

**ORDER OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS
OF MAY 29, 2013
PROVISIONAL MEASURES WITH REGARD TO EL SALVADOR
MATTER OF B.¹**

HAVING SEEN:

1. The brief of the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) received on May 27, 2013, and its annexes, in which it submitted to the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”) a request for provisional measures, pursuant to Articles 63(2) of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) and 27 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure”), for the Court to require the Republic of El Salvador (hereinafter “El Salvador” or “the State”) “to adopt immediately the necessary measures to protect the life, personal integrity, and health of B., in view of the urgent and imminent risk of irreparable damage as a result of the failure to implement the treatment indicated by the Medical Committee of the ‘Dr. Raúl Arguello Escalón’ National Maternity Hospital” (hereinafter “the Medical Committee”). In addition, the Commission asked that the Inter-American Court “in its order on provisional measures, [...] establish that the implementation of this treatment cannot be delayed by administrative or judicial measures or decisions,” and that it “establish in its order that immediate and effective compliance with the provisional measures that it orders cannot, in any way, result in the exercise of the State’s punitive powers.”

2. The following background information presented by the Commission in relation to the request for provisional measures:

i) “B. is a 22-year old woman who suffers from systemic discoid lupus erythematosus aggravated by lupus nephritis. In mid-April 2013, she was in the twentieth week of her second pregnancy. According to the three ultrasounds that have been performed, the fetus is anencephalic (without a brain), an anomaly that is incompatible with life outside the uterus.”

ii) “On March 22, 2013, the Head of the Legal Unit of the ‘Dr. Raúl Arguello Escalón’ National Maternity Hospital of El Salvador, Jorge Alberto Morán Funes, wrote a note to the Coordinator of the Child and Adolescents Protection Board, Julio Antonio Rivera, indicating that B. suffered from a serious condition called systemic/discoid lupus

¹ At the request of the Inter-American Commission, the identity of the woman for whom the provisional measures are sought is kept confidential, and she is identified with the letter “B.”

erythematosus that 'had been exacerbated by lupus nephritis.'" Consequently, he stressed that 'performance of a medical procedure on her is of vital importance because, if this is not done, there is a strong probability of maternal death, as she is 13 weeks pregnant with an anencephalic fetus, which is a severe anomaly incompatible with life outside the uterus.' In this regard, the opinion of the competent authority or institution was requested in order to undertake the recommended medical procedure."

iii) "On April 11, 2013, an application for *amparo* was filed against the Director, the Head of the Legal Unit, and the Head of the Perinatology Service of the 'Dr. Raúl Arguello Escalón' National Maternity Hospital. The application requested that, in order to safeguard the right to life of B., her medical intervention not be conditioned to the prior authorization of the 'competent authority,' as established in the note of March 22, 2013.

iv) "On April 12, 2013, the Medical Committee [...] considered the matter and agreed to end the pregnancy."

v) "On April 17, 2013, the Constitutional Chamber of the Supreme Court of Justice (hereinafter "the Constitutional Chamber") issued its decision admitting the application for *amparo* filed in order to preserve the right to life and health of B." In the said decision, the Constitutional Chamber "decided to adopt preventive measures so that the defendant authorities would guarantee the right to life and health, both physical and mental, of B., providing the necessary and appropriate medical treatment for the preservation of these rights, while this *amparo* is being processed."

vi) "B. returned to the 'Dr. Raúl Arguello Escalón' National Maternity Hospital. On April 18, 2013, B. was interned in this medical center and received certain medication. However, her pregnancy was not terminated because the medical professionals who would perform the procedure had not been selected."

3. The procedure relating to the request for preventive measures:

i) "On April 18 and 24, 2013, the Commission received communications informing it of the [...] facts that had occurred with regard to B. in the State of El Salvador."

ii) "On April 22, 2013, the Commission sent a request for information to the State, requiring it to forward, within 72 hours, any information it considered pertinent on the situation of B., and the medical treatment with which she was being provided."

iii) "On April 26, 2013, the State of El Salvador presented its answer to the Commission's request."

iv) "On April 29, 2013, the representatives presented updated information. They indicated that, on April 26, 2013, the Constitutional Chamber of the Supreme Court of Justice had issued a new decision."

v) "On April 29, 2013, the Commission asked the State of El Salvador to adopt preventive measures to protect the life, personal integrity, and health of B., based on: (i) the recommendations of the Medical Committee of the National Maternity Hospital; (ii) the fact that the fetus is anencephalic; (iii) the absence of a prompt ruling by the Supreme Court of Justice on the application for *amparo* filed on April 11, 2013, and (iv) the effects that the passage of time would have on the rights of B. Thus, the Commission requested that the State of El Salvador: (1) adopt the necessary measures to implement the treatment recommended by the Medical Committee [...], in order to safeguard the life, personal integrity, and health of B., and (2) reach an agreement with the beneficiary and her representatives on any measure to be adopted."

vi) "On May 3, 2013, the Commission received the State's response to the preventive measures awarded by the Commission. The State forwarded information from the Supreme Court of Justice, indicating that the decision of the Constitutional Chamber of April 26, 2013, did not alter the preventive measure adopted, owing to 'the stable situation' of B."

