

**INTER-AMERICAN COURT OF HUMAN RIGHTS\***

**CASE OF POBLETE VILCHES ET AL. V. CHILE**

**JUDGMENT OF MARCH 8, 2018**

***(Merits, reparations and costs)***

In the case of *Poblete Vilches et al.*,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following judges:

Eduardo Ferrer Mac-Gregor Poisot, President  
Humberto Antonio Sierra Porto, Judge  
Elizabeth Odio Benito, Judge  
Eugenio Raúl Zaffaroni, Judge, and  
L. Patricio Pazmiño Freire, Judge;

also present,\*\*

Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and Articles 31, 32, 62, 65 and 67 of the Rules of Procedure of the Inter-American Court (hereinafter "the Rules of Procedure" or "the Court's Rules of Procedure"), delivers this judgment, structured as follows:

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\* In accordance with Article 19(1) of the Rules of Procedure of the Inter-American Court applicable to this case, Judge Eduardo Vio Grossi, a Chilean national, did not take part in the deliberation of this judgment. In addition, Judge Roberto F. Caldas did not participate in the deliberation and signature of this judgment for reasons beyond his control that were accepted by the full Court.

\*\* The Secretary, Pablo Saavedra Alessandri, excused himself from taking part in this case. The Court accepted his excuses.

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## I

**INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE**

1. *The case submitted to the Court.* On August 26, 2016, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) submitted to the jurisdiction of the Court the case of *Poblete Vilches et al.* against the Republic of Chile (hereinafter “the State of Chile,” “the Chilean State” or “Chile”). According to the Commission, the case refers to the alleged international responsibility of the State of Chile for the acts and omissions that took place between January 17 and February 7, 2001, the dates on which Vinicio Antonio Poblete Vilches, who was an older person, was twice admitted to the Sótero del Río public hospital where he died on the latter date. The Commission established that, on two occasions, the hospital’s medical staff failed to obtain informed consent to take health-related decisions. Specifically, in the context of a procedure performed on January 26, 2001, during his first admission to the hospital, and also in the case of the decision to keep him in “intermediate treatment” in the hours before his death during his second admission to the hospital. The Commission concluded that there was sufficient evidence to consider that the decision to discharge Vinicio Antonio Poblete Vilches and the way in which this was carried out could have contributed to the rapid deterioration he experienced in the days immediately following his discharge from the hospital and his subsequent death after he was admitted a second time in a serious condition. It also determined that the State was responsible for failing to provide him with the intensive treatment required during his second admission to hospital, and for the fact that, in the domestic sphere, the investigations were not conducted with due diligence and within a reasonable time. The presumed victims in this case, in addition to Vinicio Antonio Poblete Vilches, are: his wife, Blanca Tapia Encina (deceased), and his sons and daughter, Gonzalo Poblete Tapia (deceased), Vinicio Marco Poblete Tapia and Cesia Poblete Tapia.

2. *Procedure before the Commission.* The procedure before the Commission was as follows:

- a) *Petition.* On May 15, 2002, Blanca Margarita Tapia Encina, Cesia Leyla Poblete Tapia and Vinicio Antonio Poblete Tapia (hereinafter “the petitioners”) lodged the initial petition before the Commission in which they alleged that Chile was internationally responsible for the death of Vinicio Antonio Poblete Vilches, on February 7, 2001, in a Santiago public hospital.
- b) *Admissibility Report.* On March 19, 2009, the Commission adopted Admissibility Report No. 13/09 in which it concluded that petition 339-02 was admissible.<sup>1</sup>
- c) *Merits Report.* On April 13, 2016, the Commission adopted Merits Report No. 1/16, pursuant to Article 50 of the Convention (hereinafter “the Merits Report” or “Report No. 1/16”), in which it reached a series of conclusions and made several recommendations to the State.

I. *Conclusions.* The Commission concluded that the State was responsible for the alleged violation of the following human rights established in the American Convention:

1. Violation of the right of access to information on health established in Article 13 of the Convention, in relation to the rights to life, personal integrity and health established Articles 4 and 5 of the Convention, and to the obligations established in Article 1(1) of this instrument, to the detriment of Vinicio Antonio Poblete Vilches and the members of his family[;]

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<sup>1</sup> In this report, the Commission decided that the petition was admissible with regard to the presumed violation of the rights recognized in Articles 4, 8, 24 and 25 of the American Convention, in relation to Article 1(1) of this instrument. IACHR. Admissibility Report No. 13/09, Petition 339-02. *Case of Poblete Vilches et al. v. Chile*, March 19, 2009 (file of the procedure before the Commission, volume IV, folios 1310 to 1322).

2. Violation of the rights to life, personal integrity and health established in Articles 4 and 5 of the American Convention, in relation to the obligations established in Article 1(1) of this instrument, to the detriment of Vinicio Antonio Poblete Vilches, [and]
3. Violation of the rights to personal integrity, judicial guarantees and judicial protection established in Articles 5, 8 and 25 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of the members of Vinicio Antonio Poblete Vilches's family.

II. *Recommendations.* Consequently, the Commission made a series of recommendations to the State:

1. Make full reparation to Vinicio Antonio Poblete Vilches's family for the human rights violations found in this report, including appropriate compensation for the pecuniary and non-pecuniary harm caused, as well as other measures of non-pecuniary satisfaction;
2. Undertake a thorough and effective investigation into the human rights violations found in this report so that Mr. Poblete Vilches's family can know the truth of what happened and, if appropriate, so that the corresponding sanctions be imposed. To that end, the State must continue the investigation reopened in 2008 or, if appropriate, open a new investigation with the aim of overcoming the obstacles identified in th[e] report that have impeded obtaining justice, [and]
3. Put in place measures of non-repetition that include: (i) any legislative, administrative or other measures that may be required to implement informed consent in the area of health in keeping with the standards established in this report; (ii) the measures needed, including budgetary measures, to ensure that the Sótero del Río Hospital has the resources and infrastructure needed to provide adequate care, particularly when intensive therapy is required, and (iii) education and training measures for judicial agents regarding the duty to investigate possible liabilities arising from the death of a person as the result of inadequate health care.

d) *Notification of the State.* The Merits Report was notified to the State on May 27, 2016, granting it two months to report on compliance with the recommendations.

e) *Reports on the Commission's recommendations.* The Chilean State did not respond to the Commission's Merits Report.

3. *Submission to the Court.* On August 26, 2016, the Commission submitted all the facts and human rights described in the Merits Report to the jurisdiction the Inter-American Court "given the need to obtain justice."<sup>2</sup>

4. *Requests by the Inter-American Commission.* Based on the foregoing, the Commission asked the Court to declare that the State was internationally responsible for the violations indicated in its Merits Report (*supra* para. 2.c.). The Commission also asked the Court to establish specific measures of reparation, which are described and analyzed in Chapter VIII of this judgment.

## II PROCEEDINGS BEFORE THE COURT

5. *Notification of the representatives and of the State.* The Court notified the submission of the case by the Commission to the representatives of the presumed victims, Nicolás Daneri Bascuña and Vinicio Marco Poblete Tapia, and to the State on October 17, 2016.

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<sup>2</sup> The Commission appointed Commissioner Enrique Gil Botero and Executive Secretary Paulo Abrão as its delegates before the Court and Elizabeth Abi-Mershed, Deputy Executive Secretary, and Silvia Serrano Guzmán, Executive Secretariat lawyer as legal advisers.

6. *Appointment of inter-American public defenders.* On November 23, 2016, Vinicio Poblete Tapia indicated that Nicolás Daneri Bascuña would no longer be the legal representative of the case before the Court, information that was confirmed by Mr. Daneri. Following a communication of November 24, 2016, sent by the Secretariat on the instructions of the President of the Court, Mr. Poblete Tapia asked the Court to appoint an inter-American public defender. In an order of the President of November 25, 2016, the two-month time limit for the presentation of the brief with pleadings, motions and arguments (hereinafter “the pleadings and motions brief”) was suspended until the new legal representative had been notified pursuant to Article 40 of the Court’s Rules of Procedure.<sup>3</sup> Following the respective communications with the Inter-American Public Defenders Association (AIDEF), on December 7, 2017, the General Coordinator of the Association informed the Court that Silvia Martínez and Rivana Barreto Ricarte de Oliveira had been appointed as inter-American public defenders to exercise the legal representation of the presumed victims in this case (hereinafter “the inter-American defenders” or “the representatives”).

7. *Brief with pleadings, motions and arguments.* On January 27, 2017, the inter-American defenders submitted their pleadings and motions brief to the Court. The representatives agreed substantially with the allegations of the Commission and asked the Court to declare the international responsibility of the State for the violation of Articles 4(1), 5(1), 26, 8, 25, 13(1), 11 and 7 of the American Convention, in relation with Article 1(1) and 2 of this instrument, to the detriment of Vinicio Antonio Poblete Vilches and the members of his family. The inter-American defenders also asked for access to the Victims’ Legal Assistance Fund of the Inter-American Court (hereinafter “the Court’s Legal Assistance Fund” or “the Fund”). Lastly, they asked the Court to order the State to adopt different measures of reparation and to reimburse certain costs and expenses.

8. *Answering brief.* On April 21, 2017, the State<sup>4</sup> presented to the Court its brief answering the submission of the case and the Merits Report of the Inter-American Commission, and also the pleadings and motions brief. In its brief, the State included a partial acknowledgement of international responsibility.

9. *Observations on the State’s partial acknowledgement of international responsibility.* On July 3, 2017, the inter-American defenders and the Inter-American Commission presented their observations on the partial acknowledgement of international responsibility made by the State of Chile.

10. *Public hearing.* In an order of September 21, 2017,<sup>5</sup> the President called the parties and the Inter-American Commission to a public hearing to receive their final oral arguments and observations on the merits and eventual reparations and costs, as well as to hear the statements of one presumed victim, one witness proposed by the State, and two expert witnesses offered by the Commission and the inter-American defenders. The public hearing took place on October 19, 2017, during the fifty-eighth special session of the Court held in Panama City.<sup>6</sup> During the hearing, the Court received the statement of presumed victim Vinicio Marco Antonio Poblete Tapia, witness

<sup>3</sup> Cf. Case of *Poblete Vilches et al. v. Chile*. Order of the President of the Inter-American Court of November 25, 2016. Available at: [http://www.corteidh.or.cr/docs/asuntos/poblete\\_25\\_11\\_16.pdf](http://www.corteidh.or.cr/docs/asuntos/poblete_25_11_16.pdf)

<sup>4</sup> The State appointed Hernán Quezada Cabrera, Óscar Alcamán Riffo and Diana Maquilón Tamayo as its Agents and Beatriz Contreras and Isidora Rojas Fernandois as Deputy Agents.

<sup>5</sup> Cf. Case of *Poblete Vilches et al. v. Chile*. Order of the President of the Inter-American Court of September 21, 2017. Available at: [http://www.corteidh.or.cr/docs/asuntos/poblete\\_21\\_09\\_17.pdf](http://www.corteidh.or.cr/docs/asuntos/poblete_21_09_17.pdf)

<sup>6</sup> There appeared at this hearing: (a) for the Inter-American Commission: Commissioner José de Jesús Orozco Henríquez, and the Executive Secretariat lawyers, Silvia Serrano Guzmán and Selene Soto; (b) for the representatives of the presumed victims: the inter-American defenders, Rivana Barreto Ricarte de Olivera and Silvia Edith Martínez, and (c) for the State of Chile: the agents, Hernán Quezada Cabrera, Oscar Alcamán Riffo and Diana Maquilón Tamayo; the deputy agents Beatriz Contreras Reyes and Isidora Rojas Fernandois; the representative of the Under-Secretary for Human Rights, Juan Pablo Gómez, and the representative of the Judiciary, Jorge Sáenz Martín.

Rodrigo Avendaño Brandeis, and the two expert witnesses, Alicia Ely Yemin and Javier Alejandro Santos. The Court also requested the parties to submit certain information and documentation. The affidavits that had been requested were received on October 10 and 11, 2017.

11. *Final written arguments and observations.* On November 20, 2017, the State and the representatives presented their final written arguments with annexes, and the Commission presented its final written observations. On November 27, 2017, the Court's Secretariat forwarded the annex to the representatives' final written arguments to the State and asked it to submit any observations it deemed pertinent. In a communication of December 4, 2017, the State presented observations on the annex submitted by the representatives.

12. *Helpful evidence.* On November 27, 2017, and January 26, 2018, the State was asked to provide helpful evidence. On December 22, 2017, and February 12, 2018, the State forwarded the information requested.

13. *Disbursements from the Legal Assistance Fund.* On January 26, 2018, the Secretariat, on the instructions of the President of the Court, forwarded information on the disbursements made in application of the Legal Assistance Fund in this case to the State and, as established in Article 5 of the Rules for the Operation of the Fund, granted it a time frame for presenting any observations it deemed pertinent. The State presented observations on February 2, 2018.

14. *Deliberation of the case.* The Court began deliberating this judgment on March 5, 2018.

### **III JURISDICTION**

15. The Court has jurisdiction to hear this case pursuant to Article 62(3) of the Convention because Chile has been a State Party to the Convention since August 21, 1990, and accepted the compulsory jurisdiction of the Court on that date.

### **IV PARTIAL ACKNOWLEDGEMENT OF INTERNATIONAL RESPONSIBILITY BY THE STATE**

#### ***A. Positions in relation to the State's partial acknowledgement of responsibility***

16. The **State** recognized its international responsibility for the "violation of the right to personal integrity [established in] Article 5 [of the American Convention], physical integrity [established in] Article 5 [of this instrument] and the right to health, in relation to Article 1(1) of the [Convention] to the detriment of Vinicio Poblete." However, the State did not acknowledge the violation of the right to life of Vinicio Poblete, established in Article 4 of the Convention. The State also acknowledged "the violation of the right of access to information on health-related matters established [in Article 13 of the Convention], in connection with the rights to life, personal integrity and health [established in Articles 4 and 5 of the American Convention], in relation to the obligations established in Articles 1(1) and 2 of this instrument, to the detriment of Vinicio Antonio Poblete Vilches and the members of his family." Furthermore, it acknowledged, pursuant to Articles 11 and 7 of the American Convention, the violation of the right to dignity and self-determination of Vinicio Poblete Vilches, but not with regard to the members of his family. Lastly, pursuant to Articles 8 and 25 of the American Convention, the State acknowledged responsibility as regards failure to comply with the obligation to conduct jurisdictional proceedings within a reasonable time, but not as regards due diligence.

17. The State considered that the following facts had violated the rights of Mr. Poblete Vilches:

[T]he decision to discharge Vinicio Poblete [Vilches] from the hospital constituted an obstacle to access to conditions that would have guaranteed his right to physical integrity and also his health. This was so, because the discharge occurred even though the information available reveals that this was not an appropriate measure. Added to this is the fact that, when Vinicio Poblete was readmitted to the Hospital, he was not treated in the Intensive Care Unit (ICU), despite his medical record indicating that this was the appropriate Unit for his treatment owing to his symptoms.

The State of Chile underst[ood] that, given the factual circumstances of this case, especially the hospitalization in the Sótero del Río Hospital, in a ward other than the one recommended in his medical record (owing to the lack of beds), and the State's lack of diligence to arrange his transfer to another health care center, this entail[ed] violations of the right to physical integrity in relation to the right to health.

18. The State also acknowledged the following facts before the Court: "(i) the presumed victim was unconscious when the decision was taken to operate on him and, therefore, he was not in a condition to consent to any type of procedure; (ii) the family were not adequately informed of the procedure that would be performed on the presumed victim; (iii) the only reference to the existence of supposed consent by the family was in the medical record, and it raises doubts about the way in which it was obtained and its authenticity; (iv) the medical record contains no information or note that would allow it to be understood that the supposed informed consent was provided in keeping with the requirements established by international law, and (v) the medical record reveals that doubts existed as to whether the family understood the presumed victim's condition." Regarding the actions of the judicial authorities, the Chilean State acknowledged that they were not taken within a reasonable time.

19. With regard to reparations, the State did not acknowledge the reparations requested by the presumed victims, considering that they related to the violation of the right to life. However, the State asked the Court, when determining the reparations on aspects that were admissible, to take its arguments into consideration, disregarding those factors and considerations that were unrelated to the perpetration of an internationally wrongful act or if no causal nexus existed between the violation and the harm to be repaired.

20. In its final written arguments, the State indicated that the points on which it did not acknowledge having incurred international responsibility were that: "(i) the Chilean courts conducted a substantive investigation into the facts that have resulted in this case, complying with the international standard of due diligence; (ii) from the facts of the case, and based on the standards established by this Court, it is not possible to identify any violation of the right to be tried by an impartial court in either its subjective or objective aspect; (iii) the death of Mr. Poblete Vilches cannot be attributed to the State of Chile because his death is attributable to his serious health problems; (iv) in light of Article 26 of the Convention, Chile has adopted different measures to ensure the progressive development of economic, social and cultural rights, including the right to health; (v) regarding the family members, the State is not internationally responsible for either the supposed violation of their personal integrity or the right to dignity and self-determination in relation to the right to take free decisions in health-related matters in connection with the right to informed consent."

21. The **Commission** appreciated the acknowledgement of responsibility made by the State of Chile concerning: (i) the facts relating to the medical discharge and the lack of adequate medical care on re-admission to the hospital; (ii) the violation of the right of access to health-related information, in relation to Articles 4, 5 and 13 of the American Convention and the obligations established in Articles 1(1) and 2 of this instrument, to the detriment of Vinicio Poblete Vilches and the members of his family, as well as the facts relating to this violation.

22. However, the Commission considered that the dispute remained with regard to the violation of the rights of Mr. Poblete Vilches's family pursuant to Articles 8, 25 and 5 of the American Convention, in relation to the denial of justice. Regarding the violation of Article 4 of the American



Convention, the Commission considered that it could be “inferred that the dispute subsists in relation to important parts of the Merits Report that were not included in the State’s acknowledgement.” The Commission considered that the Court should determine the corresponding facts and establish their legal consequences and the respective reparations, based on the nature and gravity of the violations that occurred in this case.” Furthermore, the Commission indicated in its final arguments that it was pertinent to take into account the interdependence and indivisibility of the civil and political rights and the economic, social and cultural rights, and the impact they have on both the right to life and the right to personal integrity and the inadequate provision of health care services.

23. The Commission emphasized that an essential aspect of the analysis remained in dispute; specifically the failure of the medical staff of a Chilean public hospital to take adequate measures, irrespective of what the final impact of such measures might be on the health of Mr. Poblete Vilches and on his possibilities of survival. The Commission also underlined the possible inconsistency of some aspects of the acknowledgement, such as the fact that the State had acknowledged the violation of the right to personal integrity, but when referring to the same facts in light of the right to life, it appeared to appraise them in a different way in relation to whether or not the State’s response was adequate. Lastly, the Commission asked the Court to examine the scope of the acknowledgement in relation to the right of informed consent and Articles 4, 5 and 13 of the Convention because, in the Merits Report, these had also been analyzed “in relation to the failure of the medical staff to take adequate measures to ensure access to information to both Mr. Poblete Vilches and the members of his family.”

24. The **representatives** also appreciated the partial acknowledgment made by the Chilean State with regard to the violation of the right to personal integrity and the right to health of Mr. Poblete Vilches in relation to Article 1(1) of the Convention; the right of access to information on health matters to the detriment of Mr. Poblete Vilches and his family, and Articles 11 and 7 of the Convention to the detriment of Mr. Poblete Vilches. Regarding Articles 8(1) and 25 in relation to Article 1(1) of the American Convention, the representatives indicated that the State had denied its responsibility for violating the right to due diligence and the right to an impartial court, but had accepted responsibility for the fact that the case was not processed within a reasonable time. The representatives also noted that, in the chapter on final considerations of the State’s answering brief, it had only referred to the violation of the right to personal integrity and the right to informed consent to the detriment of Mr. Poblete Vilches, but had not mentioned the violation of the right to dignity and self-determination, the right to take free decisions, and the right to a reasonable time, all of which it had acknowledged previously in different parts of that brief. Accordingly, the representatives indicated that several facts had not been acknowledged by the State, and there were discrepancies in relation to the legal definition of the facts acknowledged, such as “the enormous differences existing between the parties with regard to the legal definition of the facts that violated the personal integrity and health of Vinicio Antonio Poblete Vilches, which the State has only linked to the violation of Article 5 of the Convention while, to the contrary, this party underst[ood] that over and above the violation of Article 5, the facts also violated Article 4, right to life, and in addition signified the autonomous violation of the right to health and to social security recognized in Article 26 of the Convention.”

### ***B. Considerations of the Court***

25. The Court finds that the partial acknowledgement of responsibility made by the State makes a positive contribution to the development of these proceedings and to the relevance of the

principles that inspire the American Convention.<sup>7</sup> The Court also considers, as it has in other cases,<sup>8</sup> that this acknowledgement has full legal effects in this case.

26. Nevertheless, pursuant to Articles 62<sup>9</sup> and 64<sup>10</sup> of the Rules of Procedure, as well as in exercise of its powers of international judicial protection of human rights, a matter of international public order that transcends the will of the parties, it is incumbent on the Court to ensure that the acts of acquiescence are acceptable for the objectives that the inter-American system seeks to achieve. In this task, the Court is not limited to merely taking note of the acknowledgment made by the State, or to verifying the formal conditions of such acts, but rather it must relate them to the nature and gravity of the alleged violations, the requirements and interests of justice, the particular circumstances of the specific case, and the attitude and position of the parties,<sup>11</sup> so that, insofar as possible and in exercise of its competence, it is able to assess the truth about what happened.<sup>12</sup> Thus, the acknowledgement cannot result in limiting, either directly or indirectly, the exercise of the Court's authority to hear the case submitted to it,<sup>13</sup> and to decide whether a violation of a right or freedom protected by the Convention has been violated.<sup>14</sup> To this end, the Court analyzes the situation submitted to it in each specific case.<sup>15</sup>

### **1. Regarding the facts**

27. In this case, the State has made a partial acknowledgement of responsibility in relation to the facts concerning: (i) the decision on the medical discharge; (ii) Mr. Poblete Vilches's re-admission to the hospital and the State's lack of diligence during his hospitalization as regards the measures that should have been taken to address his situation, the lack of an available bed in the hospital, and the fact that Mr. Poblete Vilches was not transferred to another hospital; (iii) the failure to obtain informed consent for the surgical procedure performed on Mr. Poblete Vilches, and (iv) that the actions of the judicial authorities were not conducted within a reasonable time.

28. In particular, the Court notes that some disputes subsist in relation to several facts that have not been acknowledged by the State, specifically those relating to: the actions of the medical staff and the impact of these on the health of Mr. Poblete Vilches, especially their relationship to his death; obtaining consent to perform the surgical procedure, and the treatment of his family by the

<sup>7</sup> Cf. *Case of Benavides Cevallos v. Ecuador. Merits, reparations and costs*. Judgment of June 19, 1998. Series C No. 38, para. 57, and *Case of Vereda La Esperanza v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 341, para. 21.

<sup>8</sup> Cf. *Case of Acevedo Jaramillo et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of February 7, 2006. Series C No. 144, paras. 176 to 180, and *Case of Ortiz Hernández et al. v. Venezuela. Merits, reparations and costs*. Judgment of August 22, 2017. Series C No. 338, para. 34.

<sup>9</sup> Article 62. Acquiescence. If the respondent informs the Court of its acceptance of the facts or its total or partial acquiescence to the claims stated in the presentation of the case or the brief submitted by the alleged victims or their representatives, the Court shall decide, having heard the opinions of all those participating in the proceedings and at the appropriate procedural moment, whether to accept that acquiescence, and shall rule upon its juridical effects.

<sup>10</sup> Article 64. Continuation of the case. Bearing in mind its responsibility to protect human rights, the Court may decide to continue the consideration of a case notwithstanding the existence of the conditions indicated in the preceding articles.

<sup>11</sup> Cf. *Case of Kimel v. Argentina. Merits, reparations and costs*. Judgment of May 2, 2008. Series C No. 177, para. 24, and *Case of Vereda La Esperanza v. Colombia*, *supra*, para. 21.

<sup>12</sup> Cf. *Case of Manuel Cepeda Vargas v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of May 26, 2010. Series C No. 213, para. 17, and *Case of Vereda La Esperanza v. Colombia*, *supra*, para. 21.

<sup>13</sup> Article 62(3) of the Convention establishes: "[t]he jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

<sup>14</sup> Article 63(1) of the Convention.

<sup>15</sup> Cf. *Case of Myrna Mack Chang v. Guatemala*. Judgment of November 25, 2003. Series C No. 101, para. 105, and *Case of Ortiz Hernández et al. v. Venezuela*, *supra*, para. 22.

medical staff. Consequently, the Court finds it appropriate to examine the disputed facts in Chapter VI of this judgement.

## **2. Regarding the legal claims**

29. The Court notes that the State recognized its international responsibility for the violation of Article 13 in connection with Articles 4 and 5 of the American Convention and in relation to the obligations established in Articles 1(1) and 2 of this instrument, to the detriment of Mr. Poblete Vilches and of his family. In addition, the State considered that Articles 5, 7 and 11 of the Convention had been violated to the detriment of Mr. Poblete Vilches. Lastly, it acknowledged that Articles 8 and 25 had been violated, owing to the infringement of the right to a reasonable time by the Chilean authorities.

30. Regarding the scope of the State's responsibility for the violation of Articles 5, 7 and 11 of the Convention, the State referred only to the violation of the rights of Mr. Poblete Vilches but not to those of his family members. Furthermore, the State did not acknowledge responsibility for the violation of Articles 4 and 26 of the Convention. In the case of Articles 8 and 25 of the American Convention, the Court notes that, when acknowledging its responsibility, the State focused on the fact that the actions of the judicial authorities were not conducted within a reasonable time, but denied its responsibility for violation of the right to due diligence and the right to an impartial court.

31. Lastly, bearing in mind the violations acknowledged by the State, as well as the observations of the representatives and the Commission, the Court considers that this acknowledgement by the State constitutes a partial acquiescence to the legal claims of the Commission and the representatives. Nevertheless, and since disputes subsist in this regard, the Court finds it appropriate to include some consideration on the rights concerned in Chapter VII of the judgment.

## **3. Regarding reparations**

32. Regarding measures of reparation, the Court notes that the State has not acknowledged the measures requested by the inter-American defenders. Therefore, in Chapter VIII, the Court will take the pertinent decision on the reparations requested by the Commission and the representatives and will examine whether a causal nexus exists between the violations that have been declared and the measures claimed by the parties.

## **4. Assessment of the scope of the partial acknowledgement of responsibility**

33. Based on the foregoing and its attributes as an international organ for the protection of human rights, the Court finds it necessary, considering the particularities of the events that occurred in this case and the way in which the dispute has evolved, to deliver a judgment in which it determines the facts that occurred based on the evidence submitted in the proceedings before the Court, in order to avoid the repetition of similar events and, in sum, to comply with the purposes of the inter-American jurisdiction on human rights, because this will contribute to making reparation to the members of Mr. Poblete Vilches's family.<sup>16</sup>

34. Furthermore, in order to ensure a better understanding of the State's international responsibility in this case and the causal nexus between the violations established and the reparations that are ordered, the Court finds it pertinent to specify the scope and classification of the human rights violations that occurred in this case.<sup>17</sup>

<sup>16</sup> Cf. *Case of the "Mapiripán Massacre" v. Colombia. Merits, reparations and costs*. Judgment of September 15, 2005. Series C No. 134, para. 69, and *Case of Ortiz Hernández et al. v. Venezuela. supra*, para. 38.

<sup>17</sup> Cf. *Case of the La Rochela Massacre v. Colombia. Merits, reparations and costs. Judgment of May 11, 2007. Series C No. 163*, para. 54, and *Case of Ortiz Hernández et al. v. Venezuela. supra*, para. 39.

## V EVIDENCE

### **A. Documentary, testimonial and expert evidence**

35. The Court received diverse documents presented as evidence by the State, the representatives and the Inter-American Commission, attached to their principal briefs and with their final written arguments (*supra* paras. 5 to 13). The Court also received the affidavits made by Cesia Leila Poblete Tapia, Alejandra Marcela Fuentes Poblete and Sandra Montufar Castillo, proposed by the inter-American defenders and Patricia Isabel Navarrete and Osvaldo Salgado Zepeda, proposed by the State. It also received the opinions of expert witnesses Fernando Mussa Abujamra Aith and Hernán Víctor Gullco, proposed by the inter-American defenders, and Claudio Fuentes, proposed by the State. Regarding the evidence submitted during the public hearing, the Court received the statements of the presumed victim, Vinicio Marco Antonio Poblete Tapia, and the witness, Rodrigo Avendaño Brandeis, proposed by the State, and also of the expert witnesses, Alicia Ely Yemin, proposed by the Commission, and Javier Alejandro Santos, proposed by the inter-American defenders. In addition, pursuant to Article 59(b) of the Rules of Procedure, the Court requested as helpful evidence "Communication No. 02609 of the Directorate of the Southeastern Metropolitan Service addressed to the Chilean Ministry of Health" and the "Ruling of the Supreme Court of Justice of August 14, 2014." The State presented this documentation in communications dated December 22, 2017, and February 13, 2018,<sup>18</sup> and it was forwarded to the representatives and the Commission.

### **B. Admission of the evidence**

36. The Court admits the probative value of those documents presented at the proper procedural opportunity by the parties and the Commission that were neither contested nor challenged.<sup>19</sup> The Court finds it pertinent to admit the statements and the expert opinions provided during the public hearing and by affidavit, insofar as they are in keeping with the purpose defined by the President in the order requiring them<sup>20</sup> and the purpose of this case.

37. Regarding the procedural opportunity to submit documentary evidence, pursuant to Article 57(2) of the Rules of Procedure, in general, it should be presented together with the briefs submitting the case, with pleadings and motions, or the answering brief, as applicable. The Court recalls that evidence provided outside the appropriate procedural opportunities is not admissible, save in the case of the exceptions established in the Article 57(2) of the Rules of Procedure; namely, *force majeure*, grave impediment or if it refers to a fact that occurred after the said procedural moments.<sup>21</sup>

38. With a communication of October 24, 2017, expert witness Alicia Ely Yemin submitted a document corresponding to information that supplemented her expert opinion. This document was

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<sup>18</sup> Regarding the ruling of August 14, 2014, the State clarified that this corresponded to the ruling of August 25, 2014, based on a clerical error.

<sup>19</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, Judgment of July 29, 1988. Series C No. 4. para. 140, and *Case of the Discharged Employees of PetroPeru v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2017. Series C No. 344, para. 74.

<sup>20</sup> The purpose of all these statements was established in the order of the President of the Court of September 21, 2017, first and fifth operative paragraphs, which can be consulted on the Court's website at the following link: [http://www.corteidh.or.cr/docs/asuntos/poblete\\_21\\_09\\_17.pdf](http://www.corteidh.or.cr/docs/asuntos/poblete_21_09_17.pdf)

<sup>21</sup> Cf. *Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs*. Judgment of October 13, 2011. Series C No. 234, para.22, and *Case of the Discharged Employees of PetroPeru, supra*, para. 75.

incorporated into the proceedings and is pertinent for deciding this case;<sup>22</sup> also, the State did not contest it.

39. On November 20, 2017, with their final written arguments, the representatives forwarded an annex referring to an invoice for the fees of expert witness Fernando Mussa Abujamra Aith. In a communication of December 4, 2017, the State presented its observations on this annex and indicated that it was time-barred, because it had not been submitted with the other expenses that the other party might have incurred and also that the document should not be admitted as it lacked the essential elements to be incorporated as a valid invoice for the Victims' Legal Assistance Fund. The Court observes that, despite the extensions granted, the representatives failed to present the original invoice requested by the Court on December 12, 2017, in order to rectify the defects of the said document, so that this document on the invoice is inadmissible.

### **C. Assessment of the evidence**

40. Based on its consistent case law on evidence and its assessment, the Court will examine and assess the documentary evidence forwarded by the parties and the Commission that it has incorporated into the case file, as well as the statements and expert opinions, in order to establish the facts of the case and rule on the merits. To this end, it will abide by the principles of sound judicial discretion, within the corresponding legal framework, taking into account the whole body of evidence and the arguments submitted in the case.<sup>23</sup> Lastly, pursuant to its case law, the Court recalls that the statements made by the presumed victims cannot be assessed in isolation, but rather within the body of evidence of the proceedings, insofar as they may provide further information on the presumed violations and their consequences.<sup>24</sup>

## **VI FACTS**

41. In this chapter, the Court will establish the facts of this case based on the factual framework submitted to its consideration by the Commission, taking into consideration the body of evidence in the case, the arguments of the representatives and the State, and also the facts acknowledged by the State and those that have not been contested by the parties (*supra* paras. 16 to 20). It will do so in the following sections: (a) Regarding Vinicio Antonio Poblete Vilches; (b) First admission of Vinicio Antonio Poblete Vilches to the Sótero del Río Hospital; (c) Second admission of Vinicio Antonio Poblete Vilches to the Sótero del Río Hospital, and (d) Actions taken by the family with state organs.

### **A. Vinicio Antonio Poblete Vilches**

42. Mr. Poblete Vilches was born on May 22, 1924, and at the time of his death on February 7, 2001, he was 76 years of age.<sup>25</sup> Mr. Poblete Vilches lived with his wife, Blanca Tapia Encina and his

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<sup>22</sup> Cf. *Case of Galindo Cárdenas et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of October 2, 2015. Series C No. 301, para. 70, and *Case of the Discharged Employees of PetroPeru, supra*, para. 75.

<sup>23</sup> Cf. *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits*. Judgment of March 8, 1998. Series C No. 37, paras. 69 to 76, and *Case of the Discharged Employees of PetroPeru, supra*, para. 79.

<sup>24</sup> Cf. *Case of Loayza Tamayo v. Peru. Merits*. Judgment of September 17, 1997. Series C No. 33, para. 43, and *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340, para. 35.

