

**INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
RESOLUTION 91/2020**

Precautionary Measure N°. 1048-20
Lisa Montgomery regarding the United States of America
December 01, 2020
Original: English

I. INTRODUCTION

1. On November 5, 2020, the Inter-American Commission on Human Rights (“the Inter-American Commission,” “the Commission,” or “the IACHR”) received a request for precautionary measures filed by Sandra Babcock, Professor; Zohra Ahmed, Teaching Fellow; Veronica Cinibulk, Allison Franz and Gabriela Markolovic, students; all from Cornell Law School; Kelley Henry and Amy D. Harwell from the Office of the Federal Public Defender Middle District of Tennessee; and Lisa G. Nouri; (“the applicants”). The application urges the Commission to request that the United States of America (“the State,” “U.S.” or “United States”) stay the execution of Ms. Lisa Montgomery (“the proposed beneficiary”), initially scheduled for December 8, 2020 and currently rescheduled for January 12, 2021. The applicants stated that Ms. Montgomery is on death row in Carswell Unit in Texas, where she is under conditions of confinement that are incompatible with international human rights standards. They also indicated that she has a mental illness and, therefore, the State should not proceed with her execution. Lastly, the applicants also filed petition P-2201-20, in which they allege violations of the provisions in different articles of the American Declaration on the Rights and Duties of Man regarding Ms. Montgomery’s access to justice, due process, a proper defense, indicating that she was not adequately represented in order to avoid the death penalty.

2. The Commission requested information from the State on November 12, 2020, pursuant to Article 25.5 of its Rules of Procedure. The State submitted its observations on November 18, 2020. The applicants submitted updated information on November 20 and 24, 2020.

3. Having analyzed the submissions of fact and law by each party, the Commission considers that the information provided by the applicants and the State demonstrates *prima facie* that this matter meets the requirements of seriousness, urgency and irreparable harm set forth in Article 25 of the Rules of Procedure. Moreover, in the event Ms. Montgomery is executed before the Commission has had an opportunity to examine the merits of the matter, any eventual decision would be rendered ineffective, thus resulting in a situation of irreparable harm. Consequently, in accordance with Article 25 of the IACHR Rules of Procedure, the Commission requests that the United States of America: a) adopt the necessary measures to protect the life and right to humane treatment of Ms. Lisa Montgomery; b) refrain from carrying out the death penalty on Lisa Montgomery until the IACHR has had the opportunity to reach a decision on her petition; c) guarantee detention conditions that are compatible with international standards, with special consideration to her personal conditions; d) provide appropriate medical attention for her physical or mental health conditions, in accordance with international human rights applicable standards; and e) adopt the measures in question in consultation with the beneficiary and her representatives.

I. SUMMARY OF THE FACTS AND ARGUMENTS PROVIDED BY THE PARTIES

1. Information provided by the applicants

i. Background of the proposed beneficiary

4. The application indicates that Lisa Montgomery was born with permanent brain damage, due to her mother's alcoholism problem. Her mother's husband, Jack, used to molest and rape Diane, Lisa's older sister, even on Lisa's same bed when she was just four years old. Social services removed Diane from the household, but the agency failed to remove Lisa as well or to make any inquiries about her well-being. The request further states that, when Lisa turned thirteen, Jack started raping her and threatening to rape her little sister, Patty, if she resisted, or to kill her entire family if she told anyone. Jack built a small room onto the side of the trailer with its own entrance, making it easy for him to rape her out of earshot of others, raping her two to three times a week.

5. The allegations indicate that, when Lisa turned fifteen, her mother, Judy, began selling her for sex in exchange for utilities and services: she would ask the other children to leave the trailer so that the plumber, the electrician, and the man who delivered propane gas could rape Lisa, telling Lisa she had to pay for her own room. Around the same time, Jack would reportedly invite his friend to the house to have sex with Lisa, who was anally, orally and vaginally raped by several men "one after the other" for several hours at a time and, when they had finished, they would reportedly "urinate on her like she was trash." The applicant indicates that experts agree that Lisa's dissociative disorder (a mental illness that severs Lisa's connection with reality) began with these events.

6. The application further notes that the State failed to protect Lisa. She confided in her cousin, David, who was a police officer, but he allegedly failed to report the crimes. Social services investigated the situation in the household once, but they had announced their visit to her stepfather in advance. School administrators had reason to suspect that Lisa was suffering at home as well, but they failed to take steps to investigate further.