vii) "The representatives indicated in a communication of May 6, 2013, that the State's first report merely summarized information that the [Commission] already possessed following the brief requesting preventive measures dated April 18, 2013."

viii) "On May 9, 2013, the Commission reiterated to the State the preventive measures awarded in order to safeguard the life, personal integrity, and health of B. because, 'to date, the medical treatment recommended by the pertinent authorities who are specialized in this matter has not been implemented.'"

ix) "On May 15 and 16, 2013, the representatives presented updated information. They indicated that the appraisal by the Institute of Forensic Medicine had concluded that B. was 'clinically stable, which means that, currently, there is no imminent risk of death.'"

x) "The State presented its report on May 17, 2013. It forwarded information from the Supreme Court of Justice, indicating that it had held a hearing to receive evidence in this case on May 15, 2013."

xi) "On May 20, 2013, the representatives asked the Commission to submit a request for provisional measures in favor of B. to the Inter-American Court of Human Rights. They indicated that the beneficiary was, at that time, commencing the twenty-fourth week of her high-risk pregnancy, and thus slightly more than five weeks had passed since the Medical Committee [...] recommended ending the pregnancy, a situation that places the life, integrity and health of B. at serious risk."

xii) "The Commission decided to submit to the Court a request for provisional measures in favor of B. on May 24, 2013."

4. The arguments of the Commission as grounds for its request for provisional measures, which include the following:

i) Regarding the situation of extreme gravity, urgency and the irreparable nature of the damage, the Commission argued that:

a) "The nature of the rights at stake – life, personal integrity, and health – reveals that the situation is one of extreme gravity and that the damage that could occur, if an immediate intervention is not performed, is irreparable."

b) "Regarding the urgency of the situation, the progress of a pregnancy that entails a situation of risk such as the one described by the medical personnel is itself proof of the extreme urgency of the situation. In addition, from the documentation provided it is evident that this risk increases as the pregnancy is allowed to continue."

ii) Regarding the ineffectiveness of the State's response, the Commission argued that:

a) "The State of El Salvador has failed to adopt the necessary measures to allow B. to have access to the termination of a pregnancy that, as indicated, involves the non-viability of life outside the uterus and constitutes, in addition to her disease, a source of imminent risk to her life, personal integrity, and health."

b) "The main obstacle impeding the access of B. to the said treatment is the absolute penalization of abortion in the State de El Salvador".

- c) "This request for provisional measures does not require the Inter-American Court to rule on whether or not the said penalization is compatible with the American Convention."
- d) "In the State of El Salvador, the law that has prevented the access of B. to the treatment she needs seeks to protect the life of the fetus, even in exceptional circumstances such as those of this case. On the one hand, the life of the fetus that is the object of protection is not viable outside the womb, a situation that is consistent with the scientific evidence in this regard and which has not been disputed by the State or by the report of the Institute of Forensic Medicine. Meanwhile, the mother is in a situation of grave risk for her life, personal integrity, and health that can be avoided by the termination of her pregnancy."
- e) "The State has been unable to provide an immediate and effective response to ensure this access without fear of reprisals. Thus, in this request the Commission considers it essential to emphasize the need for the Inter-American Court to refer to this key obstacle, indicating clearly that, in compliance with the provisional measures, no one may be subjected to the exercise of the State's punitive power."

5. The note of the Secretariat of the Inter-American Court of May 28, 2013, which, upon the instruction of the Inter-American Court in plenary, requested that the State, within a non-extendible period of 24 hours, take the necessary measures for the Constitutional Chamber of the Supreme Court of Justice to provide information on its final decision concerning the *amparo* filed in favor of "B." In addition, information was requested on the reasons why, to date, the Constitutional Chamber has not issued a final decision on the said *amparo*.

6. The brief of May 29, 2013, in which the State answered the request made by the Inter-American Court, attached the decision of the Constitutional Chamber of May 28, 2013, and indicated that it "provides this for your information, to the pertinent legal effect."

CONSIDERING THAT:

1. El Salvador has been a State Party to the American Convention since June 23, 1978, and accepted the contentious jurisdiction of the Court on June 6, 1995.

2. Article 63(2) of the American Convention stipulates that: "[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission."

3. According to Article 27 of the Rules of Procedure of the Court:²

1. At any stage of proceedings involving cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court may, on its own motion, order such provisional measures as it deems appropriate, pursuant to Article 63(2) of the Convention.

2. With respect to matters not yet submitted to it, the Court may act at the request of the Commission. [...]

² Rules of Procedure adopted by the Court at its eighty-fifth regular session held from November 16 to 28, 2009.

5. The Court, or if the Court is not sitting, the Presidency, upon considering that it is possible and necessary, may require the State, the Commission, or the representatives of the beneficiaries to provide information on a request for provisional measures before deciding on the measure requested. [...]

8. When the Court considers it appropriate, it may require from other sources of information any relevant data on the matter that would permit it to assess the gravity and urgency of the situation and the effectiveness of the measures. To that end, it may also require expert opinions and any other report that it considers appropriate.

