

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
RESOLUTION 79/2020
Precautionary Measure No. 349-20

Jorge Ernesto López Zea regarding Colombia

October 28, 2020

Original: Spanish

1. On April 24, 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 Carlos Rodríguez Mejía and Diana Maite Bayona Aristizabal (“the applicants”), urging the Commission to require the Republic of Colombia (“the State” or “Colombia”) to adopt the measures necessary to protect the rights to life and personal integrity of Jorge Ernesto López Zea (“the person proposed as beneficiary”). According to the applicants the proposed beneficiary, who suffers from amyotrophic lateral sclerosis (ALS) and is currently deprived of liberty, does not receive adequate medical treatment for his disease, a situation that is reportedly aggravated in the framework of the spread of COVID-19.

2. The Commission requested information from the parties on May 12 and August 13, 2020, in accordance with Article 25 of the Rules of Procedure. The applicants responded on June 3, 5, 7 and 22; July 29; August 4 and 24; and September 28, 2020. On the part of the State, after granting a deadline extension, it issued a report on June 3, 2020, which was expanded on June 10 and August 26, 2020.

3. Having analyzed the submissions of fact and law provided by the parties, the Commission considers that the information presented shows *prima facie* that Jorge Ernesto López Zea is in a serious and urgent situation, since his rights to health, life and personal integrity are at serious risk. Consequently, in accordance with Article 25 of the IACHR Rules of Procedure, the Commission requests that Colombia: a) adopt the measures necessary to protect the rights to life, personal integrity, and health of Mr. Jorge Ernesto López Zea; in particular, by providing him with the required medical treatment in a timely manner and without undue delay, guaranteeing as well that his detention conditions are in accordance with the international standards applicable. In this regard, pursuant to their internal regulations, the competent authorities must guarantee that Mr. Jorge Ernesto López Zea be located in an area, space or structure that allows meeting his needs for treatment and prevention against COVID-19, in accordance with the recommendations issued by the respective experts and as indicated by this Commission. The foregoing, while the situation of the proposed beneficiary is once again submitted to the corresponding technical evaluations with a view to obtaining an alternative measure to prison.

I. SUMMARY OF FACTS AND ARGUMENTS

1. Information provided by the applicants

4. The proposed beneficiary suffers from ALS,¹ which is reportedly characterized by being chronic, degenerative, progressive, and severely disabling. According to the request, he is currently deprived of his

¹ALS is a rare neurological disease that primarily involves nerve cells (neurons) responsible for controlling the movement of voluntary muscles. The disease is progressive, which means that symptoms get worse over time. Currently, there is no cure for ALS, nor is there an effective treatment capable of stopping or reversing the progression of the disease. Usually the first symptoms of ALS include muscle weakness or stiffness. Gradually, all the muscles under voluntary control are affected and the person loses strength and the ability to speak, eat, move and even breathe... Most people with ALS die of respiratory failure, usually 3 to 5 years from the time the first symptoms appear. However, about 10 percent of people with ALS survive for 10 years or more {...} People with ALS have trouble breathing as the muscles of the respiratory system weaken. Over time, they lose the ability to breathe on their own and must rely on a ventilator. Affected people are also at increased risk of pneumonia during the later stages of the disease. Available at: <https://www.ninds.nih.gov/Disorders/All-Disorders/Amyotrophic-Lateral-Sclerosis-ALS-Information-Page>

liberty in the Bogotá Metropolitan Complex (COMEB) *La Picota*, serving a 36-month prison sentence for the crime of qualified theft, imposed on December 19, 2019. In the same judgment it was defined that the sentence had to be served in a detention center due to specific legal prohibition to apply benefits or penal alternatives.² The applicants questioned this decision, taking into consideration that he should benefit from an alternative measure, such as a house arrest.

5. The applicants provided information on the medical care received, while noting incidents that allegedly show that it is not sufficient or that the imprisonment of the proposed beneficiary places him at latent risk. Thus, from the file it is possible to infer that the proposed beneficiary received a telemedical consultation from the health insurance entity (EPS by its Spanish acronym) Famisanar on April 30, 2020. On May 15, he reportedly had a respiratory crisis and, although it was resolved, he had to return to the site where he is held despite having continued to feel "short of breath." The physicians allegedly gave him some medications; however, the next day he said he felt "very bad" and that he had headache since a few days ago, despite the administration of "two vials," purportedly because "oxygen is not reaching his brain." Regarding the allocation of appointments, the applicants state that the neurology assessment had already been scheduled for May 26 while he has to wait for the remaining ones to be available. The applicants also indicated that the proposed beneficiary has, from the moment of his arrest, a CPAP,³ a device that facilitates his breathing at night, and he requires respiratory therapy appointments where this device should be checked and calibrated.