7. Lisa's mother, Judy, reported that she brought Lisa to see a local physician after she discovered Jack was raping her, who performed a gynecological exam and administered a pregnancy test, but never talked to Lisa in private and did not call the police, even though he was a mandatory reporter under the law. Nine months after that the appointment, Judy reported the rape to the Child Welfare Office, but the social worker decided against pursuing the matter in juvenile court and decided to trust Judy's representations that she would take care of her daughter, failing to appreciate how Judy was implicated in her daughter's sexual abuse. The district attorney's office reportedly took no action either after taking acknowledgement of the case by the Child Welfare Office. On another occasion, when Judy testified that Jack was having sex with Lisa during her divorce proceedings, the Judge failed to make any inquiries about Lisa's safety under Judy's custody. Finally, on family counseling there was a note about a time in which her stepfather had beaten Lisa and he "broke a broom while beating" her, but they never reported the violence to authorities.

8. The applicants state that Lisa used to enjoy playing the violin or playing with her childhood dog, but Judy sold the violin during an incident and, to punish Lisa's brother, Teddy, she killed the family dog "brutally smashing its head with a shovel until its brain came out." After this, in an attempt to escape from home, Lisa signed up for the Air Force and prepared to enlist immediately after she graduated from high school. Nonetheless, Judy married Richard, who moved into the house with his 24 years old son, Carl; Judy and Richard encouraged a romantic relationship between Lisa and Carl that led Lisa to become engaged to her stepbrother at the age of seventeen and to become pregnant later on. The pregnancy disqualified her from military service.

9. The application indicates that, by her 18th birthday, Lisa had experienced nine out of ten “adverse childhood experiences” that can lead to trauma, adding that scans of her brain had revealed an absence of brain matter, which means that her brain had either deteriorated after an injury or never formed properly. She reportedly also suffered from epilepsy, frontal lobe syndrome, parietal lobe and temporal lobe dysfunction. The request specifies that parietal lobe synthesizes information and stimuli and helps a person decipher what is good or bad.

10. The applicants indicate that Lisa’s husband, Carl, continued the cycle of physical and sexual violence. They state that he “brutalized her [...] beat her, tied her in stress positions, poured hot wax on her, forcibly inserted glass in her anus and vagina, held a knife to her throat and sexually assaulted her.”¹ The proposed beneficiary gave birth to four children and, then, Judy and Carl pressured her for sterilization. According to the request, after the birth of her children, her psychotic symptoms bloomed, adding symptoms of bipolar disorder and indicating that her post-traumatic disorder exacerbated her symptoms. Lisa moved 43 times between 1984 and 2000 and she started to drink heavily, “in her twenties, she was always drunk.”² She allegedly stopped taking care of her personal appearance and hygiene and she failed to keep up with the day-to-day tasks of parenting.

11. When Lisa ended her relationship with Carl, she married Kevin Montgomery, and although the relationship had changed, the abuse persisted. He reportedly “bruised Lisa, used a horse whip on her, and tied her in forced stress positions.” She allegedly thought it was part of maintaining a relationship with a man.

12. The applicants indicate that, according to trauma experts, Lisa “developed complex Post-Traumatic Stress Disorder, a disease caused by pervasive, long-standing traumatic events. She would continue to re-experience her torture as if it was actually reoccurring.”

ii. The crime that led to Lisa Montgomery’s conviction and sentence to death

13. The request indicates that, two days before the crime, Carl, former husband and stepbrother, filed for the custody of two of her children. Lisa had told her new husband that she was pregnant, but Carl knew that was a lie because of the sterilization performed against her will, and threatened to expose her, saying that he would use the imagined pregnancy in court to obtain custody of her children. The applicants indicated that the threat of losing her children combined with years of trauma and severe mental illness pushed Lisa “past the brink.”

14. Lisa went to the home of “Bobbie,” who was 23 and eight months pregnant. She reportedly killed her, cut the baby girl from her mother’s abdomen, took the baby home, cared for her, and pretended she was her own child. The request states that all experts agree that the proposed beneficiary was suffering from severe mental illness at the time of the crime, as she could not and cannot tell what is real. The applicants added that a doctor testified that “Lisa’s dissociative disorder was one of the most severe cases she has ever seen.”

iii. Allegations of the proposed beneficiary’s failed defense

15. The applicants indicated that the lawyer who controlled the defense team had never before defended a person facing the death penalty, nor anyone with mental illness or a woman with a history of

¹ The application adds that Teddy, Lisa’s younger brother, accidentally discovered a home video showing Carl beating and raping her, describing it “like a scene out of a horror video. My sister was crying and in pain”.