4. This request for provisional measures does not arise from a case that the Court is hearing, nor has an initial petition been lodged before the Inter-American Commission for the facts that substantiate the request for provisional measures. However, this Court has established in previous cases that, "owing to the protective nature of provisional measures, exceptionally, these may be ordered, even when there is no contentious case before the inter-American system, in situations that, *prima facie*, may result in a grave and imminent impairment of human rights."³ In this regard, the Court has indicated that, in this type of situation, in addition to the requirements established in Article 63 of the Convention, it is necessary to take into account the situation described, the effectiveness of the State's actions in relation to this situation, and the degree of lack of protection in which the persons for whom the measures are requested would find themselves if these were not adopted. Thus, the Court reiterates that, in these cases, the Commission must present "sufficient grounds that include the criteria indicated. The Court also reiterates that the State has not revealed clearly and sufficiently the effectiveness of certain measures that it may have taken in the domestic jurisdiction".⁴

5. This Court has established that, under international human rights law, provisional measures are not merely preventive, in that they preserve a juridical situation, but rather they are essentially protective, since they protect human rights inasmuch as they seek to avoid irreparable damage to persons.⁵ The preventive nature of provisional measures relates to the framework for international litigations; thus, the object and purpose of such measures is to preserve the rights that are possibly at risk until the dispute has been decided. Their object and purpose are to ensure the integrity and effectiveness of the decision on the merits and, in this way, to avoid harm to the rights in litigation, a situation that could nullify or render useless the practical effects of the final decision. Accordingly, provisional measures allow the State in question to comply with the final decision and, as appropriate, proceed to implement the reparations ordered.⁶ Regarding their protective nature, this Court has indicated that, provided that the basic requirements are met, provisional measures become a

³ Cf. *Matter of the Socio-educational Internment Facility*, Provisional measures with regard to Brazil, Order of the Court of February 25, 2001, sixth considering paragraph, and *Matter of Guerrero Larez* with regard to Venezuela, Order of the Court of November 17, 2009, eighth considering paragraph.

⁴ Cf. *Matter of the Socio-educational Internment Facility*, Provisional measures with regard to Brazil, Order of the Court of February 25, 2001, sixth considering paragraph, and *Matter of Guerrero Larez* with regard to Venezuela, Order of the Inter-American Court of Human Rights of November 17, 2009, eighth considering paragraph.

⁵ Cf. *Case of the "La Nación" Newspaper*. Provisional measures with regard to Costa Rica. Order of the Court of September 7, 2001, fourth considering paragraph, and *Matter of Wong Ho Wing*. Provisional measures with regard to Peru. Order of the acting President of the Court of December 6, 2012, fifth considering paragraph.

⁶ Cf. *Matter of the Capital Detention Center El Rodeo II*. Provisional measures with regard to Venezuela. Order of the Court of February 8, 2008, seventh considering paragraph, and *Matter of Wong Ho Wing*, Provisional measures with regard to Peru. Order of the acting President of the Court of December 6, 2012, fifth considering paragraph.

real jurisdictional guarantee of a preventive nature because they protect human rights inasmuch as they seek to avoid irreparable harm to persons.⁷

6. The three conditions required by Article 63(2) of the Convention for the Court to be able to order provisional measures must co-exist in any situation in which they are requested.⁸ Based on its competence in the context of provisional measures the Court must consider only and strictly those arguments that are directly related to the extreme gravity, urgency and need to avoid irreparable damage to persons. Any other fact or argument may only be analyzed and decided during consideration of the merits of a contentious case.⁹

7. Regarding the requirement of “gravity,” in order to adopt provisional measures, the Convention requires that this be “extreme”; in other words, that it is at its highest or most intense level. The “urgent” nature means that the risk or threat involved must be imminent. Lastly, as regards the damage, there must be a reasonable probability that it will occur, and it should not relate to legal interests or rights that can be repaired.¹⁰

8. This Court observes that, from the information provided by the Commission and uncontested by the State concerning the facts and the background of this matter (*supra* having seen paragraph 2), it has been proven that:

a) B. suffers from systemic lupus erythematosus (hereinafter “SLE”), aggravated by lupus nephritis;

b) Currently, B is 26 weeks pregnant and it has been determined that the fetus is anencephalic (without a brain), an anomaly incompatible with life outside the uterus;¹¹

c) The Medical Committee of the “Dr. Raúl Arguello Escolán” National Maternity Hospital “Dr. Raúl Arguello Escolán” (hereinafter “the Medical Committee”) considered on April 12, 2013, that the pregnancy should be ended, taking into account that:¹²

1. The prognosis for the survival of the fetus is nil in the short and medium term based on the prenatal diagnosis and, in the presence of anencephaly, there is a high possibility of severe fetal malformation.

2. The maternal disease previously described, mixed connective tissue disease overlapping with systemic lupus erythematosus and lupus nephritis, would

⁷ Cf. *Case of the “La Nación” Newspaper*. Provisional measures with regard to Costa Rica. Order of the Court of September 7, 2001, fourth considering paragraph, and *Matter of Wong Ho Wing*. Provisional measures with regard to Peru. Order of the acting President of the Court of December 6, 2012, fifth considering paragraph.