6. The proposed beneficiary was hospitalized from June 6 to 12, when according to his medical record⁴ and after having been assessed by neurology, he was prescribed home oxygen supply during the day, respiratory therapy at least twice a day, physical therapy every twelve hours, daily speech and occupational therapies, as well as changes in food consistency to avoid aspiration episodes, and was recommended to have a nutritional assessment. Additionally, the proposed beneficiary has been given the medication prescribed by the EPS for the treatment of ALS and on June 10, 2020 he underwent a neurology assessment, while other therapy orders are still pending. Regarding the detention conditions, the

² Colombian Penal Code, Article 68A: Will not be granted; the conditional suspension of the enforcement of the penalty; house arrest as a substitute for prison; nor shall there be any other benefit, judicial or administrative, except the benefits for collaboration regulated by law, provided that this is effective, when the person has been convicted of a malicious crime within the previous five (5) years. Nor those who have been convicted of malicious crimes against the Public Administration; crimes against persons and property protected by International Humanitarian Law; crimes against freedom, integrity and sexual formation; fraud and breach of trust that falls on State assets; massive and habitual raising of money; improper use of inside information; aggravated association to commit a crime; money laundering; transnational bribery; domestic violence; aggravated theft; cattle stealing set forth in Article 243, third paragraph; extortion; aggravated homicide contemplated in Article 104, numeral 6; injuries caused by chemical agents, acids and/or similar substances; unlawful violation of communications; unlawful violation of official communications or correspondence; human trafficking; advocating genocide; personal injury due to anatomical or functional loss of an organ or limb; forced displacement; migrant smuggling; acting as a front man; illicit enrichment of individuals; seizure of hydrocarbons, their derivatives, biofuels or mixtures that contain them; receiving; instigation to commit a crime; use or launch of dangerous substances or objects; manufacture, import, traffic, possession or use of chemical, biological and nuclear weapons; crimes related to drug trafficking and other offenses; espionage; rebellion; and forced displacement; usurpation of real estate, counterfeiting of national or foreign currency; fictitious export or import; tax evasion; refusal of refund; aggravated smuggling; smuggling of hydrocarbons and their derivatives; aid and instigation of the employment, production and transfer of antipersonnel mines. The provisions of this article will not apply with respect to the substitution of pretrial detention and the substitution of the enforcement of the penalty in the events contemplated in Law 906 of 2004, Article 314, numerals 2, 3, 4 and 5. Subsection 1. The provisions of this article shall not apply to the release on parole contemplated in Article 64 of this Code, nor to the provisions of Article 38G of this Code. Subsection 2. The provisions of the first subsection of this article shall not apply with respect to the suspension of the enforcement of the penalty, when the personal, social and family history is indicative that there is no possibility of enforcing the penalty. Available (in Spanish) at: https://leyes.co/codigo_penal/68A.htm

³A CPAP is a continuous positive airway pressure device that provides air at a predetermined pressure through a mask and is the first-line treatment for Obstructive Sleep Apnea Apnea-Hypopnea Syndrome (OSAHS). It is used to keep the pressure in the airway constant throughout the respiratory cycle. It acts in a physiological way, fitting tightly over the patient's nose, like a pneumatic splint, avoiding the collapse of the upper airway during inspiration and expiration. Available (in Spanish) at <https://seorl.net/tratamiento-apnea-sueno-cpap/>

⁴That clinical record indicates that the proposed beneficiary is "clinically stable," without signs of respiratory distress, without dyspnea, with a requirement for supplemental oxygen through nasal cannula, and with adequate pulse oximeter levels. Furthermore, social work intervention was requested.

applicants reported that the proposed beneficiary goes out in the sun for one hour when there are favorable weather conditions; however, he has mobility difficulties and needs support of fellow prisoners in certain cases, and requires a soft diet.