² According to the application, she started drinking as a young girl to cope with Jack’s repeated rapes.

sexual violence and trauma. A female lawyer that had experience with mentally ill clients and victims of abuse and trauma agreed to join the defense team, but the lawyer leading the team “could not tolerate being told what to do by a female lawyer.” Even though this female lawyer was undertaking an in depth investigation into the proposed beneficiary’s past, trying to build a case by sustaining that her acts were product of her psychotic disorder, bipolar disorder and severe sexually-based trauma, the main lawyer and his boss asked the male federal judge to remove her from the case. The judge ordered to cut off all communications between Lisa and the female lawyer. Lisa and the lawyer did not have any communication again until after Lisa was on federal dead row. The application indicates that as a survivor of sexual trauma, trusting the male attorneys was difficult for Lisa, who even declared that the removal of the female lawyer from her team was devastating for her; three men were left in charge of the case.

16. The application indicates that these lawyers let their personal views and bias interfere with the proposed beneficiary’s representation, they rejected the American Bar Association standards to defend persons facing a death sentence, they failed to present the full extent and impact of Lisa’s childhood and sexual abuse, and they pursued conflicting defenses.

iv. The conviction and sentence to death

17. According to the application, federal prosecutors dismissed the evidence presented of her sexual assault, “trivializing it as the ‘abuse excuse.’” The jury returned a death verdict in five hours and, on October 22, 2007, the court sentenced her to death in accordance with the jury’s recommendation. The Eighth Circuit Court of Appeals upheld Ms. Montgomery’s conviction and sentence. The Supreme Court denied certiorari review on March 19, 2012.

18. Her current lawyers filed a petition for a writ of habeas corpus seeking to overturn the death sentence, but the district court denied it, holding that her conviction did not violate the U.S. Constitution. The Eighth Circuit Court of Appeals affirmed this decision and the Supreme Court again denied certiorari review on May 26, 2020.

19. On October 16, 2020, the Department of Justice moved to set an execution date in Ms. Montgomery’s case without notifying her legal team. The application indicates that, if the execution takes place, the proposed beneficiary will be the first woman in almost 70 years to be executed by the federal government of the United States.

v. The proposed beneficiary’s current conditions of confinement

20. The application indicates that Ms. Montgomery is held in solitary confinement in a freezing cell, under twenty-four hour video surveillance, that she is only allowed to wear a gown and not allowed to wear underwear. Since October 16, 2020, the authorities placed her in a single cell by herself, without access to any other prisoners, guarded twenty-four hours a day. She does not leave her cell, except to shower three times a week or for legal visits. Her cell includes only a concrete bunk, a rubber mattress, a sink and a toilet; the lights remain illuminated twenty-four hours a day and the lighting does not vary. The applicants indicate that, ever since she has been under these conditions, she has fainted twice.

21. According to the applicants, given her history of trauma, the sensation of being without basic undergarments is deeply distressing. The proposed beneficiary advised her counsel that she had overheard a male guard commenting that he could see her through the monitor in the guard’s area, therefore, it was indicated that, given her history of violent sexual trauma by men, the thought of male

guards watching her during vulnerable and exposed moments any time of the day is psychologically harmful to her.

22. She is reportedly not allowed shoes or socks in an extremely cold cell. She does not have access to glasses that the approved eye-doctor prescribed to her, nor access to a machine to treat her sleep apnea that causes her breathing to be irregular at night. Her access to hygiene is also strictly controlled and she only receives four squares of toilet paper at a time. Her access to books and media is also restricted. According to the applicants, the water in the prison is foul tasting; thus, prison officers provided prisoners with a powdered drink mixture to flavor the water given with daily meal trays; those were removed from Ms. Montgomery's trays and she is now severely dehydrated.

23. The application indicates that the Bureau of Prisons explained that the conditions of confinement are necessary to protect her from suicide, but the applicants considered that the conditions are not therapeutic and just precipitate a further decline in her mental health. The application alleges that these conditions violate international human rights law and that her conditions meet the definition of solitary confinement, which can rise to the level of torture.

vi. Main allegations from the applicants

24. The applicants state that Ms. Montgomery faces execution without full access to the courts and to a fair and reasoned clemency determination, due to the COVID-19 pandemic: federal courts are not able to hear witnesses, and experts cannot examine the proposed beneficiary. In this situation, they indicate that even her own lawyers are risking their lives by visiting her in the prison.

25. They argued that the State should not execute the proposed beneficiary, as she is not currently competent for execution, considering i. her complex post traumatic disorder; ii. her severe dissociation as a result of tremendous overwhelming trauma; iii. her suffering of psychosis; iv. a rapid cycling bipolar disorder she is developing; v. her diminished mental capacity; and vii. a multifocal brain impairment.