⁸ Cf. *Case of Carpio Nicolle et al.*, Provisional measures with regard to Guatemala. Order of the Inter-American Court of Human Rights of July 6, 2009, fourteenth considering paragraph, and *Matter of L.M.*, Provisional measures with regard to Paraguay. Order of the Court of July 1, 2001, sixth considering paragraph.

⁹ Cf. *Matter of James et al.* Provisional measures with regard to Trinidad and Tobago. Order of the Inter-American Court of Human Rights of August 29, 1998, sixth considering paragraph, and *Matter of L.M.*, Provisional measures with regard to Paraguay. Order of the Court of July 1, 2001, sixth considering paragraph.

¹⁰ Cf. *Matters of the Monagas Detention Center (“La Pica”); the Capital Region Penitentiary Center Yare I and Yare II (Yare Prison); the Occidental Region Penitentiary Center (Uribana Prison), and the Capital Detention Center El Rodeo I and El Rodeo II*. Provisional measures with regard to Venezuela, Order of the Inter-American Court of Human Rights of November 24, 2009, third considering paragraph, and *Matter of L.M.*, Provisional measures with regard to Paraguay. Order of the Court of July 1, 2001, sixth considering paragraph.

¹¹ Cf. Summary of medical report of March 22, 2013 (file of request for provisional measures, annex 1), and decision of the Constitutional Chamber of May 28, 2013.

¹² Minutes of the Medical Committee of the National Maternity Hospital of April 12, 2013 (file of request for provisional measures, annex 4).

certainly be aggravated as the pregnancy progresses and thus termination at an early stage of the pregnancy is necessary.

3. The actual moment of the pregnancy (less than 20 weeks) entails less risk for maternal complications than if the pregnancy progresses; thus, if it is prolonged there is a high risk of the occurrence of:

- Major obstetric hemorrhage
- Deterioration of the lupus
- Worsening of her kidney failure
- Severe preeclampsia, and complex forms of this condition such as hypertensive crisis, cerebral hemorrhage, arterial and venous thrombosis, and pulmonary thromboembolism
- Post-partum infections
- Maternal death

d) The Health Minister indicated that “in this case the presence of lupus is classified as a severe maternal disease with high probabilities of the deterioration or death of the mother and, in view of the fetal anencephaly, it is necessary to deal with the matter urgently from a medical and legal perspective, [because the patient’s] condition is deteriorating as the pregnancy progresses”;¹³

e) The “Latin American Center for Perinatology, Women and Reproductive Health” of the Pan-American Health Organization indicated that “according to the information, [B.] has the active disease of [systemic lupus erythematosus] with exacerbated symptoms as of the first trimester of the pregnancy and with two added complications of lupus nephrosis and hypertension, treated to date with numerous medicines that could jeopardize her health [and, t]herefore, she runs a high risk of dying if her pregnancy is not interrupted as soon as possible”;¹⁴

f) On May 2, 2013, the Director of the Hospital where B. is interned advised that “although the patient’s disease is stable, [...] owing to the physiological changes inherent in pregnancy, added to the natural history of the underlying disease, a crisis could occur at any time, and it cannot be predicted when a medical emergency may occur”;¹⁵

g) On May 7, 2013, the Institute of Forensic Medicine indicated that “the pregnancies of women with [systemic lupus erythematosus] are at increased risk, owing to different adverse maternal or fetal perinatal outcomes, compared to those women who do not have this disease before they become pregnant. Higher rates of pre-term births, fetal death, limited inter-uterine growth, low birth weight, preeclampsia and obstetric hemorrhage have been identified.” The Institute added that “the disease of systemic lupus erythematosus in pregnancy has low mortality (1%); in addition, it is important to stress that, in these cases, maternal mortality occurs in the periods when the disease is active. The assessment of maternal and fetal mortality as the pregnancy

¹³ Communication of the Minister of Health addressed to the Supreme Court of Justice dated April 15, 2013 (file of request for provisional measures, annex 4).

¹⁴ Report of the “Latin American Center for Perinatology, Women and Reproductive Health” of the Pan-American Health Organization of April 22, 2013 (file of request for provisional measures, annex 4).

¹⁵ Opinion of the Director of the National Maternity Hospital of May 2, 2013 (file of request for provisional measures, annex 7).

advances depends on numerous variables, some inherent in the mother, others related to the fetus, and other to the interaction between these two elements";¹⁶

h) Furthermore, the Institute of Forensic Medicine reached the following conclusions, among others:¹⁷ (i) "From an obstetric perspective, [B.] is in the second trimester of her second pregnancy, so that, from a medical standpoint, one can no longer speak of abortion"; (ii) "[B.] is clinically stable, which means that, today, there is no imminent risk of death"; (iii) "at this time, there is no medical justification to suspend the pregnancy and to do so would not reverse the chronic diseases from which she suffers"; (iv) "inducing the birth today would be a disproportionate, unnecessary and inappropriate measure"; (v) the medical treatment to be implemented should take into account, among other options, that "if there is evidence of severe preeclampsia, magnesium sulfate will be prescribed, and ending the pregnancy will be assessed by the pertinent means at that time," and (vi) "the conservative medical treatment should be maintained; in other words, the pregnancy should continue, and if a complication arises or the previously described chronic illnesses are reactivated, proceed to end it by the corresponding means; thus, she needs to remain interned in a third-level hospital."

