is deeply concerned by the fact that its ability to effectively investigate and determine capital cases has frequently been undermined when states have scheduled and proceeded with the execution of condemned prisoners despite the fact that those prisoners have proceedings pending before the Commission. It is for this reason that the Commission requests precautionary measures pursuant to Article 29(2) of its Regulations, as it has in Mr. Garza's case, to require a state to stay a condemned prisoner's execution until the Commission has had an opportunity to investigate his or her claims. Anything less effectively deprives condemned prisoners of their right to petition in the inter-American human rights system and causes them serious and irreparable harm. Accordingly, the Commission has on numerous occasions called upon the United States and other OAS member states to comply with the Commission's requests for precautionary measures in cases involving threats to the right to life and thereby properly and fully respect their international human rights obligations.

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¹⁴⁰ See: IACHR, Report No. 81/11, Case 12.776, Merits, Jeffrey Timothy Landrigan, United States, July 21, 2011, para. 66; Report No. 52/01, Case No. 12.243, Juan Raúl Garza, United States, Annual Report of the IACHR 2000, para. 117; IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, Doc.OEA/Ser.L/V/II.11doc.21rev. (April 6, 2001) paras. 71 and 72. See also: International Court of Justice, *Case re. the Vienna Convention on Consular Relations (Germany v. United States of America)*, Request for the Indication of Provisional Measures, Order of March 3, 1999, General List, No. 104, paras. 22-28; United Nations Human Rights Committee, *Dante Piandiong et al. v. Philippines*, Communication No. 869/1999, UN Doc. CCPR/C/70/D/869.

(See John Raul Garza, Report XXXX, para. XXX, which cites two prior press statements, issued by the Commission, but no sources for the human rights obligations statement.)

Next, the Commission's footnote cites a source outside the Commission – an International Court of Justice case involving the United States regarding the Vienna Convention on Consular Relations in which the ICJ ordered provisional measures. That case does not involve nor even mention the Inter-American Commission of Human Rights, the Charter of the Organization of American States or any obligations thereunder. Thus, it bears no relation to nor serves as a source for the proposition asserted by the Commission. The International Court is created by a treaty to which the United States is a Party and in which the Courts are given specific powers by the States Parties. While the character of provisional measures in the ICJ may be unclear under, the Court's statute provide for binding final judgments. The States Parties that have accepted the jurisdiction of the Court, thus, did so aware that final judgments of the Court are binding. That situation is very different from the situation of the Commission vis-à-vis the United States. The Commission is not the Inter-American Court of Human Rights, and the United States is not a party to the American Convention.

Finally, the footnote cites an example from the communications procedure in the Human Rights Committee. Like the ICJ source, that example does not involve the Inter-American Commission of Human Rights, the Charter of the Organization of American States or any obligations thereunder. As to the UN Human Rights Committee, established pursuant to the International Covenant on Civil and Political Rights, its interim measures are also non-binding. Under Article 5.4 of the Optional Protocol, the Committee does not decide on an individual's communication. Instead, "[t]he Committee shall forward its views to the State Party concerned and to the individual." Rule 86 of the Committee's Rules of Procedure provides similarly that the Committee may prior to forwarding its views on the communication to the State party concerned, inform that State of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. Thus, the Committee may only request that a State take interim measures, and the State is not legally bound to comply. The Committee itself has also said that its "decisions" are not binding, and courts, including the European Court of Human Rights, the Privy Council, and those of Canada, have also treated the Committee's decisions as non-binding or unenforceable.

In sum, the assertion that noncompliance with precautionary measures seriously contravenes the United States' international legal obligations is without basis. The United States respectfully requests that the Commission publish the full version of its report together with this response or indicate that it would not object to the United States doing so. We encourage the Commission to make this response available on its webpage under the section entitled "Responses from the States."

With respect to the specific points in the Commission's report, the United States is pleased to share the following responses, which are necessarily summary in nature given the two-week deadline.

"1. Grant Edgar Tamayo Arias effective relief, including the review of his trial and sentence in accordance with the guarantees of due process and a fair trial enshrined in Articles I, XVIII and XVI of the American Declaration;"

The Commission's report was transmitted by the Department of State immediately to the Governor, Attorney General and Clemency Board in Texas.

“2. Review its laws, procedures, and practices to ensure that people accused of capital crimes are tried and, if convicted, sentenced in accordance with the rights established in the American Declaration, including Articles I, XVIII, XXV and XXVI thereof;”

Every criminal defendant in the United States is entitled to the full protection of the Constitution and laws of the United States, which protect the same rights as those recognized in the American Declaration.