26. The application alleges that scheduling her execution during the pandemic has presented numerous impediments for her legal representation to access the courts and participate fully in the clemency process, violating her right to this access. In this regard, it was noted that the risk of contracting COVID-19 is retaining the mental experts from performing an up-to-date evaluation on Ms. Montgomery, and that two of the lawyers of her team (also applicants) contracted COVID-19, which represents an obstacle for them to file legal remedies (see *infra*. para. 29-30)

27. Given all the above, the applicants allege a violation of Articles XVIII and XXVI of the American Declaration by having provided incompetent defense counsel in a capital case. In this regard, they allege that the defense failed to comprehend the profound and permanent impact of Ms. Montgomery's years of torture and trauma; they wasted the opportunity to humanize her and save her life and disregarded professional standards of care. The applicants indicated that: a. the defense conducted a superficial investigation into the proposed beneficiary's life history, overlooking mitigating evidence; b. they pursued defense theories unsupported by facts or psychological expertise; c. the prosecution exploited defense counsel's incompetence; and d. the defense failure to present mitigating evidence was rooted in misogyny.

28. The application also alleges a violation of Articles I, II, V and VII of the American Declaration, regarding the failure to protect Ms. Montgomery from chronic sexual and domestic abuse as a young girl.

vii. Additional information

29. On November 20, 2020, the applicants presented updated information. The communication indicates that Kelley Henry and Amy D. Harwel, from the Office of the Federal Public Defender Middle District of Tennessee, are severely ill and unable to meet with the proposed beneficiary, as they tested positive for COVID-19 on November 10. In view of this situation, they filed an injunctive and declaratory relief before the U.S. District Court for the District of Columbia, alleging that their incapacitation deprives Ms. Montgomery of her rights to meaningfully participate in the clemency process with assistance of qualified counsel. In addition, they submitted a letter before the Department of Justice Office of the pardon Attorney asking for reprieve so they could submit a clemency petition after recovering from COVID-19.

30. In this regard, on November 19 the District Court stayed the execution of the death penalty of the proposed beneficiary, as follows:

For the reasons set forth in this Court’s Memorandum Opinion, Dkt. 19, it is hereby ORDERED that Plaintiff’s motion for a preliminary injunction and temporary restraining order, Dkt. 2, is GRANTED in part and DENIED in part; it is further ORDERED that Defendants (along with their respective successors in office, officers, agents, servants, employees, attorneys, and anyone acting in concert with them) are enjoined from executing Plaintiff Lisa Marie Montgomery before December 31, 2020; it is further ORDERED that Plaintiff’s counsel, Amy Harwell and Kelley Henry, shall finalize Plaintiff’s clemency petition as promptly as possible in light of their illness; and it is further ORDERED that if both Harwell and Henry believe that they will be unable to do so without further assistance by December 24, 2020, they shall immediately apply to the U.S. District Court for the District of Missouri to appoint qualified, additional counsel, or shall enlist the assistance of other attorneys working in the Office of the Federal Public Defender for the Middle District of Tennessee.
SO ORDERED.

31. The applicants informed that “the Government will seek to vacate the stay order, and the execution may well proceed on December 8.” Lastly, on November 24, 2020, they indicated that the government has rescheduled the execution for January 12, 2020.

2. Observations of the State

32. The United States submitted its observations on November 18, 2020. The State brought to the attention of the Commission that the applicants filed additional domestic remedies after the request for precautionary measures. Specifically, they filed various complaints before the U.S. District Court for the District of Columbia: 1. On November 6, 2020, a complaint for declaratory and injunctive relief of the conditions of her confinement;³ 2. On November 16, a request for preliminary injunction to address those

³ This complaint alleges that the conditions of confinement of Ms. Montgomery ever since her death warrant do not offer adequate regard for her gender and mental and psychiatric disabilities, are unconstitutional, and violate federal disability rights law. Ms. Montgomery’s lawyers argue that, given her history of trauma, repeated sexual and physical abuse, and neglect, Ms. Montgomery’s detention conditions amount to torture and are “cruel, unusual, and discriminatory.” They further pose that, given Ms. Montgomery’s history, transfer to the all-male prison United States Penitentiary Terre Haute (USP Terre Haute) in Indiana, where she is scheduled to be executed, would inflict “further gratuitous suffering” and likely trigger a psychiatric breakdown. The complaint emphasizes that her conditions of confinement echo some of the traumatic experiences she suffered throughout her life and are furthermore harsher than those to which male prisoners at USP Terre Haute are subjected. *Montgomery v. Barr et al.*, 1:20-cv-03214-TNM, Complaint [D.D.C. Nov. 6, 2020]. Attachment 1 of the State’s report.

conditions;⁴ 3. On November 12, a complaint for declaratory and injunctive relief alleging violations to her constitutional rights in relation with access to executive clemency procedures;⁵ 4. On November 12, a temporary restraining order and preliminary injunction seeking to enjoin her pending execution.⁶ The State considers that, while these claims are currently pending before U.S. courts and are similar to the request for precautionary measures, the present request is inadmissible. Judgements against the proposed beneficiary and the new claims referenced were both attached to the request.

33. Moreover, the U. S. notes that the precautionary measures request and an eventual analysis of the petition should be dismissed under the fourth instance doctrine. In this sense, the State argues that the potential beneficiary is pursuing domestic remedies in U.S. courts or has already pursued domestic remedies. Under this logic, the State cited Article 25.6.a of the Rules of Procedure of the Commission, which requires taking into account whether the situation has been brought to the attention of the pertinent authorities. The U.S. states that the exhaustion requirement should be applied in this case, noting its importance under international law. The State further asserts that an exception to the exhaustion of domestic remedies is not applicable, since the applicant already elected to pursue them. Lastly, the United States indicated that the Commission lacks authority to request precautionary measures, since the State is not a party to the American Convention, and requests that the IACHR refrain from requesting such measures.

III. ANALYSIS OF THE ELEMENTS OF SERIOUSNESS, URGENCY AND IRREPARABLE HARM

34. The mechanism of precautionary measures is part of the Commission's function of overseeing Member States compliance with the human rights obligations set forth in Article 106 of the Charter of the Organization of American States. These general oversight functions are established in Article 41 (b) of the American Convention on Human Rights, as well as in Article 18 (b) of the Statute of the IACHR. The mechanism of precautionary measures is described in Article 25 of the Rules of Procedure of the Commission. In accordance with this Article, the IACHR grants precautionary measures in urgent and serious situations, and when these measures are necessary to avoid irreparable harm to persons.

35. The Inter-American Commission and the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "I/A Court H. R.") have established repeatedly that precautionary and provisional measures have a dual nature, precautionary and protective. Regarding the protective nature, precautionary measures seek to avoid irreparable harm and to protect the exercise of human rights. Regarding their precautionary nature, the measures have the purpose of preserving legal situations being considered by the IACHR. Their precautionary nature aims at safeguarding the rights at risk until the

⁴ This motion seeks to "reduce the cruelty she is currently suffering at Federal Medical Center Carswell and to prevent Defendants' imminent transfer [...] to United States Penitentiary Terre Haute, which is an all-male prison where Plaintiff's mental illnesses will be profoundly exacerbated and she is very likely to have a catastrophic mental breakdown." *Montgomery v. Barr et al.*, 1:20-cv-03214-TNM, Motion for Preliminary Injunction [D.D.C. Nov. 16, 2020]. Attachment 2 of the State's report.

⁵ The complaint argues that the COVID-19 pandemic has had a negative impact on Ms. Montgomery's ability to prepare and present her clemency application due to restrictions on in-person visits pursuant to local health mandates and guidance from the Centers for Disease Control and Prevention. Complaint (*Montgomery v. Barr et al.*, 1:20-cv-03261, Complaint [D.D.C. Nov. 12, 2020]). Attachment 3 of the State's report.

⁶ Requesting reprieve until Ms. Montgomery's counsel can provide a clemency process that comports with her Fifth Amendment rights as well as a stay on her scheduled execution. The motion notifies the Defendants about Ms. Montgomery's lead counsel being scheduled for surgery on November 13, which makes it impossible for Ms. Montgomery's defense team to work on her clemency case. *Montgomery v. Barr et al.*, 1:20-cv-03261, Motion for Temporary Restraining Order and Preliminary Injunction Pursuant to Rule 65 of the Federal Rules of Civil Procedure [D.D.C. Nov. 12, 2020]. The defendants' response to this motion argues that the motion should be denied because her case fails to show a likelihood of success on its merits and that the pardon attorney has eased the process to file a pardon request. Page 169 – 207: *Montgomery v. Barr et al.*, 1:20-cv-03261, Defendants' Response in Opposition to Motion for Temporary Restraining Order and Preliminary Injunction [D.D.C. Nov. 14, 2020]. Attachment 5 of the State's report.

petition in the Inter-American System is resolved. The object and purpose are to ensure the integrity and effectiveness of the decision on the merits and, thus, avoid infringement of the rights at issue, a situation that may adversely affect the useful purpose (*effet utile*) of the final decision. In this regard, precautionary or provisional measures allow the State concerned to fulfill the final decision and, if necessary, to comply with the required reparations. Regarding the process of decision making and, according to Article 25(2) of the Rules of Procedure, the Commission considers that:

- a. “serious situation” refers to a grave impact that an action or omission can have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the Inter-American System;
- b. “urgent situation” refers to risk or threat that is imminent and can materialize, thus requiring immediate preventive or protective action; and
- c. “irreparable harm” refers to injury to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.