7. The questions that the applicants made about an alleged lack of health care were also simultaneously replicated at the judicial level, and various decisions were adopted:⁵

- a. *Request for substitution of the imprisonment measure before the Judge of Enforcement of Penalties, alleging "a state of serious illness."*

8. As part of this process, in November 2019 the National Institute of Legal Medicine and Forensic Sciences (INMLCF by its Spanish acronym) considered that "the [medical] treatment [of the proposed beneficiary] was not incompatible with the conditions of the detention center" and that he had a "moderate dependence." According to the evaluation, this means "that he requires a minimal help for some activities, particularly those relating to mobility and strength of the upper extremities (such as eating, personal hygiene, showering, dressing and undressing)." On March 6, 2020, the Judge decided not to grant the request, based on the forensic medicine opinion "which concluded that [the proposed beneficiary] did not have a serious illness because he did not have any vital organ compromise."

- b. *Appeal for protection of constitutional rights (Acción de tutela).*

9. After he allegedly presented a "respiratory failure," after being exposed to tear gas during a riot that occurred on March 21, 2020, the proposed beneficiary has reportedly received a vial "to help him open up his lungs." However, he later filed an appeal for protection of constitutional rights that was ruled in his favor on April 3. The court decision ordered to carry out the medical evaluation of the proposed beneficiary and that he be supplied with the medication for the management of his disease, as well as to "arrange and effectively carry out his transfer to the medical center provided for by the EPS Famisanar, where he should have follow-up appointments, assessments, tests and others that the treating physicians may order, for the management of his disease." After filing an appeal, the proposed beneficiary required access to house arrest "until pending tests are carried out," alleging a possible spread of the COVID-19 virus in addition to questioning the overcrowding conditions of the prison. The second instance decision declared that the proceedings were inadmissible, considering that the institutions necessary to resolve the appeal had not been notified.

10. In the new proceedings, the applicants requested the granting of provisional measures consisting of the transfer of the proposed beneficiary to his residence, "while the corresponding legal actions are resolved and the measures that guarantee his care are fulfilled." The applicants also requested that biosafety elements be granted for the prevention of COVID-19 and that the priority assessment by both the INMLCF and the EPS Famisanar be carried out. On May 5, the trial judge granted the request, except for the house arrest, among others. In particular, the court decision considered that the corresponding legal action to access temporary house arrest, in light of the regulations issued during the pandemic (Decree 546 of April 14, 2020),⁶ had not been initiated. The decision emphasized that the judge of enforcement of penalties had already rejected the defense's request to replace imprisonment, based on

⁵Other requests were allegedly raised by the defense in search of obtaining the house arrest of the proposed beneficiary, before the Ministry of Health, the Ministry of Justice and Law, the Ombudsman's Office and the Presidency of the Republic, obtaining a negative response since they are reportedly not competent to resolve the request for a substitute penalty for the proposed beneficiary, since a competent judge would be better suited to make such a determination.

⁶Decree 546 of April 14, 2020, "by means of which measures are adopted to replace the prison sentence and the pretrial detention measure in penitentiary and prison centers, for house arrest and temporary house arrest in the place of residence to people who are more vulnerable to COVID-19 and other measures are adopted to combat prison overcrowding and prevent/mitigate the risk of spread.

the forensic medicine result. After filing another appeal, in a second instance decision of May 21, the granting of the appeal for protection of constitutional rights was partially confirmed. This decision denied the transfer of the proposed beneficiary to his residence and urged the judge of penalties to give priority to a request filed on April 17, 2020 that seeks to replace the imprisonment measure, clarifying that, if the order is not fulfilled, it will be necessary to resort to an appeal for contempt of court.

c. New request for substitution of the imprisonment measure before the Judge of Enforcement of Penalties of April 17, 2020.

11. The judge requested a new assessment by forensic medicine, recalling that the proposed beneficiary was awaiting the assessment for which a court order had been issued. The applicants indicated that the assessment by the INMLCF had been fulfilled, since it was carried out on July 13, 2020. They also provided information on the characteristics of the ALS through a report dated August 17, 2020, in which a private clinic questioned the medical-legal assessment that the proposed beneficiary underwent on July 13, 2020.⁷ Notwithstanding, the applicants did not provide any information or documentary support on the forensic medicine report of July 13, 2020, nor on the status of the application in question.

d. Request for access to the benefit of "temporary" house arrest based on regulations issued during the COVID-19.