<sup>25</sup> Death certificate of Vinicio Antonio Poblete Vilches issued by the Chilean Civil Registry Service on March 9, 2001 (evidence file, annex 1 of the Merits Report, f. 7).

three children: Cesia Leila Siria Poblete Tapia, Vinicio Marco Antonio Poblete Tapia and Gonzalo Poblete Tapia.<sup>26</sup>

**B. First admission of Vinicio Antonio Poblete Vilches to the Sótero del Río Hospital**

43. On January 17, 2001, Mr. Poblete Vilches was admitted to the Sótero del Río Hospital due to severe respiratory failure.<sup>27</sup> According to the report that refers to the medical record:<sup>28</sup> “the patient was admitted in [...] very bad general condition, polipneic, semi-conscious. Diabetes in treatment, unspecified arrhythmia treated with amiodarone. In [these] conditions [he was] transferred to the [Intensive Care Unit (hereinafter ICU)], where he was stabilized [...]; consequently, on the fourth day [he was] transferred to a medical ward.”<sup>29</sup> He was hospitalized four days in the ICU. On January 22, 2001, he was moved to the Surgical Intensive Care Unit where he was hooked up to an IV drip and sedated.<sup>30</sup>

44. When family members went to visit him on January 23, 2001, Dr. María Chacón Fernández did not allow them to see him and, they indicated that they heard Mr. Poblete Vilches moaning and asking them “to get him out of there because they were killing him.”<sup>31</sup> They also stated that Dr. Chacón told them that Mr. Poblete Vilches was in good health and that they were going to take him to the “theater” to make a small incision to see if he had liquid in his heart, but he would not be operated on; in response, the family warned that their father suffered from diabetes and could not be subjected to a surgical procedure.<sup>32</sup>

45. On January 26, 2001, Mr. Poblete Vilches entered “the theater” and, when he emerged the family could see that he had three large wounds at waist level in which a drainage tube was

<sup>26</sup> Cf. Statement made by Vinicio Marco Antonio Poblete Tapia before the Court during the public hearing of October 19, 2017 (transcript of the public hearing on merits, and eventual reparations and costs; October 19, 2017, p. 96), and Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017 (evidence file affidavits, f. 4462). Blanca Tapia Encina died on January 13, 2003, due to septic shock and gallbladder cancer with multiple metastases, while Gonzalo Poblete Tapia had a brain injury and a physical disability and died on December 4, 2011. Cf. Death certificate of Blanca Margarita Tapia Encina issued by the Chilean Civil Registry Service on January 14, 2003 (evidence file, annex 17 of the Merits Report, f. 126), and Statement made by Vinicio Marco Antonio Poblete Tapia before the Court during the public hearing of October 19, 2017 ( *supra*, pp. 20 and 96), and Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017 ( *supra*, evidence file, f. 4467).

<sup>27</sup> Cf. Statement made by Vinicio Marco Antonio Poblete Tapia before the Court during the public hearing of October 19, 2017 ( *supra*, pp. 4 and 12), Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017 ( *supra*, evidence file f. 4462), and Affidavit made by Alejandra Marcela Fuentes Poblete on October 6, 2017 (evidence file affidavits, f. 4470).

<sup>28</sup> “[...] Patient with history of DM2 in treatment with glibenclamide 5mg c/12 [illegible] and unspecified cardiac arrhythmia [illegible], therefore uses amiodarone 200 mg/day orally. Yesterday, started respiratory distress associated with more significant effects on his general condition. Temperature normal. Today, worsened and presented dyspnea at rest, so taken to the S.E. where [illegible] respiratory distress and irregular tachycardia between 130-100x was noted [...]” Medical record of Vinicio Poblete Vilches. Document attached to confidential communication No. 026/09 of the Director, Southeastern Metropolitan Health Service, addressed to the Minister of Health, of August 31, 2009 (merits file, f. 1130).

<sup>29</sup> Ministerial Audit Directorate, Confidential communication No. 024, signed by Dr. Sergio Valenzuela Estévez, Department Head. Eastern Health Service Audit. Document attached to Confidential communication No. 026/09 of the Director, Southeastern Metropolitan Health Service, *supra*, and attached to communication No. 0812 of the Director [S], Dr. Sótero del Río Health Complex, addressed to the Director for Human Rights of the Ministry of Foreign Affairs, of May 19, 2010 (merits file f. 1108).

<sup>30</sup> Cf. Statement made by Vinicio Marco Antonio Poblete Tapia before the Court during the public hearing of October 19, 2017, *supra*, p. 4, Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017, *supra*, f. 4463, and Statement made by Alejandra Marcela Fuentes Poblete before the First Civil Court on June 15, 2007 (evidence file, annex 12 of the Merits Report, f. 110).

<sup>31</sup> Cf. Statement made by Vinicio Marco Antonio Poblete Tapia before the Court during the public hearing of October 19, 2017, *supra*, pp. 13 and 14, and Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017, *supra*, f. 4463.

<sup>32</sup> Affidavit made by Cesia Leila Siria Poblete on October 6, 2017, *supra*, (evidence file, f. 4464).

inserted. They also stated that he was never asked for his authorization to subject him to this surgical procedure<sup>33</sup> because he was unconscious.<sup>34</sup>

46. The medical record for January 26, 2001, contains a handwritten annotation signed "Margarita Tapia" stating:

"26.0120001 the surgical procedure to be performed on my father has been explained to me and I agree that it be carried out; the risks of the operation have been explained to me and I accept them."<sup>35</sup>

47. According to the expert handwriting analysis of December 26, 2016, the signature in the medical record did not correspond to Blanca Margarita Tapia Encina,<sup>36</sup> who, in addition, was Vinicio Poblete Vilches's wife and not his daughter.<sup>37</sup>

48. On February 2, 2001, Vinicio Poblete Tapia received a call from the hospital advising him that his father was now recovered and should return to his family home. On arriving at the hospital to collect their father, the family noted that he was in a very poor state of health and tried to talk to the doctors, but no one attended them.<sup>38</sup>

49. Owing to the poor state of Mr. Poblete Vilches's health, his family decided to hire a private ambulance to take him home because, they claimed, none were available at the hospital.<sup>39</sup>

50. Mr. Poblete Vilches arrived home the same day, February 2, 2001, with a very high temperature, and with pus issuing from his wounds, only one of which was sutured.<sup>40</sup> Consequently, on February 5, 2001, his family called a private doctor, Sandra Castillo Montufar, who, after examining him, ordered that he be taken to the hospital immediately because he had a complex

<sup>33</sup> Cf. Statement made by Vinicio Marco Antonio Poblete Tapia before the Court during the public hearing of October 19, 2017, *supra*, pp. 4 and 5, Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017, *supra*, f. 4464, Criminal complaint filed by Blanca Margarita Tapia Encina and Cesia Leila Poblete Tapia before the First Civil Court on November 12, 2001 (evidence file, annex 6 to the Merits Report, f. 29), and Affidavit made by Alejandra Marcela Fuentes Poblete on October 6, 2017, *supra* (merits file, f. 4471).

<sup>34</sup> Regarding the level of "unconsciousness" and/or "disorientation" of Mr. Poblete Vilches prior to the said surgical procedure, cf. Medical report of April 19, 2006, signed by Dr. Jorge Godoy Gallardo, Head of the Critical Patients Unit, on the admission of Vinicio Poblete Vilches to the Sótero del Río Hospital on January 17, 2001. Document attached to Confidential communication No. 026/09, *supra* (merits file, ff. 1110 and 1111). Regarding Mr. Poblete Vilches's condition when he underwent the said procedure, the report states: "[...] Patient 76 years of age [...]. History of: Diabetes Mellitus, Arterial hypertension and cardiac arrhythmia, admitted to the hospital due to respiratory distress. [...] Connected to a mechanical ventilator until 20/01/01. [...] Transferred to Medicine on 22/01/01 in stable conditions, monitored, disoriented but cooperating. During his time in Medicine an echocardiogram was carried out that showed moderate pericardial effusion. It was decided to perform a surgical drainage of his pericardial effusion and he was therefore asked for his informed consent. The procedure was carried out on 26/01, performing a videothoroscopic pericardial window [...]" Cf. Statement made by Javier Alejandro Santos before the Court during the public hearing of October 19, 2017 (transcript of the public hearing on merits, and eventual reparations and costs; October 19, 2017, pp. 50 and 51).

<sup>35</sup> Medical record of Vinicio Antonio Poblete Tapia (evidence file, annex 8 of the Merits Report, f. 79).

<sup>36</sup> Private report on the handwriting analysis signed by the expert José María Buitrago, National Public Calligrapher, dated December 26, 2016 (evidence file, annex 13 of the pleadings and motions brief, f. 3225)

<sup>37</sup> In this regard, in its answering brief, the State acknowledged that the supposed consent by the family members in the medical file "[...] raises doubts about the way it was obtained and its authenticity" (merits file, ff. 380 and 381).

<sup>38</sup> Cf. Statement made by Vinicio Marco Antonio Poblete Tapia before the Court during the public hearing of October 19, 2017, *supra*, pp. 5 and 14, Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017, *supra*, (evidence file, ff. 4464 and 4465), and Affidavit made by Alejandra Marcela Fuentes Poblete on October 6, 2017 (evidence file ff. 4471 and 4472).

<sup>39</sup> Cf. Statement made by Vinicio Marco Antonio Poblete Tapia before the Court during the public hearing of October 19, 2017, *supra*, pp. 5, 8 and 14, Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017, *supra* (evidence file, f. 4465), and Affidavit made by Alejandra Marcela Fuentes Poblete on October 6, 2017, *supra* (evidence file f. 4472).

<sup>40</sup> Cf. Statement made by Vinicio Marco Antonio Poblete Tapia before the Court during the public hearing of October 19, 2017, *supra*, pp. 2 and 5, Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017, *supra*, f. 4465, and Affidavit made by Alejandra Marcela Fuentes Poblete on October 6, 2017, *supra*, f. 4471.

febrile condition; she also diagnosed "septic shock, bilateral bronchopneumonia, diabetes mellitus 2 [and] pericarditis."<sup>41</sup>

**C. Second admission of Vinicio Antonio Poblete Vilches to the Sótero del Río Hospital.**

51. On February 5, 2001, Mr. Poblete Vilches was again admitted to the Sótero del Río Hospital, in the Emergency Department, where Dr. Luis Carvajal Freire advised that Mr. Poblete Vilches had "simple bronchopneumonia."<sup>42</sup> According to the admission medical record,<sup>43</sup> Mr. Poblete needed to be admitted to the Intensive Care Unit and put on a ventilator:

"[...] Plan: Patient to ICU for ventilatory support. No availability in ICU or Qx. Will be given intermediate care until an ICU bed becomes available.

Diagnosis:

- 1) Partial acute respiratory failure.
- 2) Shock, probably septic. Focus [...] intrahospital pneumonia.
- 3) DM Tipo II uncontrolled
- 4) Renal failure; acute?
- 5) High blood pressure
- 6) Congestive heart failure
- 7) Complete arrhythmia caused by atrial fibrillation.
- 8) Coronary cardiopathy.
- 9) Hyperkalemia
- 10) Loss of consciousness [...]"

52. According to the statements made by the family members, the following events occurred during the second admission and the State has not contested them:

- a) Vinicio Marco Antonio Poblete Tapia stated that Dr. Gonzales informed him that his father required a mechanical ventilator; however, there were none in the Surgical ICU, but one was available in the Medical ICU.<sup>44</sup>
- b) Vinicio Poblete Tapia asked the doctor about the availability of a mechanical ventilator, but the doctor replied that "nothing would be gained by providing him with one, because with or without it, he would only last about seven more days."<sup>45</sup>
- c) Cesia Leila Siria Poblete stated that her father remained in the Surgical ICU during his second admission and a doctor informed her brother, Vinicio, that he needed a mechanical ventilator, and there were none in that ICU, but one was available in the Medical ICU.<sup>46</sup>
- d) Cesia Leila Siria Poblete stated that her brother, Vinicio Marco Poblete, called the hospital and the doctor in charge of her father told him that his father had been taken to the Surgical ICU rather than the Medical ICU because it was not possible to take an old man to the Medical ICU, because that possibility should be given to a younger person.<sup>47</sup>

<sup>41</sup> Affidavit made by Sandra Castillo Montufar on October 11, 2017, *supra* (evidence file, f. 4475). Cf. Statement made by Vinicio Marco Antonio Poblete Tapia before the Court during the public hearing of October 19, 2017, *supra*, p. 16, and Affidavit made by Alejandra Marcela Fuentes Poblete on October 6, 2017, *supra* (evidence file, f. 4472).

<sup>42</sup> Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017 (evidence file affidavits, folio 4466).

<sup>43</sup> Medical record of Vinicio Poblete Vilches for February 6, 2001 (evidence file, f. 815).

<sup>44</sup> Cf. Statement made by Vinicio Marco Antonio Poblete Tapia before the Court during the public hearing of October 19, 2017, *supra*, p. 5, and Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017, *supra*, f. 4466.

<sup>45</sup> Statement made by Vinicio Marco Antonio Poblete Tapia on April 6, 2006, before the First Criminal Court (evidence file, annex 4 of the Merits Report, f. 570).

<sup>46</sup> Cf. Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017, *supra* (evidence file, f. 4466).

<sup>47</sup> Cf. Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017, *supra*, f. 4466, and Statement made by Vinicio Marco Antonio Poblete Tapia before the Court during the public hearing of October 19, 2017, *supra*, p. 5.



- e) Cesia Leila Siria Poblete added that her brother, Vinicio Marco Poblete, called the Medical ICU and spoke to the assistant director, Dr. Humberto Montecinos, asking him to help his father by admitting him to the Medical ICU where a ventilator was available, to which the doctor replied “that he had already given him the opportunity to be in the Medical ICU the first time he was hospitalized, so he would not give him a second [chance].”<sup>48</sup>
- f) Cesia Leila Siria Poblete stated that, since they did not have the money to buy a ventilator for their father, her brother, Vinicio Marco Antonio, called the television channels asking for help to obtain one. Subsequently, a journalist advised them that one had been obtained and that the information had already been passed on to Dr. Humberto Montecinos, but the family never knew what happened to that mechanical ventilator.<sup>49</sup>

53. The medical record of Vinicio Antonio Poblete Vilches, at 12.10 p.m. on February 7, 2001, indicates the time at which the family were given information on the health status of Mr. Poblete Vilches:

“[...] The seriousness of the situation has been discussed with the family; I have also spoken about the decision to keep him in intermediate care and not in the ICU owing to the patient’s condition and prognosis, and the lack of beds for critical patients. The family indicates their agreement but I doubt they fully understand the prognosis [and] the patient’s current status.”<sup>50</sup>

54. A communication of the Director of the Sótero del Río Health Complex indicates that “[...] On February 6, 2001, the patient Vinicio Antonio Poblete Vilches was readmitted to the Adult Emergency Unit of this Health Complex, and was hospitalized with a diagnosis of symptoms of pneumonia and renal failure. [...] In that Unit, Dr. Humberto Montecinos Salucci, together with his medical team, based on the clinical symptoms and the available tests, concluded that the patient had experienced multiorgan failure, and the patient’s family was advised of this situation, as well as the poor prognosis. As a result of the meeting that the medical team held with the family [...] the decision was taken not to connect the patient to a mechanical ventilator, considering it was a limitation of therapeutic efforts.”<sup>51</sup>

### **1. Death of Mr. Poblete Vilches**

55. The forensic report issued by the Forensic Medicine Service of the Government of Chile dated June 8, 2006, indicates the following with regard to the final hours of Mr. Poblete Vilches:

“11.20 p.m.: Patient with multiorgan failure and progressive metabolic acidosis. This, associated with a prior medical condition, leads to a poor prognosis. Following consultations with team, the ICU doctor notes that the patient has toxic shock syndrome associated with prior brain damage. The seriousness of the patient’s condition is discussed with the family and the need, owing to lack of a bed in the ICU, to continue in the Intermediate Service. Doctor doubts whether the family fully understand the patient’s current situation and prognosis. 5:45 a.m. death is verified. [...]”<sup>52</sup>

<sup>48</sup> Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017, *supra*, ff. 4466 and 4467. Cf. Statement made by Vinicio Marco Antonio Poblete Tapia before the Court during the public hearing of October 19, 2017, *supra*, p. 5.

<sup>49</sup> Cf. Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017, ff. 4466 and 4467. Cf. Statement made by Vinicio Marco Antonio Poblete Tapia before the Court during the public hearing of October 19, 2017, p. 5.

<sup>50</sup> Medical record of Vinicio Poblete Vilches. Document attached to confidential communication No. 026/09, *supra* (merits file, f. 1313).

<sup>51</sup> Communication No. [illegible] of Dr. Fernando Betanza Vallejos, Director, Dr. Sótero del Río Health Complex, “forwarding history of medical care, case of Vinicio Poblete Vilches,” and addressed to the Ministry of Health of the Government of Chile. September 1, 2009 (merits file, ff. 1119 and 1120).

<sup>52</sup> Forensic report No. 140-2005 issued by the Forensic Medicine Service of the Government of Chile on June 8, 2006 (evidence file, annex 48 of the Merits Report, f. 205).

56. According to the death certificate, Vinicio Antonio Poblete Vilches died of septic shock and bilateral bronchopneumonia at 5.40 a.m. on February 7, 2001.<sup>53</sup>

57. However, the family stated that they received a telephone call informing them that their relative had died from cardiac arrest.<sup>54</sup> Moreover, Mr. Poblete Tapia stated that, when he went to the hospital, he was told that his father had died from liver failure.<sup>55</sup> Subsequently, the family indicated that, when they went to collect his body, they saw that there was a piece of tape on Mr. Poblete Vilches's chest that gave the cause of death as "pulmonary edema."<sup>56</sup>

58. Consequently, the family asked the hospital to perform an autopsy, but the hospital refused to do so.<sup>57</sup>

#### **D. Actions taken by the family with state organs**

##### **1. Criminal complaints**

59. On November 12, 2001, Blanca Margarita Tapia Encina and Cesia Leila Poblete Tapia filed a criminal complaint for the crime of culpable homicide with the First Civil Court of Puente Alto<sup>58</sup> (hereinafter "the First Civil Court") against "María Chacon Fernández, Ximena Echeverría Pezoa, Luis Carvajal Freire, Erick or Marcelo Garrido, Mr. Anuch and Mr. Montecinos, in their capacity as physicians or interns of the Sótero del Río Hospital [...], who attended [their] relative, Vinicio Antonio Poblete Vilches, in their professional capacity and who, through their actions, inexplicably and with absolute negligence and culpability, brought about his death."<sup>59</sup> In this complaint, registered as Case No. 75,821-M, they requested the following procedures: (i) summon the defendants and others involved in the matter to give statements; (ii) request the medical record of Mr. Poblete Vilches, and (iii) order the exhumation of Mr. Poblete Vilches, in order to perform an autopsy.<sup>60</sup>

60. On November 12, 2001, the First Civil Court declared that it lacked jurisdiction because "the offense denounced [...] began on January 17, 2001, a date when the Third Criminal Court was on duty," and referred the proceedings to that court.<sup>61</sup> The Third Criminal Court also declined jurisdiction on November 23, 2001, and returned the case to the First Civil Court.<sup>62</sup> The First Civil

<sup>53</sup> Death certificate of Vinicio Antonio Poblete Vilches issued by the Chilean Civil Registry Service on March 9, 2001 (evidence file, annex 1 of the Merits Report, f. 7).

<sup>54</sup> Cf. Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017, *supra* (evidence file, f. 4467), and Statement made by Vinicio Marco Antonio Poblete Tapia before the Court during the public hearing on October 19, 2017, *supra*, p. 5.

<sup>55</sup> Cf. Statement made by Vinicio Marco Antonio Poblete Tapia before the First Civil Court of Puente Alto on April 6, 2006, *supra*, f. 570.

<sup>56</sup> Cf. Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017, *supra*, f. 4467, Statement made by Vinicio Marco Antonio Poblete Tapia before the First Civil Court of Puente Alto on April 6, 2006, *supra* (evidence file, f. 570), and Statement made by Vinicio Marco Antonio Poblete Tapia before the Court during the public hearing on October 19, 2017, *supra*, p. 17.

<sup>57</sup> Cf. Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017, *supra* (evidence file, f. 4467), and Affidavit made by Alejandra Marcela Fuentes Poblete on October 6, 2017, *supra* (evidence file, f. 4472).

<sup>58</sup> Cf. Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017 (evidence file, affidavits of the representatives, f. 4467), and Criminal complaint filed by Blanca Tapia Encina and Cesia Leila Poblete Tapia before the First Civil Court of Puente Alto on November 12, 2001 (evidence file, annex 6 of the Merits Report, f. 27).

<sup>59</sup> Cf. Criminal complaint filed by Blanca Tapia Encina and Cesia Poblete Tapia before the First Civil Court of Puente Alto on November 12, 2001 (evidence file, annex 6 of the Merits Report, f. 28).

<sup>60</sup> Cf. Criminal complaint filed by Blanca Tapia Encina and Cesia Poblete Tapia before the First Civil Court of Puente Alto on November 12, 2001 (evidence file, annex 6 of the Merits Report, ff. 32 to 34).

<sup>61</sup> Cf. Ruling of the First Civil Court of Puente Alto of November 12, 2001 (evidence file, annex 18 of the Merits Report, f. 128).

<sup>62</sup> Cf. Ruling of the Third Criminal Court of November 23, 2001 (evidence file, annex 19 of the Merits Report, f. 130).

Court again ruled itself incompetent on December 11, 2001,<sup>63</sup> and referred the proceedings to the San Miguel Court of Appeal,<sup>64</sup> which ruled that the First Civil Court had jurisdiction on February 6, 2002.<sup>65</sup> That court admitted the complaint and issued an investigation order to the Homicide Brigade under Case No. 75,821-M on February 13, 2002.<sup>66</sup> Also, on February 13, 2002, the First Civil Court ordered the exhumation of Mr. Poblete Vilches to perform the autopsy; however, this procedure was never executed.<sup>67</sup>

61. On October 16, 2002, the First Civil Court asked the Sótero del Río Hospital to forward the medical record of Mr. Poblete Vilches, which was received on November 14, 2002.<sup>68</sup>

62. On April 12, 2003, the First Civil Court received the police report from the Metropolitan Homicide Brigade of the Chilean Investigation Police. Attached to this was the report of the criminal forensic physician who concluded that "the contents of the medical record indicate that "the patient receive timely and effective medical care and treatment; consequently, a better explanation for his death [...] is the seriousness of the complications, which exceeded the medical efforts and available means."<sup>69</sup>

63. On May 13 and 20, and December 3, 2003, the doctors Ximena del Pilar Echeverría Pezoa,<sup>70</sup> Humberto Reinaldo Montecinos Salucci<sup>71</sup> and Sandra Zoraida Castillo Montufar,<sup>72</sup> respectively, gave their statements before the court.

64. On February 28 and December 20, 2004, and October 31, 2005, the First Civil Court issued warrants for the arrest of Luis Carvajal Freire.<sup>73</sup> On April 6, 2004, the Nineteenth Criminal Court ordered the arrest of Dr. Luis Carvajal Freire for the offense of defiance of the orders of the First Civil Court of Puente Alto.<sup>74</sup> On January 8, 2005, the previous court ordered the arrest of Dr. Luis Carvajal Freire for the quasi-delict of homicide.<sup>75</sup> On February 6, 2006, the First Civil Court ruled

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<sup>63</sup> Cf. Ruling of the First Civil Court of Puente Alto of December 11, 2001 (evidence file, annex 20 of the Merits Report, f. 132).

<sup>64</sup> Cf. Ruling of the First Civil Court of Puente Alto of December 11, 2001 (evidence file, annex 20 of the Merits Report, f. 132), and Ruling of the First Civil Court of Puente Alto of December 24, 2001 (evidence file, annex 21 of the Merits Report, f. 134).

<sup>65</sup> Cf. Ruling of the San Miguel Court of Appeal of February 6, 2002 (evidence file, annex 22 of the Merits Report, f. 136).

<sup>66</sup> Cf. Order of the First Civil Court of Puente Alto of February 13, 2002 (evidence file, annex 23 of the Merits Report, f. 138). Note: the order included the investigation order for the Homicide Brigade under Case No. 75821-M.

<sup>67</sup> Cf. Order of the First Civil Court of Puente Alto of February 13, 2002 (evidence file, annex 23 of the Merits Report, f. 138).

<sup>68</sup> Cf. Orders of the First Civil Court of Puente Alto of October 16, 2002, and November 14, 2002 (evidence file, annex 24 of the Merits Report, ff. 140 to 142).

<sup>69</sup> Cf. Report of April 5, 2003, of the criminal forensic physician, Dr. José Balletic Barrera, of the Metropolitan Homicide Brigade of the Chilean Investigation Police (evidence file, file of the procedure before the Commission, ff. 2405 to 2408).

<sup>70</sup> Cf. Statement of Ximena del Pilar Echeverría Pezoa before the First Civil Court of Puente Alto on May 13, 2003 (evidence file, annex 27 of the Merits Report, f. 157).

<sup>71</sup> Cf. Statement of Humberto Reinaldo Montecinos Salucci before the First Civil Court of Puente Alto on May 20, 2003 (evidence file, annex 28 of the Merits Report, f. 159).

<sup>72</sup> Cf. Statement of Sandra Zoraida Castillo Montufar before the First Civil Court of Puente Alto on December 3, 2003 (evidence file, annex 10 of the Merits Report, f. 104).

<sup>73</sup> Cf. Order of the First Civil Court of Puente Alto of February 28, 2004 (evidence file, annex 30 of the Merits Report, f. 163); Order No. 261 of the First Civil Court of Puente Alto of February 28, 2004 (evidence file, annex 31 of the Merits Report, f. 165), Order of the First Civil Court of Puente Alto of December 20, 2004 (evidence file, annex 32 of the Merits Report, f. 167), and Arrest warrant issued by the First Civil Court of Puente Alto of October 31, 2005 (evidence file, annex 34 of the Merits Report, f. 169).

<sup>74</sup> Cf. Arrest Warrant issued by the Nineteenth Criminal Court on April 6, 2004 (evidence file, annex 35 of the Merits Report, f. 171).

<sup>75</sup> Cf. Arrest Warrant issued by the Nineteenth Criminal Court on January 8, 2005 (evidence file, annex 36 of the Merits Report, f. 173).

that Luis Carvajal Freire was a fugitive from justice.<sup>76</sup> On May 23, 2007, the First Civil Court verified that Dr. Luis Carvajal Freire continued to work at the Sótero del Río Hospital.<sup>77</sup>

65. On July 19, 2005, the First Civil Court forwarded the proceedings to the Forensic Medicine Service asking it to obtain information “on the medical liability incurred by the medical staff involved.”<sup>78</sup> On September 15, 2005, the First Civil Court again forwarded the proceedings to the San Miguel Court of Appeal,<sup>79</sup> but that court returned the proceedings to the First Civil Court on November 21, 2005, and indicated that “the judge of the First Civil Court [...] should give preference to the processing of the said case and, twice a month, report on the progress made to the Court [of Appeal].”<sup>80</sup>

66. On October 7, 2005, Vinicio Poblete Tapia filed another complaint with the First Civil Court, and this was processed as Case No. 94,393-M, against those who might be found responsible for the offense of culpable homicide committed to the detriment of Mr. Poblete Vilches and requested the following, among other, procedures: (i) that Drs. Garrido [*sic*], Ximena Echeverría Pezoa, María Chacón Fernández, Anuch [*sic*], Lorna Luco, Gonzálo Menchaca, and Luis Carvajal Freire be summoned to testify; (ii) that the Sótero del Río Hospital be ordered to forward the complete medical record of Vinicio Antonio Poblete Vilches; (iii) that the “exhumation” of Mr. Poblete Vilches be ordered, “to perform an autopsy that determines the real cause of his death,” and (iv) that this second complaint be joindered to the previous complaint; that is, the one processed as Case No. 75,821-M, and the joinder requested by the complainant was granted by an order of the same date, “as soon as Case No. 75,821 is received from the San Miguel Court of Appeal,” which occurred on December 7, 2005.<sup>81</sup>

67. Between March 3, 2006, and June 15, 2007, during the processing of the joindered complaint before the First Civil Court of Puente Alto, the following individual gave their statements before the First Civil Court of Puente Alto: Marcelo Adán Garrido; María Carolina Chacón Fernández; Vinicio Poblete Tapia; Cesia Leila Poblete Tapia; Lili Marlene Rojas Hernández; Jorge Alejandro Fuentes Poblete, and Alejandra Marcela Fuentes Poblete.<sup>82</sup>

68. On March 21, 2006, the representative of Vinicio Poblete Tapia requested the following procedures: (i) the statement of the complainant; (ii) the statement of Cesia Leila Poblete Tapia,

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<sup>76</sup> Cf. Order of the First Civil Court of Puente Alto of February 6, 2006 (evidence file, annex 37 of the Merits Report, f. 176).

<sup>77</sup> Cf. Order of the First Civil Court of Puente Alto of May 23, 2007 (evidence file, annex 61 of the Merits Report, f. 239).

<sup>78</sup> Cf. Order No. 1363 of the First Civil Court of Puente Alto of July 19, 2005 (evidence file, annex 38 of the Merits Report, f. 178).

<sup>79</sup> Cf. Order of the First Civil Court of Puente Alto of September 15, 2005 (evidence file, annex 40 of the Merits Report, f. 182).

<sup>80</sup> Cf. Order No. 2809-05 of the First Civil Court of Puente Alto of December 7, 2005 (evidence file, annex 41 of the Merits Report, f. 184).

<sup>81</sup> Cf. Complaint filed by Vinicio Marco Antonio Poblete Tapia with the First Civil Court of Puente Alto on October 7, 2005 (evidence file, annex 7 of the Merits Report, ff. 42 and 43); Order of the First Civil Court of Puente Alto of October 7, 2005 (evidence file, annex 7 of the Merits Report, f. 44), and Order No. 2809-05 of the First Civil Court of Puente Alto of December 7, 2005 (evidence file, annex 41 of the Merits Report, f. 184).

<sup>82</sup> Cf. Statement before the First Civil Court of Puente Alto by Marcelo Adán Garrido Salvo on March 3, 2006 (evidence file, annex 2 of the Merits Report, f. 9); Statement before the First Civil Court of Puente Alto by María Carolina Chacón Fernández on March 7, 2006 (evidence file, annex 42 of the Merits Report, f. 186); Statement made before the First Criminal Court by Vinicio Marco Antonio Poblete on April 6, 2006 (evidence file, annex 4 of the Merits Report, ff. 17 to 22); Statement made before the First Civil Court of Puente Alto by Cesia Leila Siria Poblete Tapia on September 14, 2006 (evidence file, annex 3 of the Merits Report, f. 11); Statement made before the First Civil Court of Puente Alto by Lili Marlene Rojas Hernández on October 18, 2006 (evidence file, annex 53 of the Merits Report, f. 220); Statement made before the First Civil Court of Puente Alto by Jorge Alejandro Fuentes Poblete on June 12, 2007 (evidence file, annex 5 of the Merits Report, ff. 24 and 25), and Statement made before the First Civil Court of Puente Alto by Alejandra Marcela Fuentes Poblete on June 15, 2007 (evidence file, annex 12 of the Merits Report, ff. 110 and 111).

(iii) confrontation between those two and Dr. María Carolina Chacón Fernández. He also requested that, owing to the deteriorating health of Mr. Poblete Tapia, these procedures be "ordered as promptly as possible and on an urgent basis."<sup>83</sup> On April 18, 2006, Mr. Poblete Tapia's representative requested various statements.<sup>84</sup>

69. On June 8, 2006, the Forensic Medicine Service of the Government of Chile forwarded Forensic Report No. 140-2005, prepared based on the medical record, which concluded that Mr. Poblete Vilches, who suffered from type 2 diabetes, "was hospitalized on two occasions in the space of three weeks for an acute pulmonary edema and high-frequency atrial fibrillation caused by ischemic heart disease and, in addition, an extensive cutaneous infection." It also indicated that "all these medical conditions were duly diagnosed and, on account of their seriousness, were fully treated, first in the [Surgical] ICU and then in the medical service." The Forensic Report also noted that the second admission was due to "septic shock and multiorgan failure owing to a hospital-acquired pneumonia, a common situation following a previous hospital stay" and that, "given his advanced age, pre-existing medical conditions and multiple risk factors resulted in his death despite the numerous and appropriate therapeutic measures he was given." Accordingly, the experts found "that there was no violation of the rules of medical practice."<sup>85</sup>

70. On April 5, June 27 and September 5, 2006, Dr. María Carolina Chacón Fernández's representative filed motions for dismissal of the case against her before the First Civil Court owing to the death of Vinicio Poblete Vilches,<sup>86</sup> which were denied.<sup>87</sup> On November 21, 2006, Dr. María Carolina Chacón Fernández's representative again filed a motion for the dismissal of this case. On November 22, 2006, the First Civil Court of Puente Alto finally declared the said preliminary proceedings closed.<sup>88</sup>

71. On December 7, 2006, Dr. Chacón Fernández's representative asked the First Civil Court of Puente Alto to bring formal charges or to order the temporary or permanent dismissal of the case against her for the quasi-delict of homicide.<sup>89</sup> In response, on December 11, 2006, the First Civil

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<sup>83</sup> Cf. Power of attorney of Vinicio Poblete Tapia submitted to the First Civil Court of Puente Alto on March 21, 2006 (evidence file, annex 43 of the Merits Report, ff. 188 and 189).

<sup>84</sup> Namely: those corresponding to Alejandra and Jorge Fuentes Poblete, Rosa Gazmuri M., Cecilia Caniqueo Ralil, Lily Rojas and Cecilia Yañez, nurses of the Sótero del Río Hospital, and Elizabeth Aviles, the surgeon who operated on Mr. Poblete Vilches. Cf. Brief of the representative of Vinicio Poblete Tapia filed with the First Civil Court of Puente Alto on April 18, 2006 (evidence file, annex 46 of the Merits Report, f. 197).

<sup>85</sup> Cf. Forensic Report No. 140-2005 issued by the Forensic Medicine Service of the Government of Chile on June 8, 2006 (evidence file, annex 48 of the Merits Report, f. 203), signed by: Drs. Katherine Corcoran Ivelic, Forensic Physician and Technical Coordinator of the Medical Liability Unit of the Clinical Forensic Medicine Department of the Forensic Medicine Service, and Rebeca Barahona Bustamante, Forensic Physician of the Clinical Forensic Department of the Forensic Medicine Service of the Government of Chile.

<sup>86</sup> Corresponding to the proceedings held under Case No. 75,821-M based on the complaint filed by Blanca Margarita Tapia Encina and Cesia Leila Siria Poblete Tapia with the First Civil Court of Puente Alto on November 12, 2001 (evidence file, annex 6 of the Merits Report, f. 27), to which was joindered Case No. 94,393-M, processed in relation to the complaint filed by Vinicio Marco Antonio Poblete Tapia with the First Civil Court of Puente Alto on October 7, 2005 (evidence file, annex 7 of the Merits Report, ff. 36 to 43).

<sup>87</sup> Cf. Brief of the representative of María Carolina Chacón Fernández before the First Civil Court of Puente Alto, received on April 5, 2006, and Ruling of the First Civil Court of Puente Alto of April 6, 2006 (evidence file, annex 45 of the Merits Report, ff. 194 and 195); Brief of the representative of María Carolina Chacón Fernández before the First Civil Court of Puente Alto received on June 27, 2006 (evidence file, annex 49 of the Merits Report, ff. 209 and 210); Decision of the First Civil Court of Puente Alto of July 26, 2006 (evidence file, annex 50 of the Merits Report, f. 212); Brief of the representative of María Carolina Chacón Fernández before the First Civil Court of Puente Alto, received on September 5, 2006 (evidence file, annex 51 of the Merits Report, ff. 214 and 215), and Ruling of the First Civil Court of Puente Alto of September 14, 2006 (evidence file, annex 52 of the Merits Report, f. 218).