9. In addition, on April 11, 2013, an application for *amparo* was filed to protect the rights of B. (*supra* having seen paragraph 2). In the context of this *amparo*, on April 17, 2013, the Constitutional Chamber of the Supreme Court of El Salvador adopted preventive measures in favor of B. and, in particular, ordered that "the defendant authorities [...] must guarantee the life and health – physical and mental – of [B.], providing her with the necessary and appropriate medical treatment to preserve these rights, while this *amparo* is being processed." The following are some of the considerations that the Constitutional Chamber took into account when adopting these preventive measures: (i) "this application for *amparo* will be admitted in order to control the constitutionality of the presumed failure to act of [the hospital authorities] to protect the health and life of the patient [B.], who suffers from systemic lupus erythematosus aggravated by lupus nephritis, and who is in approximately the eighteenth week of her pregnancy with a fetus with anencephaly, a major anomaly incompatible with life outside the uterus, considering that her condition has a high probability of maternal death if her pregnancy is not interrupted"; (ii) "it is observed that any delay represents a real danger, because [...] the petitioner's life and health may be impaired progressively and irreparably," and (iii) the petitioner lives in extreme poverty, [...] resides at a considerable distance from the National Maternity Hospital, which is the medical institution that has been monitoring her and her medical symptoms; consequently, it would be very difficult to provide her with the appropriate health care should a complication arise."

10. On May 28, 2013, the Constitutional Chamber of the Supreme Court of Justice declared "the application that has been filed" to be "inadmissible", and also declared "the application for *amparo*" filed by B. to be "unfounded", which was "based on the supposed violation of her fundamental rights to health and life with the reservations mentioned in [...] this decision; namely, that the defendant health authorities are obliged to continue monitoring the petitioner's health and to provide her with the treatment that at all times is appropriate for her medical condition, as well as to implement the procedures that, according to medical science, are considered essential to deal with any future complications that may occur." The motivation of the said judicial decision can be summarized as follows:

¹⁶ Report of the Institute of Forensic Medicine of May 7, 2013 (file of request for provisional measures, annex 11).

¹⁷ Report of the Institute of Forensic Medicine of May 7, 2013 (file of request for provisional measures, annex 11).

- i) "The matter that is the purpose of this application for *amparo* [...] is subject to the inexorable rhythm of a biological process; namely, the pregnancy of [B., so that] it has been necessary to accumulate some procedural stages in order to ensure promptness in the substantiation of this *amparo*";
- ii) "The constitutional analysis requested by the petitioner owing to the possible conflict between her rights to life and health, on the one hand, and the right to life of the unborn child that she carries in her womb, on the other hand, will require weighing these elements, and will be designed to determine a balance between the exercise of her rights and the exercise of the rights of the unborn child or, otherwise, to establish which of them should prevail";
- iii) "The purpose of the dispute submitted to the consideration of this Chamber consists in determining whether the defendant authorities failed to provide [B.] in an opportune manner with the appropriate and necessary treatment for her condition, causing an increase in the deterioration of her health and, thereby, the imminent danger of the loss of her physical existence, in violation of the content of the fundamental rights to life and to health";
- iv) "A constitutional perspective does not allow for an interpretation of human life as an absolute and unlimited right, such that – in this case – the unborn child would be recognized to have a superior and more important right compared to the mother, because this would support depersonalization and disregard for the rights of the pregnant woman";
- v) "The recognition of human life from the moment indicated by the Constitution requires the State, as the principal entity obligated under the Constitution, to ensure its protection, and to ensure the design, creation and implementation of the appropriate and necessary public policies, mechanisms and procedures – institutional, legal, technical, etc. – to provide the mother-child duo with equal opportunities to enjoy this fundamental right";
- vi) "Furthermore, the international legal human rights instruments ratified by El Salvador – specifically the International Covenant on Civil and Political Rights (Arts. 6(1) and 7), the American Convention on Human Rights (Arts. 4(1) and 5(1)), and the Convention on the Rights of the Child (Preamble, Arts. 6(1) and 6(2)) – do not demand that the State guarantee an absolute and unconditional protection of incipient life; to the contrary, their systematic interpretation reveals the need, in specific cases, to weigh the right to life of each element of the mother-child duo";
- vii) "Regarding the specific content of the right to health, constitutional case law [...] has developed three essential aspects or elements that comprise its sphere of protection: (i) the adoption of measures to conserve the right to health, because health requires both the active and the passive protection of the State against the external risks that might endanger it; thus it is necessary to implement measures that, from the positive perspective, are intended to prevent any situations that harm this right, or to re-establish this condition and, from the negative perspective, implement measures that avoid the perpetration of any action that may impair it; (ii) medical assistance, because every person should be guaranteed the possibility of the availability of and access to the system or network of health care services, and (iii) supervision of health care services, which entails the creation of the institutions and mechanisms that supervise and monitor the safety and hygiene of health-related professional activities";
- viii) "The contents of the above-mentioned medical records reveal that the patient has received medical assistance and treatment in the National Maternity Hospital on

two occasions: (i) from December 2011 to May 2012, for a pregnancy classified as high-risk, which ended with a caesarean section at 32 weeks, and (ii) from March 2013 to date, for a second pregnancy, which, at this time, is in approximately the twenty-sixth week”;