“3. Ensure that every foreign national deprived of his or her liberty is informed, without delay and prior to his or her first statement, of his or her right to consular assistance and to request that the diplomatic authorities be immediately notified of his or her arrest or detention;”

The United States takes very seriously its international obligations with respect to consular notification and access, and the State Department has worked diligently to expand awareness of these requirements at all levels across the country, with the goal of 100 percent compliance. This is no small endeavor, as the number of law enforcement personnel in the numerous federal, state, and local jurisdictions throughout this country totals well over a million people. The State Department has worked, through a variety of means, to ensure domestic compliance with the requirements of the VCCR, including outreach, guidance, and training to law enforcement, prosecutors, and judges at the federal, state, and local levels on consular notification and access.

*Since 1997, the State Department has published a manual, titled *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 Officers to Assist Them*. It provides instructions for police and prison officials on what they must do when they detain or arrest a foreign national in order to comply with the VCCR and all relevant bilateral consular agreements. It provides a list of those countries for which consular notification must be provided even if not requested by the detainee; sample consular notification statements in English and the 20 languages most commonly spoken by foreign nationals in the United States; a sample “standard operating procedure” on consular notification and access that police departments may adopt and post in their precincts; sample fax sheets to use when notifying a consulate of an arrest or detention; and sample diplomatic and consular identification cards, so that police and prison officials may recognize the consular credentials of foreign officials who visit their facilities to conduct a consular visit. The Manual also contains an extensive “Question and Answer” section detailing what police officers and prison officials should do in different scenarios that arise in practice: what sorts of arrests and detentions trigger the consular notification and access requirement; how quickly notification must be provided; what to do when a dual national is arrested; what to do when the detainee does not speak English; what to do when the detainee's nationality cannot be conclusively ascertained; how officials from the consulate will provide consular access and assistance; and many others. The Manual lists all the foreign embassies and consulates in the United States, with phone and fax number.*

Finally, it provides a legal overview geared toward lawyers, courts, and foreign governments on the United States' consular obligations under international law.

The State Department distributes thousands of copies of the Manual per year, free of charge, to federal, state, and local officials, as well as to federal and state agencies, governors' and mayors' offices, bar associations, prison associations, foreign consulates in the United States, and many other entities. The Manual is also posted on the Department's website, <http://travel.state.gov/CNA>. Moreover, the Department also distributes other consular notification and access training materials free of charge and posts them on its website, including pocket cards for police officers listing basic consular notification and access procedures, and training videos on such procedures and scenarios. To date, the Department has distributed a vast number of consular notification and access training materials—over 200,000 manuals and 1.5 million pocket cards—to law enforcement agencies, prisons, and other entities across the United States. The Department also disseminates consular notification and access information on social media websites such as Twitter and Facebook.

These training materials complement a robust program of field training and briefings. The State Department has conducted nearly 600 outreach and training sessions on consular notification and access since 1998. The primary targets of these sessions have been federal, state, and local police and police trainees, as well as consular officers serving at foreign consulates in the United States. The Department provides briefings to other entities, such as the U.S. Departments of Justice and Homeland Security, governors' and mayors' associations, state bar associations and many other entities, explaining the Department's efforts to raise awareness of and increase compliance with consular notification and access obligations, and how alleged violations are remedied or resolved.

As a consequence of these efforts and in recognition of the importance of consular notification and access, certain national law enforcement and correctional groups require agencies to have consular notification and access procedures in place in order to earn accreditation. In particular, the Commission on Accreditation for Law Enforcement Agencies (CALEA) requires consular notification and access training for police departments in the United States to attain accreditation, and the American Correctional Association (ACA) maintains the same requirement for accrediting U.S. prisons. Thanks to extensive training and outreach measures around the nation undertaken by the United States in implementation of our obligations under the VCCR, consular notification and access has become a standard professional norm for law enforcement agencies throughout the United States. As a result, the United States believes that in the vast majority of cases, U.S. law enforcement personnel provide consular notification and access in accordance with the requirements of the VCCR.

“4. Push for urgent passage for the “Consular Notification Compliance Act” (“CNCA), which has been pending with the United States Congress since 2011.”

The United States takes very seriously its obligations under the International Court of Justice judgment in the Avena case (Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31)). The Departments of State and Justice have taken significant steps to comply with these obligations and have engaged continuously with the U.S. Congress on the passage of implementing legislation. We regret that Congress has not yet adopted legislation to

bring the United States into compliance with Avena. The most recent legislative proposal was included in the Department of State, Foreign Operations, and Related Programs Appropriations Act, Fiscal Year 2014 (S. 1372). It would have provided an opportunity to seek judicial review and reconsideration of convictions and sentences for those foreign nationals convicted and sentenced to death as of the date of enactment who had not received consular notification or access consistent with U.S. obligations.