<sup>88</sup> Cf. Brief of the representative of María Carolina Chacón Fernández before the First Civil Court of Puente Alto, received on November 21, 2006 (evidence file, annex 54 of the Merits Report, f. 222 and 223), and Ruling of the First Civil Court of Puente Alto of November 22, 2006 (evidence file, annex 55 of the Merits Report, f. 225).

<sup>89</sup> Cf. Brief of the representative of María Carolina Chacón Fernández before the First Civil Court of Puente Alto, received on December 7, 2006 (evidence file, annex 56 of the Merits Report, f. 227).

Court decided that “the existence of the alleged offense had not been sufficiently proved in the proceedings” and declared that “this case is provisionally dismissed until new and better evidence is collected by the investigation.”<sup>90</sup>

72. On January 29, 2007, Mr. Poblete Tapia’s representative requested the reopening of the preliminary investigation arguing that “the investigation undertaken previously [...] lacked important background details directly related to the case, which had not been taken into consideration because the court had not obtained them, despite having been requested to do so opportunely during the proceedings” and again requested additional procedures, including the exhumation of Mr. Poblete Vilches, in order to clarify the definitive cause of his death.<sup>91</sup>

73. On February 27, 2007, the First Civil Court reopened the case and on April 17, 2007, it was again at the stage of the preliminary investigation.<sup>92</sup>

74. On January 21, 2008, the First Civil Court ordered a “report on the mental faculties” of Cesia Poblete Tapia and Vinicio Poblete Tapia.<sup>93</sup> However, in a communication of May 30, 2008, the Forensic Medicine Service reported that it had not received this request.<sup>94</sup>

75. On May 3, 2008, the file of the case before the First Civil Court was admitted to the docket of the San Miguel Court of Appeal in Santiago, and returned to the first instance court on May 14, 2008.<sup>95</sup>

76. On June 11, 2008, the First Civil Court again declared the preliminary investigation closed<sup>96</sup> and on June 30, 2008, once again ordered a temporary dismissal of the case “until new and better evidence is collected by the investigation.”<sup>97</sup>

77. On August 4, 2008, the representative of Mr. Poblete Vilches requested the reopening of the case<sup>98</sup> and, on August 5, 2008, the First Civil Court ordered the case to be reopened.<sup>99</sup>

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<sup>90</sup> Cf. Order of the First Civil Court of Puente Alto of December 11, 2006 (evidence file, annex 57 of the Merits Report, f. 230).

<sup>91</sup> Cf. Brief of the representative of Vinicio Poblete Tapia filed before the First Civil Court of Puente Alto, received on January 29, 2007 (evidence file, annex 58 of the Merits Report, ff. 232 and 233).

<sup>92</sup> Cf. Order of the First Civil Court of Puente Alto of February 27, 2007 (evidence file, annex 59 of the Merits Report, f. 235), and Order of the First Civil Court of Puente Alto of April 17, 2007 (evidence file, annex 60 of the Merits Report, f. 237).

<sup>93</sup> Cf. Order of the First Civil Court of Puente Alto of January 21, 2008 (evidence file, annex 62 of the Merits Report, f. 241).

<sup>94</sup> Cf. Order No. 10187 issued by the Forensic Medicine Service of the Government of Chile, addressed to the First Civil Court of Puente Alto on June 11, 2008 (evidence file, annex 63 of the Merits Report, f. 243).

<sup>95</sup> Cf. Order of the San Miguel Court of Appeal of May 3, 2008 (evidence file, annexes 65 and 66 of the Merits Report, ff. 247 and 249).

<sup>96</sup> Cf. Order of June 11, 2008, of the First Civil Court of Puente Alto (evidence file, annex 67 of the Merits Report, f. 251).

<sup>97</sup> Cf. Order of June 30, 2008, of the First Civil Court of Puente Alto (evidence file, annex 69 of the Merits Report, f. 253).

<sup>98</sup> Cf. Brief of the representative of Vinicio Poblete Tapia before the First Civil Court of Puente Alto, received on August 4, 2008 (evidence file, annex 70 of the Merits Report, f. 255).

<sup>99</sup> Cf. Order of August 5, 2008, of the First Civil Court of Puente Alto (evidence file, annex 71 of the Merits Report, f. 257).

78. On August 28, 2008, the Supreme Court of Justice asked the First Civil Court to forward a copy of case No. 75,821 against María Chacón Fernández and others for the offense of homicide;<sup>100</sup> this was sent to the Supreme Court of Justice on September 9, 2008.<sup>101</sup>

79. Vinicio Poblete Tapia filed several requests before the President of the Supreme Court of Justice between 2008 and 2015, asking him to intervene in the investigation before the First Civil Court. The President of the Supreme Court of Justice rejected all these requests,<sup>102</sup> repeatedly stating that “the President [...] d[id] not have the authority to intervene in proceedings underway before the other courts of the Republic, indicating [...] that the filing of procedural remedies [...] constituted the appropriate way to file a complaint against judicial decisions whose content the parties considered unfavorable to their interests” and that “the President [...] lack[ed] legal authority to hear the matter [...] because he is unable to intervene in judicial proceedings that have been concluded.” On January 8, 2015, the President of the Supreme Court of Justice stated that he “lack[ed] the legal authority to hear the matter in question because the claims made ha[d] been heard and decided by a competent court, specifically the [Supreme Court of Justice] on August 14, 2014, and the decisions taken therein cannot be modified.”<sup>103</sup>

## **2. Other proceedings**

### *2.1 Mediation*

80. On January 13, 2006, Vinicio Marco Antonio Poblete Tapia filed a complaint against the Sótero del Río Hospital and its officials with the Mediation Unit of the State Defense Council.<sup>104</sup> The first mediation hearing was held on April 4, 2006, in the presence of Vinicio Poblete Tapia, Cesia Leila Poblete Tapia and Jorge Fuentes Poblete. The hospital was represented by the lawyer, Hernán Pardo Roche. Mr. Poblete Tapia stated that “[t]he lack of information was revealed by three facts that he categorized as serious: the incision was not performed as indicated; discharge in a serious condition, and refusal to perform an autopsy.” He added that “Dr. Chacón, [...] treated the family inappropriately, in a manner [he described as] humiliating.” However, since the doctors concerned were not present it was agreed to hold a second mediation hearing.<sup>105</sup>

81. On April 27, 2006, a second mediation hearing was held before the Mediation Unit of the State Defense Council. This was attended by, on the one hand, Vinicio Marco Antonio Poblete Tapia, Cesia Leila Poblete Tapia and Jorge Fuentes Poblete, assisted by the lawyer, María Francisca Jiménez, and, on the other, the lawyer, Hernán Pardo Roche, and Dr. Luis Carvajal Freire. On that occasion, the representative of the Sótero del Río Hospital handed over a copy of a medical audit<sup>106</sup> carried out by Sergio Valenzuela Estévez, Head of the Audit Department of the E.S.M.S.O., dated May 29, 2001, which, based on the medical record, reached the following conclusion:

<sup>100</sup> Cf. Ruling of the Supreme Court of Justice of Chile, communication 4824 of August 28, 2008, addressed to the First Civil Court of Puente Alto (evidence file, annex 72 of the Merits Report, f. 259).

<sup>101</sup> Cf. Order of September 9, 2008, of the First Civil Court of Puente Alto (evidence file, annex 73 of the Merits Report, f. 261).

<sup>102</sup> Cf. Rulings of the Supreme Court of Justice of March 6, 2008, July 8, 2011, August 20, 2012, March 14, 2013, and January 8, 2015 (evidence file, annex 64, f. 245; annex 74, ff. 263 and 264; annex 75, ff. 266 and 267; annex 76, ff. 269 and 270, and annex 77, f. 272, all of the Merits Report).

<sup>103</sup> Cf. Ruling of the Supreme Court of Justice of January 8, 2015 (evidence file, annex 77 of the Merits Report, f. 272), and Ruling of the Supreme Court of Justice of August 25, 2014 (merits file, helpful evidence submitted by the State, ff. 1399 to 1401).

<sup>104</sup> Cf. Minutes of the first mediation hearing at the Mediation Unit of the State Defense Council on April 4, 2006 (evidence file, annex 78 of the Merits Report, f. 274).

<sup>105</sup> Cf. Minutes of the first mediation hearing at the Mediation Unit of the State Defense Council (evidence file, annex 78 of the Merits Report, ff. 274 to 276).

<sup>106</sup> Cf. Minutes of the second mediation hearing by the Mediation Unit of the State Defense Council on April 27, 2006 (evidence file, annex 79 of the Merits Report, f. 278).

"[...] In the opinion of this auditor, the patient, who was in a serious condition, was treated adequately owing to multiorgan failure. The doctor in charge discussed the seriousness of the patient's condition with his family and the impossibility of moving him to the Medical ICU owing to the patient's condition and prognosis, and the lack of beds. 'The family indicates their agreement but I doubt they fully understand the prognosis and the patient's current condition.' He died on 07-02-2001 at 5.45 a.m. [...]"<sup>107</sup>

## 2.2 Administrative and other procedures

82. According to information provided by the parties, a request made to the Department of Health Service Networks by the Human Rights, Nationality and Citizenship Committee of the Chamber of Deputies for information on the administrative proceedings and their results, based on presumed medical negligence in the death of Mr. Poblete Vilches, revealed that no administrative procedure of any kind existed in relation to Vinicio Poblete Vilches.<sup>108</sup>

83. The case file before the Court contains newspaper articles dated 2010 and 2012, showing that situations of medical negligence in the Sótero del Río Hospital had been reported.<sup>109</sup> In addition, on the webpage [www.reclamos.cl](http://www.reclamos.cl) there is a list of complaints against this hospital relating to both presumed medical negligence and also deficient service and poor conditions from 2011 to date.<sup>110</sup>

## VII MERITS

84. This case relates to the State's alleged international responsibility for the treatment provided to Mr. Poblete Vilches, who was an older person, in the Sótero del Río hospital, a public institution.<sup>111</sup> During his first admission, a procedure was performed on him, presumably when the patient was unconscious, without the consent of the family. It is also alleged that he was discharged too soon and, during his second admission, he was refused the treatment he required, which resulted in his subsequent death in the same hospital. The case also relates to the judicial investigations and actions conducted to clarify his death and, if appropriate, identify the corresponding responsibilities, as well as any possible adverse effects suffered by the members of his family. Consequently, and taking into account the State's partial acknowledgement of responsibility, the Court must determine the scope of the violations that have been proved. To this end, the Court will analyze the arguments presented by the parties and the Commission, and will

<sup>107</sup> Cf. Minutes of the second mediation hearing by the Mediation Unit of the State Defense Council on April 27, 2006 (evidence file, annex 79 of the Merits Report, f. 278).

<sup>108</sup> Cf. Communication No. 005-10 of the Human Rights, Nationality and Citizenship Committee (evidence file, annex 80 of the Merits Report, f. 280); Communication of the Ministry of Health of the Government of Chile of October 30, 2009 (evidence file, annex 82 of the Merits Report, ff. 284 and 285), and Communication No. 4181 of the Minister of Health of December 15, 2009 (evidence file, annex 81 of the Merits Report, f. 282).

<sup>109</sup> Cf. News article on Facebook of the *Cambio 21* newspaper entitled "*Presentan denuncia por negligencia médica contra hospital Sótero del Río [...]*" [Complaint of medical negligence filed against Sótero del Río Hospital] (evidence file, annex 13 of the Merits Report, f. 113); Newspaper article in *MEGA* of May 14, 2012, entitled "*Familia denuncia negligencia médica Hospital Sótero del Río*" [Family denounces medical negligence in Sótero del Río Hospital] (evidence file, annex 14 of the Merits Report, f. 115), and News article on Facebook of Radio Bio on October 27, 2010, entitled "*Hospital Sótero del Río realizará sumario interno por muerte de bebé en vientre materno*" [Sótero del Río Hospital will conduct internal investigation for death of unborn baby] (evidence file, annex 15 of the Merits Report, ff. 117 and 118).

<sup>110</sup> Cf. Complete list of complaints associated with the Sótero del Río Hospital (evidence file, annex 16 of the Merits Report, ff. 120 to 124). The constant complaints about irregularities and deficiencies in the said hospital continue up until the present and are added to this list; the most frequent are those related to poor medical care, lack of opportune treatment, lack of hospitalization beds and equipment, as well as erroneous diagnoses; the most recent occurred on January 28, 2018. Cf. [https://www.reclamos.cl/empresa/hospital\\_s\\_tero\\_del\\_r\\_o](https://www.reclamos.cl/empresa/hospital_s_tero_del_r_o).

<sup>111</sup> The Court will use the expression "older person" in this judgment, since this was the terminology adopted in Article 2 of the Inter-American Convention on Protecting the Human Rights of Older Persons, adopted on June 15, 2015, by the OAS General Assembly. Entry into force on January 11, 2017. Nevertheless, owing to date of the violations, this instrument is not applicable to the facts of the instant case.



develop the relevant considerations of law related to the right to health (Article 26<sup>112</sup>); the rights to life and to personal integrity (Articles 4<sup>113</sup> and 5<sup>114</sup>), and the right to informed consent in health matters (Articles 26, 13,<sup>115</sup> 11<sup>116</sup> and 7<sup>117</sup>). It will also analyze the right to judicial guarantees and judicial protection (Articles 8<sup>118</sup> and 25<sup>119</sup>), and the right to personal integrity of the family members (Article 5), all in relation to Article 1(1)<sup>120</sup> of the American Convention on Human Rights.

**VII-1**  
**RIGHTS TO HEALTH, LIFE, INTEGRITY AND ACCESS TO INFORMATION**  
**(ARTICLES 26, 1(1), 4, 5, 13, 7 AND 11 OF THE AMERICAN CONVENTION)**

**A. Arguments of the parties and of the Commission**

**1. On the right to health**

85. The **Commission** did not argue an autonomous violation of the right to health or rule in this regard in its Merits Report. However, in its final written observations, it indicated that it “considers it important that, notwithstanding the information provided by the State regarding the most recent advances concerning the protection of economic, social and cultural rights in Chile, the Court make the appropriate determinations in relation to the moment at which the facts and the specific violations identified in this case took place.” It argued that this was an opportunity to examine presumptions of State responsibility derived from structural deficiencies in public hospitals. The Commission also indicated that the case provided the possibility of analyzing specific situations of vulnerability in access to the right to health and to the public health system, specifically in relation to older persons and also adequate protection of the rights of impoverished individuals, and application of the principle of equality and non-discrimination.

86. The **representatives** argued that the State had violated the right to health and the right to social security established in Article 26 of the Convention autonomously. Regarding the direct justiciability of the ESCER, they referred to the precedent in the case of *Lagos del Campo v. Peru*, in which, for the first time, the Court declared the autonomous violation of Article 26 of the American Convention; therefore, they understood that it should also do so in this case. Regarding the State’s obligations, the representatives argued that “some aspects should be complied with

<sup>112</sup> Article 26. Progressive Development. The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, subject to available resources, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

<sup>113</sup> Article 4. Right to Life. 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. [...].

<sup>114</sup> Article 5. Right to Humane Treatment. 1. Every person has the right to have his physical, mental, and moral integrity respected. [...].

<sup>115</sup> Article 13. Freedom of Thought and Expression. 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. [...].

<sup>116</sup> Article 11. Right to Privacy. 1. Everyone has the right to have his honor respected and his dignity recognized [...].

<sup>117</sup> Article 7. Right to Personal Liberty. 1. Every person has the right to personal liberty and security. [...].

<sup>118</sup> Article 8. Right to a Fair Trial. 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. [...].

<sup>119</sup> Article 25. Judicial Protection. 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. [...].

<sup>120</sup> Article 1(1) of the Convention establishes that the States “undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms [...].”

immediately because they are simple actions that the State can take that do not require important resources." They also argued that the progressive nature of the ESCER did not mean that they were "not enforceable or that compliance with them can perpetually be postponed."

87. The representatives stressed that Mr. Poblete Vilches was an older person "with several medical conditions and this meant that his condition required prompt and opportune treatment." By failing to provide adequate treatment, "the State of Chile failed to provide the minimum health care assistance required which was enforceable immediately." They added that, "in this case, it was not possible to discuss the progressive nature of the right to health." They also underlined that the State had "provided abundant details of the different policies implemented and measures adopted in order to improve its public health system"; however, it had "merely offered a list of political decisions implemented in recent years without proving the real and effective impact that they may have had on the most vulnerable sectors of the population."

88. Meanwhile, although the **State** mentioned the right to health in its acknowledgement, it considered that Article 26 of the Convention had not been violated, because it was not possible to prove non-compliance with the obligation to adopt measures for the progressive development of the right to health and the right to social security. In order to prove compliance with its obligations, the State listed different programs, laws and administrative and financial measures that it had implemented over the years. Also, in its final arguments, the State indicated that it supported the justiciability of the ESCR by connectivity with the civil and political rights, but did not recognize the Court's competence to declare the violation of Article 26 of the Convention directly. The State added that, although the Court may incorporate diverse interpretive criteria in the development of its case law, an international court must respect the jurisdictional limits to its contentious jurisdiction and take into consideration the obligations that the States assumed when ratifying the Convention.

## ***2. On the right to life and to personal integrity***

89. The **Commission** determined that the State was responsible for the violation of the rights to life, to personal integrity and to health established in Articles 4 and 5, in relation to Article 1(1) of the Convention, to the detriment of Mr. Poblete Vilches, based on both the decision to discharge him from hospital, and the failure to provide adequate treatment during his second admission. Consequently, it considered that the State had failed to take the available and reasonable measures that it could realistically have adopted to provide adequate treatment to Mr. Poblete Vilches. In its Merits Report it analyzed Articles 4 and 5 of the Convention together, and reiterated the possible inconsistency that arose from the scope that the State had given to its partial acknowledgement of responsibility, in the sense that, for example, it only covered the violation of the right to personal integrity of Vinicio Poblete in relation to facts that the Commission also determined had violated his right to life.

90. The **representatives** argued, regarding the connection of the right to life and to personal integrity with the right to health, that "the right to life requires States to adopt measures of prevention related to supporting an individual's life by providing economic and social conditions that prevent his death due to lack of medical care." They argued that there was a strong inconsistency between the State's assertions concerning its responsibility for the violation of the right to life and its assertions in relation to the violation of the right to personal integrity. They argued that the facts relating to Articles 4 and 5 are the same and that, therefore, the acknowledgement of responsibility should apply to both rights. They also indicated that "the absence of the programs, infrastructure and activities necessary for personal well-being" or "the deficient quality of these" may result in a violation of the right to health by the State.

91. Regarding the violation of the right to life, the representatives argued that the State had failed to adopt all the measures available to it to provide Vinicio Poblete Vilches with adequate health care. In relation to the requirement to demonstrate a causal relationship between the

omissions that had been proved and the resulting death, they understood that the State's responsibility arose when it was proved that its acts or omissions increased the risk to a person's life. They added that the State knew of the existence of a situation that placed the life of Mr. Poblete at risk and failed to take the necessary measures to prevent or avoid that risk. They recalled that the expert witness had indicated that, if Vinicio Poblete had had any possibility of surviving, it was by the adoption of measures as basic as admitting him to a closed intensive care unit, and providing him with mechanical ventilation and appropriate antibiotic treatment. The representatives indicated that it was not possible to speak about a relationship or causal nexus in these cases and that, it could never be asserted, either in this case or another, that providing treatment to a patient, whatsoever the treatment, would have avoided his death with absolute certainty. They concluded that the State failed to comply with the special obligations of protection to which vulnerable individuals have a right. Thus, the State was responsible for the violation of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the Convention.

92. The **State** argued that it was not internationally responsible for the violation of Article 4 of the American Convention. It argued that "death in itself is not sufficient to determine a violation of the right to life; it must also be proved that the State, within its powers, did not adopt the necessary measures that could reasonably have been expected to ensure the right, and that the failure to adopt the said measures was the direct cause of death." The State asserted that it had taken the measures it had available to safeguard the life of Vinicio Poblete Vilches, taking into consideration his delicate state of health and the clinical devices available. It also argued that there was no way of proving whether, with a different treatment to the one provided, Mr. Poblete Vilches would have survived.

93. The State compared its position with that of the opinion of expert witness Santos, who had referred to his discrepancy concerning matters that were supposedly basic, such as mechanical ventilation or the antibiotic that he considered was appropriate following Mr. Poblete Vilches's readmission to the hospital; however, this discrepancy was not sufficient to indicate that there had been medical negligence in the case. Thus, "the mere disagreement with the treatment provided during his second admission cannot be transformed into a standard to be established by the Court in its case law." The State argued that mechanical ventilation was not a basic service. It also pointed out that, in the course of the medical procedure, the Sótero del Río Hospital acted in keeping with the standard of reasonableness and this was not the reason for the regrettable death of Mr. Poblete Vilches who, added to his age, at the time of his first admission was suffering from a chronic medical condition, which expert witness Santos himself had recognized. The State concluded that the facts described constituted a violation of Article 5 of the Convention, but not of the right to life, which was governed by different standards; thus, it acknowledged responsibility with regard to one and not the other. Consequently, it expressly acknowledged that the decision to discharge the victim was not appropriate or pertinent and that it "constituted an obstacle to access to conditions that would ensure his right to physical integrity and also his health."

### **3. On informed consent**

94. The **Commission** argued that the medical record does not contain any indication that would allow it to be understood whether Mr. Poblete Vilches and the members of his family received specific information in order to give informed consent, or that the three components of informed consent had been complied with. The Commission indicated that, neither in the context of the procedure performed during the first admission of Mr. Poblete Vilches, nor in the context of the treatment following his second admission, had the medical staff fulfilled their obligations in relation to informed consent. It also indicated that, since the Sótero del Río Hospital was a public hospital, non-compliance could be directed attributed to the Chilean State. In this regard, the Commission considered that Chile had violated the right of access to information to choose health care services, protected by Article 13, in relation to the obligations of Article 1(1), and the rights to life, integrity and health established in Articles 4 and 5 of the Convention, to the detriment of Mr. Poblete Vilches and of his family members.

95. The **representatives** argued that Mr. Poblete Vilches was unconscious when the decision was taken to perform a surgical procedure and, therefore, he was not in a condition to consent to any type of procedure. In addition, his family, who knew his history of diabetes, had indicated that they did not authorize any intervention. Thus, the representatives indicated that the record in the medical file authorizing the procedure was falsified. They also indicated that there was no record whatsoever indicating that the presumed victim or his family received complete information on the health status of Mr. Poblete Vilches, the nature of the diagnosis, or a detailed description of the nature, risks and consequences of the procedure and alternative treatments. They added that, at the time of the facts, the State had relevant domestic norms on informed consent.<sup>121</sup> Therefore, the representatives concluded that the State had violated the right to information on health matters established in Article 13(1) in connection with Articles 4(1), 5(1) and 26 and with the obligations that arise from Article 1(1) of the American Convention, by failing to guarantee to Vinicio Poblete and his direct family the right to give their informed consent prior to the execution of a medical intervention. Lastly, the representatives concluded that the absence of consent before submitting the presumed victim to a surgical procedure also violated the right to personal autonomy and to decide freely, established in Articles 11 and 7 of the Convention, to the detriment of Mr. Poblete Vilches and of his family members.

96. Regarding the partial acknowledgement of responsibility, the representatives indicated in their final written arguments that the State had only acknowledged the violation of Articles 7 and 11 with regard to Vinicio Poblete, but not of his family members. In this regard, the representatives argued that: (i) the entitlement to both the right to autonomy and privacy recognized in Article 11, and the right to take free decisions that arises from Article 7 of the Convention, cannot be subject to whether or not a formal act expressing the patient's wish exists; (ii) when a patient is not able to provide informed consent, the family members have the right to do this because the right to take free decisions comes into effect for the family when the patient is unable to exercise this right himself; (iii) the right of the family to take free decisions is a logical derivation of the right to obtain health-related information; (iv) Article 11 contains a general clause of protection of the dignity that the patient's family also possesses and this was affected because they were denied the right to obtain health-related information and, thereby, the possibility of exercising their right to take free decisions with regard to the health of Mr. Poblete Vilches, and (v) Article 11 recognizes the right to privacy, establishing the inviolability of private and family life, which is irremediably harmed by the State's refusal to provide health-related information that would allow the best decision to be taken freely for the protection of the life of a family member. The representatives also asked the Court to take into consideration a second time when the family's consent should have been requested and was not; this related to the fact that Mr. Poblete Vilches was given intermediate care owing to the lack of beds, instead of the care he required, which was treatment in the Medical ICU with a mechanical ventilator.

97. The State acknowledged the violation of Article 13 of the Convention, right of access to health-related information, in connection with Articles 4 and 5, and in relation to the obligations under Articles 1(1) and 2 of the American Convention, to the detriment of Mr. Poblete Vilches and the members of his family. The State also acknowledged its responsibility for the violation of Articles 11 and 7 to the detriment of Mr. Poblete Vilches, but not to the supposed detriment of his family. In addition, the State stressed the legal precedents on informed consent, including Supreme Decree No. 42; the document entitled "Medical Ethics Norms and Documents," prepared by the Physician's Association; the "Charter of Patients' Rights" of the National Health Foundation and the Ministry of Health, and recent legal advances such as Law No. 20,584 which regulates the rights and obligations of the individual with regard to actions relating to health care, and Decree No. 31,

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<sup>121</sup> Such as: the Ethics Code of the Chilean Physicians' Association; Supreme Decree No. 42, rescinded in 2005, and the "Charter of Patients' Rights," prepared by the National Health Foundation together with the Ministry of Health. These instruments include the obligation of doctors to obtain the express consent of patients or their families, which makes the omission of the doctors in this case inexcusable.

adopting the Regulations on the delivery of information and the expression of informed consent in health care facilities. In its final arguments, the State mentioned the implementation of Law 19,966 of 2004, which included the rule of informed consent, and also Law 20,584 of 2012, which regulated the rights and obligations of the individual with regard to actions relating to health care, including the right to informed consent and health-related information.

98. In addition, it considered that the violation of the rights established in Articles 11 and 7 were not applicable to the family members “because these [...] rights are part of the individual sphere of each person and cannot be passed on to others, even if the desire of the patient exists in a convincing and credible manner in order to adequately protect his rights because he is unable to exercise them for himself, especially in decisions that are so personal as those that may affect his life.” It added that “transferring this personal autonomy to the family members is unacceptable, because there is no record of the existence of a substitute or surrogate decision, or the signature of prior instructions, or the existence of a document in which the patient expresses his wish to submit to the decisions of his family members.” The State also indicated that with regard to considering this violation to the detriment of the family members in this case, the situation was different from the case of *I.V. v. Bolivia* because, in that case, a mechanism had intervened that in some legislations is known as informed consent by representation or substitution. Thus, the State argued that their participation in the communications process was limited to merely providing an opinion on what the wishes of the patient might have been before he became unconscious.

## **B. Considerations of the Court**

99. Owing to the discrepancies regarding the treatment provided by public institutions that allegedly resulted in the death of Mr. Poblete Vilches, the Court must now rule, in particular, on the scope and components of the right to health in the following general sections: (1) the right to health protected by the Convention; (2) the rights to life and to integrity, and (3) informed consent and access to health-related information. For the purposes of this case, the Court finds it unnecessary to refer also to the right to social security mentioned by the representatives (*supra* para. 86).

### **1. THE RIGHT TO HEALTH**

#### **1.1 The right to health protected by Article 26 of the Convention**

100. In the judgment in the case of *Lagos del Campo v. Peru*, the Court developed and, for the first time, established a specific and autonomous violation of Article 26 of the American Convention,<sup>122</sup> included in Chapter III of this treaty entitled Economic, Social and Cultural Rights. In that judgment, the Court reiterated<sup>123</sup> its competence to hear and decide disputes relating to Article 26 of the American Convention as an integral part of the rights named therein, and regarding which Article 1(1) establishes general obligations of respect and guarantee for the States.<sup>124</sup> The

<sup>122</sup> *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340, paras. 142 and 145.

<sup>123</sup> *Cf. Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller’s Office”) v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009 Series C No 198, para. 16, 17 and 100, and *Case of Lagos del Campo v. Peru, supra*, para. 154.

<sup>124</sup> *Cf. Case of Lagos del Campo v. Peru, supra*, paras. 142 and 154. Para. 142. “Thus, the Court has previously asserted that the broad terms in which the Convention was drafted signify that the Court exercises full jurisdiction over all its articles and provisions. It should also be noted that although Article 26 appears in Chapter III of the Convention, entitled ‘Economic, Social and Cultural Rights,’ it is also located in Part I of this instrument, entitled ‘State Obligations and Rights Protected’ and, consequently, it is subject to the general obligations contained in Articles 1(1) and 2 in Chapter I (entitled ‘General Obligations’), as also are Articles 3 to 25 that appear in Chapter II (entitled ‘Civil and Political Rights’).” *Cf. Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller’s Office”) v. Peru, supra*, para. 100, and UN. Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The right to education (art. 13 of the Covenant)*, UN Doc. E/C.12/1999/10, December 8, 1999, para. 50.

Court also reiterated the interdependence of civil and political rights and economic, social, cultural and environmental rights, because they should be understood integrally and as a whole as human rights, without any specific hierarchy, and be enforceable in all cases before the competent authorities.<sup>125</sup>

101. Also, in the case of *Acevedo Buendía v. Peru*, the Court ruled on the preparatory work of the Convention with regard to Article 26, even underlining the Chilean State's intervention on that occasion with regard to the safeguard of the rights protected by that article.<sup>126</sup>

102. In this regard, the Court underlines the Preamble to the American Convention, which clearly establishes the interdependence and the protection of the economic and social rights in the American Convention, by establishing that:

[...]

The American states signatory to the present Convention,

[...] Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights; and

<sup>125</sup> Cf. *Case of Lagos del Campo v. Peru*, *supra*, para. 141; *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru*, *supra*, para. 101. See also *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of May 21, 2013. Series C No. 261, para. 131; *Case of Gonzales Lluu et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 172; *Advisory Opinion OC-23/17* of November 15, 2017. Series A No. 23, paras. 47, 51, 52, 54 and 57. Similarly, cf. UN. Committee on Economic, Social and Cultural Rights, *General Comment No. 9: "The domestic application of the Covenant,"* UN Doc. E/C.12/1998/24, December 3, 1998, para. 10. See also: ECHR, *Case of Airey v. Ireland*, No. 6289/73. Judgment of October 9, 1979, para. 26, and *Case of Sidabras and Dziautas v. Lithuania*, Nos. 55480/00 and 59330/00. Judgment of July 27, 2004, para. 47. See also: American Declaration of the Rights and Duties of Man (Arts. VI, VII, XI-XVI, XXI-XXIII); Vienna Declaration and Programme of Action adopted by the United Nations World Conference on Human Rights held in Vienna, Austria, from June 14 to 25, 1993; African Charter on Human and Peoples' Rights, adopted on June 27, 1981, during the XVIII Assembly of Heads of State and Government of the Organization of African Unity; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on December 10, 2008; 1997 Maastricht guidelines on violations of economic, social and cultural rights; 1986 Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights.

<sup>126</sup> Specifically: "[...] In this sense, the Court notes that the content of Article 26 of the Convention was the subject of intense discussion in the preparatory work of the Convention, as a result of the States Parties' interest to include a 'direct reference' to the 'economic, social and cultural rights'; 'a provision establishing certain legal obligations [...] to comply with them and their implementation'; and also 'the [respective] mechanisms [for their] promotion and protection,' since the preliminary draft of the treaty prepared by the Inter-American Commission referred to them in two articles that, according to some States, only 'contemplated, in a merely declarative text, the conclusions established at the Buenos Aires Conference.' A review of the said preparatory work of the Convention also shows that the main observations on which the approval of the Convention was based, placed special emphasis on 'granting the economic, social and cultural rights the maximum protection compatible with the particular conditions of most of the American States.' Thus, during the discussions of the preparatory work, it was also proposed 'to make it possible to enforce [the said rights] by the action of the courts.'" *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru*, *supra*, para. 99. Cf. OAS, Inter-American Specialized Conference on Human Rights. *Actas y documentos*, OAS/Ser.K/XVI/1.2 (B-32), held from November 7 to 22, 1969, in Washington, DC. The initial draft contained relevant articles on the economic, social and cultural rights, *inter alia*: Article 25: "[...] The States Parties also express their intention to establish and, as appropriate, to maintain and improve, in their domestic law, the most appropriate precepts [...]." Also, its article 26 established: "The States Parties shall advise the Commission on Human Rights periodically of the measures they have adopted for the purposes indicated in the preceding article. The Commission shall make any appropriate recommendations [...]." In this regard it is interesting to underscore the observations made by the State of Chile on the draft human rights convention (Document 7, September 26, 1969, para. 14). It observed that "[t]he articles on economic, social and cultural rights that have been kept in the draft are those that warrant most reservations as to their form and content. These are articles 25, 26 and 41. Any direct mention of these rights has been eliminated; indirectly, in article 25(1), there is an insufficient recognition of 'the need for the States Parties to devote their greatest efforts to adopting in their domestic laws and, as appropriate, to guaranteeing the other rights established in the American Declaration of the Rights and Duties of Man that have not been included in the preceding articles. [...] In any case, an article should be included on the economic, social and cultural rights establishing a certain legal obligation (to the extent permitted by the nature of those rights) to comply with and to implement them. To this end, it would be necessary to contemplate a clause similar to Article 2(1) of the relevant United Nations Covenant."

Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters,

Have agreed upon the following: [...].<sup>127</sup>

103. Thus, it can clearly be interpreted that the American Convention incorporated into its list of protected rights the so-called economic, social, cultural and environmental rights (ESCER),<sup>128</sup> by derivation from the norms recognized in the Charter of the Organization of American States (OAS), and also the rules of interpretation established in Article 29 of the Convention itself;<sup>129</sup> particularly, insofar as they prevent excluding or limiting the enjoyment of the rights established in the American Declaration and even those recognized by domestic law (*infra* para. 108). Furthermore, based on a systematic, teleological and evolutive interpretation,<sup>130</sup> the Court has resorted to the national and international *corpus iuris* on the matter to give specific content to the scope of the rights protected by the Convention<sup>131</sup> (*infra* para. 114), in order to derive the scope of the specific obligations relating to each right.

104. The Court also emphasizes that two types of obligations can be inferred from the content of Article 26. On the one hand, the *progressive* adoption of general measures and, on the other, the adoption of *immediate* measures. Regarding the former, to which the State referred in this case, the progressive realization means that the States Parties have the specific and constant obligation to make the most expeditious and effective progress possible towards the full effectiveness of the

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<sup>127</sup> Underlining added. Regarding the amendments to the OAS Charter, see also: OAS, 1948 Charter of the Organization of American States, "[a]s amended by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Buenos Aires", signed on February 27, 1967, at the Third Special Inter-American Conference, by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Cartagena de Indias", approved on December 5, 1985, at the Fourteenth Special Session of the General Assembly, by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Washington", approved on December 14, 1992, at the Sixteenth Special Session of the General Assembly, and by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Managua", adopted on June 10, 1993, at the Nineteenth Special Session of the General Assembly. OAS. Available at: [http://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-41\\_charter\\_OAS.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp).

<sup>128</sup> Gradually, the inter-American system has been consolidating this concept (ESCER). In 2014, the Inter-American Commission on Human Rights adopted the decision to create a "Special Rapporteurship on Economic, Social, Cultural and Environmental Rights" which became fully operational in August 2017. See also: Inter-American Commission on Human Rights, *Report on poverty and human rights in the Americas*, OAS/Ser.L/V/II.164, September 7, 2017, para. 112, and "*Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*". Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 57.

<sup>129</sup> Cf. Thus Article 29(b) and (d) of the Convention establishes that: "[n]o provision of this Convention shall be interpreted as: [...] (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; [...] (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have." Consequently, according to this article, the right to health recognized by the Chilean Constitution should be incorporated, for the purposes of this case, into the interpretation and scope of the right protected by Article 26 of the American Convention.

<sup>130</sup> Cf. *Vienna Convention on the Law of Treaties*, 1969, UN Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331. Entry into force on January 27, 1980. See also: the general rules of interpretation established in the Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights (prior to General Comment No. 3 of the Committee on Economic, Social and Cultural Rights on the nature of States parties' obligations) which in Principle 4 establish that: "[t]he International Covenant on Economic, Social and Cultural Rights [...] should, in accordance with the Vienna Convention on the Law of Treaties [...] should be interpreted in good faith, taking into account the object and purpose, the ordinary meaning, the preparatory work and the relevant practice".

<sup>131</sup> *Inter alia*, Cf. *The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, October 1, 1999. Series A No. 16, para. 115; *Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, paras. 32, 43 and 59; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 83; and "*Other Treaties Subject to the Advisory Jurisdiction of the Court (art. 64 American Convention on Human Rights)*", Advisory Opinion OC-1/82, September 24, 1982. Series A No. 1, para. 41.

ESCER;<sup>132</sup> and this should not be interpreted in the sense that, while implementation is underway, these obligations are deprived of specific content; moreover, this does not mean that the States may postpone indefinitely the adoption of measures to give effect to the rights in question, especially nearly forty years after the entry into force of the inter-American treaty. Therefore, there is also an obligation of non-retrogressivity in relation to rights that have been realized.<sup>133</sup> Regarding the obligations of an *immediate* nature, these consist in adopting effective measures in order to guarantee access, without discrimination, to the benefits recognized for each right. Such measures must be adequate, deliberate and specific in order to achieve the full realization of such rights.<sup>134</sup> Consequently, the Convention-based obligations of respect and guarantee, as well as the adoption of domestic legal provisions (Articles 1(1) and 2), are fundamental to achieve their effectiveness.

105. Having established the above, and because this Court will rule for the first time on the right to health autonomously, as an integral part of the ESCER, the Court will now proceed to verify its consolidation as a right that is justiciable in light of the Convention, by analyzing the following elements.

*a) Derivation from the OAS Charter*

106. Regarding the right to health protected by Article 26 of the American Convention, the Court observes that the wording indicates that it is a right derived from the economic, social, educational, scientific and cultural standards contained in the OAS Charter. That said, Article 34(i) and 34(l)<sup>135</sup> of the Charter establish, among the basic goals of integral development, that of the “[p]rotection of man's potential through the extension and application of modern medical science,” as well as the “conditions that offer the opportunity for a healthful, productive, and full life.” Meanwhile, Article 45(h)<sup>136</sup> stresses that “man can only achieve the full realization of his aspirations within a just social order, [by] the application of the following principles and mechanisms,” including: “(h) [d]evelopment of an efficient social security policy.”

<sup>132</sup> Cf. UN, Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health*, E/C.12/2000/4, August 11, 2000, para. 31.

<sup>133</sup> Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru*, *supra*, paras. 102, 103. See also: “Working Group to Examine the National Reports envisioned in the Protocol of San Salvador.” Initially the Working Group prepared the document “Progress Indicators for Measuring Rights under the Protocol of San,” OAS/Ser.L/XXV.2.1; GT/PSS/doc.2/11 rev.2, of December 16, 2011, based on guidelines presented by the Inter-American Commission on Human Rights, which were presented to the States and civil society for their comments and adopted by the General Assembly at its forty-second regular session held in Cochabamba, Bolivia, in June 2012 (AG/RES. 2713 (XLII-O/12)). On that occasion, the rights to social security, health and education were addressed (p.13). Subsequently, a second group of rights were examined and the Working Group issued the “Progress Indicators for Measuring Rights under the Protocol of San Salvador – second group of rights,” OAS/Ser.L/XXV.2.1 GT/PSS/doc.9/13, adopted by the OAS General Assembly in Resolution AG/RES. 2823 (XLIV-O/14), at the second plenary session on June 4, 2014. Finally, in 2015, the Working Group combined the two groups of rights in a publication entitled “Progress Indicators for Measuring Rights under the Protocol of San Salvador,” OAS/Ser.D/XXVI.11 (2015). On that occasion, the Working Group addressed the right to work and trade union rights, and the rights to adequate food, a healthy environment and the benefits of culture (p. 75).

<sup>134</sup> Cf. UN, Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States Parties' obligations* (Art. 2, Para. 1, of the Covenant), U.N. Doc. E/1991/23, December 14, 1990, para. 9, and *General Comment No. 14: The right to the highest attainable standard of health*, *supra*, para. 30. In particular, in the latter, the Committee commented that: “States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2.2) and the obligation to take steps (art. 2.1) towards the full realization of article 12.” In paragraph 2, the Committee indicated that “article 12.2 enumerates, by way of illustration, a number of “steps to be taken by the States parties ... to achieve the full realization of this right.”

<sup>135</sup> Article 34 of the OAS Charter. The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: [...] (i) [p]rotection of man's potential through the extension and application of modern medical science [and] (l) [c]onditions that offer the opportunity for a healthful, productive, and full life.

<sup>136</sup> Article 45 of the OAS Charter. The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: [...] h) Development of an efficient social security policy [...].



*b) The American Declaration*

107. The Court has also reiterated the incorporation of the American Declaration into the interpretation of the OAS Charter. Thus, its Advisory Opinion OC-10/89, the Court indicated that:

[...] [T]he Member States of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus, the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.<sup>137</sup>

108. Meanwhile, Article 29(d) of the American Convention expressly establishes that “[n]o provision of this Convention shall be interpreted as: [...] (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.”

109. Also, Article XI of the American Declaration allows the right to health to be identified when indicating that “[e]very person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.” This provision is relevant to define the scope of Article 26, because “the American Declaration constitutes, as pertinent and in relation to the Charter of the Organization, a source of international obligations.”<sup>138</sup>

110. Based on the above, the Court finds that the right to health is a right protected by Article 26 of the Convention. The Court will now verify the scope and content of this right for the effects of the instant case.

*c) Domestic legislation*

111. Article 29(b) of the American Convention expressly establishes that “[n]o provision of this Convention shall be interpreted as: [...] (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party.” [...].

112. In this regard, article 19(9) of the Chilean Constitution, in force at the time of the facts and currently,<sup>139</sup> establishes the obligation to guarantee everyone the right to the protection of health, protecting “free and equal access to actions for the promotion, protection and recovery of health and for the rehabilitation of the individual.” The scope of this right is also developed in domestic regulations.<sup>140</sup>

<sup>137</sup> Cf. *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, July 14, 1989. Series A No. 1, para. 43, and *Case of Lagos del Campo*, *supra*, para. 143.

<sup>138</sup> Cf. *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, *supra*, paras. 43 and 45.

<sup>139</sup> Government of the Republic of Chile. Constitution of the Republic of Chile. Adopted by Decree Law No. 3464 of August 11, 1980, and promulgated by Decree No. 1150 of October 21, 1980. Article 19: The Constitution guarantees everyone: [...] 9. The right to the protection of health. The State protects free and equal access to actions for the promotion, protection and recovery of health and for the rehabilitation of the individual. It shall also be responsible for coordination and control of health-related actions. The State has the special obligation to ensure the execution of health-related actions, whether they are provided by public or private institutions, in the manner and under the conditions determined by law, which may establish compulsory contributions. Everyone shall have the right to choose their preferred health care system, whether public or private [...].

<sup>140</sup> Cf. *Inter alia*: Ethics Code of the Chilean Physicians’ Association, adopted by the General Council in session No. 64, by Resolution No. 231 of November 22, 1983, and in session No. 39, by Resolution No. 154 of May 7, 1985; Supreme

113. The Court also observes a broad regional consensus in the consolidation of the right to health, which is explicitly recognized in different Constitutions and the domestic laws of the States of the region, including: Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.<sup>141</sup>

*d) International corpus iuris on the right to health*

114. The right to health is also established in a vast international *corpus iuris*; *inter alia*: Article 25(1) of the Universal Declaration of Human Rights;<sup>142</sup> Article 12 of the International Covenant on Economic, Social and Cultural Rights;<sup>143</sup> Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.<sup>144</sup> In addition, the right to health is recognized in Article 5(e) of the International Convention on the Elimination of All Forms of Racial Discrimination;<sup>145</sup> Article 12(1) of the Convention on the Elimination of All Forms of Discrimination against Women;<sup>146</sup> Article 24(1) of the Convention on the Rights of the Child;<sup>147</sup> Article 28 of the International Convention on the Protection of the Rights of All Migrant

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Decree No. 42, entry into force on February 9, 1986, rescinded on April 21, 2005, and the Charter of Patients' Rights, prepared in 1999 by the National Health Foundation (FONASA) together with the Ministry of Health (MINSAL).

<sup>141</sup> Included in the constitutional provisions of the following States Parties to the American Convention: Argentina (art. 42); Barbados (art. 17.2.A); Bolivia (art. 35); Brazil (art. 196); Colombia (art. 49); Costa Rica (art. 46); Dominican Republic (art. 61); Ecuador (art. 32); El Salvador (art. 65); Guatemala (arts. 93 and 94); Haiti (art. 19); Honduras (art. 145); Mexico (art. 4); Nicaragua (art. 59); Panama (art. 109); Paraguay (art. 68); Peru (art. 70); Suriname (art. 36); Uruguay (art. 44) and Venezuela (art. 83).

<sup>142</sup> Adopted by the UN General Assembly in Resolution 217 A (III), on December 10, 1948, in Paris. Article 25: (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services [...].

<sup>143</sup> Adopted by the UN General Assembly in Resolution 2200A (XXI), of December 16, 1966, and in force since January 3, 1976. Ratified by Chile on February 10, 1972. Its Article 12, "Right to the enjoyment of the highest attainable standard of health," establishes the obligation to take the necessary steps to reduce stillbirth-rate and infant mortality; to ensure the health development of children; to improve all aspects of environmental and industrial hygiene; to prevent, treat and control epidemic, endemic, occupational and other diseases, and to assure to all medical service and medical attention in the event of sickness.

<sup>144</sup> Adopted by the OAS General Assembly on November 17, 1988, in San Salvador. Entry into force on November 16, 1999. To date, this has not been ratified by the State of Chile. Article 10. Right to health. 1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being. 2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right: (a) Primary health care, that is, essential health care made available to all individuals and families in the community; (b) Extension of the benefits of health services to all individuals subject to the State's jurisdiction; (c) Universal immunization against the principal infectious diseases; (d) Prevention and treatment of endemic, occupational and other diseases; (e) Education of the population on the prevention and treatment of health problems, and (f) Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.

<sup>145</sup> Adopted by the UN General Assembly in Resolution 2106 A (XX), of December 21, 1965. Entry into force on January 4, 1969. Entry into force for Chile on November 19, 1971. Article 5. In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...] (e) The economic, social and cultural rights, in particular: [...] (iv) The right to public health, medical care, social security and social services [...].

<sup>146</sup> Adopted by the UN General Assembly on December 18, 1979. Entry into force on September 3, 1981. Article 12. (1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

<sup>147</sup> Adopted by the UN General Assembly in Resolution 44/25, of November 20, 1989. Entry into force on September 2, 1990. Ratified by Chile August 14, 1990. Article 24. (1) States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

Workers and Members of their Families,<sup>148</sup> and Article 25 of the Convention on the Rights of Persons with Disabilities.<sup>149</sup> This right is also established in several regional human rights instruments, such as in Article 17 of the Social Charter of the Americas;<sup>150</sup> Article 11 of the 1961 European Social Charter, as amended;<sup>151</sup> Article 16 of the African Charter on Human and Peoples' Rights,<sup>152</sup> and recently in the Inter-American Convention on Protecting the Human Rights of Older Persons<sup>153</sup> (although it should be pointed out, that owing to the date this came into effect, it is not enforceable in relation to the facts of the instant case). The right to health has also been recognized in Section II, paragraph 41, of the Vienna Declaration and Programme of Action,<sup>154</sup> and in other international instruments and decisions.<sup>155</sup>

115. Meanwhile, the United Nations Committee on Economic, Social and Cultural Rights (hereinafter "the CESCR") has ruled on the obligations of the States in the field of health, mainly

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<sup>148</sup> Adopted by the UN General Assembly in Resolution 45/158, on December 18, 1990. Ratified by Chile on April 12, 2005. Article 28. Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment

<sup>149</sup> Adopted by the UN General Assembly on December 13, 2006. Entry into force on May 3, 2008. Ratified by Chile on August 25, 2008. Article 25. States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation.

<sup>150</sup> Adopted in the second plenary session of the OAS General Assembly held on June 4, 2012. Its Article 17 indicates that "Member States states reaffirm that the enjoyment of the highest attainable standard of health is a fundamental right of all persons without discrimination and recognize that health is an essential condition for social inclusion and cohesion, integral development and economic growth with equity." In addition, regarding integral development, its Article 33(2) expressly mentions the field of health.

<sup>151</sup> Council of Europe (Strasbourg). Adopted in Turin on October 18, 1961. Article 11: The right to protection of health. With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia: (1) to remove as far as possible the causes of ill-health; (2) to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; (3) to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

<sup>152</sup> Adopted during the XVIII Assembly of Head of State and Government of the Organization of African Unity, in Nairobi, Kenya, on June 27, 1981. Article 16. 1. Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

<sup>153</sup> Adopted at the fifth regular session of the OAS General Assembly in Washington, D.C., on June 15, 2015. Entry into force on January 11, 2017. Ratified by Chile on November 7, 2017. Article 19. Right to health. Older persons have the right to physical and mental health without discrimination of any kind. States Parties shall design and implement comprehensive-care oriented intersectoral public health policies that include health promotion, prevention and care of disease at all stages, and rehabilitation and palliative care for older persons, in order to promote enjoyment of the highest level of physical, mental and social well-being. [...] In the case of the present analysis, it should be noted that this provision was not enforceable at the time of the facts of this case.

<sup>154</sup> Adopted by the World Conference on Human Rights in Vienna on June 25, 1993. Paragraph 41. The World Conference on Human Rights recognizes the importance of the enjoyment by women of the highest standard of physical and mental health throughout their life span. In the context of the World Conference on Women and the Convention on the Elimination of All Forms of Discrimination against Women, as well as the Proclamation of Tehran, the World Conference on Human Rights reaffirms, on the basis of equality between women and men, a woman's right to accessible and adequate health care and the widest range of family planning services, as well as equal access to education at all levels.

<sup>155</sup> The following are relevant for the analysis of the right to health, *General Comment No. 14: "The right to the highest attainable standard of health"*, CESCR, which will be examined *infra*. The comments of the Committee on the Rights of the Child are also useful, in particular *General Comment No. 3: "HIV/AIDS and the rights of the child,"* CRC/GC/2003/3 (2003), and *General Comment No. 4: "Adolescent Health and Development in the context of the Convention on the Rights of the Child,"* CRC/GC/2003/4 (2003). Also, *General Recommendation No. 24* of the Committee on the Elimination of Discrimination against Women, "Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women – Women and Health," of February 2, 1999, A/54/38/Rev.1, and the reports of the Special Rapporteur of the Human Rights Commission on the right to health. UN Commission on Human Rights, "Non-discrimination in the field of health," Resolution 1989/11. Adopted at the 45<sup>th</sup> session on March 2, 1989.

in its General Comment No. 14 on the right to the highest attainable standard of health.<sup>156</sup> It has also ruled on components of the right to health in successive General Comments Nos.: 3,<sup>157</sup> 4,<sup>158</sup> 5,<sup>159</sup> 6,<sup>160</sup> 15,<sup>161</sup> 16,<sup>162</sup> 18,<sup>163</sup> 19<sup>164</sup> and 20.<sup>165</sup> In the Americas, the OAS Working Group to Examine the Periodic Reports of the States Parties in relation to the progress indicators has also referred to the analysis of the right to health.<sup>166</sup>

116. Bearing in mind the foregoing, the Court considers that various standards applicable to this case can be derived from the consolidation of the right to health in relation to specific basic health care services, particularly to address situations of medical urgency or emergency.

117. Consequently, the Court will now examine the standards for the right to health in situations of medical emergency (paras. 118 to 124), as well as with regard to older persons (paras. 125 to 132), and will then make the corresponding assessment applicable to this case (paras. 133 to 143).

### **1.1.1 Standards for the right to health applicable to situations of medical emergency**

118. The Court considers that "health is a fundamental human right, indispensable for the exercise of other human rights. Every human being is entitled to enjoy the highest attainable standard of health conducive to living a life in dignity,"<sup>167</sup> understanding health<sup>168</sup> not merely as the absence of disease or infirmity, but also as a state of complete physical, mental and social well-being derived from a lifestyle that allows the individual to achieve an overall balance. The Court has established that the general obligation results in the State's obligation to ensure that everyone has access to essential health services,<sup>169</sup> guaranteeing quality and effective medical services, as well as promoting the improvement of the health conditions of the population.

<sup>156</sup> Cf. UN. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment (GC) No. 14: "The right to the highest attainable standard of health"*, E/C.12/2000/4, August 11, 2000.

<sup>157</sup> Cf. UN. CESCR, *GC-3: "The nature of States parties' obligations (art. 2, para. 1, of the Covenant)"*, E/1991/23, December 14, 1990, paras. 3 and 10.

<sup>158</sup> Cf. UN. CESCR, *GC-4: "The right to adequate housing"*, E/1992/23, December 13, 1991, para. 8.

<sup>159</sup> Cf. UN. CESCR, *GC-5: "Persons with disabilities"*, E/C.12/1994/13, 1994, para. 34.

<sup>160</sup> Cf. UN. CESCR, *GC-6: "The economic, social and cultural rights of older persons"*, E/1996/22, December 8, 2015, paras. 5 and 34.

<sup>161</sup> Cf. UN. CESCR, *GC-15: "The right to water"*, E/C.12/2002/11, January 20, 2003, paras. 3 and 8.

<sup>162</sup> Cf. UN. CESCR, *GC-16: "The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)"*, E/C.12/2005/4, August 11, 2005, para. 29.

<sup>163</sup> Cf. UN. CESCR, *GC-18: "The right to work (Art. 6 of the Covenant)"*, E/C.12/GC/18, February 6, 2006, para. 12.

<sup>164</sup> Cf. UN. CESCR, *GC-19: "The right to social security"*, E/C.12/GC/19, February 4, 2008, paras. 13 and 14.

<sup>165</sup> Cf. UN. CESCR, *GC-20: "Non-discrimination in economic, social and cultural rights"*, E/C.12/GC/20, July 2, 2009, para. 33.

<sup>166</sup> Cf. OAS. the Working Group to Examine the National Reports Envisioned in the Protocol of San Salvador, *"Progress indicators for measuring rights under the Protocol of San Salvador"*, OAS/Ser.L/XXV.2.1; GT/PSS/doc.2/11 rev.2, of December 16, 2011. *"Progress indicators for measuring rights under the Protocol of San Salvador - Second group of rights"*, OAS/Ser.L/XXV.2.1 GT/PSS/doc.9/13, and *"Progress indicators for measuring rights under the Protocol of San Salvador"*, OAS/Ser.D/XXVI.11 (2015), pp. 43 to 53. See *supra*, footnote 133. This instrument provides evidence to assess whether State programs and actions are aligned with human rights standards.

<sup>167</sup> Cf. UN, CESCR *GC-14, supra*, para. 1.

<sup>168</sup> Cf. *inter alia*, Preamble to the Constitution of the World Health Organization (WHO). Adopted by the International Health Conference held in New York from June 19 to July 22, 1946, signed on July 22, 1946, by the representatives of 61 States (Official Record, World Health Organization), and entered into force on April 7, 1948. The amendments adopted by the 26th, 29th, 39th and 51st World Health Assemblies (Resolutions WHA26.37, WHA29.38, WHA39.6 and WHA51.23), which entered into force on February 3, 1977, January 20, 1984, July 11, 1994, and September 15, 2005, respectively, have been successively incorporated into its text.

<sup>169</sup> Cf. *Mutatis mutandi, Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149, para. 128.

119. First, the implementation of this obligation begins with the duty of regulation; therefore, the Court has indicated that States are responsible for the permanent regulation of the provision of health services (both public and private) and the execution of national programs to ensure the provision of quality services.<sup>170</sup>

120. Second, taking into account CESCR General Comment No. 14,<sup>171</sup> this Court has referred to a series of essential and interrelated elements that must be fulfilled in the area of health. These are: *availability, accessibility, acceptability and quality*.<sup>172</sup>

121. Consequently, the Court finds that, in the case of emergency medical services, States must guarantee, at least, the following standards:

- a) Regarding *quality*, it is necessary to have the adequate infrastructure required to meet basic and emergency needs. This includes any type of life support device or instrument, as well as the human resources qualified to respond to medical emergencies.
- b) Regarding *accessibility*,<sup>173</sup> emergency health facilities, goods and services must be accessible to all. Accessibility should be understood with the overlapping dimensions of non-discrimination, physical accessibility, economic accessibility and information accessibility. Thus, providing an inclusive health care system based on human rights.<sup>174</sup>
- c) Regarding *availability*, public health facilities, goods and services must be available in sufficient quantity, and also comprehensive health programs. Coordination between the system's establishments is important in order to cover the basic needs of the population integrally.
- d) Regarding *acceptability*, health care facilities and services must respect medical ethics and culturally appropriate criteria; they must also include a gender perspective, as well as the conditions of the patient's life cycle. The patient must be informed of his diagnosis and treatment and, in this regard, his wishes must be respected (*infra* paras. 161, 162 and 166).

<sup>170</sup> Cf. *Case of Suárez Peralta v. Ecuador, supra*, para. 134, and *Case of Ximenes Lopes v. Brazil, supra*, para. 99.

<sup>171</sup> UN, CESCR, GC-14, *supra*, para. 12. In this regard, the Committee indicated that "[t]he right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party:

a) Availability. Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party. [...] [These services] will include, [...] the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel [...].

b) Accessibility. Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party [...];

c) Acceptability. All health facilities, goods and services must be respectful of medical ethics and culturally appropriate [...] as well as being designed to respect confidentiality and improve the health status of those concerned;

d) Quality. As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, *inter alia*, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.

<sup>172</sup> Cf. *Case of Suárez Peralta v. Ecuador, supra*, para. 152, and *Case of Gonzales Lluy et al. v. Ecuador, supra*, para. 235.

<sup>173</sup> The Court has indicated that States have the obligation to ensure everyone's access to basic health care services. Cf. *Case of Ximenes Lopes v. Brazil, supra*, para. 128.

<sup>174</sup> In this regard, in the document supplementing her expert opinion, expert witness Alicia Ely Yemin underscored that a human rights approach in health policies requires the health system to guarantee equal access to, and availability of, acceptable services together with quality care (merits file, f. 754).

122. Third, and as a cross-cutting condition of accessibility,<sup>175</sup> the Court recalls that the State is obliged to ensure equal treatment to all those who require health care services; consequently, pursuant to Article 1(1) of the American Convention discriminatory treatment<sup>176</sup> “for reasons of race, color, sex, [...] economic status, birth, or any other social condition” is prohibited.<sup>177</sup> In this regard, the specific criteria based on which discrimination is prohibited according to Article 1(1) of the American Convention, are not restrictive or exclusive, but merely declaratory. To the contrary, the wording of this article leaves the criteria open with the inclusion of the expression “any other social condition” to incorporate other categories that were not explicitly mentioned.<sup>178</sup> Thus, the Court has indicated that age is also a category protected by this article.<sup>179</sup> Accordingly, the prohibition of discrimination related to age, in the case of older persons, is protected by the American Convention. This entails, among other matters, the application of inclusive policies that cover the whole population and ease of access to public services.<sup>180</sup>

123. The Court reiterates that the right to equality and non-discrimination encompasses two concepts: a negative concept related to the prohibition of arbitrary differences in treatment, and a positive concept related to the obligation of States to create conditions of real equality for groups that have been historically excluded or that are at a greater risk of being discriminated against.<sup>181</sup> Therefore, the adoption of positive measures is increased in relation to the protection of individuals who are in a vulnerable situation or at risk, who should be given equal access to medical health care services.

124. Fourth, in the *Suárez Peralta* case, the Court asserted that the State should establish official supervision and monitoring mechanisms for both public and private health care institutions.<sup>182</sup> In this regard, the Court has indicated that, in the case of essential competences related to the supervision and monitoring of the provision of services of public interest, such as health services, the attribution of responsibility may arise due to omission in compliance with the duty to supervise

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<sup>175</sup> See: UN. CESCR, *General Comment No. 14, supra*, para. 12. In this regard, it states that “accessibility has four overlapping dimensions.” One of these is “non-discrimination: health facilities, goods and services must be accessible to all especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.”

<sup>176</sup> Cf. Inter-American Convention on Protecting the Human Rights of Older Persons, *supra*, Preamble and Article 5. See also, Preamble to the WHO Constitution, *supra*, para. 3, which establishes that “[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”

<sup>177</sup> Cf. *Inter alia*: *Case of Veliz Franco et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of May 19, 2014. Series C No. 277, para. 204; *Case of Case of Gonzales Lluy et al. v. Ecuador, supra*, para. 288; *Case of Velásquez Paiz et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of November 19, 2015. Series C No. 307, paras. 173 and 174; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of February 26, 2016. Series C No. 310, para. 90; *Case of Flor Freire v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of August 31, 2016. Series C No. 315, paras. 111 and 112; *Case of the Hacienda Brasil Verde Workers v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of October 20, 2016. Series C No. 318, para. 335; *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2016. Series C No. 329, para. 240, and *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples. State Obligations in relation to Change of Name, Gender Identity, and Rights deriving from a relationship between Same-Sex Couples (Interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights).* Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 67.

<sup>178</sup> Cf. *Case of Atala Riffo and daughters v. Chile, supra*, para. 85.

<sup>179</sup> Cf. *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, September 17, 2003. Series A No. 18, para. 101, and CESCR. *General Comment No. 20, supra*, paras. 27 and 29. The CESCR has also included this category in the phrase “other social condition.”

<sup>180</sup> Cf. *Mutatis mutandi, Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 164, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010. Series C No. 214, para. 233.

<sup>181</sup> Cf. *Case of Furlan and family v. Argentina, supra*, para. 267.

<sup>182</sup> Cf. *Case of Suárez Peralta v. Ecuador, supra*, para. 149, and *Case of Ximenes Lopes v. Brazil, supra*, para. 141.

the provision of the service so as to protect the respective right.<sup>183</sup> The Court has indicated that “[t]he possible provision of medical care in institutions without the proper authorization, and without the adequate infrastructure or hygiene for the provision of medical services, or by professionals who do not have the appropriate qualifications for such activities, could have a significant impact on the rights to life and to integrity of the patient.”<sup>184</sup> Accordingly, this obligation of supervision and monitoring should be implemented constantly, particularly in the case of emergency medical services.<sup>185</sup>

### **1.1.2 Older persons<sup>186</sup> and health-related matters**

125. The Court underlines this opportunity of ruling for the first time, specifically, on the rights of older persons in health-related matters.<sup>187</sup>

126. The Court has verified the important development and consolidation of the relevant international standards. For example, Article 17 of the Protocol of San Salvador, which establishes the right to health of older persons;<sup>188</sup> the Protocol to the African Charter of Human and Peoples’ Rights on the Rights of Older Persons in Africa,<sup>189</sup> and the European Social Charter.<sup>190</sup> The recent adoption of the Inter-American Convention on Protecting the Human Rights of Older Persons<sup>191</sup> merits special attention; among other matters, it recognizes that the older person has a right to both physical and mental health, without any discrimination.<sup>192</sup> The Court also notes other developments in the area, such as: the United Nations Principles for the Older Person,<sup>193</sup> the Vienna

<sup>183</sup> Cf. *Case of Albán Cornejo et al. v. Ecuador. Merits, reparations and costs*. Judgment of November 22, 2007. Series C No. 171, para. 119.

<sup>184</sup> *Case of Suárez Peralta v. Ecuador, supra*, para. 149.

<sup>185</sup> Cf. *Case of Suárez Peralta v. Ecuador, supra*, para. 152.

<sup>186</sup> Although Mr. Poblete Vilches was 76 years of age at the time of the facts, for illustrative purposes, the Court refers to the definition “older person” contained in Article 2 of the Inter-American Convention, *supra*: “Article 2. Definitions. For the purposes of this Convention the following definitions shall apply: [...] “Older person”: A person aged 60 or older, except where legislation has determined a minimum age that is lesser or greater, provided that it is not over 65 years. This concept includes, among others, elderly persons.”

<sup>187</sup> It should be noted that in the *Case of the Yake Axa Indigenous Community v. Paraguay*, the judgment mentioned briefly that “the health of older persons should be protected in case of chronic and terminal illnesses.” And, in the case of *García Lucero et al. v. Chile*, under the heading of reparations, the Court recognized the victim’s situation of vulnerability owing to his condition as an older person. Cf. *Case of the Yake Axa Indigenous Community v. Paraguay, supra*, para. 175, and *Case of García Lucero et al. v. Chile. Preliminary objection, merits and reparations*. Judgment of August 28, 2013. Series C No. 267, para. 231.

<sup>188</sup> OAS. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”. Adopted by the OAS General Assembly on November 17, 1988, in San Salvador. Entry into force on November 16, 1999. To date the State of Chile has not ratified it. “Article 17. Everyone has the right to special protection in old age. With this in view the States Parties agree to take progressively the necessary steps to make this right a reality and, particularly, to: (a) provide suitable facilities, as well as food and specialized medical care, for elderly individuals who lack them and are unable to provide them for themselves; (b) undertake work programs specifically designed to give the elderly the opportunity to engage in a productive activity suited to their abilities and consistent with their vocations or desires, and (c) foster the establishment of social organizations aimed at improving the quality of life for the elderly.”

<sup>189</sup> Adopted by the twenty-sixth ordinary session of the Assembly of the African Union held in Addis Ababa, Ethiopia, on January 31, 2016. Its article 15(1) establishes the obligation of the African States to “guarantee the rights of older persons to access health services that meet their specific needs.”

<sup>190</sup> Council of Europe (Strasbourg). *European Social Charter, supra*. Its Article 23 establishes the right of elderly persons to social protection and establishes the undertaking of the States Parties to adopt or promote appropriate measures to ensure the effective exercise of this right.

<sup>191</sup> OAS. Inter-American Convention on Protecting the Human Rights of Older Persons, *supra*. Ratified by Chile on November 7, 2017.

<sup>192</sup> Article 19. Right to health. Older persons have the right to physical and mental health without discrimination of any kind.

<sup>193</sup> UN. General Assembly, *United Nations Principles for the Older Person*. Adopted by Resolution 46/91 of December 16, 1991.

International Plan of Action on Ageing,<sup>194</sup> the Proclamation on Ageing,<sup>195</sup> the Political Statement and Madrid International Plan of Action on Ageing,<sup>196</sup> as well as others of a regional nature, such as: the Regional strategy for the implementation in Latin America and the Caribbean of the Madrid International Plan of Action on Ageing,<sup>197</sup> the Brasilia Declaration,<sup>198</sup> the Pan-American Health Organization Plan of Action on the Health of Older Persons, including Active and Healthy Aging,<sup>199</sup> the Declaration of Commitment of Port-of-Spain,<sup>200</sup> the San José Charter on the Rights of the Older Person of Latin American and the Caribbean.<sup>201</sup>

127. These international instrument establish a minimum list of human rights,<sup>202</sup> respect for which is essential to ensure the highest level of development for older persons in all aspects of their life and in the best possible conditions, with particular emphasis on the right to health. In addition, older persons have the right to increased protection and, consequently, this requires the adoption of differentiated measures.<sup>203</sup> Regarding the right to health, in both the public and the private sphere, the State has the obligation to ensure all the necessary measures available to it in order to guarantee the highest attainable standard of health, without discrimination. The said instruments also reveal progress in the international standards concerning the rights of older persons,<sup>204</sup> by understanding and recognizing the right to a dignified old age and consequently the measures required to this end.<sup>205</sup> In this regard, various agendas can be noted that give greater prominence to the older person in public policies<sup>206</sup> through programs to raise awareness and enhance

<sup>194</sup> Adopted at the "World Assembly on Ageing" on August 6, 1982, and endorsed by the United Nations General Assembly in Resolution 37/51.

<sup>195</sup> UN. General Assembly, *Proclamation on Ageing*. Adopted by Resolution 47/5 of October 16, 1992.

<sup>196</sup> UN. General Assembly, *Political Statement and Madrid International Plan of Action on Ageing*. Report of the Second World Assembly on Ageing, A/CONF.197/9, April 12, 2002.

<sup>197</sup> UN. ECLAC, *Regional strategy for the implementation in Latin America and the Caribbean of the Madrid International Plan of Action on Ageing*, LC/G.2228. Adopted at the Regional Inter-governmental Conference on Ageing on November 21, 2003.

<sup>198</sup> UN. ECLAC, *Brasilia Declaration*. Adopted at the Second Regional Intergovernmental Conference on Ageing in Latin America and the Caribbean, on December 6, 2007, LC/G.2359/Rev.1.

<sup>199</sup> WHO. Pan-American Health Organization. Final report of the 49th Directing Council, 61st Session of the Regional Committee, Res. CD49.R15, October 2, 2009.

<sup>200</sup> Adopted at the Fifth Summit of the Americas held in Port-of-Spain, Trinidad and Tobago, on April 19, 2009, OAS/Ser.E CA-V/DEC.1/09.

<sup>201</sup> UN. ECLAC, *San José Charter on the Rights of the Older Person of Latin American and the Caribbean*. Adopted at the Third Regional Intergovernmental Conference on Ageing in Latin America and the Caribbean on May 11, 2012, LC/G.2537.

<sup>202</sup> Some of them are: the right to health, to life, to non-discrimination for reasons of age, to decent treatment, the prohibition of cruel or degrading treatment, and the right of access to personal information.

<sup>203</sup> The international community began to emphasize the situation of the older person in the Vienna Declaration and Programme of Action and the following declarations continued to raise international awareness of the essential requirements for the well-being of older persons, and differentiated measures were adopted under both the universal system and the regional systems. In the case of the universal system, specific measures can be mentioned such as the promotion and protection of human rights and the elimination of discrimination, abandonment, abuse and violence against older persons; activities to promote health and universal and life-long access of older persons to health services as a pillar to support healthy ageing. In the case of the regional system, mention can be made of measures such as the promotion of universal coverage of health services for older persons, incorporating ageing as an essential component of national health policies and laws; the promotion of equal access to comprehensive, opportune and quality health services in accordance with the public policies of each country; the promotion of access to basic medicines of long-term use for older persons, and reinforcement of the prevention and treatment of chronic illnesses and other health problems of older persons.

<sup>204</sup> Cf. OAS. Inter-American Convention on Protecting the Human Rights of Older Persons, *supra*. Ratified by Chile on November 7, 2017.

<sup>205</sup> The Inter-American Convention on Protecting the Human Rights of Older Persons deserves special recognition in this regard; it standardizes guarantees of great relevance that no other binding international instrument had previously explicitly considered in the case of older persons, such as the relationship between the right to life and dignity in old age, or the right to independence and autonomy.

<sup>206</sup> The Southern Common Market (MERCOSUR) forms part of the Meeting of High-Level Human Rights Authorities and Foreign Ministries of MERCOSUR and Associated States. In 2016, the MERCOSUR Institute for Human Rights Public Policies



appreciation of the older person in society, the creation of national plans to address the issue of ageing and the associated needs integrally, the promulgation of laws, and the facilitation of access to social security systems.

128. The CESCR General Comment No. 6<sup>207</sup> emphasizes the obligation of the States Parties to the Covenant (ICESCR) to bear in mind that prevention, through regular checks suited to the needs of older women and men, plays a decisive role, as does rehabilitation, by maintaining the functional capacities of older persons, with a resulting decrease in the cost of investments in health care and social services.<sup>208</sup> In this regard, CESCR General Comment No. 14 identifies the substantive issues derived from the implementation of the right to health and specific issues relating to older persons, including “preventive, curative and rehabilitative elements [...] aimed at maintaining the functionality and autonomy of older persons; and attention and care for chronically and terminally ill persons, sparing them avoidable pain and enabling them to die with dignity.”<sup>209</sup> The European Court of Human Rights (hereinafter “ECHR”) has also referred to the protection of the rights of older persons.<sup>210</sup>

129. With regard to the regional case law on the right to health of older persons, the decisions of high courts of some States in the region have developed the protection of the rights of older persons at the domestic level,<sup>211</sup> underscoring the need to provide special protection to the older person.

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(IPPDH) published a document entitled: “Older persons: towards a regional rights agenda,” which reveals the progress made by the members countries on consolidating the rights of older persons in the region. Cf. IPPDH-MERCOSUR, “*Personas mayores: hacia una agenda regional de derechos*”, November 2016, pp. 55 to 156.

<sup>207</sup> Cf. UN. CESCR, *General Comment No. 6, supra*.

<sup>208</sup> Cf. UN. CESCR, *General Comment No. 6, supra*, para. 35.

<sup>209</sup> Cf. UN. CESCR, *General Comment No. 14, supra*, para. 25.

<sup>210</sup> Cf. ECHR, *Case of Sawoniuk v. The United Kingdom*, No. 63716/00. Judgment of May 20, 2001; *Case of Farbtuhs v. Latvia (Just satisfaction)*, No. 4672/02. Judgment of December 2, 2004, and *Case of Dodov v. Bulgaria*, No. 59548/00. Judgment of January 17, 2008, paras. 80 and 81.

<sup>211</sup> For example: Constitutional Court of Colombia. Judgment T-149 of March 1, 2002: “The scarcity of resources is not an argument that is constitutionally admissible to deny basic health care to individuals in a situation of evident vulnerability such as older persons [...]. There is an obligation to provide special protection to the older person” [...]; Judgment T-056 of February 12, 2015: “In relation to right to health of those who form part of a group that is subject to special protection, it is necessary to consider that, pursuant to the Constitution, greater effort is required to comply with the obligations of protection and guarantee by the authorities and by private individuals when treating their illnesses or health problems. Beneficiaries of such measures include [...] older persons [...] because older persons have the right to increased protection in relation to health, and health-care facilities are obliged to provide them with the medical care they require [...]. Indeed, the increased protection is implemented with the guarantee of the continuing, permanent and effective health services that the user requires, which means, if necessary, the provision of medicines, inputs or services excluded from the Compulsory Health Plan.” Supreme Court of Justice of Costa Rica. Constitutional Chamber. Case file: 15-016089-0007-CO. Res. No: 2015017512. Judgment of November 6, 2015; Case file: 15-001311-0007-CO. Res. No: 2015002392. Judgment of February 20, 2015, and Case file: 15-015890-0007-CO. Res. No: 2015018610. Judgment of November 27, 2015.

Cf. *Mutatis mutandi*, Constitutional Court of Colombia, Judgment T-716/17. In this case, when ruling on the protection of the minimum subsistence for an older person who was eliminated from the “Colombia Mayor” assistance program, the Constitutional Court ordered that his real conditions of vulnerability be verified in order to determine the effects of the measure. Also, similar cases include: Judgment T- 010/17; Judgment T-025/16, and Judgment T-348/09, in which that Court emphasized that “owing to the reduction in physical abilities, the reduction in life expectancy, and the greater effects on their health [older persons] constitute one of the groups that are subject to special constitutional protection.”

Cf. Supreme Court of Justice of the Nation Argentina. Ruling: 329:1638. Judgment of May 16, 2006.

Meanwhile, in Mexico, the First Chamber of the Supreme Court of Justice of the Nation, in the judgment on the review of a direct amparo No. 1399/2013, determined that older persons “owing to [their] vulnerability merit special protection, and this is increased by the fact that international instruments and modern legal systems have been establishing guidelines [for their] protection, to improve their situation within the social fabric, and it is intended to achieve this by ensuring the right to: [...] iii) non-discrimination in employment, access to housing, health care and social services; (iv) health services” [...]. Cf. Supreme Court of Justice of the Nation (Mexico), Ruling 1. CXXXIV/2016, Tenth period. Book 29, Volume II, April 2016.

130. In this regard, this Court emphasizes that it is an unescapable fact that the population is ageing<sup>212</sup> constantly and considerably.<sup>213</sup> The vertiginous change in demographics in the countries of the region<sup>214</sup> presents challenges and the impact on human rights requires States to get involved to provide a comprehensive response, so that older persons are recognized as special subjects of law as regards measures of promotion and prevention in the area of health. To this end, society must also be involved in order to provide older persons with an acceptable quality of life. During the hearing, expert witness Dr. Javier Santos, stated that:

“Older persons are generally vulnerable patients; they are patients that will need not only the doctor but also society in order to live their lives. We no longer talk about life expectancy [...] but rather about years of life free of illnesses [...]; that is why they need the support of the whole State. We must all get involved to ensure that we have the most possible years of [quality] life.<sup>215</sup> [...] We are all going to grow old if we are lucky [...]. What we must do is train people and shape the environment, society, to ensure that we have a place where we will be treated properly.”<sup>216</sup>

131. The Court notes that, in many situations, older persons are particularly vulnerable as regards access to health and underlines the existence of different factors such as physical limitations, and limited mobility, economic status, and the severity of an illness and possibilities of recovery. Also, in certain situations, this vulnerability is increased owing to the imbalance of power in the doctor–patient relationship,<sup>217</sup> so that it is essential that patients are guaranteed, in a clear and accessible way, the necessary information to understand their diagnosis or particular situation, as well as the measures or treatment to address the situation (*infra* para. 162).

132. Consequently, the Court emphasizes the importance of giving prominence to older persons as subjects of rights with special protection and, consequently, of comprehensive care, respecting their autonomy and independence.<sup>218</sup> The Court has asserted that, at the very least, “their health should be protected in case of chronic or terminal illnesses.”<sup>219</sup> Therefore, the Court considers that, in the case of older persons, as a vulnerable group, there is an increased obligation to respect and to ensure their right to health.<sup>220</sup> This results in the obligation to provide them with the necessary health services efficiently and continuously. Consequently, non-compliance with this obligation

<sup>212</sup> Cf. UN. United Nations High Commissioner for Human Rights, “Normative standards in international human rights law in relation to older persons,” Analytical Outcome Paper, August 2012. In this regard, the Special Rapporteur underlines that “the ageing world’s most important challenge was to ensure the enjoyment of human rights of older persons, and this made it essential to take measures to eradicate discrimination and exclusion. Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/HRC/18/37, July 4, 2011, para. 9.

<sup>213</sup> Cf. WHO, “Social Development and Ageing: Crisis or Opportunity.” Special panel at Geneva 2000, p. 4, and UN. CESCR, GC- 6, *supra*, para. 1.

<sup>214</sup> Cf. UN Population Division, “World Population Prospects: The 2015 Revision, Key Findings and Advance Tables”, Working Paper, No. 241. ESA/P/WP.241, 2015. Available at: <http://esa.un.org/unpd/wpp/>. Also: UN. ECLAC, “Challenges to the autonomy and interdependent rights of older persons,” LC/CRE.4/3, 2017, pp. 15 to 50.

<sup>215</sup> Opinion of expert witness, Dr. Javier Alejandro Santos, specialist in geriatrics and gerontology, before the Court during the public hearing of the *Case of Poblete Vilches v. Chile*, on October 19, 2017 (transcript of public hearing, p. 96).

<sup>216</sup> Opinion of expert witness, Dr. Javier Alejandro Santos, *supra*, pp. 55 and 60.

<sup>217</sup> Cf. Document supplementing the opinion of expert witness Alicia Ely Yemin, *supra* (merits file, f. 762). In it, the expert emphasized that “[...] the power imbalance in the relationship between doctor and patient may be exacerbated by the power imbalances that have historically contributed to marginalization, exclusion and/or discrimination against vulnerable groups owing to their social or economic status or situation. These structural power relationships have the potential to reinforce the position of the patient as dependent and subordinate, rather than a human being with autonomy and dignity [...]”. See also, *Case of I.V. v. Bolivia, Preliminary objections, merits, reparations and costs*. Judgement of November 30, 2016. Series C No. 329, para. 160.

<sup>218</sup> Cf. MERCOSUR. Permanent Commission on Older Persons, “*Campaña Regional: Vivir con dignidad and derechos a todas las edades*” [Regional Campaign: Living with dignity and rights at every age]. Proceedings of the XXX Plenary session, MERCOSUR/RAADH/ACTA No. 02/17.

<sup>219</sup> *Case of the Yake Axa Indigenous Community v. Paraguay, supra*, para. 175.

<sup>220</sup> Cf. *Mutatis mutandi, Case of Furlan and family v. Argentina, supra*, para. 201, and *Case of Gonzales Lluy et al. v. Ecuador, supra*, para. 311.

arises when they are denied access to health care or their protection is not ensured, and this may also result in a violation of other rights.

### **1.1.3 Analysis of this case**

133. The Court recalls that, in the instant case, the presumed victim was admitted to the Sótero del Río public hospital on two occasions. The first time, Mr. Poblete Vilches was admitted to the hospital on January 17, 2001, due to severe respiratory failure. He remained hospitalized in the Medical Intensive Care Unit for four days. On January 22, 2001, he entered the Surgical Intensive Care Unit (*supra* para. 43). On February 2, 2001, he was discharged and the members of his family had to hire a private ambulance to take him home, because the hospital did not have any ambulances available (*supra* para. 49). In the case of the second admission, on February 5 he was again admitted to the Sótero del Río Hospital where he remained in an intermediate care unit; however, his medical record stipulated that he need to be admitted to an intensive care ward (*supra* para. 51). Mr. Poblete Vilches required a mechanical ventilator, but he was not provided with this device. Mr. Poblete Vilches died on February 7, 2001 (*supra* para. 56).

134. In the instant case, the Court does not find that it is the progressive aspect of the State's obligations with regard to the right to health that is in dispute (*supra* para. 88), and this was not alleged by the representatives (*supra* para. 87). The Court must assess the alleged acts and omissions of the State in relation to the provision of immediate and basic measures (*supra* para. 104) to protect the health of Mr. Poblete Vilches, and it will therefore limit its analysis to the scope of this obligation in the specific case and in light of the obligations recognized in Articles 1(1) and 2 of the Convention.

135. Regarding standards for health-related matters, first, the Court notes that, at the time of the facts, adequate regulations existed in relation to the right to health that guaranteed this right to everyone without distinction (*supra* para. 112), so that the obligation to regulate was in keeping with the Convention (*supra* para. 119).

136. With regard to the acts and omissions that have been proved, the evidence reveals that, during the *first admission* of Mr. Poblete Vilches to the Sótero del Río Hospital, there are indications that the decision to give him an early discharge,<sup>221</sup> was not appropriate, and the State of Chile has recognized its international responsibility for this fact (*supra* para. 17). The foregoing constituted a medical action that was irresponsible at the very least, because the evidence shows that Mr. Poblete Vilches was not in an acceptable medical condition to be given an early discharge, especially considering the possibility that he had contracted an in-hospital infection.<sup>222</sup> Thus, the patient was discharged with fever and with pus seeping from his wounds. Moreover, the family were not given any indication of how to care for the patient at home, or told what could be warning signs. Therefore, it is evident for this Court that the authorities were aware of his critical condition. Thus, the early discharge had a significant impact, at least, on the rapid deterioration that he suffered immediately after this early discharge from the Sótero del Río Hospital, which represented medical negligence.<sup>223</sup>

<sup>221</sup> Cf. Opinion of expert witness, Dr. Javier Alejandro Santos, *supra*, p. 47. The expert witness added in this regard that "he was a very vulnerable patient [and he was discharged] 72 hours [after the first admission]." The expert witness also indicated that "the patient was discharged in very basic health conditions [...]; he should not have been discharged."

<sup>222</sup> Cf. Opinion of expert witness, Dr. Javier Alejandro Santos, *supra*, p. 48. Regarding the second admission to the Sótero del Río Hospital, when referring to the health of Mr. Poblete Vilches, the expert witness indicated: "he was a vulnerable patient who was discharged after 72 hours; therefore, it was not just any infection, it was an in-hospital infection."

<sup>223</sup> Cf. *Mutatis mutandi*, *Case of Vera et al. v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of May 19, 2011. Series C No. 226, paras. 54, 65, 74 and 78, and *Case of Suárez Peralta v. Ecuador, supra*, para. 154.

137. Regarding the *second admission* of Mr. Poblete Vilches to the Sótero del Río Hospital, during the hearing, expert witness Santos described the patient's condition, underlining that it was very serious, and that it called for rapid action because the older person is a very vulnerable patient. It should also be emphasized that, according to this expert witness, the antibiotic treatment was not appropriate.<sup>224</sup> In addition, he stressed that the Intensive Care Unit would have been crucial,<sup>225</sup> and also the mechanical ventilator<sup>226</sup> and that, without it, it was impossible that the patient could have survived. He also stressed that these were basic services. The expert witness also underlined that, in his opinion, the most serious error was not to have referred the patient to another center with the capacity to provide him with the care he needed, so that two days after this second admission, Mr. Poblete Vilches died without having been provided with adequate treatment to preserve his health.<sup>227</sup>

138. Accordingly, based on the elements of *quality and availability* (*supra* para. 121), during the second admission, the failure to provide the intensive care that was required in the Medical ICU, owing to the unavailability of beds in that unit, the lack of assistance with a mechanical ventilator, and the failure to transfer the patient to another medical center with the necessary facilities have been proved.<sup>228</sup> These services were basic for treating emergencies (*supra* paras. 121 and 137). In addition, the precipitate decision to discharge the patient during his first admission was significant. Consequently, based on the unavailability of certain basic elements, the health care that the patient received lacked even the minimum quality.

139. Regarding the elements of *accessibility and acceptability* (*supra* paras. 121), the Court underlines that Mr. Poblete Vilches's age proved to be a factor that limited his access to opportune medical care, because the facts of the case reveal that he was not provided with the appropriate medical treatment partly due to his condition as an older person (*supra* paras. 47 and 53). This was the reason why his medical care was not given priority despite his critical condition and his advanced age (*supra* para. 52).<sup>229</sup> In addition, the falsification of the family's consent and the lack

<sup>224</sup> Cf. Opinion of expert witness, Dr. Javier Alejandro Santos, *supra*, pp. 48 and 56. When referring to the antibiotic treatment provided during the second admission, the expert witness stated: "treatment must be prompt, powerful, because we don't know if there will be another opportunity [...], in my opinion, the antibiotic treatment was not correct. As I mentioned previously, the choice of antibiotic is important, because there will not be another opportunity, and that is what happened [...]."

<sup>225</sup> Expert witness Javier Alejandro Santos pointed out that it was essential that Mr. Poblete Vilches be treated in an ICU and it was not viable that he be treated with intermediate therapy following his first discharge and subsequent re-admission to the Sótero del Río Hospital. Such therapy is provided in the "Intermediate Treatment Unit" or simply the "Intermediate Unit" in hospitals, which consists of "the part of the hospital for stable critical patients whose care calls for non-invasive monitoring, surveillance, and permanent nursing services in addition to medical treatment," that "can be offered in any requested Service or Unit [...] once the patient is stable, without a significant need for invasive monitoring, and does not require procedures and/or care that only exists in that unit [the ICU], such as mechanical ventilation." Cf. Opinion of expert witness, Dr. Javier Alejandro Santos, *supra*, p. 48.

E. Páez y col., "Guías 2004 de organización y funcionamiento de unidades de pacientes críticos", Revista Chilena de Medicina Intensiva, 2004, Vol. 19 (4), p. 211, and C. de la Hoz and R. Ríofrío, "Criterios de Ingreso y Egreso de la Unidad de Paciente Crítico. Unidad de Paciente Crítico: Unidad de Cuidados Intensivos (ICU) y Unidad de Tratamiento Intermedio (UTI)", Clínica Mayor, Chile, March 2015, p. 7. Regarding the general nature of the specialized medical care provided in hospital intensive care units, see E. Páez y col., "Guías 2004 de organización y funcionamiento de unidades de pacientes críticos," *supra*.

<sup>226</sup> Cf. Opinion of expert witness, Dr. Javier Alejandro Santos, *supra*, p. 54. In this regard, he stated: "if the patient had had any chance of recovering, it was with its assistance [...]."

<sup>227</sup> Cf. Opinion of expert witness, Dr. Javier Alejandro Santos, *supra*, p. 60. The expert witness stated: "[...] I could build 30 hospitals and I would never have enough beds; what I have to do is see how I can provide a person in need with what they require. If I have to obtain it from somewhere else, I will take him where he needs to go, but I cannot simply not treat him because I have not got what is required."

<sup>228</sup> Cf. Affidavit made by Cesia Leila Siria Poblete Tapia, *supra* (evidence file affidavits, f. 4466).

<sup>229</sup> Cf. Statement made by Vinicio Marco Antonio Poblete Tapia before the Court during the public hearing of October 19, 2017, *supra*, p. 16. Mr. Poblete Tapia stated: "Dr. Montecinos said 'your father was already given a chance to live' – as if he was a supernatural being who had power over life – 'I gave him the opportunity to live' he said [...] 'the first time he was admitted to the Sótero del Río; I am not going to give him another opportunity to live, your father must now die [...].'"

of clear and accessible information on the patient's condition is also unacceptable (*supra* para. 46 and *infra* para. 173).

140. On this basis, the Court affirms that a person's age should not represent an obstacle to his human development and, thus, to access to the protection of his health. In this regard, the Court reiterates that older persons are subject to protection owing to their situation of vulnerability and the State has increased obligations in relation to the protection and guarantee of their right to health.

141. During the hearing, expert witness Santos underscored the lack of capacity of the human resources as regards knowing how to treat an older person based on the latter's vulnerability, and the infrastructure deficiencies<sup>230</sup> evident in that hospital. In particular, he stated that:

"[The measures that should have been taken were basic] for a medium-level hospital; it did not even have to be a high-level hospital. [...] It was basic. Now, in 2001, even in the 1990s and in the 1980s also; [thus,] if the patient could have had the possibility of responding, it was with the assistance of a mechanical ventilator and with hemodynamic monitoring in a closed unit [...]."

142. Mr. Poblete Vilches was an older person with additional medical conditions;<sup>231</sup> this meant that his situation converted him into a patient who was even more vulnerable. Nevertheless, it has been shown that he did not receive adequate treatment based on his specific condition. The factual framework reveals that, during his second admission, he required urgent health care services and their immediate provision was vital. In sum, the patient required urgent, good quality medical care, which the public health system failed to provide, so that the situation resulted in discrimination owing to his condition as an older person.

143. Based on the above, the Court concludes that the Chilean State did not ensure Mr. Poblete Vilches's right to health without discrimination, by providing the necessary and urgent services required by his special situation of vulnerability as an older person. Therefore, the State violated the right to health, pursuant to Article 26 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Mr. Poblete Vilches.

## **1.2 Rights to life and to personal integrity**

### **1.2.1 Regarding the right to life**

144. The State did not acknowledge its responsibility for the violation of Article 4 of the American Convention, considering that the facts that occurred lacked a causal nexus to the death of Mr. Poblete Vilches (*supra* para. 20). The Court must therefore determine whether there is evidence that proves that the State's acts or omissions resulted in the death of the patient.

145. The Court has indicated that the right to life is a fundamental human right, and its full enjoyment is a requirement for the enjoyment of all the other human rights. Owing to the

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<sup>230</sup> Opinion of expert witness, Dr. Javier Alejandro Santos, *supra*, p. 51. In this regard, the expert indicated: "regarding individual shortcomings, there were no professionals who could understand what the patient was indicating," and he added: "regarding structural deficiencies, these related to the need for a service organized by the State, or the institution in which it has been set up, with the specialists able to treat this type of medical condition."

<sup>231</sup> Cf. Opinion of expert witness, Dr. Javier Alejandro Santos, *supra*, p. 46. In it, he stated: "patient, 76 years of age, with history of Type 2 diabetes, hypertension, arrhythmia [...]."

fundamental role assigned to it in the Convention, States have the obligation to create the conditions required to ensure that this right is not violated.<sup>232</sup>

146. The Court has affirmed that States must implement positive measures to protect the life of the persons under their jurisdiction. Moreover, they must ensure the quality of health services and that health care professionals meet the necessary requirements for the exercise of their profession in order to protect the life of their patients.<sup>233</sup> The CESCR<sup>234</sup> and the European Court of Human Rights<sup>235</sup> have ruled similarly.

147. In this regard, the Court finds that, in health-related matters, not every death that occurs due to medical negligence should be attributed to the State in the international sphere.<sup>236</sup> Therefore, the particular circumstances of the case must be examined.

148. To determine the international responsibility of the State in cases of death in a medical context, it is necessary to prove the following: (a) that, by act or omission, a patient is denied access to health in situations of medical emergency or the need for essential medical treatments, despite the risk that this denial signifies for the patient's life, or (b) serious medical malpractice is proved,<sup>237</sup> and (c) that there is a causal nexus between the act that has been proved and the harm suffered by the patient.<sup>238</sup> When responsibility can be attributed to an omission, it is necessary to verify the probability that the omitted conduct would have interrupted the causal process that led to the harmful result. This verification must take into consideration the possible situation of special vulnerability of the person concerned<sup>239</sup> and, if this is applicable, the measures taken to protect that situation.<sup>240</sup>

149. In the case *sub judice*, this Court has verified a series of omissions in basic health services,<sup>241</sup> several of which have even been acknowledged by the State (*supra* paras. 17 and 18). In particular,

<sup>232</sup> *Case of Ximenes Lopes v. Brazil, supra*, para. 124; *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2012 Series C No. 257, para. 172, and Case of the Punta Piedra Garifuna Community and its members v. Honduras, Preliminary objections, merits, reparations and costs. Judgment of October 8, 2015. Series C No. 304, para. 262.*

<sup>233</sup> *Case of Suarez Peralta v. Ecuador, supra*, para. 135.

<sup>234</sup> UN, Economic and Social Council, CESCR. GC-14, *supra*, paras. 35 and 51: “[o]bligations to protect include [...] the duties of States to adopt legislation or to take other measures ensuring [...] quality of health facilities [...] and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct.” “Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties,” which include, for example, “such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others.”

<sup>235</sup> The ECHR has indicated that: “[among] the fundamental provisions of the Convention [States are required to comply with] the obligation [...] to adopt] the necessary measures to protect the lives of the persons under their jurisdiction [...]. These principles also apply in the sphere of public health, where positive obligations [...] require the State to establish a framework of regulated entities, either public or private, adopting appropriate measures for the protection of their patients’ lives.” See also, *Case of Lazar v. Romania*, No. 32146/05. Third Section. Judgment of May 16, 2010, para. 66; *Case of Z v. Poland, supra*, para. 76, *Case of Calvelli and Ciglio v. Italy*. No. 32967/96. Judgment of January 17, 2002, para. 49, *Case of Byrzykowski v. Poland*. No 11562/05. Fourth Section. Judgment of June 27, 2006, para. 104, and *Case of Silih v. Slovenia*. No. 71463/014. Judgment of April 9, 2009, para. 192.

<sup>236</sup> ECHR, *Case of Lopes de Sousa Fernandes v. Portugal*, No. 56080/13. Judgment of December 19, 2017, paras. 194, 195 and 196.

<sup>237</sup> *Case of Ximenes Lopes v. Brazil, supra*, paras. 120 to 122, 146 and 150. and *Case of Vera Vera et al. v. Ecuador, supra*, paras. 54 and 65.

<sup>238</sup> *Cf. Mutatis mutandi*, ECHR, *Case of Lopes de Sousa Fernandes v. Portugal, supra*, para. 195.

<sup>239</sup> *Cf. Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs. Judgment of August 24, 2010. Series C No. 214. para. 227, and Case of Furlan and family v. Argentina, supra*, para. 134.

<sup>240</sup> *Case of Ximenes Lopes v. Brazil, supra*, para. 125.

<sup>241</sup> In this regard, at the time of the facts, the Sótero del Río Hospital did not have the infrastructure and basic elements to provide adequate medical care to the patient. This is exemplified by, for example, the unavailability of beds in the

during his second admission, it was verified that the State was aware of the intensive treatment that Mr. Poblete Vilches required (ordered in his medical record) and which he did not receive.

150. The Court considers that the State denied Mr. Poblete Vilches urgent medical treatment, despite the medical staff being aware that his life was in danger if he was not given the required life support and, especially, considering his condition as an older person (*supra* para. 137). Therefore, the State did not take the necessary basic and urgent measures that could reasonably have been taken to ensure his right to life (*supra* paras. 141 and 142). Furthermore, the State did not provide a valid justification for having denied basic emergency services.

151. Regarding the causal nexus, the Court considers that the cause of the harmful result cannot be attributed to the lack of health care, because this is an omission, and it is evident that omissions cannot “cause” anything; rather, they allow a causation to continue that “should have” been interrupted by the conducted ordered by law. Consequently, the probable outcome of the interruption of a causation that was not interrupted must always be assessed. Therefore, it has been proved in this case that there is a high probability that adequate health care assistance would, at least, have prolonged the life of Mr. Poblete Vilches; thus, it must be concluded that the omission to provide basic health care services violated his right to life (Article 4 of the Convention).

### **1.2.2 Regarding the right to personal integrity**

152. In relation to Article 5(1) of the Convention, the Court has established that personal integrity is directly and immediately connected to health care,<sup>242</sup> and the lack of adequate medical care may lead to the violation of Article 5(1) of the Convention.<sup>243</sup> In this regard, the Court has affirmed that the protection of the right to personal integrity supposes the regulation of the health services in the domestic sphere, as well as the implementation of a series of mechanisms to protect the effectiveness of this regulation<sup>244</sup> (*supra* para. 124). Therefore, the Court has indicated that, in order to comply with the obligation to ensure the right to personal integrity, and in the context of health, States must establish an adequate legal framework that regulates the provision of health services, establishing standards of quality for both public and private institutions that prevent any possible violation of personal integrity in those services.<sup>245</sup>

153. The Court notes that in her statement before this Court, Dr. Sandra Castillo Montufar stated that:

“Following the surgical procedure in question, on February 5, 2001, [...] [o]n arriving at the home of Vinicio Poblete Vilches, [she found] a patient with serious physical and mental deterioration, feverish, stuporous, and in a coma [...]. The patient was severely ill with sepsis; unresponsive to stimuli, light or sound. He was unconscious and needed to be transferred to hospital urgently [...].”<sup>246</sup>

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appropriate medical unit, the failure to transfer him and the lack of a mechanical ventilator, together with the lack of ambulances and the failure to provide clear and transparent information to the family members. Furthermore, the medical staff who intervened did not ensure the patient’s vital needs, due particularly to the early discharge, the antibiotic used, the numerous versions of the cause of death, and the treatment provided given his condition as an older person (*supra*, paras. 136 and 137).

<sup>242</sup> Cf. *Case of Albán Cornejo et al.*, *supra*, para. 117, and *Case of Vera Vera et al. v. Ecuador*, *supra*, para. 43.

<sup>243</sup> Cf. *Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela (Preliminary objection, merits, reparations and costs)*. Judgment of July 5, 2006. Series C No. 150, para. 103, and *Case of Vera Vera et al.*, *supra*, para. 44.

<sup>244</sup> Cf. *Case of Gonzales Lluy v. Ecuador*, *supra*, paras. 171, and *Case of Albán Cornejo et al.*, *supra*, para. 121; See also: ECHR. *Case of Lazar v. Romania*, *supra*, para. 66; *Case of Z v. Poland*, No. 46132/08. Fourth Section. Judgment of November 13, 2012, para. 76, and UN, CESCR, GC-14, *supra*, para. 12, 33, 35, 36 and 51.

<sup>245</sup> Cf. *Case of Suárez Peralta v. Ecuador*, *supra*, para. 132.

<sup>246</sup> Cf. Affidavit made by Sandra Castillo Montufar on October 11, 2017 (evidence file affidavits, ff. 4475 and 4476).

154. Regarding the second admission, and in relation to Mr. Poblete's condition, the family indicated that:

"They left him hospitalized, in a hallway, naked, with just a sheet over him, tied down and without any medical supervision [for] two days; [...] on February 6, his condition was even worse and he was still on a stretcher in a hallway [and] they had still not admitted him to the ICU," and that the following day "at 5.45 a.m. and following a long agony [...] he died."<sup>247</sup>

155. In the instant case, the Court has verified various omissions in the care provided that contributed to the deterioration of Mr. Poblete Vilches's health (*supra* paras. 133 to 143). These omissions, several of them acknowledged by the State itself, occurred, in particular, during both the first admission, with the early discharge and the lack of information to the family about the patient's condition and care so that they could appreciate the warning signs and know how to respond, and during the second admission, with the denial of the basic services he required and the failure to transfer him to another center with available facilities. In particular, as a result of these situations, for at least five days Mr. Poblete Vilches suffered in different ways due to the failure to treat his specific health problems (*supra* paras. 153 and 154). In this regard, the Court finds that the foregoing facts constituted a violation of his right to personal integrity, as acknowledged by the State itself.

156. Consequently, the Court finds that the State is responsible for the violation of the obligation to ensure the rights to life and personal integrity, recognized in Articles 4 and 5 of the American Convention, in relation to the rights to health and non-discrimination pursuant to Articles 26 and 1(1) of this instrument, to the detriment of Mr. Poblete Vilches.

### **1.3 Right to informed consent in health-related matters and access to information**

#### **1.3.1. Vinicio Poblete and the State's partial acknowledgement of responsibility**

157. In the instant case, the Court notes that there is no dispute about the violations of the Convention that have been alleged to the detriment of Mr. Poblete Vilches, because the State acknowledged its international responsibility for the violation of the rights of access to information (Article 13), and to dignity (Article 11) and personal liberty (Article 7) (*supra* para. 16). The Court admits the scope of this acknowledgement to the detriment of Mr. Poblete Vilches.

158. In this regard, the State acknowledged the following facts: (i) the presumed victim was unconscious when the decision was taken to operate on him and, therefore, he was not in a condition to consent to any type of procedure; (ii) the family were not adequately informed of the procedure that would be performed on the presumed victim; (iii) the only reference to the existence of a supposed consent by the family was in the medical record, and it raises doubts about the way in which it was obtained and its authenticity; (iv) the medical record contains no information or note that would allow it to be understood that the supposed informed consent was provided in keeping with the requirements established by international law, and (v) the medical record reveals that doubts existed as to whether the family understood the presumed victim's condition (*supra* para. 18).

159. Regarding the members of Mr. Poblete Vilches's family, the Court notes that the State acknowledged that, in this case, there had been no prior, free, full and informed consent pursuant to Article 13 of the Convention. However, it did not acknowledge its international responsibility for the alleged violation of Article 7 and 11 to their detriment (*supra* paras. 30 and 98)

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<sup>247</sup> Cf. Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017 (evidence file affidavits, f. 4466), and Affidavit made by Alejandra Marcela Fuentes Poblete on October 6, 2017 (evidence file affidavits, f. 4472).



160. In this case, the Court understands that informed consent forms part of the accessibility of information (*supra* para. 121) and, therefore, of the right to health (Article 26). Accordingly, access to information – established in Article 13 of the Convention – acquires an instrumental nature<sup>248</sup> to ensure and to respect the right to health. Thus, the right of access to information is a guarantee in order to make the derivation of the right contemplated in Article 26 of the Convention, with the possibility of accrediting other related rights, according to the particularities of the specific case. Consequently, and because the dispute persists in relation to specific aspects of the consent in favor of the family, the Court will now rule on: (i) consent by representation or substitution, and (ii) the alleged violation of Articles 11 and 7 to the detriment of the family members.

### **1.3.2 Consent by substitution and access to information on health-related matters by the family**

161. Regarding the right to obtain informed consent, the Court has recognized that Article 13 of the American Convention includes the freedom to seek, receive, and impart information and ideas of all kinds,<sup>249</sup> and this protects the right of access to information, including information on the health of an individual.<sup>250</sup> It has established that informed consent consists of “a prior decision to accept or to submit to a medical act in the broadest sense, which has been freely obtained – in other words, without threats or coercion, improper induction or incentives – and given after obtaining adequate, complete, reliable, comprehensible and accessible information, provided that this information has really been understood, which would allow the individual to give their full consent.” This rule consists not only in an act of acceptance, but also in “the resulting process in which the following elements must be present for it to be considered valid: the consent must be prior, free, full and informed.”<sup>251</sup> In this regard, as a general rule, consent is personal, because it should be provided by the person who will undergo the procedure.<sup>252</sup>

162. The Court has also established that, at the very least, health-care providers should offer the following information: (i) an evaluation of the diagnosis; (ii) the purpose, method, probable duration, and expected benefits and risks of the proposed treatment; (iii) the possible adverse effects of the proposed treatment; (iv) treatment alternatives, including those that are less invasive, together with the possible pain or discomfort, risks, benefits and secondary effects of the alternative treatments proposed; (v) the consequences of the treatment, and (vi) what may occur before, during and after the treatment.<sup>253</sup>

163. In this case, the Court recalls that the facts that relate to the lack of informed consent by the family are those that occurred in relation to the surgical procedure performed on Mr. Poblete Vilches

<sup>248</sup> Cf. *Advisory Opinion OC-23/17, supra*, para. 211. “Also, inter-American case law has recognized the instrumental nature of certain rights of the American Convention, such as the right of access to information, insofar as they allow the realization of other rights of the Convention, including the rights to health, to life and to personal integrity [...]”

<sup>249</sup> Cf. *Case of “The Last Temptation of Christ” (Olmedo Bustos et al.) v. Chile. Merits, reparations and costs*. Judgment of February 5, 2001. Series C No. 73, para. 64, and *Case of Lagos del Campo v. Peru, supra*, para. 89.

<sup>250</sup> Cf. *Case of Claude Reyes et al. v. Chile. Merits, reparations and costs*. Judgment of September 19, 2006. Series C No. 151, para. 77, and *Case of I.V. v. Bolivia, supra*, para. 156. See also, UN, CESCR, GC-14, *The right to the highest attainable standard of health, supra*, para. 12.

<sup>251</sup> Cf. *Case of I.V. v. Bolivia, supra*, para. 166.

<sup>252</sup> Cf. *Case of I.V. v. Bolivia, supra*, para. 182. Cf. Indeed, only the patient may agree to undergo a medical procedure according to the World Medical Association Declaration of Helsinki, Ethical Principles for Medical Research involving Human Subjects, Helsinki, Finland, June 1964, and amended by the 59<sup>th</sup> General Assembly, Seoul, Republic of Korea, October 2008), Principle 25, and the World Medical Association Declaration of Lisbon on the Rights of the Patient, adopted by the 34<sup>th</sup> World Medical Association Assembly in Lisbon, Portugal, September/October 1981, and amended by the 47<sup>th</sup> WMA General Assembly, Bali, Indonesia, September 1995, and editorially revised by the 171<sup>st</sup> WMA Council Session, Santiago, Chile, October 2005, Principle 3.

<sup>253</sup> Cf. *Case of I.V. v. Bolivia, supra*, para. 189.

during his first admission. However, with regard to the second admission, the facts relate to aspects of access to information by the family (*infra* para. 173).

164. During his first admission, Mr. Poblete Vilches was transferred to the “theater” to make an incision in order to verify whether he had fluid in the heart, even though his family members informed the medical staff that he could not undergo a surgical procedure because he was diabetic. Following the surgical procedure, Mr. Poblete had three wounds at waist-level in which a drainage tube was inserted. In this case, the representatives alleged that Mr. Poblete Vilches’s family were never provided with information either before or after the surgical procedure performed on Mr. Poblete Vilches during his first admission to the Sótero del Río Hospital.<sup>254</sup> They also indicated that the family never authorized this procedure and the authorization in the medical file was falsified (*supra* paras. 45 to 47).

165. The Court takes note of the domestic norms that existed at the time of the facts, particularly with regard to the consent required in order to perform procedures such as those that this case refers to, namely:

a) Supreme Decree No. 42 of 1986, which adopted the Organic Health Services Regulations, established in its article 105 that “medical professionals shall inform patients, their legal representatives or their family members, when possible and when appropriate, of the diagnosis and the probable prognosis of their illness, the therapeutic or medical-surgical measures that will be applied and the risks that these – or their omission – involve, in order to allow their informed decision, and also the preventive measures that the patient or his family should take.”

b) The 1986 “Medical Ethics Norms and Documents” prepared by the Chilean Medical Association, established in its article 15 that “in cases in which it might be therapeutically necessary to resort to treatments that involve certain risks or severe mutilation for the patient, the doctor must have the express consent, provided by a fully informed decision, by the patient, or the responsible family members when the patient is a minor or is unable to take a decision. In situations of medical emergency or absence of responsible family members, when it is not possible to communicate with them or if they do not exist, the doctor may prescind of the authorization established in the preceding paragraph, without prejudice to trying to obtain a colleague’s favorable opinion of the treatment.”<sup>255</sup>

<sup>254</sup> Cf. Affidavit made by Cesia Leila Siria Poblete Tapia on October 6, 2017 (evidence file, f. 4465); Affidavit made by Alejandra Marcela Fuentes Poblete on October 6, 2017 (evidence file, f. 4472); Statement made by Vinicio Marco Antonio Poblete Tapia before the Court during the public hearing on October 19, 2017, *supra*, pp. 5, 6, 8 and 14).

<sup>255</sup> Ethics Code of the Chilean Physicians’ Association; A.G, Reprinted 2013, Article 27 (updated in 2013): “If the patient is not in conditions to give his consent because he is a minor, incapacitated, or due to the urgency of the situation, and it is not possible to obtain the consent of the family, the doctor shall provide the care dictated by his professional conscience. The opinion of a minor shall be considered based on age and level of maturity.” Article 28 (updated in 2013): “The right of the patient to reject, totally or partially, a diagnostic test or a treatment shall be respected and, in all cases, the doctor must inform the patient, in such a way that it is understandable, of the possible consequences of his refusal. In this circumstance, the doctor will not abandon the patient, and should ensure that he is provided with the necessary general care. In cases of imperative medical emergency, the doctor shall act in accordance with this conscience, protecting the right to life of the patient.” Ministry of Health, Public Health Department, Law 20584 of April 24, 2012. Regulating the rights and obligations of individuals in relation to actions involving their health care. Article 10: In the case of urgent or emergency medical care; that is, when the lack of an imperative and immediate intervention involves a risk to life or severe functional consequences for the person and they are not in a condition to receive and understand the information, this shall be provided to their representative or the person who is caring for them, ensuring that the information is limited to the situation described. Nevertheless, the person shall be informed, as indicated in the preceding paragraphs when, in the opinion of the attending physician, his condition allows this, provided this does not endanger his life. The impossibility of providing information may never delay or postpone urgent or emergency health care. Ministry of Health, Department of Health Service Networks, Decree No 31 of November 26, 2012. Adoption of Regulations on delivery of information and expression of informed consent in health care. Article 4: “If the patient, according to the professional who is treating him, is not in conditions to receive the information on his health condition directly, for reasons of an emotional nature or if he has difficulties to understand, or is unconscious, the information shall be given to his legal representative and, in the absence of the latter, to the person who is caring for him. Nevertheless, once he has recovered his ability to understand, if this occurs, he shall be provided with the information directly. The same procedure shall be adopted in situations of medical urgency or emergency; that is, when the lack of immediate medical care signifies a risk to the patient’s life or of severe

c) In 1999, the National Health Foundation, together with the Chilean Ministry of Health prepared the "Charter of Patients' Rights" which established the steps to follow to obtain a patient's informed consent, and also the cases in which there are exceptions: minors, legal incapacity, understanding impairment – even in adults who do not have the ability to decide on a procedure. In the latter case, it is necessary to obtain the informed consent of the next of kin or the closest relatives who are legally entitled to represent the patient.<sup>256</sup>

166. Based on the foregoing, the Court understand that consent by representation or substitution comes into play when it is verified that the patient, owing to his particular condition, is not able to take a decision on his health, so that this power is granted to his representative, the authority, person, family member or institution designated by law. However, any limitation on decision-making must take into account the evolution of the patient and his actual condition to be able to provide consent.<sup>257</sup> The Court considers that among the elements required for the family to be able to give informed consent is that this must also be prior, free, full and informed,<sup>258</sup> unless an emergency situation exists, in which case the Court has already recognized that there are exceptions and health-care providers may act without the requirement of consent when this cannot be provided by the person concerned and an immediate, urgent or emergency medical or surgical procedure is required, in light of a serious risk to the life or health of the patient.<sup>259</sup>

167. In this regard, neither the representatives nor the State have argued that the surgical procedure performed on Mr. Poblete Vilches (during his first admission) was an emergency procedure. Moreover, there is no evidence that it was. Consequently, the Court finds that this incision procedure was not an emergency procedure; therefore, based on the domestic norms (*supra* para. 165), it was necessary to obtain the consent of the family members, and that did not happen in this specific case.<sup>260</sup>

168. Regarding the right to dignity recognized in Article 11 of the American Convention, the Court has indicated that a central aspect of the recognition of dignity is constituted by the possibility of all human beings for self-determination and to freely choose the options and circumstances that give a meaning to their existence, based on their own choices and convictions.<sup>261</sup> Furthermore, the second paragraph of this article establishes the inviolability of private and family life, among other protected areas. In this regard, the Court reiterates that Article 11(2) of the American Convention is closely related to the right contemplated in Article 17 of this instrument,<sup>262</sup> which recognizes the

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functional consequences and the person is not in conditions to receive and understand the information. In such cases, the information provided shall be limited to the situation in question."

<sup>256</sup> The State's answering brief (merits file, ff. 384 to 386).

<sup>257</sup> Expert opinion of Alicia Ely Yemin (evidence file, f. 761). The ECHR has determined that the violation of the right of the family to give their consent may affect other rights relating to the omission to provide clear and precise information on the procedure to be applied to the patient. ECHR, *Case of Petrova v. Latvia*, No. 4605/05. Judgment of June 24, 2014, para. 87. ECHR, *Case of Glass v. The United Kingdom*, No. 61827/09. Judgment of March 9, 2004, para. 72.

<sup>258</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, Article 6(4), Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164>, Declaration on the promotion of patient's rights in Europe, WHO Regional Office for Europe, 1994, 3.4 and UN, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, submitted in accordance with Human Rights Council Resolution 6/29, A/64/272 of August 10, 2009. Summary. Available at: <https://undocs.org/A/64/272>.

<sup>259</sup> *Cf. Case of I.V. v. Bolivia, supra*, para. 177.

<sup>260</sup> Statement of expert witness Dr. Javier Alejandro Santos, specialist in geriatrics and gerontology, during the public hearing held in this case on October 19, 2017, in Panama City, Panama, p. 53. According to the opinion of Dr. Santos, this was a necessary procedure that had to be performed. "Evidently, urgent does not mean that it can be performed 48 hours later or that the patient did not require this surgical procedure as soon as possible." "Yes, this is routine, a routine control in a patient admitted with a coronary or pulmonary edema, it is a procedure that must be performed."

<sup>261</sup> *Cf. Case of Atala Riffo and daughters v. Chile, supra*, para. 150.

<sup>262</sup> *Cf. Case of Atala Riffo and daughters v. Chile, supra*, para. 169 and *I.V. v. Bolivia, supra*, para. 153.

central role of the family and family life in the existence of an individual and in society in general.<sup>263</sup>

169. This Court has also provided a broad interpretation to the concept of liberty recognized in Article 7 of the Convention, defining it as the capacity to do or not do everything that is legally allowed, permitting everyone to organize their individual and social life, pursuant to the law, based on their own choices and convictions. The Court reiterates that this right is related to the freedom to take decisions in matters relating to health.<sup>264</sup>

170. In this regard, the Court has recognized the relationship that exists between obtaining informed consent before performing any medical act, and the autonomy and self-determination of the individual, as part of the respect and guarantee of the dignity of every human being, as well as the right to liberty. Therefore the Court understands that the need to obtain informed consent protects not only the right of patients to decide freely whether or not they wish to undergo a medical act, but is also a fundamental mechanism to achieve the respect and guarantee of different human rights recognized by the American Convention, such as dignity, personal liberty, personal integrity, including health care, and private and family life.<sup>265</sup> Thus, the existence of a connection between informed consent and the personal liberty and autonomy to take decisions regarding one's own body and health requires, on the one hand, that the State ensure and respect the decisions and choices made freely and responsibly and, on the other hand, that it ensure access to relevant information so that the individual is able to take informed decisions on the course of action to follow with regard to his body and health in accordance with his personal life plan.<sup>266</sup>

171. The Court observes that the right to the informed consent of the family members being obtained has been acknowledged by the State (*supra* para. 16). Bearing in mind the provisions of domestic law and since Mr. Poblete Vilches was unable to take a decision with regard to his health, this power should have been accorded to his family members.

172. Accordingly, taking into considering the relationship between informed consent in health-related matters (Articles 26 and 13) and Articles 7 and 11 of the American Convention, the Court finds that, in the instant case, the right of the family members to take free decisions in matters relating to health and their right to have the necessary information to take these decision, as well as their right to dignity, based on the elements of private and family life, were violated by not being accorded the possibility of giving their informed consent.

173. On this basis, the Court concludes that the State failed to comply with its international obligation to obtain, through its health personnel, the informed consent of the family of Mr. Poblete Vilches for the medical acts performed during his first admission to the Sótero del Río Hospital. In addition, the State violated the family's right of access to information because it failed to provide them with clear and precise information when the patient was discharged on the care he needed. In addition, it violated this right because, during the second admission, it did not provide clear and accessible information on the diagnosis and medical care provided to Mr. Poblete Vilches. Consequently, the Court considers that the State violated the right to obtain informed consent and of access to information on health-related matters, pursuant to Articles 26, 13, 11 and 7 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Mr. Poblete Vilches and the members of his family.

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<sup>263</sup> Cf. *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica*, *supra*, para. 145, and *I.V. v. Bolivia*, *supra*, para. 153.

<sup>264</sup> *Case of I.V. v. Bolivia*, *supra*, para. 151 and 155.

<sup>265</sup> *Case of I.V. v. Bolivia*, *supra*, paras. 165.

<sup>266</sup> Cf. *Mutatis mutandi*, *Case of Furlan and Family v. Argentina*, *supra*, para. 294, and *Case of I.V. v. Bolivia*, *supra*, para. 155.

#### **1.4 General conclusion on the right to health**

174. Taking the foregoing considerations into account, the Court has verified that: (i) the right to health is an autonomous right protected by Article 26 of the American Convention; (ii) in emergency situations, this right requires the States to ensure adequate regulation of the health care services, providing the necessary services based on the elements of availability, accessibility, quality and acceptability, in equal conditions and without discrimination, but also ensuring positive measures for groups in a situation of vulnerability; (iii) older persons enjoy an increased level of protection in relation to preventive and emergency health care services; (iv) in order to attribute responsibility to the State for medical deaths it is necessary to prove the denial of an essential service or treatment despite the predictability of the risk faced by the patient, or serious medical malpractice, and that a causal nexus is corroborated between the action and the harm. In the case of an omission, it is necessary to verify the probability that the omitted conduct would have interrupted the causal process that led to the harmful result; (v) the lack of adequate medical care may entail the violation of personal integrity, and (vi) obtaining informed consent is an obligation under the responsibility of health institutions; older persons are entitled to this right; however, it may be transferred in certain circumstances to their family members or representatives. In addition, the obligation remains to inform patients or, when appropriate, their representatives about the procedures and the patient's condition.

175. In this specific case, the Court considers that the State of Chile did not guarantee that the health care service provided to Mr. Poblete Vilches complied with the said standards, so that it failed to comply with the provision of basic measures; in other words, with its obligations of an immediate nature related to the right to health in emergency situations. In addition, the State failed to comply with its obligation to obtain the informed consent by substitution of the family members for the surgical procedure that was performed, and to provide the family with clear and accessible information on the procedure performed on the patient and his treatment. The negligence verified in the second admission, particularly denying him a ventilator, and the possibility of admittance to the required care unit, and failing to transfer him to another center that could have provided him with these measures, partly owing to his condition as an older person, considerably reduced the patient's possibilities of recovery and survival, so that his death can be attributed to the State. Furthermore, the Court has indicated that Mr. Poblete Vilches's age, as a category protected against discrimination, contributed to reducing his possibility of obtaining the required medical care.

176. Therefore, the Court finds that the Chilean State is internationally responsible for the failure to ensure the right to health, life, personal integrity, liberty, dignity and access to information pursuant to Articles 26, 4, 5, 13, 7 and 11 of the American Convention, in relation to the obligation of non-discrimination of Article 1(1) of this instrument, to the detriment of Mr. Poblete Vilches. The State is also responsible for the violation of Articles 26, 13, 7 and 11, to the detriment of the members of his family.

### **VII-2**

#### **RIGHTS TO JUDICIAL GUARANTEES AND JUDICIAL PROTECTION (ARTICLES 8 AND 25 OF THE AMERICAN CONVENTION)**

##### **A. Arguments of the parties and of the Commission**

177. The **Commission** argued that the State had violated Articles 8 and 25 of the American Convention, in relation to Article 1(1) of this instrument, in relation to the obligation to investigate the facts of this case with due diligence and in a reasonable time, to the detriment of the members of Mr. Poblete Vilches's family. Regarding due diligence, it observed that the first criminal complaint was filed by Mr. Poblete Vilches's family in November 2001 and that, due to several courts declaring themselves without jurisdiction, it was only in February 2002 that a decision was made as to which judicial authority had jurisdiction to hear their complaint. The Commission stressed that no steps

were taken in the proceedings until October 2002, eight months later, when the Sótero del Río Hospital was asked for Mr. Poblete Vilches's medical record. It also noted that more than 18 months passed between the filing of the complaint and the moment when the first deponents were called to testify. It mentioned that, over a five-year period, 2003 to 2008, only one medical opinion was requested and added that, to date, Mr. Poblete Vilches's body had not been exhumed in order to perform the autopsy that the representatives had requested on numerous occasions, and emphasized that the State had not justified why this had not been done. Moreover, it underlined that it had no information on the adoption of measures to obtain an expert opinion that clarified essential issues in order to determine possible responsibilities in the death of Mr. Poblete Vilches.

178. The Commission also indicated that the statement of the accused, Luis Carvajal Freire, was never taken, even though the First Civil Court verified that he continued working at the Sótero del Río Hospital; neither were some of the statements requested in the proceedings by Mr. Poblete Vilches's family. However, it emphasized that, despite those evidentiary omissions, the judicial authorities twice ordered the case dismissed, in December 2006 and in June 2008. In addition, the Commission mentioned that, since the second reopening of the investigation, it had no information that would allow it to establish that efforts had been made to rectify those omissions. Lastly, with regard to obtaining the family's consent for the procedure performed on January 26, 2001, it underscored the State's failure to clarify the irregularities verified in this regard. Therefore, it concluded that the State had "failed to investigate the facts of the instant case with due diligence."

179. With regard to the duty to investigate within a reasonable time, the Commission examined the four criteria established in the Court's case law. Regarding the first element – the complexity of the matter – it observed that the case related to an alleged culpable homicide to the detriment of a single victim, which occurred in a public hospital, and in which some doctors were allegedly involved; therefore, it did not find grounds to consider that the case involved a level of complexity that would justify the delay of more than 14 years. Regarding the second element – the procedural activity of the interested party – it underscored that, it was the family that initiated and promoted the investigations by filing the criminal complaints. Therefore, it argued that it was not possible to consider that the delay was due to the acts or omissions of Mr. Poblete's family. Regarding the third element – the conduct of the judicial authorities – it emphasized that the reopening of the investigation on two occasions had not resulted in the implementation of procedures to rectify the deficiencies in the investigation conducted by the authorities; to the contrary, it indicated that, since the investigation was reopened in 2008 it had received no information on any activity in the case, with the exception of the responses of the Supreme Court of Justice to the family's requests that it intervene. Lastly, the Commission considered that it was not necessary to examine the fourth element – the effect on the legal situation of the person concerned. However, it noted that, in this type of case, the outcome of the criminal proceedings may have an impact on the possibilities of obtaining reparation. Finally, the Commission concluded that the investigations conducted in the domestic sphere had not complied with the guarantee of a reasonable time. It considered that the State been unable to prove how an unjustified delay in the proceedings had no direct impact on the obligation of due diligence in the investigation and adjudication of the proceedings. It should be pointed out that the Commission did not refer to the violation of the right to an impartial judge.

180. The **representatives** agreed with the arguments of the Commission regarding the violation of Articles 8 and 25 of the American Convention. They indicated that the criminal proceedings had not complied with the required standards and that the victims had not had access to an effective remedy against the violation of their rights; consequently, they were unable to enjoy effective judicial protection. They representatives emphasized the ineffectiveness of the proceedings and, as an example of this, pointed out that the requested confrontations had not been implemented. They also underlined the lack of diligence and effectiveness of the agents of justice in advancing the investigations which were interrupted and delayed without any justification, resulting in the domestic proceedings taking seven years. In addition, they argued the violation of the right to an impartial judge established in Article 8(1) of the American Convention to the detriment of Mr.

Poblete Vilches's family. In this regard, they considered that the judge's request for reports on the mental faculties of Vinicio and Cesia Poblete Tapia was made without any grounds and without the case file revealing any element that would have justified this. They added that the judge's decision was arbitrary because it lacked any justification and, consequently, they considered it to be an example of the lack of impartiality of the judge. They concluded that the State had failed in its obligations to provide access to justice and to the truth.

181. The **State** acknowledged the violation of Articles 8 and 25 of the American Convention, in relation to the right to a reasonable time, considering that the actions of the Chilean authorities had not been sufficiently diligent (*supra* para. 16). However, it did not acknowledge the violation of the right to due diligence (*supra* para. 20) considering that the First Civil Court had conducted all the necessary evidentiary procedures. In particular, the State emphasized that, with regard to the cause of death of Mr. Poblete Vilches, two forensic medical reports had been prepared that established that there had been no violation of the rules of medical practice and rejecting the causal nexus between the doctors' actions and the patient's death. It added that the two complaints filed were processed under the former criminal inquiry proceedings in which the person who conducted the investigation was the same person who adjudicated the matter, which lessened the impartiality required by due process. It stressed that all the evidentiary procedures requested were granted with the exception of the exhumation of the body and the confrontations. In this regard, it indicated that 19 of the 26 procedures requested had been conducted and clarified that, in the instant case, there were two complaints: the first of May 2001, in which all the requested procedures were conducted and Vinicio and Cesia Poblete Tapia did not ask to be called on to ratify the complaint, and the second, filed in October 2005, in which members of the Poblete Tapia family asked to be called to ratify the complaint, and were called in April 2006; thus, the delay in the summons was six months, and not five years. The State argued that the court's investigation actions were positive and substantive, exhausting all the legal measures available. Lastly, the State did not acknowledge the violation of the right to be tried by an impartial court (*supra* para. 20) because it considered that the competent court acted within the limits of its legal authority, based on the content of the law. In this regard, it stressed that the subjective impartiality of the judge is presumed and, therefore, whoever alleges the contrary must prove this with specific, concrete evidence.

## **B. Considerations of the Court**

182. The Court recalls that, in this case, Mr. Poblete Vilches's family filed an initial criminal complaint in 2001, and a second complaint in 2005. On December 11, 2006, the First Civil Court ordered the dismissal of the case; however, on February 17, 2007, it reopened the case. Again, on June 30, 2008, it ordered the dismissal of the case and, on August 5, 2008, it ordered its reopening. To date, the criminal responsibilities for the facts of this case have not been established (*supra* paras. 59 to 79).

183. The Court recalls that the State has already acknowledged its responsibility in relation to the failure to comply with the reasonable time, taking into account the delay of approximately 17 years in the investigation of this case without results (*supra* para. 16). The Court notes that the dispute has ceased in this regard. Consequently, the Court will now refer to alleged violation of Articles 8 and 25 of the American Convention owing to the alleged violation of the rights to: (1) due diligence and (2) judicial impartiality.

### **1. On due diligence**

184. This Court has asserted that judicial protection "is one of the basic pillars of the American Convention and of the rule of law itself in a democratic society."<sup>267</sup> The Court has also indicated

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<sup>267</sup> Cf. *Case of Castillo Páez v. Peru. Merits*. Judgment of November 3, 1997. Series C No. 34, para. 82, and *Case of Lagos del Campo v. Peru, supra*, para. 174.

that "Articles 8 and 25 of the Convention establish the right of access to justice, an imperative norm of international law."<sup>268</sup> In addition, the principle of effective judicial protection requires that judicial proceedings must be accessible to the parties, without obstacles or undue delays, in order to achieve their purpose in a prompt, simple and comprehensive manner.<sup>269</sup> Added to this, the Court has indicated that Article 25(1) of the Convention establishes the obligation of the States Parties to ensure to all persons subject to their jurisdiction an effective judicial remedy against acts that violate their fundamental rights<sup>270</sup> recognized in the Constitution, the law or the Convention.<sup>271</sup>

185. Furthermore, the Court has consistently indicated that the obligation to investigate is an obligation of means and not of results, that must be undertaken by the State as its inherent legal duty and not as a mere formality preordained to be ineffective, or as a step taken by private interests that depends upon the procedural initiative of the victims or their family members or upon their offer of probative elements.<sup>272</sup> In addition, the investigation must be serious, objective and effective and designed to determine the truth and to pursue, capture and eventually prosecute and punish the perpetrators of the facts.<sup>273</sup> In addition, due diligence requires that the investigating body conduct all those actions and inquiries that are required to obtain the result sought.<sup>274</sup>

186. That said, the Court's ability, within its sphere of competence which is complementary and accessory, to examine the domestic investigation proceedings<sup>275</sup> may lead to the determination of shortcomings in their due diligence.<sup>276</sup> However, this would be admissible to the extent that it has been shown that the alleged shortcomings could have affected the investigation as a whole, so that "with the passage of time, the possibility of obtaining and presenting pertinent evidence that would clarify the facts and determine the corresponding responsibilities had been unduly affected."<sup>277</sup> Thus, it should not be assumed that deficiencies in individual measures of investigation have a negative impact on the proceedings as a whole if, despite them, the investigation was effective in determining the facts.<sup>278</sup>

187. In addition, the Court recalls that, regarding the treatment of the victim's corpse, some minimum and essential procedures are required in order to conserve probative elements and evidence that may contribute to the success of the investigation, such as the autopsy.<sup>279</sup> Thus, the

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<sup>268</sup> Cf. *Case of Goiburú et al. v. Paraguay. Merits, reparations and costs.* Judgment of September 22, 2006. Series C No. 153, para. 131, and *Case of Lagos del Campo v. Peru, supra*, para. 174.

<sup>269</sup> Cf. *Case of Mejía Idrovo v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of July 5, 2011. Series C No.228, para. 106, and *Case of Lagos del Campo v. Peru, supra*, para. 174.

<sup>270</sup> Cf. *Case of Velásquez Rodríguez v. Honduras, Merits, supra*, para. 219, and *Case of Lagos del Campo v. Peru, supra*, para. 174.

<sup>271</sup> Cf. *Case of Baena Ricardo et al. v. Panama. Jurisdiction.* Judgment of November 28, 2003. Series C No 104. para. 73; *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru, supra*, para. 69, and *Case of Vereda La Esperanza v. Colombia. supra*, para. 185.

<sup>272</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, para. 177, and *Case of Vereda la Esperanza v. Colombia, supra*, para. 185.

<sup>273</sup> Cf. *Case of Juan Humberto Sánchez v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of June 7, 2003. Series C No. 99, para. 127, and *Case of Vereda la Esperanza v. Colombia, supra*, para. 185.

<sup>274</sup> Cf. *Case of the Serrano Cruz Sisters v. El Salvador. Merits, reparations and costs.* Judgment of March 1, 2005. Series C No. 120, para. 83, and *Case of Vereda la Esperanza v. Colombia, supra*, para. 185.

<sup>275</sup> Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, para. 222, and *Case of Vereda la Esperanza v. Colombia, supra*, para. 186.

<sup>276</sup> Cf. *Case of Yarce et al. v. Colombia*, para. 282, and *Case of Vereda la Esperanza v. Colombia, supra*, para. 186.

<sup>277</sup> Cf. *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs.* Judgment of September 1, 2010. Series C No. 217, para. 172, and *Case of Vereda la Esperanza v. Colombia, supra*, para. 186.

<sup>278</sup> Cf. *Case of Luna López v. Honduras. Merits, reparations and costs.* Judgment of October 10, 2013. Series C No. 269, para. 167, and *Case of Yarce et al. v. Colombia. supra*, para. 282.

<sup>279</sup> Cf. *Case of Luna López v. Honduras. Merits, reparations and costs.* Judgment of October 10, 2013. Series C No. 269, para. 164, and *Case of the Landaeta Mejías Brothers et al. v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of August 27, 2014. Series C No. 281, para. 227.



Court has established that autopsies and the analysis of human remains must be conducted rigorously, by skilled professionals, using the most appropriate procedures.<sup>280</sup>

188. In this case, the Court reiterates that the Chilean State did not acknowledge its responsibility for the violation of diligence; consequently, the dispute subsists in this regard (*supra* paras. 30 and 181).

189. The Court notes that the Chilean State implemented a series of evidentiary procedures in the investigation of the facts of this case, such as: (a) the request to the Sótero del Río Hospital for the medical record of Mr. Poblete Vilches; (b) taking statements from some of the defendants and members of Mr. Poblete's family; (c) forensic medical reports, and (d) the issue of arrest warrants against Dr. Luis Carvajal Freire.

190. However, the Court notes that several probative procedures or judicial actions were not conducted, namely: (a) the exhumation of Mr. Poblete Vilches in order to perform an autopsy that determined the real cause of his death, requested on November 12, 2001, and ordered on February 13, 2002 (*supra* para. 60), and again requested on October 7, 2005, and on January 29, 2007, by Mr. Poblete's family; (b) the criminal case on the death of Mr. Poblete Vilches was dismissed on two occasions over a period of approximately 18 months. Added to this, following the second reopening of the case on August 4, 2008, there is no evidence that the judicial authorities have taken any steps to investigate the facts that occurred in this case and to prosecute and punish those responsible;<sup>281</sup> (c) the confrontation between Vinicio Poblete Tapia and Cesia Leyla Poblete Tapia, and Dr. María Carolina Chacón Fernández, requested by the former on March 21, 2006, and (d) Dr. Luis Carvajal Freire was not arrested, despite the fact that on February 28, 2004, December 20, 2004, and October 31, 2005, the First Civil Court issued arrest warrants against him; on April 6, 2004, the 19<sup>th</sup> Criminal Court ordered his arrest for the offense of disobeying the orders of the First Civil Court of Puente Alto; on January 8, 2005, the 19<sup>th</sup> Criminal Court ordered his arrest for the quasi-offense of homicide, and on May 23, 2007, the First Civil Court verified that Dr. Luis Carvajal Freire continued to work at the Sótero del Río Hospital.

191. Regarding the omissions described in the preceding paragraph, the Court emphasizes that they were very important for discovering the legal truth because, normally, they would have been appropriate to clarify the facts that occurred in this case and identify the corresponding responsibilities, all of which has led to a situation of impunity.<sup>282</sup>

192. Consequently, the Court considers that, in this case, the deficiencies, delays and omissions in the criminal investigation reveal that the state authorities did not act with due diligence or in keeping with the obligations to investigate and to comply with effective judicial protection within a reasonable time in order to ensure the clarification of the facts and the determination of the respective responsibilities. After approximately 17 years, the facts of this case remain in impunity. Therefore, the Court finds that the State did not ensure access to justice in violation of Articles 8(1)

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<sup>280</sup> Cf. *Case of the Landaeta Mejías Brothers et al. v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of August 27, 2014. Series C No. 281, para. 227.

<sup>281</sup> In this regard, the Court noted that on December 11, 2006, the First Court ruled that, "during the proceedings, it was found that the existence of the offense denounced had not been sufficiently justified" and declared that "the case was provisionally dismissed until new and better information has been obtained by the investigation." However, on January 29, 2007, Mr. Poblete Tapia's representatives requested the reopening of the preliminary investigation, and on February 17, 2007, the First Civil Court reopened the case and on April 17, 2007, returned the case to the preliminary investigation stage. Similarly, on June 11, 2008, the First Civil Court again declared the preliminary investigation closed and on June 30, 2008, it once again determined the dismissal "provisionally of the case, until new and better evidence is gathered by the investigation." Thus, on August 4, 2008, based on new and better evidence, the representatives of Mr. Poblete Vilches's family requested the reopening of the case and, on August 5, 2008, the First Civil Court ordered the reopening of the case (*supra* paras. 71 to 79).

<sup>282</sup> Cf. *Case of Osorio Rivera and family v. Peru, supra*, para. 184, and *Case of Tenorio Roca et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of June 22, 2016. Series C No. 314, para. 182.

and 25(1) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of the members of Mr. Poblete Vilches's family.

193. Lastly, the Court calls attention to the efforts that the collegiate medical mediation bodies should make when assessing situations of the denial of health care services or medical malpractice. In this regard, a comprehensive approach to the right to health is essential from the perspective of human rights and differentiated impacts, to ensure that they constitute independent bodies that, in light of their medical expertise, also guarantee the rights of patients.

## **2. On judicial impartiality**

194. Article 8(1) of the Convention guarantees that the decisions which determine the rights of the individual must be taken by the competent authorities determined by domestic law<sup>283</sup> and in accordance with the procedure established therein.<sup>284</sup>

195. The Court stresses that the right to be tried by an impartial judge or court is a fundamental guarantee of due process, and it must be ensured that the judge or court, in the exercise of its functions, has the utmost objectivity in the conduct of the trial.<sup>285</sup> This Court has established that impartiality requires that the judge presiding a specific dispute approach the facts of the case lacking any subjective prejudice and, also, offering sufficient guarantees of an objective nature to inspire the necessary trust in the parties to the case and in the citizens of a democratic society.<sup>286</sup> The impartiality of the court means that its members do not have a direct interest, a preconceived position, or a preference for either of the parties, and that they are not involved in the dispute.<sup>287</sup> This is because the judge must act without being subject to any improper influences, inducements, pressures, threats or interferences, direct or indirect,<sup>288</sup> but only and exclusively in accordance with – and motivated by – the law.<sup>289</sup>

196. Furthermore, the Court reiterates that the personal impartiality of a judge is to be presumed, unless there is evidence to the contrary. In an analysis of subjective impartiality, the Court must attempt to discover the personal interests or motivations of a judge in a particular case. As to the type of evidence required to prove subjective impartiality, it is necessary to ascertain whether the judge has displayed hostility or has arranged to have the case assigned to himself for personal reasons.<sup>290</sup>

197. A violation of Article 8(1) of the Convention owing to the presumed lack of impartiality of the judge must be established based on specific and concrete evidence that indicates a situation in which judges have clearly allowed themselves to be influenced by aspects or criteria outside the legal provisions.<sup>291</sup> In the instant case, the representatives did not provide probative elements or

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<sup>283</sup> Cf. *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2013. Series C No. 266, para. 158, and *Case of Duque v. Colombia, supra*, para. 159.

<sup>284</sup> Cf. *Case of Duque v. Colombia, supra*, para. 159.

<sup>285</sup> Cf. *Case of Herrera Ulloa v. Costa Rica*, para. 171, and *Case of Duque v. Colombia, supra*, para. 162.

<sup>286</sup> Cf. *Case of Herrera Ulloa v. Costa Rica*, para. 171, and *Case of Duque v. Colombia, supra*, para. 162.

<sup>287</sup> Cf. *Case of Palamara Iribarne v. Chile. Merits, reparations and costs*. Judgment of November 22, 2005. Series C No. 135, para. 146, and *Case of Duque v. Colombia, supra*, para. 162.

<sup>288</sup> Principle 2 of the UN Basic Principles on the Independence of the Judiciary.

<sup>289</sup> Cf. *Case of Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, para. 56, and *Case of Duque v. Colombia, supra*, para. 162.

<sup>290</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 234.

<sup>291</sup> Cf. *Case of Atala Riffo and daughters v. Chile. supra*, para. 190, and *Case of Duque v. Colombia, supra*, para. 165.

evidence that would allow this Court to consider that the judicial authorities acted in the absence of impartiality.

198. Consequently, the Court concludes that the State is not responsible for the violation of judicial guarantees established in Article 8(1) of the Convention, owing to the alleged lack of judicial impartiality.

### **VII-3 RIGHT TO PERSONAL INTEGRITY OF THE FAMILY MEMBERS (ARTICLE 5(1) OF THE AMERICAN CONVENTION)**

#### ***A. Arguments of the Commission and of the parties***

199. The **Commission** argued that the State had violated Article 5(1) of the American Convention, in relation to Article 1(1) of this instrument, regarding the right to mental and moral integrity to the detriment of the members of Mr. Poblete Vilches's family, owing to the additional suffering they had undergone as a result of the violations perpetrated against their loved ones and the acts or omissions of the state authorities in relation to the facts. Regarding the alleged mistreatment suffered by Mr. Poblete Vilches's family, the Commission indicated that it has no probative elements that would allow it to make a legal analysis of this. However, it stressed that the State was aware of the presumed victims' allegations regarding acts that were incompatible with their personal integrity and that of Mr. Poblete Vilches following the complaint they filed on November 12, 2001.

200. The **representatives** argued that the State had violated the right to personal integrity to the detriment of the direct family of Mr. Poblete Vilches. They indicated that his family members suffered profound depression following the death of Mr. Poblete Vilches and this affected their ability to come to terms with their new living conditions and had a serious impact on their social relations, family ties and life projects. To substantiate this, the representatives provided, as annexes to their briefs, the reports documenting the depression suffered by Blanca Margarita Tapia Encina and Cesia Poblete Tapia's attempted suicide following the death of Mr. Poblete Vilches. They indicated that the Commission had identified violations of Article 5(1) "[...] because actions that could be attributed to the State had resulted in 'emotional trauma,' in 'traumas and anxiety,' in impediments to 'living as (the victim) would have wished,' in 'psychological effects' and in 'adverse effects on self-esteem.'"

201. The representatives added that "[n]otwithstanding the violation of personal integrity that the next of kin of Mr. Poblete Vilches suffered as a result of the facts that resulted in his death, they also suffered from other violations of their personal integrity during the hospitalization [of Mr. Poblete Vilches] because they had been direct victims of mistreatment and humiliation" by the staff of the Sótero del Río Hospital during the time Mr. Poblete Vilches spent in this institution, which violated their personal integrity. As an example of this mistreatment, the representatives argued that the medical staff tried to prevent the family from seeing Mr. Poblete Vilches, "closing the door in their faces," and that the staff had refused to give them information or had provided inexact information on the status of Mr. Poblete Vilches's health each time the family asked.<sup>292</sup> The representatives added that, in their understanding, there had been an autonomous violation of the right to personal integrity of Blanca Tapia Encina and her children, Vinicio Marco Antonio Poblete Tapia and Cesia Leila Poblete Tapia and, therefore, the Court should declare the responsibility of the State of Chile for the violation of Article 5(1) in relation to Article 1(1) of the Convention to the detriment of the members of Mr. Poblete Vilches's family.

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<sup>292</sup> In their opinion, the mistreatment and humiliation suffered by the family of Mr. Poblete Vilches during his hospitalization at the hands of the medical personnel of the Sótero del Río Hospital was also revealed by the statements of Jorge Alejandro Fuentes Poblete, Alejandra M. Fuentes Poblete and Teresa del Carmen Campos Quinteros, "[...] and were explained bluntly by Vinicio Poblete Tapia during the public hearing."

202. The **State** did not acknowledge having violated the right to personal integrity to the detriment of the direct family members of Vinicio Poblete Vilches, arguing that it had not been proved that his death had been the result of its negligence, so that “a supposed violation of the family members’ personal integrity would, of necessity, have to be a direct consequence of a violation by the State in connection with the death of Vinicio Poblete Vilches,” and it considered that this had not occurred. The State recalled that, with regard to the violation of the right to personal integrity owing to the alleged mistreatment received by Mr. Poblete Vilches and the members of his family, the Commission had indicated in its Merits Report that “it does not have additional elements that allow it to establish as proven and, therefore, to make a legal analysis of the alleged mistreatment suffered by Mr. Poblete Vilches and his family.” Lastly, in its final arguments, the State added that, in its opinion, it was not possible to extend its international responsibility to the autonomous violation of the right to personal integrity of the family members because no causal nexus had been proved between the death of Vinicio Poblete Vilches and the State’s actions in this specific case.

### **B. Considerations of the Court**

203. In the instant case, the dispute between the parties subsists with regard to the autonomous violation of the right to integrity of Blanca Tapia Encina, Vinicio Marco Antonio Poblete Vilches, Cesia Leila Siria Poblete Vilches and Gonzalo Poblete Vilches, as a result of their physical and psychological suffering owing to the death of Vinicio Poblete Vilches, which is attributed to the State, as well as that resulting from the denial of justice and the alleged mistreatment received in the hospital.

204. The Court has understood that, in certain cases of egregious human rights violations, it is possible to presume the harm caused to certain members of the victims’ families owing to the suffering and anguish that the facts of such cases suppose.<sup>293</sup> However, having assessed the circumstances of this case, the Court has determined that, since the case does not correspond to an egregious violation of human rights in the terms of its case law, the violation of personal integrity of the members of Vinicio Poblete Vilches’s family based on their suffering must be proved.<sup>294</sup>

205. This Court has also underlined that the State’s contribution to the creation or exacerbation of the situation of vulnerability of an individual has a significant impact on the integrity of those around him; in particular, the close family members who are obliged to face the uncertainty and insecurity resulting from the harm caused to their immediate or close family member.<sup>295</sup>

206. In this specific case, the physical and psychological suffering of the family of Mr. Poblete Vilches consisted of: (i) Blanca Tapia Encina “sank into a deep depression [that] worsened as the attempts to clarify the death of her husband and to obtain justice were thwarted, one by one. Shortly after, she was diagnosed to be suffering from cancer, an illness that rapidly resulted in her sudden death on January 13, 2003; in other words, less than two years after the death of her husband. The cause of death was determined to be septic shock, gallbladder cancer with multiple metastases”; (ii) the depression suffered by Cesia Leila Poblete Tapia as a result of the death of Vinicio Poblete Vilches led to her attempted suicide; (iii) Vinicio Marco Antonio Poblete Tapia was diagnosed with cancer in 2005, and subsequently his right kidney was removed with the consequent aftereffects, and he also suffered from chronic obstructive pulmonary disease, “resulting from a previous pulmonary emphysema,” he was diagnosed with diabetes mellitus in 2013, and developed thyroid nodules and, lastly, (iv) the death of Gonzalo Poblete Tapia due to a heart attack; he had

<sup>293</sup> Cf. *Case of Blake v. Guatemala. Merits*. Judgment of January 24, 1998. Series C No. 36, para. 114, and *Case of Favela Nova Brasília v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of February 16, 2017. Series C No. 333, para. 67.

<sup>294</sup> *Case of Suárez Peralta v. Ecuador, supra* para. 158, and *Case of Valencia Hinojosa et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 29, 2016. Series C No. 327, para. 142.

<sup>295</sup> *Case of the Yean and Bosico Girls v. Dominican Republic. Preliminary objections, merits, reparations and costs*. Judgment of September 8, 2005. Series C No 130, para. 204.

previously suffered a severe stroke in his childhood as a result of in-hospital meningitis, and had suffered from depression and a general deterioration in his health.

207. In this regard, the Court does not have evidence to determine reliably that the physical ailments and deaths described by the family necessarily resulted from the facts analyzed in this case. Since there is no evidence to prove the causal nexus between their physical ailments and the facts attributed to the State, the Court concludes that, in this regard, a violation of the personal integrity of Blanca Tapia Encina, Vinicio Marco Antonio Poblete Vilches, Cesia Leila Siria Poblete Vilches and Gonzalo Poblete Vilches has not been proved.

208. However, the Court has found that the right to mental and moral integrity of certain family members has been violated owing to the suffering they have endured because of the acts or omissions of the state authorities<sup>296</sup> considering, among other aspects, their efforts to obtain justice and the existence of close family ties.<sup>297</sup> It has also determined the violation of this right based on the suffering caused by the acts perpetrated against their loved ones.<sup>298</sup>

209. In this regard, during the public hearing Vinicio Marco Poblete stated before the Court that:

“[...] my family was destroyed by the injustice; we were discriminated against, humiliated by an organ of the State of Chile because we were poor. For more than 16 years, the State was aware of what had happened to my father in the Sótero del Río Hospital and the State never investigated my father’s death, never. [...] For them, he was just a poor man that they killed in a public hospital. My father was humiliated, physically and psychologically mistreated, because he was an older person in a public hospital. He was a victim of Chilean public health care and all the suffering destroyed my family; [...] we have endured years of suffering and injustice. We have suffered too much, too much with my sister [...].”

210. The Court considers that, in this specific case, it has been proved that, owing to their close family ties to the direct victim, it was logical to understand their suffering due to the treatment received during the initial admission to the Sótero del Río Hospital, including the impossibility of seeing their family member, the lack of a clear diagnosis of the patient’s condition and information on how to care for him at home when he was discharged and, especially, the failure to obtain consent for the surgical procedure performed on their family member (*supra* para. 173). The Court also understands the suffering of the family due to the long process of seeking justice, in particular in relation to clarifying the facts, as well as the uncertainty owing to the failure to determine the cause of death of Mr. Poblete Vilches and, in this regard, the response offered by the authorities in different instances (*supra* paras. 59 and 81). These difficulties had an impact on the family and on the development of their life projects. Therefore, the State is responsible for the violation of Article 5(1) of the Convention, to the detriment of the members of Mr. Poblete Vilches’s family.

## **VIII REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION)**

211. Based on the provisions of Article 63(1) of the American Convention,<sup>299</sup> the Court has

<sup>296</sup> Cf. *Case of Vera Vera et al. v. Ecuador*, *supra* para. 104.

<sup>297</sup> Cf. *Case of Blake v. Guatemala. Merits. supra* para. 114, and *Case of the Members of the Village of Chichupac and neighboring communities of the municipality of Rabinal v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of November 30, 2016, para. 161.

<sup>298</sup> Cf. *Case of Bámaca Velásquez v. Guatemala. Merits.* Judgment of November 25, 2000, paras. 162 and 163, and *Case of Vásquez Durand et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of February 15, 2017. Series C No. 332, para. 182.

<sup>299</sup> Article 63(1) of the American Convention establishes: “If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or

indicated that any violation of an international obligation that has caused harm entails the duty to make adequate reparation and that this provision “reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.”<sup>300</sup>

212. The Court has established that the reparations must have a causal nexus to the facts of the case, the violations that have been declared, the harm proved, and the measures requested to redress the respective harm. Therefore, the Court must analyze the concurrence of these factors to rule appropriately and pursuant to law.<sup>301</sup>

213. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution which consists in the re-establishment of the previous situation. If this is not feasible, the Court will determine measures to ensure the rights that have been violated and to repair the consequences of such violations.<sup>302</sup>

214. Bearing in mind the violations of the Convention declared in the preceding chapters, the Court will proceed to examine the claims submitted by the Commission and the representatives, as well as the arguments of the State in light of the criteria established in its case law on the nature and scope of the obligation to make reparation<sup>303</sup> in order to establish measures addressed at redressing the harm caused to the victim.

### **A. Injured party**

215. Pursuant to Article 63(1) of the Convention, this Court considers that those who have been declared victims of the violation of any right recognized in this instrument are the injured party. Therefore, the Court considers that Vinicio Antonio Poblete Vilches (deceased), and his family members: Blanca Tapia Encina (deceased), Gonzalo Poblete Tapia (deceased), Vinicio Marco Poblete Tapia and Cesia Poblete Tapia are the “injured party” (*supra* para. 41).

### **B. Investigation**

216. The **Commission** asked that the State undertake a “thorough and effective investigation” in order to clarify what happened and, if necessary, “impose the corresponding sanctions.” The Commission declared that the State must continue the investigation reopened in 2008 or open a new investigation that can overcome the obstacles that prevented “obtaining justice” in the initial investigation. The Commission reiterated the importance of reparations in relation to the need to clarify, effectively and completely, the acts or omissions that resulted in the international responsibility of the State, including aspects of a structural nature in relation to the medical care received by Mr. Poblete Vilches.

217. The **representatives** also asked that the State be ordered to reopen the criminal investigation and issue the relevant administrative instructions to ascertain the causes and responsibilities in the case.

218. The **State** referred to a series of procedures requested by the complainants, which were

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freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”

<sup>300</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra*, para. 182.

<sup>301</sup> Cf. *Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra*, para. 184.

<sup>302</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations, supra*, para. 26, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra*, para. 183.

<sup>303</sup> Cf. *Case of Velásquez Rodríguez. Reparations, supra*, para. 189, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra*, para. 185.

granted during both the first and the second complaints. In its final arguments, in response to a question posed by the Court regarding the possible prescription of the criminal action, the State referred to its domestic criminal laws and concluded that the statute of limitations for the criminal actions in this case was five years. Regarding the calculation of this time frame, it indicated that this started on the day the offense was committed. It added that although the prescription was suspended from the moment the proceedings were held against the defendant, in June 2008 the criminal proceedings were stalled and, as a result, the calculation of the prescription continued as if it had never been suspended.

219. The Court, in its case law, has indicated that, in criminal matters, prescription determines the extinction of the punitive claims owing to the passage of time and that, generally, this limits the punitive power of the State to prosecute the unlawful conduct and to punish the perpetrators. Consequently, and because the facts of this case have prescribed under Chilean law, the Court finds that, taking into account the type of violation proved,<sup>304</sup> in this case it is not appropriate to order the State to reopen the criminal investigations into the facts relating to the death of Vinicio Antonio Poblete Vilches in February 2001.

220. Nevertheless, the Court will establish other measures to redress the violated rights.

### **C. Satisfaction**

221. The **Commission** asked that, in addition to full reparation for pecuniary and non-pecuniary harm, "measures of moral satisfaction" should be established.

222. The **representatives** asked that for the publication of the whole judgment "in three newspapers with widespread circulation in the country" and in the Official Record of Chile, as well as "the elaboration and publication of a leaflet" with the summary of the judgment.

223. The representatives also asked the Court to order the State, through the Chilean Ministry of Justice and Ministry of Health, to hold a public ceremony "as an act of reparation to acknowledge its international responsibility and offer a public apology." In this regard, the representatives indicated that local authorities and the director of the Sótero del Río Hospital should take part in the ceremony and the national media should be invited in order to disseminate it. They also asked that the State send an official letter to Vinicio Poblete Tapia and Cesia Poblete Tapia acknowledging the violation of their rights and apologizing.

224. Lastly, the representatives asked the Court to order the State, as it had in the *Case of Ruano Torres et al. v. El Salvador*, to "place a plaque in a visible place in the Public Defender's Office [...] within one year of notification of the [...] judgment"<sup>305</sup> and a plaque to commemorate Mr. Poblete Vilches in a place to be defined, "preferably near the hospital," the content of which should be agreed between the presumed victims and the State.

225. The **State** did not comment in this regard.

#### *i) Publication of the judgment*

226. The Court finds, as it has in other cases,<sup>306</sup> that the State must publish, within six months of notification of this judgment: (a) the official summary of this judgment prepared by the Court,

<sup>304</sup> Cf. *Case of Albán Cornejo v. Ecuador*, *supra*, para. 111; *Case of Suárez Peralta v. Ecuador*, *supra*, para. 176 and *Case of Vera Vera et al. v. Ecuador*, *supra*, para. 117.

<sup>305</sup> *Case of Ruano Torres et al. v. El Salvador. Merits, reparations and costs*. Judgment of October 5, 2015. Series C No. 303, para. 225.

<sup>306</sup> Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of the Xucuru Indigenous People and its members v. Brazil*, *supra*, para. 199.

once, in the official gazette, in a legible and appropriate font size; (b) the official summary of this judgment prepared by the Court, once, in a national newspaper with widespread circulation, in a legible and appropriate font size, and (c) this judgment in its entirety, available for one year, on an official website that is accessible to the public from the home page of the website. The State must advise the Court immediately after it has made each of the publications ordered, regardless of the one-year time frame for presenting its first report established in the nineteenth operative paragraph of the judgment.

*ii) Public act to acknowledge responsibility*

227. The Court establishes, as it has in other cases,<sup>307</sup> that the State must organize a public act to acknowledge Chile's international responsibility, during which it must refer to the human rights violations declared in this judgment. This act must be carried out in a public ceremony in the presence of senior State officials, as well as with the participation of the victims in this case. The State must reach agreement with the victims or their representatives on the method of complying with this public act of acknowledgement, as well as on all the details, such as the place and date. To this end, the State has one year from notification of this judgment.

**D. Rehabilitation**

228. The **Commission** did not comment in this regard.

229. The **representatives** asked that the presumed victims in this case be provided with medical and psychological treatment. For this, they asked that the State provide each victim with the sum of US\$10,000 for the expenses related to the said medical and psychological treatment. They also asked that the State guarantee quality health care for the numerous physical ailments that they currently suffer.

230. The **State** did not comment in this regard.

231. The Court has verified that there is a causal nexus between the facts of the case and the psychological and emotional effects suffered by the victims, which were proved in Chapter VII-3. Consequently, the Court finds it pertinent that, if the victims request this, they are provided with professional psychological care as a measure of rehabilitation for the psychological and emotional effects they suffered as a result of the facts of this case. Therefore, the Court establishes the State's obligation to provide, through its health care institutions, free of charge and immediately, professional psychological treatment to the victims, based on their specific needs. When providing the treatment, it is essential to respond to the circumstances and needs of each victim in order to provide effective and personalized treatment. In addition, the treatment must include the provision of medicines and, if applicable, transportation and other directly related and strictly necessary expenses. In particular, this treatment must be provided, insofar as possible, in the centers nearest to their place of residence. The victims who request this measure of reparation, or their legal representatives, have six month from notification of this judgment to advise the State of their intention to receive psychological or psychiatric treatment.

**E. Guarantees of non-repetition**

232. The **Commission** asked that the State adopt measures of non-repetition, including: (i) the legislative, administrative, and other measures that may be required to implement informed consent in health-related matters in keeping with the standards established in th[e] report; (ii) the necessary measures, including budgetary measures, to ensure that the Sótero del Río Hospital has

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<sup>307</sup> Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs*, *supra*, para. 81; *Case of I.V. v. Bolivia*, *supra*, para. 336, and *Case of Gonzales Lluy et al. v. Ecuador*, *supra*, para. 368.



the resources and infrastructure needed to provide adequate care, particularly when intensive therapy is required, and (iii) education and training measures for judicial agents regarding the duty to investigate possible liabilities arising from the death of a person as the result of inadequate health care.”

233. The **representatives** requested the adoption of domestic legal provisions to regulate the conduct of health professionals, pursuant to the relevant national and international standards, as well as legislative and other measures “to reinforce the civil and criminal liability of doctors and health care workers.” They also requested that the obligation of active transparency be duly implemented with regard to health care services in order to ensure the right of all patients subject to medical treatment under the Chilean public and private health care system to provide free informed consent. In addition, they requested that training be provided to health care professionals in public and private hospitals and clinics on “human rights, criminal law, patients’ rights, and the case law of the Inter-American Court.” Lastly, they requested the construction of a hospital for older persons or the remodeling of existing hospitals in order to endow them with a wing specifically for treating older persons and, consequently, increase the beds available for this particular group.

234. The **State** referred to various measures it had implemented over the years with regard to informed consent in health-related matters, in order to adapt to the relevant international standards. It mentioned that the document: “Medical Ethics Documents and Standards” prepared by the Chilean Medical Association in 1986 had been updated in 2013, and now included informed consent. It also pointed out that Law No. 20,584 had entered into force on October 1, 2012, and “it regulates the informed consent of the patient, providing him with autonomy to decide which medical procedures he wishes to undergo” and “the right to obtain the necessary information to give his consent.” The said law applies to any type of health care provider, in either the public or the private sector, and regulates the way in which information is provided to the patient; it should be sufficient, opportune, truthful and understandable for the patient or his legal representative or the person in whose care he is if the patient himself is unable to receive it. The law also includes the creation of health care ethical committees and scientific ethical evaluation committees. The State also indicated that, on November 26, 2012, the “Regulations on the delivery of information and expression of informed consent in health care services,” entered into force; the regulations develop the previous norms and regulate the delivery of information before any action is taken in relation to health care, in order to obtain the patient’s informed consent.

235. Regarding the representatives’ request to build a hospital for older persons or establish special wings for them, the State called this disproportionate and unnecessary, because it stressed that it has a National Institute of Geriatrics (INGER). It also indicated that it had implemented a comprehensive public policy on bed accessibility, and considered that this constituted a clear guarantee of non-repetition in this case. It stressed that the number of critical beds had increased from 1,234 in 2006 to 2,839 in 2016, and asserted that the success of this policy was explained by the creation of the Centralized Bed Management Unit in the Ministry of Health that operates 24/7. Lastly, it indicated that another reason to reject the measure related to whether it was pertinent for the judicial sector to establish public policies at this level of detail and that engage public funds, because it considered that “a decision of this nature is one in which the State should have a margin of appreciation as regards its implementation.”

236. The Court takes note of and appreciates all the actions taken and the progress made by the State in order to comply with its obligations in relation to the implementation of informed consent in conformity with the relevant international standards. It recognizes the efforts made by the Chilean State with the promulgation of Law No. 20,584 and its respective Regulations, that regulate the way in which informed consent should be obtained, and the obligations of health care providers in the health care services as regards the information they must provide to the patient. In addition, the Court appreciates the increase in the number of care beds and the Centralized Bed Management

Unit.<sup>308</sup> However, the Court observes that, regarding the availability of ICU beds, there appears to have been no significant increase.<sup>309</sup> Based on the facts and the violations that have been verified, and in light of the information provided, the Court finds it pertinent to order the following measures as guarantees of non-repetition<sup>310</sup>

### 1. Training programs

237. To redress the harm integrally and to avoid the repetition of similar facts to those found in this case, the Court considers it necessary to order the State to adopt,<sup>311</sup> within one year, permanent education and training programs for medical students and medical professionals, as well as all the personnel of the health care and social security systems, including mediation bodies, on the appropriate treatment of the older person in health-related matters from the perspective of human rights and differentiated impacts. These programs should make special mention of this judgment and the international human rights instruments, specifically those that relate to the right to health (*supra* paras. 118 to 132) and access to information (*supra* paras. 160 to 171).<sup>312</sup> The State must provide an annual report on their implementation.

### 2. Report on implementation of progress in the Sótero del Río Hospital

238. The Court also finds that the Chilean State must ensure, by the sufficient and necessary measures, that the Sótero del Río Hospital has the essential infrastructure to provide adequate, opportune and quality care to its patients, particularly in emergency health care situations, providing increased protection to older persons. To this end, the Court asks the State to report, in one year's time, on: (a) improvements implemented at the date of the report in the infrastructure of the hospital's Intensive Care Unit; (b) the protocols in force on care for medical emergencies, and (c) actions implemented to improve the medical care of patients in the ICU, particularly older persons – from a geriatric perspective – and in light of the standards of this judgment. The State must provide an annual report on these improvements for three years. The Court will assess this information while monitoring compliance with the judgment and will rule in this regard.

### 3. Impact of age on health and measures in favor of the older person

#### i) Institutional strengthening

239. Regarding the representatives' request that the State build a hospital specializing in the medical treatment of older persons, or else provide a special wing for older persons in existing hospitals and reinforce the civil and criminal liability of health care providers in such cases, the Court takes note of the existence of the "National Institute of Geriatrics" and its impact on improving medical care for older persons in Chile, and therefore urges the State to reinforce this institution and its impact on the public and private hospital network, and to involve it in the training ordered in paragraph 237. Owing to the particularities of this measure, the Court will not monitor compliance with this point.

<sup>308</sup> Regarding beds, the State advised that they increased from 1234 in 2006 to 2839 in 2016, owing to the efforts of the Ministry of Health (f. 856). *Cf.* Affidavit of Dr. Osvaldo Salgado Cepeda, (evidence file, f. 4641).

<sup>309</sup> *Cf.* Level of Complexity in Closed Care. Department of Hospital Processes and Renovation, 2012, (evidence file, f. 5312). In the comparative analysis of bed types in high complexity hospitals, it indicates: 12% critical care beds, 8% intensive care beds, and 80% basic care beds. This imbalance between the demand and the type of offer increases the lack of access to timely hospitalization adapted to the needs of the patient, and produces a delay in the flow of patients from the critical care units. *Cf.* Organization and Operations Manual, Adult Critical Patient Units, Ministry of Health, 2004, (evidence file, f. 5196). This describes the actual situation of critical care beds for adults in the country.

<sup>310</sup> Pursuant to Article 63(1), the guarantees of non-repetition have traditionally been addressed at remedying "the consequences of the measure or situation that constituted the breach of such rights."

<sup>311</sup> *Cf. Case of Albán Cornejo et al. v. Ecuador, supra*, para. 164, and *Case of Gonzales Lluy et al. v. Ecuador, supra*, para. 368.

<sup>312</sup> *Cf. Case of the "Mapiripán Massacre" v. Colombia, supra* para. 316, and *Case of I.V. v. Bolivia, supra*, para. 342.

*ii) Leaflet on the older person*

240. As it has in one other case,<sup>313</sup> the Court finds it pertinent to order the State to design a publication or leaflet outlining, in a concise, clear and accessible way, the rights of the older person in relation to health care contained in the standards established in this judgment, as well as the obligations of medical personnel when providing medical care. This publication (printed and/or in digital form) must be available in all public and private hospitals in Chile, for both the patients and the medical staff, and also on the Ministry of Health's website. Following execution of this measure, the State must provide an annual report on its implementation for three years.

*iii) Comprehensive protection for older persons*

241. Lastly, the Court establishes that the State must take the necessary steps to design an overall policy for the comprehensive protection of older persons, based on the relevant standards. The State must implement this measure within three years following notification of the judgment.

**F. Compensation**

242. The **Commission** asked that the members of Mr. Poblete Vilches's family be included in the integral reparation, with regard to both pecuniary and non-pecuniary damage.

243. The **representatives** requested compensation for pecuniary and non-pecuniary damage. Regarding the pecuniary damage, the representatives indicated that it was not possible to obtain evidence of the salary of Mr. Poblete Vilches because his work was completely informal; however, his children indicated that "he earned approximately five hundred thousand (500,000) Chilean pesos a month" (approximately US\$888 in February 2001).<sup>314</sup> Regarding Cesia Poblete Tapia, she earned around three hundred thousand (300,000) Chilean pesos a month (approximately US\$532 in February 2001)<sup>315</sup> at the time of her father's death, but, as a result of this, she had to leave her job to take care of her mother and disabled younger brother. The representatives added that the presumed victims had spent around seven million (7,000,000) Chilean pesos (approximately US\$12,430 in February 2001) over more than 14 years mailing documents to the Inter-American Commission and making telephone calls related to the case. They also noted that all the relevant documentation that the presumed victims had filed away was destroyed in a fire in their home. They also asked that the Court consider all the expenditures related to the deaths of Mr. Poblete Vilches, Blanca Tapia Encina and Gonzalo Poblete,<sup>316</sup> including, for example, those incurred for the funerals, burials and religious services. Based on the foregoing, the representatives asked the Court to grant compensation of twenty thousand United States dollars (US\$20,000) or the sum that the Court considered just.<sup>317</sup>

<sup>313</sup> Cf. *Case of Furlan and Family v. Argentina, supra*, para. 295. and *Case of I.V. v. Bolivia, supra*, para. 341.

<sup>314</sup> <http://www.sii.cl/pagina/valores/dolar/dolar2001.htm>

<sup>315</sup> <http://www.sii.cl/pagina/valores/dolar/dolar2001.htm>

<sup>316</sup> Regarding Gonzalo Tapia, (4) Expenses incurred as a result of the funeral of Gonzalo Poblete Tapia: 110,000 Chilean pesos (brief with pleadings, motions and arguments, f. 275 and 276).

<sup>317</sup> To arrive at this amount, the representatives listed the following expenses: (i) 12,000 Chilean pesos: transfer in private ambulance (approximately US\$21 in February 2001); (ii) 469,851 Chilean pesos: funeral expenses of Mr. Poblete Vilches (approximately US\$834 in February 2001); (iii) 627,600 Chilean pesos: funeral expenses of Blanca Tapia (approximately US\$1,114 in January 2003); (iv) 110,000 Chilean pesos: funeral expenses of Gonzalo Poblete Tapia (approximately US\$195 in December 2011); (v) 33,777,341 Chilean pesos: medical services during the first admission to the Clínica Dávila of Cesia Poblete Tapia following her attempted suicide (approximately US\$59 [sic] currently); (vi) 21,179,310 Chilean pesos: medical services during the second admission to the Clínica Dávila of Cesia Poblete Tapia following her attempted suicide (approximately US\$37,609 currently); (vii) 6,000 Chilean pesos: medical services of Dr. Sandra Montufar Castillo (approximately US\$10,654 in February 2001) (brief with pleadings, motions and arguments, ff. 277 and 278).

244. Regarding non-pecuniary damage, the representatives indicated that as a result of the facts of this case: (i) Blanca Tapia Encina suffered a profound depression followed by cancer, an illness from which she died; (ii) Cesia Poblete Tapia also suffered a severe depression and tried to commit suicide following her father's death; (iii) Vinicio Marco Poblete Tapia had to assume the care of his family; devoted his free time to judicial proceedings, and psychological therapy which meant that he was unable to obtain stable work and, in addition, began to suffer serious health problems because he was diagnosed with cancer and lost his right kidney, and (iv) lastly, Gonzalo Poblete Tapia, who had suffered from severe paralysis since childhood, "also began to suffer from symptoms of depression as a result of which his general health deteriorated" and he died of a heart attack in 2011. The representatives asked that the Court grant the sum of US\$600,000 (six hundred thousand United States dollars) for non-pecuniary damage or, if the Court did not agree with this sum, that it determine the amount based on the equity principle. Of the amount requested, the representatives asked that US\$200,000 (two hundred thousand United States dollars) be awarded to Mr. Poblete Vilches and that this amount be delivered to his heirs, US\$150,000 (one hundred and fifty thousand United States dollars) to Blanca Tapia Encina and that this sum be delivered to her heirs, US\$125,000 (one hundred and twenty-five thousand United States dollars) to Cesia Poblete Tapia and US\$125,000 (one hundred and twenty-five thousand United States dollars) to Vinicio Poblete Tapia.

245. The **State** indicated that, regarding the non-pecuniary damage, the pain and suffering indicated by the representatives would have to be a result of an internationally wrongful act. Regarding the death of Mr. Poblete Vilches, the State argued that it had not been possible to prove that his death was the result of negligent conduct that could be attributed to the State. Therefore, the State maintained that, owing to the lack of a causal nexus, the Court could not consider that the death of Mr. Poblete Vilches gave rise to the State's obligation to make reparation. It added that, in addition, the Court could not take into consideration the death of Blanca Tapia Encina or Gonzalo Poblete Tapia, or the health problems of Cesia Poblete Tapia and Vinicio Poblete Tapia following the death of their father, because these had natural causes; that is, they were not the result of acts that could be attributed to the State. Regarding the pecuniary damage, the State indicated that, in the case of Mr. Poblete Vilches's loss of earnings, the representatives had not proved the existence of a causal nexus and that his death was a direct consequence of negligent conduct by the State. The State added that, based on the foregoing, there was no causal nexus between the damage claimed for expenditures incurred in relation to funeral services, burials and religious services following the deaths of Mr. Poblete Vilches, Blanca Tapia Encina and Gonzalo Poblete Vilches, because they were not directly related to the facts of this case and were due to natural causes.

### **1. Pecuniary damage**

246. In its case law, the Court has developed the concept of pecuniary damage and has established that it supposes "the loss of, or detriment to, the income of the victims, the expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a causal nexus with the facts of the case."<sup>318</sup> Consequently, the Court will determine the pertinence of awarding pecuniary reparations and the respective amounts due in this case.

247. Regarding *loss of earnings*, the Court observes that the representatives did not submit any concrete proof about the loss of earning of Mr. Poblete Vilches, because he worked informally and the Court only has an indication of the approximate salary indicated by his sons amounting to 500,000 Chilean pesos a month. Given that the State was found responsible for the violation of Articles 26, 4, 5, 13, 11 and 7 of the Convention, and bearing in mind the particular conditions of Mr. Poblete Vilches, the Court establishes that the State must pay, as compensation for loss of

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<sup>318</sup> Cf. *Case of Bámaca Velásquez v. Guatemala. Reparations*, *supra*, para. 43, and *Case of Pacheco León et al. v. Honduras. Merits, reparations and costs*. Judgment of November 15, 2017. Series No. 342, para. 217.

earning, the sum of US\$10,000 (ten thousand United States dollars).

248. In addition, the Court observes that, in the corresponding chapter (*supra* para. 207), it was not proved that any rights were violated as a result of the deaths of Blanca Margarita Tapia Encina and Gonzalo Poblete Tapia so that the Court will not award compensation for loss of earnings or indirect damage based on those facts.

249. Regarding *indirect damage*, the Court notes that, as a result of the death of Mr. Poblete Vilches and of the violations declared in Chapter VII of this judgment, expenses were incurred related to the transportation in ambulance of Mr. Poblete Vilches, and his subsequent funeral, burial and religious services.<sup>319</sup> The Court understands that, owing to the fire at the family home, some vouchers were destroyed or have been lost with the passage of time. Therefore, the Court finds that it should award the reasonable amount of US\$1,000 (one thousand United States dollars).

250. The amounts established by the Court for loss of earnings and indirect damage must be delivered to his two children in equal parts within one year of notification of the judgment.

## **2. Non-pecuniary damage**

251. Regarding non-pecuniary damage, this Court has determined that it "may include both the suffering and affliction caused to the direct victims and their family, the impairment of values of great significance for the individual, as well as the alterations of a non-pecuniary nature in the living conditions of the victims or their family."<sup>320</sup>

252. Pursuant to the criteria developed by the Court on the concept of *non-pecuniary damage*<sup>321</sup> and based on the circumstances of this case, and the nature of the violations committed, the Court establishes, in equity, the sum of US\$100,000 (one hundred thousand United States dollars) in favor Mr. Poblete Vilches.<sup>322</sup> The amount established by the Court must be delivered to his heirs as beneficiaries of the reparation within one year of notification of the judgment.

253. In addition, based on the violation declared to the detriment of the family members that resulted in harm to their moral and mental integrity, the Court establishes, in equity, US\$15,000 (fifteen thousand United States dollars) for each of the four family members victims in this case (*supra* para. 244). In the case of those who are deceased, the amount must be delivered to their heirs.

## **G. Costs and expenses**

254. The **Commission** made no observations with regard to costs and expenses.

255. The **representatives** indicated that the presumed victims had spent around seven million Chilean pesos over more than 14 years mailing documents to the Inter-American Commission and making telephone calls related to the case. They also noted that all the corresponding

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<sup>319</sup> The representatives indicated that the expenses corresponding to the transfer by ambulance from the Sótero del Río Hospital to the family home following the first admission amounted to \$12,000 Chilean pesos, according to the voucher presented in annex 16 of the pleadings, motions and arguments brief, and the expenses relating to the funeral of Mr. Poblete Vilches amounted to \$469,851 Chilean pesos, as shown by the vouchers attached to annex 72 of the pleadings, motions and arguments brief (brief with pleadings, motions and arguments, f.277).

<sup>320</sup> *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 26, 2001. Series C No. 77, para. 84 and *Case of Pacheco León et al. v. Honduras, supra*, para. 217.

<sup>321</sup> *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs, supra*, para. 84. and *Case of Pacheco León et al. v. Honduras, supra*, para. 217.

<sup>322</sup> *Cf. Case of Albán Cornejo v. Ecuador, supra*, para. 153; *Case of Ximénes Lopes v. Brazil, supra*, para. 238, and *Case of Suárez Peralta v. Ecuador, supra*, para. 214.

documentation that the presumed victims had kept had been destroyed in a house fire.

256. The **State** did not make any observations in this regard.

257. The Court reiterates that, pursuant to its case law,<sup>323</sup> costs and expenses form part of the concept of reparations, because the actions taken by the victims in order to obtain justice, at both the national and the international level, involve disbursements that should be compensated when the international responsibility of the State has been declared in a judgment. Regarding the reimbursement of costs and expenses, it corresponds to the Court to assess their scope prudently, and this includes the expenses incurred before the authorities of the domestic jurisdiction as well as those incurred during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment must be made taking into account the expenses indicated by the parties, provided their *quantum* is reasonable.<sup>324</sup>

258. The Court has indicated that “the claims of the victims or their representatives with regard to costs and expenses, and the evidence that supports these must be submitted to the Court at the first procedural moment granted them; that is, in the pleadings and motions brief, without prejudice to updating those claims subsequently, based on the new costs and expenses incurred during the proceedings before this Court.”<sup>325</sup> In addition, the Court reiterates that it is not sufficient merely to submit probative documents; rather, the parties are required to include arguments that relate the evidence to the fact it is considered to represent and, in the case of alleged financial disbursements, the items and their justification must be clearly established.<sup>326</sup>

259. In this case, the Court notes that the representatives did not refer to the amount of the expenses incurred during the litigation at the national level or provide any evidence in this regard. Therefore, the Court has no evidence to determine the disbursements made. No evidence was provided either with regard to the expenses incurred during the international proceedings, because the vouchers were lost as the result of a fire in the family home. However, the Court considers that it is reasonable to suppose that during the years that this case was processed before the domestic jurisdiction, the victims had financial disbursements. The Court also considers it reasonable that the victims in this case and their representatives incurred different expenses relating to fees, collection of evidence, transportation and communications, among others, during the international processing of this case. Consequently, the Court decides to establish the reasonable sum of US\$15,000 (fifteen thousand United States dollars) based on the work carried out during the litigation of this case, and this must be delivered to the surviving victims in this case, who may deliver it to the corresponding persons. This will not be monitored by the Court.

#### **H. Reimbursement of expenses to the Victims’ Legal Assistance Fund**

260. In 2008, the General Assembly of the Organization of American States created the Legal Assistance Fund of the Inter-American System of Human Rights in order “to facilitate access to the inter-American human rights system by persons who currently lack the resources needed to bring

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<sup>323</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations*, *supra*, para. 42, and *Case of the Xucuru Indigenous People and their members v. Brazil*, *supra*, para. 214.

<sup>324</sup> Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 82, and *Case of the Xucuru Indigenous People and their members v. Brazil*, *supra*, para. 214.

<sup>325</sup> Cf. *Case of Garrido and Baigorria v. Argentina. Reparations*, *supra*, para.79, and *Case of Zegarra Marín v. Peru*, *supra*, para. 230.

<sup>326</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 277, and *Case of the Xucuru Indigenous People and their members v. Brazil*, *supra*, para. 215.

their cases before the system.”<sup>327</sup> The representatives, in their brief with pleadings, motions and arguments, asked to access the Court’s Assistance Fund. In an order issued by the President of the Inter-American Court on September 21, 2017,<sup>328</sup> the application of the Fund was authorized to cover the expenses of: (i) travel and accommodation for the two inter-American defenders to attend the public hearing and represent the presumed victims; (ii) travel and accommodation for Vinicio Marco Antonio Poblete Tapia and Javier Alejandro Santos to attend this hearing to provide their statement and expert opinion, respectively; (iii) the costs of obtaining the affidavits of a total of five deponents or expert witnesses proposed by the defenders, as specified in the operative paragraphs of the order; (iv) other reasonable and necessary expenses incurred by the inter-American defenders.

261. With a note of the Court’s Secretariat of January 12, 2018,<sup>329</sup> a report was sent to the State on the disbursements made in application of the Victims’ Assistance Fund in this case, which amounted to US\$10,939.93<sup>330</sup> (ten thousand nine hundred and thirty nine United States dollars and ninety-three cents)<sup>331</sup> and, as established in article 5 of the Rules for the Operation of the Fund, the Chilean State was granted a time frame to present any comments it deemed pertinent.<sup>332</sup> This amount had to be reimbursed within ninety days of notification of this judgment.

### ***I. Method of complying with the payments ordered***

262. The State shall make the payments for compensation for pecuniary and non-pecuniary damage, and to reimburse the costs and expenses established in this judgment directly to the persons indicated herein, within one year of notification of this judgment, pursuant to the following paragraphs.

263. If a beneficiary dies before the respective compensation had been delivered to them, it shall be delivered directly to their heirs, in accordance with the relevant domestic law.

264. The State shall comply with its monetary obligations by payment in United States dollars or the equivalent in Chilean currency, using the exchange rate in force on the New York Stock Market (United States of America) the day before the respective payment.

265. If, for reasons that can be attributed to the beneficiary of the compensation or his/her heirs, it is not possible to pay the amounts established within the indicated time frame, the State shall deposit the said amounts in their favor in a deposit account or certificate in a solvent Chilean financial institution in United States dollars and in the most favorable financial conditions allowed by the State’s banking laws and practice. If the corresponding compensation is not claimed within

<sup>327</sup> AG/RES. 2426 (XXXVIII-O/08), Resolution adopted by the General Assembly of the OAS during its XXXVIII Period of Regular Sessions, in the fourth plenary session, held on June 3, 2008, “Establishment of the Legal Assistance Fund of the Inter-American Human Rights System,” operative paragraph 2(a), and CP/RES. 963 (1728/09), Resolution adopted on November 11, 2009, by the OAS Permanent Commission, “Rules of Procedure for the Operation of the Legal Assistance Fund of the Inter-American Human Rights System,” Article 1(1).

<sup>328</sup> Cf. *Case of Poblete Vilches et al. v. Chile*. Call to a hearing. Order of the President of the Inter-American Court of Human Rights of September 21, 2017, para. 21.

<sup>329</sup> (Merits file, ff. 1327 to 1328).

<sup>330</sup> The amount requested corresponds to: (i) plane tickets for the defenders and deponents to attend the hearing: US\$6,977.45 (six thousand nine hundred and seventy-seven United States dollars and forty-five cents), (ii) per diems: US\$2,893.00 (two thousand eight hundred and ninety-three United States dollars), (iii) terminal transport expenses: US\$570 (five hundred and seventy United States dollars), and (iv) affidavit: US\$499.48 (four hundred and ninety-nine United States dollars and forty-eight cents).

<sup>331</sup> The amount requested corresponds to: (i) plane tickets: \$6,977.45 (six thousand nine hundred and seventy-seven United States dollars and forty-five cents), (ii) per diems: US\$2,893.00 (two thousand eight hundred and ninety-three United States dollars), (iii) terminal transport expenses: US\$570 (five hundred and seventy United States dollars), and (iv) affidavit: US\$499.48 (four hundred and ninety-nine United States dollars and forty-eight cents) (merits file, f. 1328).

<sup>332</sup> In a communication of February 6, 2018, the State indicated that it had no comments to make on the disbursement report of the Victims’ Assistance Fund (merits file, f. 1382).

ten years, the sums shall be returned to the State with the interest accrued.

266. The amounts allocated in this judgment as compensation for non-pecuniary damage, and to reimburse costs and expenses shall be delivered to the persons indicated in full, as established in this judgment, without any deductions arising from possible charges or taxes.

267. If the State should fall in arrears, including with the reimbursement of the expenses of the Victims' Legal Assistance Fund, it shall pay interest on the amount owed corresponding to banking interest on arrears in the Republic of Chile.

## **IX OPERATIVE PARAGRAPHS**

Therefore,

### **THE COURT**

#### **DECIDES,**

Unanimously:

1. To accept the partial acknowledgement of international responsibility made by the State, pursuant to paragraphs 25 to 34 of this judgment.

#### **DECLARES**

Unanimously, that:

2. The State is responsible for the violation of the right to health, in conformity with Article 26 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Vinicio Poblete Vilches, pursuant to paragraphs 99 to 143 and 174 to 176 of this judgment.

3. The State is responsible for the violation of the right to life, recognized in Article 4 of the American Convention, in relation to Articles 26 and 1(1) of this instrument, to the detriment of Vinicio Poblete Vilches, pursuant to paragraphs 144 to 151 and 174 to 176 of this judgment.

4. The State is responsible for the violation of the right to personal integrity, recognized in Article 5 of the American Convention, in relation to Articles 26 and 1(1) of this instrument, to the detriment of Vinicio Poblete Vilches, pursuant to paragraphs 158 to 160 and 174 to 176 of this judgment.

5. The State is responsible for the violation of the right to obtain informed consent and access to information on health-related matters, contemplated in Articles 26, 13, 7 and 11 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Vinicio Poblete Vilches and of his family members, pursuant to paragraphs 161 to 173 and 174 to 176 of this judgment.

6. The State is responsible for the violation of the rights to judicial guarantees and judicial protection, recognized in Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of his family members: Blanca Tapia Encina, Gonzalo Poblete Tapia, Vinicio Marco Poblete Tapia and Cesia Poblete Tapia, pursuant to paragraphs 182 to 193 of this judgment.

7. The State is responsible for the violation of the right to personal integrity, recognized in Article 5(1) of the American Convention, to the detriment of his family members: Blanca Tapia Encina, Gonzalo Poblete Tapia, Vinicio Marco Poblete Tapia and Cesia Poblete Tapia, pursuant to paragraphs 203 to 210 of this judgment.



8. The State is not responsible for the violation of the right to social security under Article 26 of the American Convention, or the right to judicial impartiality under Article 8 of this instrument, pursuant to paragraph 99 and 194 to 198, respectively, of this judgment.

**AND ESTABLISHES:**

Unanimously, that:

9. This judgment constitutes, *per se*, a form of reparation.

10. The State shall, within six months of notification of this judgment, make the publications indicated in paragraph 226 of this judgment.

11. The State shall, within one year of notification of this judgment, hold a public act to acknowledge responsibility, pursuant to paragraph 227 of this judgment.

12. The State shall provide, through its health care institutions, immediately and free of charge, medical psychological care to the victims, pursuant to paragraph 231 of this judgment.

13. The State shall implement, within one-year, permanent human rights education programs, pursuant to paragraph 237 of this judgment.

By four votes to one, that:

14. The State shall advise the Court, within one year, on the progress made in the said hospital, pursuant to paragraph 238 of this judgment.

15. The State shall reinforce the National Institute of Geriatrics and its impact on the hospital network, as established in paragraph 239 of this judgment, and design a publication or leaflet on the rights of the older person in health-related matters, pursuant to paragraph 240 of this judgment.

16. The State shall take the necessary measures to design a general policy for the comprehensive protection of the older person, pursuant to paragraph 241 of this judgment.

Dissenting Judge Humberto Antonio Sierra Porto.

Unanimously, that:

17. The State shall pay the amounts established in paragraphs 247, 249, 252, 253 and 259 of this judgment, as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses, pursuant to the said paragraphs and paragraphs 250, 253, 259 and 262 to 267 of this judgment.

18. The State shall reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights the amount disbursed during the processing of this case, pursuant to paragraph 261 of this judgment.

19. The State shall, within one year of notification of this judgment, provide the Court with a report on the measures taken to comply with it, without prejudice to the provisions of paragraphs 226 and 231 of this judgment.

20. The Court will monitor full compliance with this judgment, in exercise of its attributes and in fulfillment of its duties under the American Convention on Human Rights, and will consider this case

closed when the State has complied fully with its provisions.

Judge Humberto Sierra Porto informed the Court of his concurring opinion and this is attached to the judgment.

DONE, at San José, Costa Rica, on March 8, 2018, in the Spanish language.

I/ACourtHR. Case of *Poblete Vilches et al. v. Chile*. Merits, reparations and costs. Judgment of March 8, 2018.

Eduardo Ferrer Mac-Gregor Poisot  
President

Humberto A. Sierra Porto

Elizabeth Odio Benito

Eugenio Raúl Zaffaroni

L. Patricio Pazmiño Freire

Emilia Segares Rodríguez  
Deputy Secretary

So ordered,

Eduardo Ferrer Mac-Gregor Poisot  
President

Emilia Segares Rodríguez  
Deputy Secretary

**CONCURRING OPINION OF  
JUDGE HUMBERTO ANTONIO SIERRA PORTO**

**TO THE JUDGMENT OF MARCH 8, 2018  
OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

**IN THE CASE OF POBLETE VILCHES *ET AL.* V. CHILE**

***I. Introduction***

1. With my usual respect for the decisions of the Inter-American Court of Human Rights (hereinafter also “the Court”), I submit this concurring opinion. The opinion focuses on the analysis of the merits made by the Court with regard to the State’s international responsibility for the violation of the rights to health, life, personal integrity, and access to information. Specifically, I will explain why I voted with the majority on the declaration of international responsibility for the violation of the right to health (*supra*, para. 143), and include some reflections on the Court’s analysis of the violations of the economic, social, cultural and environmental rights (hereinafter also “the ESCER”) based on Article 26 of the American Convention on Human Rights (hereinafter also “the Convention”). I note that my reflections supplement what I have already indicated in my partially dissenting opinions in the cases of *Lagos del Campo v. Peru*,<sup>1</sup> *Dismissed Employees of PetroPeru et al. v. Peru*,<sup>2</sup> and *San Miguel Sosa et al. v. Venezuela*;<sup>3</sup> as well as my concurring opinion in the cases of *Gonzales Lluy et al. v. Ecuador*.<sup>4</sup>

***II. Regarding my support for the declaration of international responsibility for violation of the right to health***

2. In this judgment, the Court concluded, in essence, that: (i) the health care services provided to Mr. Poblete Vilches did not meet the standards of availability, accessibility, quality and acceptability, and this constituted a violation of his right to health; (ii) the State failed to comply with its obligation to obtain the informed consent of the victim’s family for the surgical procedure that was performed, and (iii) the State violated his rights to life and to personal integrity, because the lack of adequate medical care had harmful results and, ultimately, caused his death (paras. 174-175). Therefore, the Court considered that the Chilean State was responsible for the violation of Articles 26, 4, 5, 13, 7 and 11 of the American Convention in relation to the obligation of non-discrimination established in Article 1(1) of this instrument; as well as the violation of Articles 26, 13, 7 and 11, to the detriment of his family (para. 176).

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<sup>1</sup> *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Antonio Humberto Sierra Porto.

<sup>2</sup> *Case of the Discharged Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Antonio Humberto Sierra Porto.

<sup>3</sup> *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348. Partially dissenting opinion of Judge Humberto A. Sierra Porto.

<sup>4</sup> *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto.

3. Although I share the opinion held by my colleagues, which is demonstrated by my support for their position in the operative paragraphs of the judgment (*supra*, second operative paragraph), it is relevant to clarify that this does not mean that I am diverging from my position in other previous dissenting and concurring opinions.<sup>5</sup> I repeat that the justiciability of the ESCER, by a direct application of Article 26 of the Convention, has at least two major flaws: the first, that the said Article 26 does not contain a list of rights, but rather refers to the Charter of the Organization of American States (hereinafter, "the OAS Charter"), and, similarly, neither does the OAS Charter contain a list of clear and precise rights that would allow deriving obligations from them that can be required of the States under the system of individual petitions; moreover, the rights it recognizes are of a benefit-related nature.<sup>6</sup> The second, that the argument used in the judgment to justify the Court's competence ignores the fact that the States agreed, in the Protocol of San Salvador,<sup>7</sup> that the Court's competence to examine violations of the ESCR under the system of individual petitions was restricted to some aspects of trade union rights and the right to education.<sup>8</sup>

4. Nevertheless, there is no doubt that the violations of the human rights of Mr. Poblete Vilches that have been declared in this judgment were the result of the deficient medical care he received that harmed his personal integrity and his life. The Court found that the State had denied the victim emergency medical treatment, even though a risk existed, and therefore concluded that the State had not taken the necessary measures to ensure his right to life in violation of Article 4(1) of the Convention in relation to Articles 26 and 1(1) of this instrument (para. 150). The Court also considered that the different omissions incurred by the medical personnel of the hospital contributed to the deterioration of Mr. Poblete's health, thus affecting his personal integrity in violation of Article 5(1) of the Convention in relation to Article 26 and 1(1) of this instrument.

5. The Court was correct in linking its analysis of the violation of the victim's rights to life and to personal integrity in light of different benefit-related aspects of the right to health. Regarding this analysis, the Court adhered to the thesis – correct, in my opinion – that it had held throughout its case law of analyzing the violations of the ESCER by connectivity.<sup>9</sup> The analysis made in this case verified the pertinence of the Court's

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<sup>5</sup> *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Humberto A. Sierra Porto, and *Case of the Discharged Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Humberto A. Sierra Porto.

<sup>6</sup> *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Antonio Humberto Sierra Porto, para. 9, and *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298. Partially dissenting opinion of Judge Antonio Humberto Sierra Porto, paras. 7 to 9.

<sup>7</sup> The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" establishes the following in Article 19(6): "Any instance in which the rights established in paragraph (a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights."

<sup>8</sup> *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Antonio Humberto Sierra Porto, paras. 15 to 17.

<sup>9</sup> *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298, paras. 191 and 229; *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of May 21, 2013. Series C No. 57, 89 and 90;

approach to this type of situation before the case of *Lagos del Campo*. Indeed, as I have mentioned on other occasions, the analysis of the ESCER by connectivity allows the Court to define the obligations relating to the right to health without expanding its competence beyond what corresponds to any court, and what a strict reading, based on the law, the American Convention, the Protocol of San Salvador and international law would permit.

6. Having said this, I am not affirming that the analysis made in this case is correct at all levels. The judgment includes numerous explicit references to the approach taken by the Court starting with the case of *Lagos del Campo* in relation to the possibility of declaring violations of Article 26 autonomously and owing to an “individual” violation (paras. 100-132), and declares the international responsibility of the State in those terms (para. 143). But, if one reads the judgment carefully, it is possible to observe that the analysis relating to the violation of the right to health is closely linked to the harm that Mr. Poblete Vilches suffered to his life and his personal integrity. Indeed, it is quite difficult, if not impossible, to discern where the internationally wrongful act begins and ends in relation to each of the rights that are declared to have been violated. Thus, it can be affirmed that the considerations in the judgment on the obligations of the State in health-related matters acquire a practice meaning once they are reflected in the analysis of Articles 4(1) and 5(1) of the Convention. In my opinion, the analysis of Article 26 understood autonomously is unnecessary, even though it is extremely relevant when it is considered in connectivity with the right to life and to personal integrity. In this specific case, this analysis entails an unnecessary duplication as regards the declaration of the rights of the Convention that have been violated, and this is revealed because the acts and omissions attributed to the State as violations of the rights to health, life and personal integrity are, in essence, the same.

7. Consequently, I should clarify that my vote in favor of the judgment in the second operative paragraph should not be understood as acceptance of the thesis – erroneous, in my opinion – that the Court has upheld recently regarding the possibility of declaring autonomous violations of Article 26 of the American Convention. To the contrary, it should be understood as a vote in favor of the international responsibility of Chile owing to the failure to provide medical care to Mr. Poblete Vilches, which resulted in the violation of his rights to personal integrity and life in relation to the right to health.

### **III. Reflections on the analysis of the violation of the right to health in this case**

8. This case also allows me to make some additional reflections to those I have expressed on other occasions on the problematic approach that the Court has decided to adopt in the analysis of the autonomous violation of Article 26 of the Convention. These reflections should be read in relation to the arguments that I have already set out in my dissenting and concurring opinions in recent cases.<sup>10</sup>

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*Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340, para. 154.

<sup>10</sup> *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340 Partially dissenting opinion of Judge Antonio Humberto Sierra Porto. *Case of the Discharged Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Antonio Humberto Sierra Porto; *Case of San Miguel Sosa et al. v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of February 8, 2018. Series C. No. 348, and *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto.

9. First, and regarding the remarks made in the preceding section, the practicality of the Court's action in declaring the violation of Article 26 autonomously should be questioned, when the violation that has been proved in this case is of the personal integrity and life of Mr. Poblete Vilches. The analysis seems to suggest that, when a person's personal integrity or life is violated, as the result of deficient medical care, there is an automatic violation of the right to health in its "individual" dimension (paras. 150 and 155). However, the judgment does not establish clearly the specific violation of the victim's right to health in that "individual" dimension, but focuses on establishing the reasons why the State failed to comply with its duties and obligations in relation to the adequate provision of health services and, on this basis, derives that his health was affected (para. 138). In this way, the Court assumes a consequentialist position that merges – and confuses – the violation of the integrity and the life of Mr. Poblete Vilches with the violation of his right to health. This is the same conceptual error incurred by the Court in the cases of *Lagos del Campo*, *Discharged Employees of PetroPeru et al.*, and *San Miguel Sosa et al.*

10. I consider that this conceptual omission has a direct effect on legal certainty, of which we are also the guardians, because it results in the impossibility of making an adequate subsumption of a specific fact in relation to a norm. Indeed, this approximation would appear to subsume the norm within a fact. Thus, it could be asked: What is the precise list of ESCER protected by the Convention? Where does this list begin and where does it end? This legal uncertainty affects not only the States, but also the victims of violations of their fundamental rights who seek to use the system of individual petitions. For example, the question arises as to: regarding which violation domestic remedies should be exhausted? A violation constituted based on the "individual" dimension, or one that is constituted in the "collective" dimension, but that has effects on the individual dimension? From my perspective, the approach to the cases mentioned above does not provide an answer to any of the questions raised. As a court, we are obliged to provide an answer that allows predictability; public trust in the inter-American institutional framework depends on this.

11. The reason for these reflections is not merely to generate a vigorous exchange of ideas, but also due to authentic concern about the possible consequences and impact of our decisions. The current climate of legal uncertainty generated by the case of *Lagos del Campo*, opens the door to a wave of individual petitions based on presumed violations of the ESCER which could exacerbate the Commission's problem of procedural backlog, with the resulting harm to the persons that the system is intended to protect. As a court, we have the responsibility and the obligation not to ignore that reality, or many other realities in which our decisions will ultimately be applied.

12. In addition, this type of analysis makes the declaration of the State's international responsibility for violation of the right to health appear futile, because, in reality, the rights affected – and proved before this Court – are Mr. Poblete Vilches's rights to personal integrity and life. This reinforces the prudence of the thesis that affirms that the right to health, in its "individual" dimension, should be analyzed in relation to the right to personal integrity or to life and, in its "progressive" dimension, in relation to the sufficiency of the health services provided by the State. Focusing the analysis in this way would allow the Court to identify, on the one hand, when it is possible to link the State's actions in the area of the provision of health services to the violation of the personal integrity or the life of a person. On the other hand, it would allow the Court to evaluate when the State's public policies in the area of the ESCER, *per se*, violate the obligations of progressivity established in Article 26 of the Convention. In the first hypothesis, the analysis would be made based on Article 4 and/or 5 in relation to Article 26 and 1(1)

and, in the second hypothesis, it would be made directly on the basis of Article 26 in relation to Article 1(1) of the Convention.

13. An approach of this nature would allow the Court to distinguish the cases in which the State is responsible for the violation of an individual right as the result of deficient medical care in a public hospital, and those in which it is the benefit-related elements of the health services, *per se*, that violate Article 26 of the Convention. Evidently, the analysis of the benefit-related aspects requires a significant methodological and conceptual effort, but it would accord a certain rationality and objectivity to the attribution of responsibility to the State based on Article 26. It would also allow a causal nexus to be established between the declaration of the violation of the right to health and the measures of reparation focused on improving the State's public policies. However, in this case, the Court evaluated the provision of a health care service in a public hospital and, on that basis, derived an "individual" violation of Mr. Poblete Vilches's right to health based on Article 26 of the Convention.

14. Nevertheless, the methodology used by the Court makes it difficult – or impossible in this case – to identify the causal nexus between the State's acts and omissions and the violation of Mr. Poblete Vilches's the right to health. It is true that the judgment considered a series of acts that established the violation of the right to health.<sup>11</sup> However, it is unclear how those acts had repercussions on the victim's health, and it would appear that, as there were a series of omissions in the provision of the service, this involved an automatic violation of the right to health. To overcome this problem, it would perhaps have been necessary to determine clearly what the right to health in its "individual" dimensions consists of, and to establish clearly how the State's actions violated that right. But even in this case, the Court would have had to act as a legislator, because the right to health, as it is regulated in Article 26 of the Convention, is a benefit-related right, so that declaring a State responsible for the violation of that right because a person did not have access to adequate medical care would mean that a system for the provision of health services is judged on the basis of one specific act.

15. Second, I repeat my disagreement with the scope that the judgment gives to the principle of interdependence and indivisibility in relation to its interpretation of Article 26. Indeed, this principle indicates that the enjoyment of a right depends for its existence on the realization of other rights, but this does not mean that the ESCER should automatically be incorporated into the content of the Convention. Similarly, in relation to the principle of indivisibility, it is true that rights are intrinsically connected and should not be seen in isolation, but neither is the indivisibility of rights sufficient to modify the competence of a court, as proposed by those who claim direct justiciability using a broad interpretation of Article 26 of the Convention.<sup>12</sup> Indeed, the principles of indivisibility and interdependence are congruent with an analysis of the ESCER from the perspective of connectivity, because their application does not imply an unlimited expansion of the Court's competences, but does permit a broader understanding of the rights protected by the Convention.

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<sup>11</sup> For example, the judgment mentions the following: (i) lack of information to the family with regard to the patient's condition and treatment; (ii) performance of a surgical procedure without informed consent; (iii) precipitated discharge from the hospital; (iv) failure to provide the required intensive treatment in the Medical ICU; (v) unavailability of beds; (vi) lack of assistance with a mechanical ventilator, and (v) failure to order the patient's transfer to another medical center with the necessary facilities.

<sup>12</sup> *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto, para. 4.



16. In addition, the judgment affirms that "it can clearly be interpreted that the American Convention incorporated into its list of protected rights the so-called economic, social, cultural and environmental rights (ESCER) by derivation from the norms recognized in the Charter of the Organization of American States (OAS), and also the rules of interpretation established in Article 29 of the Convention itself; particularly, insofar as they prevent excluding or limiting the enjoyment of the rights established in the American Declaration and even those recognized by domestic law (para. 103). Based on this interpretation, the judgment suggests that the ESCER that could be analyzed under the system of individual petitions are those contained in the OAS Charter, those recognized in the American Declaration, those recognized in "domestic norms," and those derived from the relevant national and international *corpus iuris*.

17. According to this approach, Article 26 is a type of norm of referral to all the national and international norms on the ESCER and, according to a unique reading of Article 29 of the Convention, this would potentially recognize that the Court had jurisdiction to declare violations of any right established in any national or international instrument that contained it, provided it could be classified as an ESCER. This interpretation is so far from the rules of the Vienna Convention on the Law of Treaties and of the American Convention,<sup>13</sup> and so remote from the system of sources of law established by international law,<sup>14</sup> that it becomes an act of creating norms and expanding jurisdiction never before seen by the international community. Following this maximalist logic, based on Article 29 of the Convention, the Court would have competence to declare the international responsibility of the State when it considered that it had violated an ESCER recognized in some national or international legal norm, without any further formal considerations. In this regard, the majority opinion should be reminded that the Inter-American Court is an international court, not a constitutional court, and that the American Convention is an international treaty and not a national Constitution.

18. In this regard, even though they may seem obvious, it is essential to recall the meaning of some basic norms of international law. The first is article 26 of the Vienna Convention which establishes the obligation of the States to comply in good faith with the rules they have agreed on. This means that international obligations depend, above all, on their acceptance by the States that are signatories to a treaty; thus, a norm that has not been accepted by a State as a source of an international obligation (such as a norm contained in the domestic law of another State, or a norm contained in a treaty for which the Court does not have jurisdiction), cannot be enforced at the international level by the system of individual petitions of the inter-American system. It is true that international courts play a role in the development of law, but this role should be limited

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<sup>13</sup> In the *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Antonio Humberto Sierra Porto. In this opinion, I stated the following: "If trying to construct a list of ESCR based on the Charter is a complex interpretive task, using every existing human rights treaties to give content to Article 26 of the ACHR can only create a dynamic of "*vis expansiva*" ["expansive force"] of the international responsibility of the States. In other words, since there is no definitive list of the ESCR the violation of which generates State responsibility, the States are unable to prevent or redress such violations in the domestic sphere because, simply put, the Inter-American Court may amend the list of rights depending on the case."

<sup>14</sup> It should be recalled that Article 38(a) of the Statute of the International Court of Justice indicates: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

so that the Court does not become an unrestricted legislator, as entailed by the position assumed by the majority in the case of the ESCER.

19. The second norm is Article 29 of the American Convention, which establishes – *inter alia* – that no provision of the Convention may be interpreted as:

(b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;

(d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

20. Article 29 of the Convention plays the important role of preventing the States from limiting the enjoyment or exercise of a right contained in domestic law or in international law by an interpretation of the American Convention. For the Inter-American Court, this article has served to interpret the clauses of the Convention in light of other national and international human rights instruments and, in this way, to give them greater content.<sup>15</sup> But it is one matter to use Article 29 of the Convention to prevent the States from limiting rights recognized in the domestic sphere or in other international instruments by citing the Convention, and that the Court uses it as a means of interpretation to update the normative content of the articles of the Convention, and it is quite another matter to use Article 29 of the Convention as a type of norm of referral to other norms of national and international law in order to, thus, “affirm” the Court’s competence to declare violations of rights established in national and international instruments for which the Court clearly lacks jurisdiction. Plainly, this interpretation is an abuse of the *pro persona* principle and a violation of the principle of legal certainty that would not allow the State to anticipate the type of conduct they should observe to comply with their international obligations.

21. Supplementing the above, it is important to point out that the human rights norms established in instruments such as the American Declaration of the Rights and Duties of Man and other instruments of this nature have a normative value that is relevant to identify the content of the international obligations established by the Convention.<sup>16</sup> However, this does not mean that these instruments enjoy the same mandatory nature as an international treaty; rather, they should be recognized as norms of soft law. This means that their mandatory nature within the system of sources of international law is “relativized,” and that they do not constitute an autonomous source of rights and obligations that can result in the international responsibility of the State if they are not complied with. This is important because the Court must be particularly careful not to confuse the obligations that result for the States owing to articles of the Convention that recognize rights and obligations that are immediately enforceable and

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<sup>15</sup> *Case of the Discharged Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Antonio Humberto Sierra Porto, paras. 14 to 20. *Case of the Pacheco Tineo family v. Bolivia. Preliminary objections, merits, reparations and costs.* Judgment of November 25, 2013. Series C No. 272, para. 143.

<sup>16</sup> Sergio García Ramírez, who was a judge of the Inter-American Court at the time, in an article entitled “*El control judicial interno de convencionalidad*” published in IUS, Revista del Instituto de Ciencias Jurídicas de Puebla, Mexico, No. 28, July-December 2011, pp. 123-159, indicated that international human rights law includes, in addition to the treaties and protocols referred to as “hard” law, which are binding and peremptory, other sources of a different nature such as declarations, statutes and regulations, advisory opinions, judgments, other jurisdictional decisions, recommendations, reports, principles, rapporteurships, conclusions of international meetings, and so on, which constitute “soft” law that does not have the same binding and peremptory nature. There is a strong tendency to endow this soft law with increasing force.

for which the Court has jurisdiction, with those norms or principles that serve for the interpretation of the said articles of the Convention.

22. As I have stated on other occasions, it is important to recall that the use of norms other than those of the Convention for its interpretation should be based on a series of presumptions concerning the normative value of both the norms and principles that are interpreted (for example, the Convention), and those that are used as parameters of interpretation (for example, the American Declaration<sup>17</sup>). In other words, the interpretation made by the Court is not – and should not – be absolutely free, but should be made within the framework of what is established by secondary rules of international law that determine the compulsory nature of the sources of law and the way in which these should be interpreted (such as article 38 of the Statute of the International Court of Justice or the Vienna Convention on the Law of Treaties itself). The Inter-American Court is an international court and, therefore, it is reasonable to assume that it conducts itself as such. This work will be particularly relevant to the extent that the Court begins “to develop” the content of the ESCER in light of the interpretation that it has followed since the case of *Lagos del Campo* and with which I have expressed my discrepancy.

Humberto Antonio Sierra Porto  
Judge

Emilia Segares Rodríguez  
Deputy Secretary

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<sup>17</sup> Cf. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, October 1, 1999. Series A No. 16, para. 114, and *Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System (Interpretation and scope of Article 1(2), in relation to Articles 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 And 62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) And (B) of the Protocol of San Salvador)*. Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, para. 49.