12. On May 22, 2020, a new request was filed before the judge of enforcement of penalties, requiring that the proposed beneficiary be granted "temporary" house arrest. On May 26, the judge dismissed the request, stressing that it was inadmissible, given that it is for the director of the National Penitentiary and Prison Institute (INPEC) to make the request as well as to provide the elements to carry out the assessment in accordance with the applicable regulations issued during the pandemic.

e. Request for contempt of court regarding the protection of constitutional rights judgment

13. On June 23, 2020, an appeal for contempt of court was filed. On July 13, the judge ordered the prison director to report, within the following twenty-four hours, whether the appointments with neurology, speech therapy, physical and occupational therapy of the proposed beneficiary were carried out or are scheduled, as well as the steps taken to supply biosecurity elements and other services prescribed. The judge also required that INMLCF report whether the evaluation of the proposed beneficiary had been carried out and that EPS FAMISANAR report whether the neurology appointment was scheduled, in accordance with the request made by the prison health area on July 1, 2020. On July 17, the representatives reiterated the request to initiate the appeal for contempt of court. On July 24, the INMLCF informed the representatives that on July 14 the expert report on the proposed beneficiary had been sent to the court of enforcement of penalties. On July 30, the judge decided to suspend the proceedings, indicating that once the confinement situation associated with the COVID-19 pandemic is overcome, a follow-up will be carried out to guarantee the provision of the therapeutic and speech therapy service that is allegedly pending, and that supply of biosafety elements is provided.

⁷The applicants indicated that, according to the evaluation carried out by the private specialist, it should be analyzed whether the State can guarantee the recommendations made by the legal-medical report, reiterating that they consider that it is not possible to comply with them in the detention center where the proposed beneficiary is, reiterating the need for house arrest to be granted to avoid an irreparable harm.

2. Response from the State

14. The State confirmed the medical diagnosis and the procedural status of the proposed beneficiary, who has indeed been sentenced in a criminal court. Regarding the possibility of accessing a prison benefit, the State reported that in December 2019 he was denied the measure of house arrest after the forensic medicine assessment concluded that the proposed beneficiary is not in a serious condition due to illness. Subsequently, the legal situation of Mr. López was evaluated, to corroborate whether the measure of “temporary” house arrest would be an option for him, in light of the request of May 22, 2020, and it was established that the proposed beneficiary is included in one of the grounds for exception of it.

15. Regarding the measures adopted by the national Government to prevent the pandemic, the State indicated that it has adopted various guidelines and measures⁸ to guarantee the life and health of persons deprived of liberty, which include the recommendations issued by the WHO and the Ministry of Health. Among these measures, the State noted the suspension of visits, hygiene and care measures by prison staff. The State also noted that each detention center has been provided with the elements necessary to fight the virus. In addition, it reported that facemasks, protective suits and disinfection cabins have been distributed, among other measures that facilitate conditions in prisons. The INPEC General Directorate also ordered the delivery of a hygiene kit⁹ to persons deprived of their liberty.

16. With regard to the existence of confirmed cases of COVID-19 within the penitentiary,¹⁰ the State indicated that since April the INPEC and the USPEC [unit of penitentiary and prison services] have worked in coordination with the Ministry of Health, the National Institute of Health, the International Committee of the Red Cross and the Ministry of Justice, to implement the document "Guidelines for control, prevention and management of cases of COVID 19 for persons deprived of their liberty in Colombia, versions 1 and 2,"¹¹ establishing spaces for isolation for those contagious inside the detention center, which has allowed to effectively contain the virus. The State also indicated that most of the cases are asymptomatic and that they have not required any type of referral or hospital care. However, external health care networks have been prepared, if needed. The State also explained the modifications made on matters of medical assistance to persons deprived of their liberty, based on preventive isolation measures due to the COVID-19 pandemic.¹²

17. Specifically, regarding the health situation of the proposed beneficiary, the State emphasized that he is insured by the EPS Famisanar, which is responsible for providing the health service. Primary or emergency care is carried out through the Health Care Fund Consortium for persons deprived of liberty, and more complex or specialized medicine care is carried out through the EPS in the tele-consultation

⁸Adoption of flexible hours, in order to reduce the concurrence of people in work spaces and reduce the spread of respiratory diseases; authorization of teleworking and/or work at home, guaranteeing the security of the information of the work carried out at home; obligations and duties of the immediate bosses and prison officers who work in person at their workplaces, such as reduction of face-to-face meetings, biomedical record at entry and exit; permanence of personnel with a professional service provision contract and management support [...]; suspension of visits to detention centers [...]; temporary expansion of the capacity to hold virtual audiences [...]”, among others.