36. In analyzing those requirements, the Commission reiterates that the facts supporting a request for precautionary measures need not be proven beyond doubt; rather, the purpose of the assessment of the information provided should be to determine *prima facie* if a serious and urgent situation exists.⁷

37. As a preliminary observation, the Commission considers it necessary to point out that, according to its mandate, it is not called to determine individuals’ responsibilities in relation to the alleged commission of crimes or offenses. Moreover, it is not competent to review internal decisions on the basis of compliance with internal law or assessment of facts. In this sense, the Commission will analyze the present request for precautionary measures under Article 25 of its Rule of Procedures. As for the underlying petition P-2201-20, which denounces violations of the rights of the proposed beneficiary, the Commission recalls that the analysis of such claims shall be carried out under the specific provisions related to the Petition and Case System and to the relevant Statute and Rules of Procedure.

38. Furthermore, the Commission observes that exhaustion of domestic remedies is indeed a requirement for the admissibility of petitions under the Petitions and Cases System, according to Article 31 of the Rules of Procedure, as indicated by the State. However, this is not a requirement for the granting of precautionary measures. As the United States has correctly stated, Article 25.6.a of the Rules of Procedure⁸ establishes that actions pending before domestic authorities should be taken into account when reviewing a request, but such actions does not bar the Commission from granting precautionary measures under the consideration of the requirements of seriousness, urgency and irreparable harm. Additionally, as previously indicated (*see para. 34*), the Commission’s competence to order precautionary measures extends to members of the Organization of American States and does not derive from the American Convention on Human Rights, to which the United States is not a party.

39. Prior to the analysis of the requirements, the Inter-American Commission recalls that the death penalty has been subject to strict scrutiny within the Inter-American system. Despite the tendency observed in OAS Member States in favor of the gradual abolition of death penalty, for States that maintain the death penalty, there are a number of restrictions and limitations established in the regional human

⁷ For instance, in relation to provisional measures the Inter-American Court has considered that this standard requires a minimum of detail and information that allow for the *prima facie* assessment of the situation of risk and urgency. IACHR, *Matter of the children and adolescents deprived of their liberty in the “Complexo do Tatuapé” of the Fundação CASA*. Request for extension of measures. Provisional Measures regarding Brazil. Resolution of the Inter-American Court of Human Rights of July 4, 2006. Considerandum 23.

⁸ “6. In considering the request, the Commission shall take into account its context and the following elements:

a. whether the situation has been brought to the attention of the pertinent authorities or the reasons why it would not have been possible to do so; (...).”

rights instruments with which they are bound to comply under international law.⁹ Those limitations are based upon the acknowledgment of the right to life as the supreme right of the human being, and the condition *sine qua non* for the enjoyment of all other rights, thus calling for a heightened scrutiny test so as to ensure that any deprivation of life which may occur through the application of the death penalty complies strictly with the requirements of the applicable instruments.¹⁰ In this sense, the Commission has stressed that the right to due process plays a significant role in ensuring the protection of the rights of persons who have been sentenced to death. Indeed, among due process guarantees, States are bound to ensure the exercise of the right to a fair trial, ensure the strictest compliance with the right to defense, and guarantee the right to equality and non-discrimination.¹¹

40. As it pertains to the present matter, the Inter-American Commission finds that the requirement of seriousness is met, under both its precautionary and protective components. In this sense, although the imposition of the death penalty is not prohibited under the American Declaration, the Commission observes that the right to life as set forth in Article I of the American Declaration is at risk given that Ms. Montgomery faces execution in the framework of a legal process that allegedly did not comply with the rights to a fair trial and due process of law (*see paras. 15-19, 27*). The applicants further allege violations of the right to equality before the law; the right to protection of honor, personal reputation, and private and family life; as well as the right to protection for mothers and children, contemplated in Articles II, V and VII of the American Declaration (*see para. 28*), in relation to Ms. Lisa Montgomery. In this regard, the Commission has consistently declared that the possibility of an execution in such circumstances is sufficiently serious to allow for the granting of precautionary measures to the effect of safeguarding a decision on the merits of the petition filed.¹²

41. In relation to the protective component, the Commission observes that Ms. Montgomery is on death row at the Carswell Unit in Texas since October 16, when she was scheduled for execution. Furthermore, the so-called “death row phenomenon” is widely known due to the impact that it has on the rights of persons deprived of liberty.¹³ As for the impact that solitary confinement may have on the rights to life and personal integrity, the United Nations Special Rapporteur on Torture, Juan E. Mendez, has stated that:

Individuals held in solitary confinement suffer extreme forms of sensory deprivation, anxiety and exclusion, clearly surpassing lawful conditions of deprivation of liberty. Solitary confinement, in combination with the foreknowledge of death and the uncertainty of whether or when an execution is to take place, contributes to the risk of serious and irreparable mental and physical harm and suffering to

⁹ IACHR. *Report on The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition*, OEA/Ser.L/V/II; Doc. 68, 31 December 2011, para. 138 and 139, available at: <http://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf>

¹⁰ IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), *Medellín, Ramírez Cardenas and Leal García, United States*, August 7, 2009, para. 122.

¹¹ IACHR. *Report on The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition*, OEA/Ser.L/V/II; Doc. 68, 31 December 2011, para. 141, available at: <http://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf>

¹² IACHR. *Matter of Víctor Hugo Saldaño* regarding the United States of America (MC-241-17), Resolution 14/17 of May 26; *Matter of Williams Charles Morva* regarding the United States (MC-156-17), Resolution 9/2017, March 16, 2017; *Matter of Alfredo Rolando Prieto* regarding the United States (MC-498-15), Resolution 32/2015, September 29, 2015; *Matter of José Trinidad Loza Ventura* regarding the United States (MC-304-15), Resolution 27/2015, August 11, 2015; *Matter of Samuel Moreland* regarding the United States (MC-37-14), Resolution 32/2014; *Matter of John Winfield* regarding the United States (MC-204-14), Resolution 16/2014, June 6, 2014; *Matter of Russell Bucklew and Charles Warmer* regarding the United States (MC-177-14), Resolution 14/2014, May 20, 2014; *Charles Don Flores* regarding the United States of America (PM-334-18), Resolution 32/2018, May 5, 2018. All the decisions are available at: <http://www.oas.org/en/iachr/decisions/precautionary.asp>.

¹³ In that regard, in *Soering v. United Kingdom*, the European Court found that the “death row phenomenon” is characterized by a prolonged period of detention while awaiting execution, during which prisoners suffer severe mental anxiety in addition to other conditions. IACHR, *The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition*, OEA/Ser.L/V/II. Doc. 68, December 31, 2011, p. 200. Available at: <http://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf>.

the inmate. Solitary confinement used on death row is by definition prolonged and indefinite and thus constitutes cruel, inhuman or degrading treatment or punishment or even torture.¹⁴

42. In the present matter, according to the request, Ms. Montgomery is being held in solitary confinement in a freezing cell, under twenty-four hour video surveillance, without contact with any other prisoners, she rarely ever leaves her cell, except to shower three times a week or for legal visits. Furthermore, the applicants indicated that her cell includes only a bunk made of concrete, a rubber mattress, a sink and a toilet; the lights are kept on twenty-four hours a day and the lighting does not vary. The information provided also indicates poor access to hygiene and clean water, causing her to be dehydrated.

43. The Commission had the opportunity to evaluate similar factual circumstance¹⁵ in the framework of merits report No. 76/16 –the matter of Víctor Hugo Saldaño regarding the United States- and concluded that all these factors, reviewed together, demonstrate the extreme severity of the consequences suffered on death row. In the circumstances of the Saldaño case, the Commission determined that, in addition to being inhuman, cruel, unusual, and infamous, the conditions constituted a form of torture.¹⁶

44. In the current situation, the Commission notes with high concern the applicant's allegations that Ms. Montgomery fainted twice since the Bureau of Prisons placed her in these conditions. In this way, considering the different serious mental health illnesses alleged by the applicants in conjunction with her current conditions of confinement, the Commission deems it feasible that these conditions may precipitate a further decline in her mental health, as stated by the applicants.

45. In addition to the above, there is an indication that the prison authorities do not allow the proposed beneficiary the use of underwear, and that male guards expressed that they can see her on the monitor all the time, depriving her from any privacy or intimacy. In this regard, the Commission considers that these conditions are not adequate for a woman survivor of sexual violence, especially considering the very serious information of sexual abuse during the proposed beneficiary's life that would have caused her different traumas and illnesses.

46. The Commission observes that the United States did not controvert the alleged conditions of confinement of the proposed beneficiary in its report, nor did it inform of any measures being adopted by domestic courts or administrative authorities to allow for humane conditions and prevent any harm to the proposed beneficiary.

47. Consequently, and without presenting a prejudgment on the petition filed, the Commission concludes that the rights of Ms. Montgomery are *prima facie* at risk, due to the possible execution of the death penalty and its subsequent effects, which have been included in the petition currently under study by the Commission, as well as the ongoing conditions of incarceration on death row and their impact on the rights to life and humane treatment of the proposed beneficiary.

48. With regard to the requirement of urgency, from its precautionary component, the Commission observes that the proposed beneficiary's execution date had been initially scheduled for December 8. However, a federal judge stayed the execution to allow her lawyers to file of a clemency petition, and setting December 31, 2020, as the new date. Nonetheless, the applicants stated that the Government will

¹⁴ United Nations, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 9 August 2012, A/67/279, para. 48.

¹⁵ On that occasion, the IACHR reviewed the situation of the Polunsky Unit, a Texas State death row facility.

¹⁶ IACHR, Report No. 5/17, Case 12. 254, *Víctor Saldaño (United States)*, January 27, 2017, para. 251.

seek to vacate the order and the execution can still take place on December 8, but they later informed that the government rescheduled the execution for January 12, 2021. In this scenario, the Commission considers that both between December 8, 2020 or January 12, 2021 are very close dates and, notwithstanding the filing of different internal remedies, the possibility that these remedies may be dismissed, together with the proximity of the dates set for execution, would not allow the Commission to act in a timely manner to prevent the execution of the death penalty and, in consequence, to reach a merits decision before her execution. Furthermore, the IACHR notes that, at present, all ordinary resources of her criminal procedures are exhausted, which has given way to her death penalty execution date. In this sense, the current remedies, such as those pending before the District Court of D.C. or the attempt to present a clemency petition are extraordinary remedies seeking a revision of her current conditions and her suitability for execution of the death penalty. In this regard, none of these remedies have granted protection to the proposed beneficiary, but just a procedural allowance to file the clemency petition (*see supra* para. 30). In view of the imminent possibility of the death penalty being applied, which, as previously indicated, would lead to irreparable harm, the Commission considers that it is pertinent to adopt precautionary measures for the protection of her life and so it may have the opportunity to examine the petition filed.

49. In relation to the protective component, the Commission considers that the requirement of urgency is also been met, insofar as the risk to the rights of Ms. Lisa Montgomery requires immediate measures against the harsh conditions to which she is subjected on death row and the possible execution of the death penalty in the near future.

50. Regarding the requirement for the need to avoid irreparable harm, the Commission considers that the loss of life imposes the most extreme and irreversible situation possible. With regard to the precautionary aspect, the Commission considers that if Ms. Montgomery is executed before it has had an opportunity to fully examine this matter through petition P-2201-20, any eventual decision would be rendered ineffective since the situation of irreparable harm would have materialized.

51. The Commission wishes to stress the subsidiary nature of the Inter-American System, as it relates to any considerations of the State. For a claim based on said principle to be successful, the actions adopted by the State must have been sufficient so as to ascertain that the potential beneficiaries of a precautionary measure no longer face a serious and urgent risk of irreparable harm, due to its substantial reduction as a consequence of the local authorities' intervention. As previously indicated, there is no indication of measures effectively taken by the State to address the current situation of the proposed beneficiary.

IV. BENEFICIARY

52. The Commission hereby declares that the beneficiary of this precautionary measure is Ms. Lisa Montgomery, who has been duly identified within this procedure.

V. DECISION

53. In light of these considerations, the IACHR finds that this matter meets *prima facie* the requirements of seriousness, urgency and risk of irreparable harm set forth in Article 25 of its Rules of Procedure. Moreover, in the event Ms. Montgomery is executed before the Commission has had an opportunity to examine the merits of the matter, any eventual decision would be rendered ineffective, thus resulting in a situation of irreparable harm. Consequently, it is hereby requested that the United States:

- a) adopt the necessary measures to protect the life and right to humane treatment of Ms. Lisa Montgomery;
- b) refrain from carrying out the death penalty on Lisa Montgomery until the IACHR has had the opportunity to reach a decision on her petition
- c) guarantee detention conditions that are compatible with international standards, with special consideration to her personal conditions;
- d) provide appropriate medical attention for her physical or mental health conditions, in accordance with international human rights applicable standards; and
- e) adopt the measures in question in consultation with the beneficiary and her representatives.

54. The Commission requests that the Government of the United States of America inform within a period of 10 days, as from the date of notification of the present resolution, on the adoption of the precautionary measures that have been consulted and agreed upon and to periodically update this information.

55. The Commission emphasizes that, in conformity with Article 25(8) of its Rules of Procedure, the granting of precautionary measures and their adoption by the State do not constitute a prejudgment on the possible violation of rights safeguarded in the American Declaration and other applicable instruments.

56. The Commission instructs its Executive Secretariat to notify the present resolution to the United States of America and to the applicants.

57. Approved on December 1, 2020 by: Joel Hernández García, President; Antonia Urrejola, First Vice-President; Flávia Piovesan, Second Vice-president; Margarette May Macaulay and Esmeralda Arosemena de Troitiño; members of the IACHR.



María Claudia Pulido
Acting Executive Secretary