ix) “The said medical records reveal that: (i) the patient [B.] suffers from SLE with discoid, rheumatoid arthritis, and lupus nephritis symptoms; (ii) during her second pregnancy she has suffered from infections, pulmonary problems and arterial hypertension that, according to the diagnoses and evaluations contained in her medical records, reveal that, as her pregnancy progresses, the patient may suffer from a worsening of the SLE and the above-mentioned obstetric complications, and these symptoms are aggravated by the fetal anencephaly, which would cause other problems, and (iii) with medical assistance and treatment, the patient’s health has improved significantly, to the extent that it is now stable”;

x) “The report of the Latin American Center for Perinatology, Women and Reproductive Health of the Pan-American Health Organization incorporated into these proceedings, indicates that the physiological changes inherent in a pregnancy may accelerate and exacerbate the illness of [B.] and even cause a series of obstetric complications that already occurred in her first pregnancy, including preeclampsia. Added to this, it indicates that it should be recalled that the patient suffers from lupus nephritis; namely, one of the highest causes of mortality in pregnant women with SLE”;

xi) “Another factor that should be considered in the case of [B.] is the anencephaly – absence of cranium and brain – of the fetus that she is carrying, because this congenital malformation, incompatible with life outside the uterus, is associated with a series of obstetric-maternal complications, such as disseminated intravascular coagulation”;

xii) “According to the declaration of the Head of the Perinatology Service of the National Maternity Hospital, in the twenty-sixth week, the physiological changes of pregnancy provoke hypervolemia, in other words, an increase in the volume of blood accompanied by changes in coagulation, such that during this period the patient may experience the problems referred to previously, which she experienced in the twenty-eighth week of her first pregnancy”;

xiii) “Regarding the medical care that the petitioner received when she was transferred to the National Maternity Hospital in March this year, there is sufficient evidence to conclude that the defendant officials provided [B.] with satisfactory medical assistance, because they were able to stabilize her health situation, providing her with treatment to control the lupus outbreak from which she was suffering”;

xiv) “The said authorities decided to provide [B.] with the necessary medicines to stabilize her critical situation, avoiding complications to her health and imminent danger to her right to life or that of the unborn child. This action by the said authorities was in keeping with the conclusions of the appraisal of the Institute of Forensic Medicine, specifically the finding that, in the case examined, what was appropriate at that moment was that the patient should be kept under medical observation and treatment. Consequently, since the authorities of the National Maternity Hospital provided [B.] with the treatment that, according to medical science, guaranteed her rights to health and life, which consisted in hospitalizing her, constantly monitoring her health situation, and providing her with the necessary medicines to stabilize this, it is concluded that, at the specific moment of the presentation of the application and during this proceeding the said authorities have not committed the omission attributed to them and, consequently, the alleged violation of fundamental rights does not exist. Indeed, the patient survives

and her health is stable despite her pregnancy and the diseases from which she suffers”;

xv) “Despite the foregoing, the fact that [B.] is stable at this time does not mean that the risk implicit in her medical history – which has been classified as severe and exceptional – has disappeared, owing to the unpredictable behavior of the underlying disease from which she suffers (SLE) and the biological changes that her body may undergo in the final stages of pregnancy during which the probability of the medical complications that she suffered during her first pregnancy is increased, or others may occur. Added to this, the anencephaly of the fetus that she is carrying may also, in the future, be the cause of obstetric complications”;

xvi) “Therefore, it should be made clear that the actual absence of especially severe symptoms or complications in the health of [B.] – according to examinations that were incorporated into this proceeding – is not necessarily a permanent situation that will not vary over the course of time and, for this reason, the defendant health authorities are obliged to continue monitoring the petitioner’s health and to provide her with the treatment that, at all times, is appropriate for her medical condition, as well as to implement the procedures that, according to medical science, are considered essential to deal with any future complications that may occur,” and

xvii) “This Chamber maintains that the rights of the mother cannot be privileged over those of the unborn child or vice versa; in addition, that there is an absolute impediment to authorize the practice of an abortion, because this runs counter to the constitutional protection that is granted to the human being “from the moment of conception” (art. 1, para. 2). While respecting these requirements, the circumstances that authorize the medical intervention and the appropriate moment for this are decisions that correspond strictly to the medical professionals who must assume the risks involved in the exercise of their profession.”

11. Bearing in mind the background information indicated above, the Court will now analyze the requirements established in Article 63 of the Convention; namely, extreme gravity and urgency, and the possibility of irreparable damage. However, before this, the Court recalls that the adoption of urgent or provisional measures does not presuppose or involve an eventual decision on the merits of the matter if the case should be submitted to the consideration of the Court, or prejudice the State’s responsibility for the facts denounced.¹⁸

12. Regarding the first requirement, the Court underscores that all the medical reports cited have emphasized the severity of the health situation of B. Indeed, the disease from which B. suffers, added to the other medical conditions that she has and the fact that she is pregnant, can result in a series of medical complications and even death (*supra* considering paragraph 8). Indeed, the Court observes that, on April 22, 2013, the Latin American Center for Perinatology, Women and Reproductive Health” of the Pan-American Health Organization indicated that B. had [systemic lupus erythematosus] with exacerbated symptoms as of the first trimester of the pregnancy, and with two added complications of lupus nephrosis and hypertension, which have been treated to date with numerous medicines that could jeopardize her health [and, t]herefore, she has a high risk of dying,” and also that “the patient suffers from lupus nephritis; namely, one of the highest causes of