⁹A hygiene kit consisting of two rolls of toilet paper, a toothpaste, a toothbrush, a razor, a soap, two deodorant sachets.

¹⁰The State shared statistics from the National Institute of Health that indicates that the total population of COBOG [sic] is 8,312, total of tests taken 3800, tests with negative results 2248, tests with positive results 1552, recovered 981 and 560 active cases of COVID-19.

¹¹ S-GAPDH-20-017321 Report, Ministry of Foreign Affairs, August 26, 2020, page 13.

¹²The State indicated that those deprived of their liberty are being cared for by the Health Care Fund Consortium. That care is primary and intramural in the health areas of each detention center and is under the emergency modality. The management given to the patient will depend on the assessment made by the consortium doctor, who will also provide analgesic medications, if needed. In those cases of health conditions that require greater complexity, the prisoner is transferred to the IPS where the management will begin and the relevant proceedings will be coordinated with the EPS to continue the care. In addition, the evaluations and transcriptions of medical prescriptions for chronic patients are being carried out through the tele-consultation modality. Furthermore, telephone lines have been enabled for notification of COVID-19 cases through which all actions for suspected or confirmed inmates are notified and coordinated, additionally establishing communication channels through which certifications associated with the benefit of temporary house arrest and coordination of teleconsultations are managed.

modality. Regarding medical care, the State indicated that during the month of March, due to lack of guards, the proposed beneficiary was not transferred to two appointments, one for respiratory therapy control and the other for general medicine. The State also confirmed that he had the medical teleconsultation on April 30, 2020, which was indicated by the applicants, and the supply of the medication *Riluzole* 50 mg to the proposed beneficiary from May 15, 2020, specifying that the other referrals were being coordinated through the EPS and in accordance with the new pandemic protocols. The proposed beneficiary also received intramural medical care on May 13, 15 and 28, 2020, and was given intravenous hydrocortisone and analgesics due to difficulty breathing and headache, and those symptoms improved. The last evaluation recommended to continue with the medication *Riluzole* and follow-up through the EPS.

18. The State indicated that the appointment scheduled for June 5 did not take place because the EPS did not send the connection message necessary for the teleconsultation, a situation that was informed by the INPEC to the EPS, requesting then to send the connection message on the days established for it. The following day, the penitentiary's physician ordered the referral of the proposed beneficiary to the hospital for being a suspect of COVID-19. There, he was assessed by neurology, nutrition and social work, who found him clinically stable, without signs of respiratory distress, with supplemental oxygen requirement through nasal cannula, without fever, under medical surveillance. The result of the COVID-19 test performed yielded a negative result, and he was treated in a ward specially enabled for the care of suspicious patients. The State clarified that it was unaware of the need for him to receive a therapeutic diet since no request had allegedly been made in this regard, nor had a prescription been filed in that regard. However, the State noted that the INPEC will carry out the nutritional assessment once he returns to the detention center, and the necessary supplies will be authorized.

19. Regarding the most recent medical care, the State explained that, in order to access scheduled medical check-ups, the proposed beneficiary must request the INPEC officer responsible for health care to arrange the appointments with the EPS. Subsequently, the INPEC custodial personnel would transfer the proposed beneficiary to attend the appointment on the scheduled date and time; however, this coordination has varied due to the pandemic situation, therefore the respective evaluations and transcriptions of medical prescriptions for chronic patients are being carried out electronically. Additionally, all EPS have reportedly defined lines for notification of COVID-19 cases, through which all actions for suspected patients are notified and coordinated. However, additional communication channels have been established through which the management of certifications associated with the benefit of temporary house arrest and other situations, such as the coordination of teleconsultation, is carried out. The State added that on August 14 the proposed beneficiary was evaluated by general medicine, who ordered the medication *Riluzole* 50 mg once again, as well as pregabalin 75 mg, and generated an order for evaluation by pulmonology and neurology. Moreover, the State emphasized that the prison's health facility is ready and attentive so that, when the EPS Famisanar arranges appointments, they can be processed in a timely manner.

20. Regarding the request for house arrest, the State reported that, according to the INMLyCF opinion dated July 13, 2020,

[...] Mr. Jorge Ernesto López Zea does not meet medical-legal criteria to establish a serious illness, he must continue with the medical management and treatment suggested by the treating physicians, as well as outpatient medical controls, all the recommendations given in the discussion must be taken into account, and the Prison and Penitentiary system must guarantee compliance with them. It is suggested that the authority order a new assessment by a forensic doctor within two months, with a copy of the medical record, or sooner if there is a change in his health conditions.

21. The forensic medical assessment further noted that

A distinctive feature of this disease is the absence of curative treatment and the only medication that has succeeded in prolonging patient survival by three months is *Riluzole*, which the patient is already taking. Dysphagia represents one of the most serious complications of this disease. It is usually associated with dysarthria and dysphonia (which have an earlier onset) and is a consequence of bulbar damage. The swallowing phase is usually the most affected, secondary to tongue atrophy; however, although the patient exhibits these symptoms, no weight loss or alteration of body mass index has been observed. Therefore, no nutritional deficit was diagnosed; however, given the assessment of the speech therapist, a smoothie or compote type diet was recommended. Upon physical examination, Mr. Lopez Zea is in acceptable general state with vital signs within normal limits, partially tolerating the ambient oxygen with minimum oxygen saturation of 87%, without signs of respiratory difficulty with stable progress, dysarthric, with functional limitation of superior limbs, with muscular hypotrophy that limits his ability to eat, put on clothes and clean. For this reason, he requires a person to help him, with a Barthel functional scale of 50 for moderate functional dependency.

22. In addition, the medical forensic assessment issued the following recommendations for the treatment of the proposed beneficiary:

1. Strict medical management according to the periodicity determined by the services of neurology and psychiatry and/or internal medicine; 2. Evaluation by pneumology to perform spirometry and continue with the control of supplementary oxygen and CPAP; 3. Must ensure the administration of oxygen and CPAP equipment, as well as transport oxygen equipment; 6. Continue with the diet recommendations prescribed by nutrition and dietetics which must be normo fat, normo sodium, normoglycid, rich in fruits, fiber and vegetables in at least 6 meals a day with nutritional protein supplement three times a day; 7. Perform paraclinical and laboratory tests to control their basic pathology, such as: hemogram, basal glycemia, creatinine, ureic nitrogen, lipid profile, uroanalysis, electrolytes, 24-hour urine proteinuria, liver function, chest Rx, electrocardiogram, and others that the patients consider relevant. 9. Your room or stay should have certain health conditions, without overcrowding, without exposure to passive or active cigarette smoke or irritating substances. 10. You should also receive comprehensive management by your assigned health service of first level of care which includes general medicine, nursing, dentistry and psychology based on programs of promotion and prevention of the disease, as well as have access to the emergency service in case of decompensation of your disease.

23. Regarding the legal status of the proposed beneficiary, the State added that on May 22, 2020, the applicants requested "temporary" house arrest, in accordance with the measures adopted during the pandemic, but this was denied by the judge, since it is the responsibility of the director of INPEC to send the corresponding information. However, the State stressed that, according to Decree 546, one of the requirements for the application is that the applicant must have "completed 40% of the prison sentence." Therefore, the Court decided on June 24 to deny the proposed beneficiary the alternative measure of temporary house arrest, because he has not yet exceeded 40% of the sentence imposed.

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

24. Precautionary measures are one of the mechanisms of the Commission for the exercise of its function of overseeing compliance with human rights obligations, as established in Article 106 of the Charter of the Organization of American States ("OAS"). 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. Moreover, the precautionary measures mechanism is described in Article 25 of the Rules of Procedure of the Commission. In accordance with this Article, the Commission grants precautionary measures in serious and urgent situations in which these measures are necessary to avoid an irreparable harm to persons or to the subject matter of a petition or case currently under review of the organs of the Inter-American System.

25. The Inter-American Commission and the Inter-American Court on 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, both protective and precautionary. Regarding the protective nature, these 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 while it is being considered by the IACHR. The precautionary nature aims to safeguard the rights at risk until the request under consideration in the Inter-American System is resolved. Their objective and purpose are to ensure the integrity and effectiveness of an eventual decision on the merits, and, thus, avoid any further infringement of the rights at issue, a situation that may adversely affect the useful effect (*effet utile*) of the final decision. In this regard, precautionary or provisional measures allow the State concerned to comply with the final decision and, if necessary, implement the ordered reparations. For such purposes, 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” is determined as of the information provided and refers to risk of 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.

26. 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.¹³ Furthermore, when analyzing these requirements, the Commission emphasizes that it is not called upon to determine through the mechanism of precautionary measures what may have taken place on January 27, 2020 in relation to the proposed beneficiary. The following analysis relates exclusively to the elements established in Article 25 of the Rules of Procedure, which can be resolved without any determination of the merits of the case.

27. As regards the requirement of seriousness, the Commission notes that the proposed beneficiary is deprived of his liberty and, therefore, the State is in a special position of guarantor, given that the prison authorities exercise a strong control or command over the persons in their custody.¹⁴ This is due to the unique relation and interaction of subordination between the person deprived of liberty and the State, characterized by the particular intensity with which the State can regulate their rights and obligations, and by the inherent circumstances of imprisonment, where prisoners are prevented from satisfying on their own a series of basic needs that are essential for the development of a dignified life.¹⁵ It is further recalled that the State must ensure that persons deprived of liberty suffering from serious, chronic or terminal illnesses are provided with adequate, specialized and continuous medical care, whether inside or outside the prison.¹⁶ Even so, there is “[...] no obligation to fulfill every wish and preference of the

¹³ In that regard, for instance, in relation to the provisional measures, the Inter-American Court has considered that this standard requires a minimum of details and information that allow for the *prima facie* assessment of the situation of risk and urgency. I/A Court H.R., *Matter of the children and adolescents deprived of their liberty in the “Complexo do Tatuapé” of the Fundação CASA* Request for extension of precautionary measures. Provisional Measures regarding Brazil. Resolution of the Inter-American Court of Human Rights of July 4, 2006. Considerandum 23.

¹⁴ I/A Court H.R. *Case Mendoza and others Vs. Argentina*. Preliminary Exceptions, Merits and Reparations. Judgment of May 14, 2013. Series C No. 260, para. 188. Also, see: IACHR, *Report on the human rights of persons deprived of liberty in the Americas*, December 31, 2011, para. 49

¹⁵ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, December 31, 2011, para. 49 et seq.

¹⁶ I/A Court H.R. *Case of Chinchilla Sandoval V. Guatemala*, paras. 184 and 185. “According to the standards described in the previous section and specified further on, persons deprived of liberty who suffer serious, chronic or terminal illnesses should not remain in prison establishments, unless States can ensure that they have adequate medical facilities to provide adequate specialized care and treatment, including areas, equipment and

person deprived of liberty with regard to medical care, but rather with those truly necessary in accordance with their actual situation."¹⁷ In addition, the Commission, in its Resolution 1/2020 on "Pandemic and Human Rights", recommended that the States of the region "[e]nsure that in the case of persons at risk for the pandemic, requests for prison privileges and alternatives to a sentence of incarceration be assessed."¹⁸

28. In the present matter, the Commission notes that the proposed beneficiary suffers from a rare disease characterized by its chronic, degenerative, and severely disabling effects, for which only palliative treatment is available to date. According to the information provided by both parties, Mr. López Zea's health is potentially delicate, to the extent that, although he is stable according to the last medical report indicated, his situation is such that any complication, even more so a COVID-19 infection, may seriously and irreparably affect his rights to life and personal integrity. For example, according to the applicants, the proposed beneficiary has been exposed to a critical health risk by inhaling tear gas during a riot in March, a circumstance that in itself may constitute a risk factor. The Commission further considers the allegations of occasional undue delay in the granting of the corresponding treatment, partly due to the fact that the applicant is deprived of liberty in the context of the pandemic, and has had to resort to legal remedies repeatedly in order to obtain effective protection of his rights.

29. The Commission acknowledges the findings of the relevant experts that the disease suffered by the proposed beneficiary is known only as a palliative type of treatment. Accordingly, it is appropriate to adapt the procedure of deprivation of liberty so as not to constitute a source of additional risk. This is in view of the fact that, according to the information provided, the disease is in an advanced stage and as the effects on the respiratory system, in the current context of COVID-19, are considered to be the main cause of death in this type of patient, a condition that may be exacerbated in the context of imprisonment in a penitentiary center. In this regard, the Commission notes that while the State provided general information on the measures taken to prevent the spread of COVID-19 in prison, no further details were provided on the specific conditions such as whether he is being provided with a diet prescribed by nutrition and dietetics specialists, daily access to supervised daily physical activity, physical rehabilitation programs and monitoring by occupational therapy and speech therapy, and paraclinical and laboratory tests to monitor his pathology. Furthermore, there is no information on the sanitary conditions of his place of confinement and the guarantee that he will not be exposed to overcrowding or to any further irritant substances.

30. The Commission also takes note of the information provided by the State regarding the measures adopted by the national government for the prevention of the pandemic caused by COVID-19, in order to guarantee the rights to life, personal integrity and health of persons deprived of liberty, which reflect the recommendations issued by the WHO and the Ministry of Health, including arrangements made with the EPS to ensure compliance with medical appointments. Notwithstanding the foregoing, the Commission notes that to date the proposed beneficiary has not been provided with the sanitary conditions and

qualified staff (medical and nursing). In such cases, the State must also supply adequate food and the specific diets prescribed for persons who suffer certain types of diseases. Prison system staff must monitor nutrition processes, based on the diets prescribed by the medical personnel and on the minimum requirements for their supply. In all cases, but especially where an individual is clearly ill, the States have an obligation to ensure that a record or file is kept on the state of health and treatment of every person who enters prison, either in the prison itself or at the hospitals or health centers where they will receive treatment." 185. In this case it is pertinent to determine whether or not the State provided the alleged victim with the necessary treatment in an effective, adequate, continuous manner, by qualified medical staff, and supplied the required medicines and food, either within or outside the prison, for her various illnesses or ailments and throughout the time that she was incarcerated. Similarly, it is pertinent to determine whether the State adopted adequate measures when her health deteriorated.

¹⁷ I/A Court H.R. Case of *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*. (Preliminary Objection, Merits, Reparations and Costs. Judgment of July 5, 2006. Serie C No. 150. Para. 102.

¹⁸ IACHR, Resolution 1/2020 about the "Pandemic and Human Rights in the Americas", adopted on April 10, 2020, para. 46. Available at: <https://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>

medical recommendations that were deemed necessary to avoid the deterioration of his health situation. Under these circumstances, and based on the information provided by the parties, the Commission understands that all relevant measures have not yet been taken to sufficiently mitigate the sources of risk that still persist today.

31. In light of these considerations, taking into account the specific characteristics of the situation and in the light of the *prima facie* standard, the Commission concludes that the rights to life, personal integrity, and health of Mr. Jorge Ernesto López Zea are at serious risk.

32. As regards the requirement of urgency, the Commission considers that it is equally fulfilled, in view of the fact that the proposed beneficiary, while remaining in prison in conditions that make it difficult to implement the medical recommendations, may become subject to an aggravation of his health situation, which in the current context of the pandemic may be fatal, thus requiring the adoption of immediate protective measures.

33. As it pertains to the requirement of irreparable harm, the Commission finds it met since the possible impact on the rights to life and personal integrity constitute the maximum situation of irreparable harm.

III. BENEFICIARIES

21. The Commission hereby declares that the beneficiary of this precautionary measure is Mr. Jorge Ernesto López Zea, who has been duly accredited in this process.

IV. DECISION

34. The Inter-American Commission on Human Rights considers that the present matter meets *prima facie* the requirements of seriousness, urgency and irreparable harm contained in Article 25 of its Rules of Procedure. Consequently, the IACHR request that State of Colombia:

- a) adopt the measures necessary to protect the rights to life, personal integrity, and health of Mr. Jorge Ernesto López Zea; in particular, by providing him with the required medical treatment in a timely manner and without undue delay, guaranteeing as well that his detention conditions are in accordance with the international standards applicable. In this regard, pursuant to their internal regulations, the competent authorities must guarantee that Mr. Jorge Ernesto López Zea be located in an area, space or structure that allows meeting his needs for treatment and prevention against COVID-19, in accordance with the recommendations issued by the respective experts and as indicated by this Commission. The foregoing, while the situation of the proposed beneficiary is once again submitted to the corresponding technical evaluations with a view to obtaining an alternative measure to prison.

35. The Commission requests that the State of Colombia report, within 15 days from the date of this resolution, on the adoption of the precautionary measures requested and to update that information periodically.

36. The Commission emphasizes that, in accordance with Article 25 (8) of its Rules of Procedure, the granting of this precautionary measure and its adoption by the State do not constitute a prejudice on any violation of the rights protected in the American Convention and other applicable instruments.

37. The Commission instructs its Executive Secretariat to notify the State of Colombia and the applicants of this resolution.

38. Approved on October 28, 2020, by: Antonia Urrejola Noguera, First Vice-President; Flávia Piovesan, Second Vice-President; Esmeralda Arosemena de Troitiño; Margarete May Macaulay; and Julissa Mantilla Falcón, members of the IACHR.

María Claudia Pulido
Acting Executive Secretary