Although Congress has not yet adopted implementing legislation, we remain committed to working with Congress to get legislation enacted into law. The Department's engagement with Congress over the years has been significant and at a high level, and reflects our continued commitment to achieve this goal. In particular, Secretary Kerry – who had been engaged on this issue while he was still in the Senate – has been personally involved in our efforts to obtain implementing legislation. The Departments of State and Justice were also continually engaged with Congress on prior versions of this legislation, including through letters sent by former Secretary of State Clinton, Attorney General Holder and former Secretary of Defense Panetta and testimony by senior officials from the Departments of State and Justice before the Senate. We plan to continue our significant efforts to achieve passage of implementing legislation.

“5. Ensure that the legal counsel provided by the State in death penalty cases is effective, trained to serve in death penalty cases, and able to thoroughly and diligently investigate all mitigating evidence;”

The right to counsel is guaranteed by the U.S. Constitution to criminal defendants in death penalty cases. Each jurisdiction implements this guarantee. The following link provides information on what the United States government does in this area for federal cases—see http://www.capdefnet.org/FDPRC/links.aspx?menu_id=78&id=2276.

“6. Review its laws, procedures and practices to make certain that no one with a mental or intellectual disability at the time of the commission of the crime or execution of the death sentence receives the death penalty or is executed. The State should also ensure that anyone accused of a capital offense who requests an independent evaluation of his or her mental health and who does not have the means to retain the services of an independent expert, has access to such an evaluation.”

The Eighth– Amendment to the U.S. Constitution prohibits execution of persons who are severely mentally impaired or who are insane. Proof of such a defense in cases where a defendant has court-appointed counsel would be part of the preparation of the defense funded by the court.

“7. Review its laws, procedures and practices to ensure that solitary confinement is not used as a court-imposed sentence in the cases of persons sentenced to death. Ensure that capital punishment is reserved for only the most exceptional circumstances, in accordance with international standards.”

The United States Constitution prohibits the use of seclusion in a manner that constitutes cruel and unusual punishment and the United States remains committed to preventing abuses

with regard to detention conditions, protecting prisoners from such abuses and bringing to justice those who commit them. At the federal level, the Bureau of Prisons (BOP) does not hold inmates in extreme conditions amounting to solitary confinement. The BOP's inmates are not deprived of human contact, recreation, environmental stimulation, or medical or mental health care. Many constitutional challenges to the abuse of prisoners in seclusion have also been tried successfully in courts, thereby strengthening the protection of prisoners from such abuses. With regard to state and local facilities, the Department of Justice's Civil Rights Division works tirelessly to enforce federal safeguards against the abuse of seclusion at the state and local levels.

With respect to the crimes for which the death penalty may be used, further information on the this area may be found for the federal system in the Department of Justice death penalty charging guidelines: <http://www.deathpenaltyinfo.org/documents/FedDPRules2011.pdf> Information about this matter at the state level varies by jurisdiction, although all must comply with the U.S. Constitution's prohibition on cruel and unusual punishments.

“8. Ensure that persons sentenced to death have the opportunity to have contact with family members and access to various programs and activities.”

At the federal level, Bureau of Prison inmates at all security levels are provided opportunities for visiting, correspondence, recreation, varying levels of interaction with others, environmental stimulation, and medical and mental health care.

“9. Ensure that persons sentenced to death have access to information, in a timely manner, related to the precise procedures to be followed in their execution, the drugs and doses to be used, and the composition of the execution team as well as the training of its members. The State must also ensure that persons sentenced to death have the opportunity to challenge every aspect of the execution procedure.”

Prisoners routinely bring actions in U.S. courts challenging the conditions or their detention and the basis for their incarceration. Information available about pending capital punishment procedures varies by jurisdiction.

“10. Given the violations of the American Declaration that the IACHR has established in the present case and in others involving application of the death penalty, the Inter-American Commission also recommends to the United States that it adopt a moratorium on executions of persons sentenced to death. “

The Department of State notes the Commission's recommendation of a moratorium on the death penalty in the United States. Some states currently have such a moratorium. Others, and the U.S. federal government, do not.

Please accept renewed assurances of my highest consideration.

Sincerely,

A handwritten signature in blue ink that reads "Carmen Lomellin". The signature is written in a cursive style with a large initial "C" and a long, sweeping underline.

Carmen Lomellin
Ambassador