¹⁸ Cf. *Matter of James et al.* Provisional measures with regard to Trinidad and Tobago. Order of the President of the Inter-American Court of Human Rights of July 13, 1998, sixth considering paragraph, and *Matter of L.M.*, Provisional measures with regard to Paraguay. Order of the Court of July 1, 2001, twenty-second considering paragraph.

mortality in pregnant women with SLE.”¹⁹ For its part, on May 7, 2013, the Institute of Forensic Medicine indicated that it was necessary to maintain “a strict medical supervision of the condition of the mother and fetus, and not to suspend the medical treatment for the chronic ailments from which she suffers, and [...] required that she remain interned in a level three hospital.” In addition, another example of the complex nature of her health situation is that the specialists agree that she must be kept under permanent medical supervision. Consequently, the Court considers that the gravity of the situation is high, so that the extreme gravity of this matter is proved *prima facie*.

13. Regarding the element of urgency, the Court observes that information was presented indicating that, actually, B. is stable and appears to be responding to the medical treatment that she is receiving (*supra* considering paragraph 8). Despite this, the Court underlines that, on May 2, 2013, the treating physician of B. indicated that “even though the patient’s disease is stable, [...] owing to the physiological changes inherent in pregnancy, added to the natural history of the underlying disease, a crisis could occur at any time, and it cannot be predicted when a medical emergency may occur.” Similarly, the Constitutional Chamber’s ruling of May 28, 2011, stressed that “the fact that B. is in a stable condition at this time, does not mean that the risk implicit in her medical history – which has been classified as severe and exceptional – has disappeared, owing to the unpredictable behavior of the underlying disease from which she suffers (SLE), and the biological changes that her body may undergo during the final stages of pregnancy during which the probability of the medical complications that she suffered during her first pregnancy is increased, or others may occur.” It is precisely the fact that it is impossible to foresee whether the condition of B. will continue to be stable or whether, at any moment, a crisis could occur that creates a medical emergency that proves that it is urgent and necessary to take measures that prevent an impairment of her rights to life and to personal integrity. Moreover, the passage of time could have an impact on the right to the life and integrity of B., bearing in mind that the Constitutional Chamber itself noted that “the medical records” indicate that “as her pregnancy progresses, the patient may suffer from a worsening of the SLE and the above-mentioned obstetric complications, and these symptoms are aggravated by the fetal anencephaly, which would cause other problems,” and that the Pan-American Health Organization indicated that “the physiological changes inherent in pregnancy may accelerate and exacerbate the disease of [B.] and even cause a series of obstetric complications, which had already occurred in her first pregnancy, including preeclampsia.”

14. Regarding the alleged irreparable damage that could be produced if the necessary measures are not taken, the Court underscores that B.’s treating physicians have concluded that her disease, added to the fact that she is pregnant with a fetus with “anencephaly, a major anomaly, incompatible with life outside the uterus,” could entail risks to her health such as major obstetric hemorrhage, deterioration of the lupus, worsening of her kidney failure, severe preeclampsia and complex forms of this, such as hypertensive crisis, cerebral hemorrhage, arterial and venous thrombosis and pulmonary thromboembolism, post-partum infections or maternal death (*supra* considering paragraph 8). In addition to the physical harm that B. could suffer, the Court emphasizes that her mental health would also be placed at risk. Indeed, the Court stresses that the documentation attached to this request contains some expressions of the intentions of B. in relation to her situation. In particular, B. has stated to the media that: “I want to live ... yes, I want to live for my other child. I think that as this child is unfortunately ailing, and is going to die, then they should remove it ... because my life is in danger.”²⁰ Also, on May 7, 2013, the Institute of Forensic

¹⁹ Report of the “Latin American Center for Perinatology, Women and Reproductive Health” of the Pan-American Health Organization of April 22, 2013 (file of request for provisional measures, annex 4).

²⁰ Newspaper article entitled “*Yo quiero vivir, por mi otro hijo... si este viniera bien, arriesgaría mi vida*” [I

Medicine indicated in its report that, "with regard to the emotional state of the individual examined, as she herself has said, she is under pressure, because she has been told that she is in danger of dying if they do not decide 'to remove the child.'" In addition, it indicated that "[t]he emotional situation of the individual examined is also affected by her belief that she could be faced with a prison sentence." It added that "[a]nother situation that causes her tension is her necessary separation from the family because, at the present time, she is hospitalized." The Institute of Forensic Medicine concluded that "[t]hese situations have led to the appearance of psychosomatic symptoms consistent with a state of emotional tension."²¹ Accordingly, the Court considers that the risk of irreparable damage to the life and physical and mental integrity of B. has been proved in this matter.

15. As previously mentioned, in matters in which the adoption of measures seeks to relate exclusively to their protective nature, it is necessary to analyze, in addition to the three requirements established in Article 63 of the Convention, the effectiveness of the State's actions to deal with the situation described and the degree of lack of protection in which the individuals for whom the measures are requested would find themselves if the measures are not adopted (*supra* considering paragraph 4). In this regard, the Court considers that, in the context of the extreme situation to which this matter refers, the inter-American protection must reinforce and complement,²² to the greatest extent possible, the internal decisions adopted, so that B. does not find herself unprotected in regard to the possible harm that could be caused to her life and personal. In particular, the Court stresses that, in its ruling the Constitutional Chamber stated that "after the twentieth week, an eventual interruption of the pregnancy would not lead to or, in particular, have the purpose of the destruction of the fetus and, also, that the latter would be provided with the necessary measures to ensure, insofar as possible, its life outside the uterus." In addition, in the context of the decision taken by the Constitutional Chamber, "the defendant health authorities are obliged to continue monitoring the petitioner's health and to provide her with the treatment that, at any moment, is appropriate for her medical condition, as well as to implement the procedures that, according to medical science, are considered essential to deal with any future complications that may occur." Therefore, the State is obliged to guarantee that the team of treating physicians has the necessary protection to exercise fully their functions based on the decisions that, according to medical science, the said medical team may decide to adopt.

16. In addition, the Court takes note of the contents of the recent reports concerning this matter, in relation to the procedure that could be implemented, taking into account that B. is now in the twenty-sixth week of her pregnancy. Thus, on May 7, 2013, in its conclusions, the Institute of Forensic Medicine stated that, "from an obstetric perspective, [B.] is in the second trimester of her second pregnancy, so that, from a medical standpoint, one can no longer speak of abortion,"²³ and that "if complications occurred or a reactivation of the above-mentioned chronic diseases, [it would be possible] to proceed to terminate it by the corresponding means." Similarly, on May 17, 2013, the treating physician of the National Maternity Hospital indicated that "it should be clarified that, from a medical point of

want to live for my other child ... if this one was healthy, I would risk my life], published on "elfaro.net" on April 23, 2013 (file of request for provisional measures, tome I, annex 9).

²¹ Report of the Institute of Forensic Medicine of May 7, 2013 (file of request for provisional measures, annex 11).

²² The Preamble to the American Convention states that the essential rights of man are not derived from one's being a national of a certain State, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States.

²³ Report of the Institute of Forensic Medicine of May 7, 2013 (file of request for provisional measures, annex 11).

view, now at this stage of the pregnancy, [should it be required,] it would be necessary to effect an immature birth by caesarean section," and added that "a vaginal birth cannot be induced because the patient has had a previous caesarean section with a short period between pregnancies, and there is a risk of rupture of the uterus with the respective severe complications."²⁴

17. Based on all the above, the Inter-American Court considers that all the requirements have been met to adopt provisional measures in favor of B. in this matter. Therefore, the Court decides that the State must adopt and guarantee, urgently, all the necessary and effective measures so that the medical personnel who are treating B. can take, without interference, the medical measures they consider opportune and desirable to ensure due protection of the rights established in Articles 4 and 5 of the American Convention and, in this way, avoid any damage that could be irreparable to the rights to the life, personal integrity and health of B. In this regard, the State must take the necessary steps to ensure that B. is attended by the doctors of her choice.²⁵

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

in exercise of its authority under Article 63(2) of the American Convention and Article 27 of its Rules of Procedure,

DECIDES:

1. To require the State of Salvador to adopt and guarantee, urgently, all the necessary and effective measures so that the medical team who are treating B. can take, without any interference, the medical measures they consider opportune and desirable to ensure due protection of the rights established in Articles 4 and 5 of the American Convention and, in this way, avoid any damage that could be irreparable to the rights to the life, personal integrity and health of B, as indicated in considering paragraphs 11 to 17 of this Order.

2. To require the State to provide information to the Inter-American Court, by June 7, 2013, at the latest, with regard to the decision in the first operative paragraph of this Order.

3. To require the representatives and the Inter-American Commission to present to the Inter-American Court any observations they consider pertinent about the report mentioned in the second operative paragraph of this Order within two weeks.

4. To require the State to provide information to the Inter-American Court every two weeks starting on June 7, 2013, about the provisional measures adopted in compliance with this decision.

²⁴ Report presented by the Ministry of Health and incorporated into the State's report of May 17, 2013 (file of request for provisional measures, annex 13).

²⁵ Cf. *Case of Cesti Hurtado*. Provisional measures with regard to Peru. Order of the President of the Inter-American Court of Human Rights of January 21, 1998, sixth considering paragraph and second operative paragraph, and *Matter of María Lourdes Afiuni*, Provisional measures with regard to Venezuela. Order of the President of the Inter-American Court of Human Rights of December 10, 2010, twelfth considering paragraph.

5. To ask the representatives and the Inter-American Commission to present their observations within one week of notification of the State's reports indicated in the fourth operative paragraph.

6. To require the Secretariat to notify the State and the Inter-American Commission of this Order and, through the latter, to notify the representatives of the beneficiary.

Diego García-Sayán
President

Manuel E. Ventura Robles

Alberto Pérez Pérez

Eduardo Vio Grossi

Roberto de Figueiredo Caldas

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary