INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF VERA ROJAS ET AL. V. CHILE

JUDGMENT OF OCTOBER 1, 2021

(Preliminary Objections, Merits, Reparations, and Costs)

In the case of *Vera Rojas et al. v. Chile*,

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

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

also present,

Romina I. Sijniensky, Deputy Registrar,[**]

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 Court (hereinafter "the Rules of Procedure" or "the Court's Rules of Procedure"), delivers this judgment structured as follows:

[*] Judge Eduardo Vio Grossi, a Chilean national, did not take part in the processing of this case or in the deliberation and signing of this judgment, in accordance with Articles 19(1) and 19(2) of the Court's Rules of Procedure.

[**] The Registrar, Pablo Saavedra Alessandri, did not take part in the deliberation and signing of this judgment.

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I
INTRODUCTION OF THE CASE AND CAUSE OF ACTION

1. *The case submitted to the Court.* On November 8, 2019, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission")[1] submitted to the jurisdiction of the Court the case of "Martina Rebeca Vera Rojas" against the Republic of Chile (hereinafter "the State" or "Chile"). The Commission noted that the dispute revolves around allegations of human rights violations committed due to a lack of regulation, monitoring, and adequate complaint systems for oversight of the decision of the health insurer (Isapre MasVida) regarding the discontinuation of the "home hospitalization" that was essential for the survival of Martina Rebeca Vera Rojas (hereinafter "Martina," "Martina Vera," or "the alleged victim"), a child diagnosed with Leigh syndrome. The Commission believed that the State's failure to protect the health of Martina Vera, as well as the decisions adopted by the Superintendency of Health and the Supreme Court of Justice, which heard the actions brought by her parents, constituted violations of the rights to health, social security, life, judicial guarantees, judicial protection, and special protection for children, to the detriment of Martina Vera. Furthermore, the Commission found that the right to personal integrity of the parents, Carolina Andrea del Pilar Rojas Farías and Ramiro Álvaro Vera Rojas, had been violated.

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

a) *Petition.* On November 4, 2011, the Commission received the initial petition, presented by Karinna Fernández Neira, Boris Paredes Bustos, Carolina Andrea del Pilar Rojas Farias, and Ramiro Álvarez Vera Luza (hereinafter "the representatives").[2]

b) *Reports on Admissibility and Merits.* On November 4, 2016 and October 5, 2018, the Commission approved Admissibility Report No. 44/16 (hereinafter "Admissibility Report") and Merits Report No. 107/18 (hereinafter "Merits Report") respectively. The Merits Report drew conclusions[3] and developed recommendations for the State.

3. *Notification to the State.* The Commission sent the State a notification of Report No. 107/18 on December 6, 2018, giving it two months to report back on its compliance with the recommendations. The State responded to the report on February 6, 2019, requesting a total of three extensions from the Commission to comply with its recommendations. The Commission granted two extensions but declined the final request presented by the State. In this decision, the Commission took into consideration the lack of progress in negotiations for an amicable settlement, as well as the need for redress for Martina Vera due to her fragile health.

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[1] The Commission appointed as delegates then-Commissioner Luis Ernesto Vargas Silva, then-Executive Secretary Paulo Abrão, and Special Rapporteur on Economic, Social, Cultural, and Environmental Rights Soledad García Muñoz, as well as Deputy Executive Secretary Marisol Blanchard Vera, Jorge Meza Flores, Piero Vásquez Agüero, and Luis Carlos Buob Concha as its legal advisors.

[2] The Commission noted that on April 14, 2017, Karinna Fernández withdrew as a representative of the case before the Commission. The same day, the attorney Magdalena Garcés was appointed petitioner. Subsequently, in a letter before the Court dated November 14, 2019, Ramiro Vera and Carolina Rojas granted power of representation in the case to Magdalena Garcés, Karinna Fernández, Boris Paredes, and the Healthy Families Initiative (HFI) of the O'Neill Institute for National and Global Health Law. These latter individuals and institution acted as representatives in the case before the Court.

[3] The Commission concluded that Chile is responsible for violating the rights to life, to the integrity of disabled children, to health, to judicial guarantees, and to judicial protection contained in Articles 4(1), 5(1), 19, 26, 8(1), and 25 of the American Convention, in conjunction with Articles 1(1) and 2 of the same document.

4. *Submission to the Court.* On September 6, 2019, the Commission submitted the case to the Court with respect to the facts and human rights violations described in the Merits Report.

5. *The Commission's requests.* Based on the above, the Inter-American Commission asked this Court to declare the State's international responsibility for the violations contained in the Merits Report, and to order the State to implement the measures of reparation included therein. This Court notes that seven years and ten months have passed between the presentation of the initial petition to the Commission and the submission of the case to the Court.

II
PROCEEDINGS BEFORE THE COURT

6. *Notification to the representatives and to the State.* The representatives of the alleged victims, as well as the State, were notified of the submission of the case on November 26, 2019.

7. *Brief with motions, pleadings, and evidence.* On February 3, 2020, the representatives presented their brief with motions, pleadings, and evidence (hereinafter "motions and pleadings brief"), pursuant to Articles 25 and 40 of the Court's Rules of Procedure. They agreed with the Commission's arguments and made arguments regarding the merits, as well as specific requests pertaining to redress.

8. *Request for working meeting.* On February 4, 2020, the State presented a document asking the President of the Court for a working meeting among the parties to the case to adopt a mechanism for resolution. On February 28, 2020, the representatives and the Commission submitted their observations regarding the State's request. On March 13, 2020, the State reiterated its request that a working meeting be convened, and it asked for a suspension of the deadline for presenting the answering brief. The President was informed of that request, and she noted that, even though the parties can come to an agreement on a friendly settlement at any point during the Court proceedings, it is not the Court's role to convene a hearing for that purpose, so the State's request was deemed to lack merit.

9. *Preliminary objections and answering brief.* In Court Agreement No. 1/20 of March 17, 2020, and Court Agreement No. 2/20 of April 16, 2020, the Court ordered the suspension of time limits due to the health emergency caused by the COVID-19 pandemic. For this reason, the deadline for presenting the answering brief was postponed to July 13, 2020. On July 13, 2020, Chile presented its brief with preliminary objections, an answer to the submission of the case, and observations on the motions and pleadings brief (hereinafter "answering brief") pursuant to Article 41 of the Court's Rules of Procedure.[4] The State filed three preliminary objections and one preliminary question, denied the alleged violations and the validity of the measures of reparation requested, and raised an additional question regarding the representatives in the case.

[4] The state appointed the following agents for the case: Juan Pedro Pablo Crisóstomo Merino, Luis Horacio Petit-Laurent Baldrich, and Gonzalo Fernando Candia Falcón, and as alternate agents Oliver Román López Serrano, Karen Soledad Zacur López, and Josemaría Francisco Rodríguez Conca. It later certified María Ignacia Macari Toro as an alternate agent in place of Josemaría Francisco Rodriguez Conca, as well as Constanza Alejandra Richards Yánez and Francisco Javier Urbina Molfino. In addition, it withdrew the representation of Luis Horacio Petit-Laurent Baldrich, Gonzalo Fernando Candia Falcón, and Karen Soledad Zacur López, and named as agents Constanza Alejandra Richards Yáñez and Oliver Román López Serrano, and as alternate agents Francisca Sánchez Fernández, Paula Nuño Balmaceda, and Josemaría Francisco Rodríguez Conca.

10. *Observations on the preliminary objections.* On September 23 and 24, 2020, the representatives and the Inter-American Commission presented their observations on the preliminary objections.

11. *State's request regarding the representatives.* On October 23, 2020, the State submitted a document asking the Court to request observations from the Inter-American Commission and the representatives with respect to the question raised in section VIII of the State's answering brief, "Additional questions related to the petitioners' representatives." On November 26, 2020, the representatives presented their observations regarding the State's request, and the Commission noted that it had no observations. The President and the Court were informed of the State's request and the observations of the representatives and the Commission.

12. *Amicus brief*. The Court received amicus briefs from: (a) the Program of Action for Equality and Social Inclusion (PAIIS) of the Law School of the University of the Andes (Colombia);[5] and (b) the Legal Clinic on Disability and Human Rights of the Pontifical Catholic University of Peru.[6]

13. *Public Hearing.* On December 4, 2020, the President of the Court issued an order convening the parties and the Commission to a public hearing on preliminary and potential objections, as well as merits, reparations, and costs, in order to hear the final oral arguments and observations of the parties and the Commission.[7] Due to the exceptional circumstances of the COVID-19 pandemic, the public hearing took place by videoconference, in accordance with the Court's Rules of Procedure, on February 1-2, 2021, during the 139th regular session.[8]

14. *Final written arguments and observations.* On March 4, 2021, the Commission presented its final written observations, and the State and the representatives submitted their final written arguments.

15. *Observations on the annexes to the final arguments.* On April 9, 2021, the Commission and the representatives presented their observations on the annexes submitted with the State's final written arguments.

16. *Deliberation of the case.* The Court deliberated this judgment by virtual session on September 29 and 30 and October 1, 2021.[9]

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[5] The document signed by Juliana Bustamante Reyes, Federico Isaza Piedrahita, María Antonia Moreno Garcés, and Valentina Muñoz Pantoja, presents an analysis of the case in light of the maximum standard of international protection of the human rights of individuals with disabilities.

[6] The document signed by Renata Bregaglio Lazarte, Renato Constantino Caycho, and Teresa Arce Coronel, addresses the social model of disability enshrined by the CRPD and the need to interpret the case in light of Martina Vera's status as a disabled child.

[7] *Cf. Case of Vera Rojas et al. v. Chile. Call for a hearing.* December 4, 2020, Order of the President of the Inter-American Court of Human Rights. Available in Spanish at: http://www.corteidh.or.cr/docs/asuntos/vera_rojas_4_12_2020.pdf

[8] Present at this hearing were: (a) for the Inter-American Commission: Joel Hernández García, then-President of the Commission; Marisol Blanchard, Assistant Executive Secretary of the Commission; Jorge Meza Flores and Analía Banfi Vique, advisors; (b) for the representatives of the alleged victims: Karina Fernández Neira, María Belén Saavedra, and Silvia Serrano Guzmán, attorneys; and (c) for the state: Ambassador Jaime Chomalí Garib, Constanza Richards Yáñez, and Josemaría Rodríguez Conca, agents in the case.

[9] Due to the exceptional circumstances of the COVID-19 pandemic, this judgment was deliberated and approved during the 144th regular session, which took place virtually in accordance with the Court's Rules of Procedure. See Press Release 39/2020, May 25, 2020, available at: https://www.corteidh.or.cr/docs/comunicados/cp_39_2020_eng.pdf.

III
JURISDICTION

17. 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 American Convention since August 21, 1990, and accepted the contentious jurisdiction of the Court on the same date.

IV
PRELIMINARY OBJECTIONS

18. The State presented three preliminary objections, which will be analyzed in the following order: (a) the failure to exhaust domestic remedies; (b) the inadmissibility of the petitioner's August 27, 2012, complaint due to a lack of object; and (c) the Court's lack of jurisdiction to hear potential violations of Article 26 of the American Convention.

A. Objection regarding the failure to exhaust domestic remedies

A.1. Arguments of the State and observations of the Commission and the representatives

19. The ***State*** argued that the petition was brought before the inter-American system without the prior exhaustion of the appropriate and effective remedies established in domestic law for addressing the alleged violation, in contravention of Article 46(1) of the Convention. It emphasized in this regard that the petition was brought on November 4, 2011, while the appeal before the Superintendency of Health, which was an appropriate and effective remedy for the violation, was initiated on January 10, 2012. It explained that the appropriate and effective remedy for revoking the decision of the Isapre regarding the discontinuation of in-home medical care was the arbitration mechanism before the Superintendency established in Article 117 of Executive Order No. 1 of 2005 of the Ministry of Health, and that the situation of Martina fell within the purpose of this remedy as it was a matter of dispute between the Isapre and its insured individuals to determine the legal obligations of the insurer. In this regard, it claimed that the effectiveness of this mechanism is demonstrated by the facts, because as a result of the mechanism, the Isapre to this day still covers the in-home medical care of Martina.

20. The ***representatives*** argued that the preliminary objection is inadmissible because it was not submitted at the proper time. In this regard, they noted that the Court has reiterated that in order for it to be admissible, the State must have filed it during the admissibility stage before the Commission, which is the proper procedural time. They stated that not only did the State fail to file the objection during that period, but it also took a "position completely contrary" to what it had written in its answering brief, as documented in the Admissibility Report and in its July 17, 2015, brief. The representatives added that the action of protection was the available legal remedy and that the positive outcome of the arbitration mechanism before the Superintendency of Health does not make that an "appropriate legal avenue that must be exhausted," and that even if this argument of the State were accepted, the remedy had been exhausted once the admissibility declaration had been made by the Commission, which is when the requirement of exhausting domestic remedies should be evaluated.

21. The ***Commission*** argued that the State did not present its objection (regarding failure to exhaust domestic remedies) at the proper procedural time, that is before the adoption of the Admissibility Report. It added that the State, in its July 17, 2015, answering brief, "expressly stated it did not have objections regarding the admissibility of the petition." It noted that even

if the State had filed its objection at the proper time, domestic remedies must be exhausted by the time of the admissibility declaration and not necessarily when the petition is submitted. It therefore noted that in this case, the remedy before the Superintendency of Health, considered by the State to be appropriate, had already been exhausted when the Admissibility Report was approved. The Commission maintained that as a result, the preliminary objection was inadmissible because it was not submitted at the proper time.

A.2. Considerations of the Court

22. Article 46(1)(a) of the American Convention establishes that for determining the admissibility of a petition or communication submitted to the Inter-American Commission under the terms of either Article 44 or Article 45, remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law.[10] In this regard, the Court recalls that an objection to the exercise of its jurisdiction based on the supposed failure to exhaust domestic remedies must be presented at the proper procedural time, which is during the admissibility proceedings before the Commission.[11] Therefore, the State must clearly specify before the Commission during the admissibility stage of the case the remedies that, in its view, still have not been exhausted. Furthermore, the arguments supporting the preliminary objection filed by the State before the Commission during the admissibility stage must correspond to those put forward before the Court.[12]

23. The Court therefore believes that in the present case it is necessary to examine whether the objection regarding exhaustion of remedies was presented clearly at the proper procedural time. The Court notes that the State, in its July 17, 2015, communication in which it addressed compliance with the admissibility requirements of the petition of the case, indicated that "[s]pecifically, and without prejudice to any observations on merit the State may bring in due course, it has no objections to bring at this stage."[13] The Court notes that the State did not in fact make arguments during the admissibility stage before the Commission questioning its jurisdiction due to a failure to exhaust domestic remedies.[14] Instead, the first time the State made these arguments explicitly was in its answering brief during the proceedings before this Court. Because of this, the State's argument regarding a failure to exhaust remedies is untimely, so Chile's preliminary objection for failure to exhaust domestic remedies is denied.

B. Inadmissibility of petitioner's complaint dated August 27, 2012, due to lack of object

B.1. Arguments of the State and observations of the Commission and the representatives

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[10] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 85, and *Case of Martínez Esquivia v. Colombia. Preliminary Objections, Merits, and Reparations.* Judgment of October 06, 2020. Series C No. 412, para. 20.

[11] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary Objections, supra* para. 84 and 85, and *Case of Martínez Esquivia v. Colombia, supra* para. 21.

[12] *Cf. Case of Furlán and Family v. Argentina. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of August 31, 2012. Series C No. 246, para. 85, and *Case of Martínez Esquivia v. Colombia, supra* para. 21.

[13] Informational brief regarding compliance with admissibility requirements sent to the Inter-American Commission on July 17, 2015 (evidence file, folio 1508).

[14] *Cf.* Inter-American Commission on Human Rights, Admissibility Report No. 44/16 of November 4, 2016 (evidence file, folio 1489).

24. The ***State*** argued that it objected to the entire complaint before the inter-American system because the Superintendency of Health had ordered in a final judgment dated August 27, 2012, which was already enforced, the resumption of coverage for the home hospitalization of the child Martina, which was recognized implicitly by the petitioners and the Commission within the framework of the 2013 request for precautionary measures. It stated that even if there could arguably be reasons for submitting the petition to the inter-American system on October 4, 2011, those reasons ceased to exist upon issuance of the August 27, 2012, judgment. It added that in light of this situation, the Commission could "have decided on its own initiative to close the case" in line with Article 48(1)(b) of the American Convention, regardless of whether the State had requested it.[15] It also added that the supporting and complementary nature of the inter-American system means that it would be futile for the Court to rule on the merits of a case in which the claimed violation had clearly been remedied by actions taken by state entities, as occurred in the present case.

25. The ***representatives*** indicated that the objection raised by the State confuses the cessation of a human rights violation with its comprehensive reparation because the fact that the Isapre's arbitrary decision was revoked in August 2012 does not mean that the violation has been remedied comprehensively, but rather that many pending issues remain, such as measures of non-repetition that transcend the victims. They stated that accepting the State's argument would mean that the inter-American system can only hear cases of human rights violations while they are still being committed. Furthermore, they alleged that in the case of *Petro Urrego v. Colombia*, the Court found that even though the legal authorities had decided in favor of the victim, that decision had not resulted in the cessation of the violation with respect to the validity of a legal framework incompatible with the Convention, as in this case regarding the violation of Article 2. The representatives asked the Court to declare this preliminary objection inadmissible.

26. The ***Commission*** noted that the arguments presented by the State regarding supervening reparation belong to an analysis of the merits of the case, and it is therefore not appropriate to rule on them as a preliminary objection. It emphasized that the steps taken by the State in terms of supervening reparation can be relevant for an analysis of the merits but that they do not affect the exercise of the Court's jurisdiction in the case, and that for the complementarity argument to be appropriate, the State would have to recognize the international offense and consider whether it had remedied it comprehensively. The Commission maintained that the State's responsibility and the reasons for the petition still exist because the State has not demonstrated that it recognized and comprehensively remedied the international offense.

B.2. Considerations of the Court

27. The Court recalls that, pursuant to its case law, it will admit as preliminary objections only those submissions that have the potential, given their content and purpose, to impede the proceedings or a ruling on the merits, should they be decided favorably.[16] The Court has repeatedly noted that preliminary objections are for presenting objections related to the admissibility of a case or the jurisdiction of the Court to hear a certain case or some of its issues,

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[15] Article 48(1). When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows: [...] b) After the information has been received, or after the period established has elapsed and the information not been received, the Commission shall ascertain whether the grounds for the petition or communication still exist. If they do not, the Commission shall order the record to be closed.

[16] *Cf. Case of Cepeda Vargas v. Colombia. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of May 26, 2010. Series C No. 213, para. 35, and *Case of Petro Urrego v. Colombia*, *supra*, para. 32.

whether because of the person, matter, time, or place.[17] Thus, regardless of whether the State calls an assertion a "preliminary objection," if an analysis of such assertions necessitates prior consideration of the merits of a case, those statements lose their preliminary nature and cannot be analyzed as such.[18]

28. The Court notes that the central issue in the present case consists in determining whether the State neglected its duty to ensure the rights to health, social security, life, dignity, judicial guarantees, judicial protection, and special protection for children, to the detriment of Martina Vera Rojas, for the alleged failure to regulate, oversee, and monitor the decision of the Pension Health Institution Más Vida (hereinafter "the Isapre" or "Isapre MasVida"). A determination on these questions obviously concerns the merits of the dispute in the case, as does a determination on whether said violations have ceased and been remedied by the decision of the Superintendency of Health, as the State argued, in which case it would not be for this Court to decide on the State's international responsibility. Therefore, because the State's argument does not refer to questions of admissibility in the case but rather to questions concerning the merits of the dispute, the Court rejects the preliminary objection presented by the State.

C. Court's lack of jurisdiction to hear potential violations of Article 26 of the American Convention

C.1. Arguments of the State and observations of the Commission and the representatives

29. The ***State*** argued that Article 26 of the Convention does not assert recognition of the right to health, but rather recognizes a general obligation of all States to adopt progressive measures that give effect to the rights derived from the Charter of the Organization of American States (hereinafter "Charter of the OAS"). It added that the Court does not have jurisdiction to hear violations of Article 26 of the Convention. First, it noted that the State of Chile has not ratified the Protocol of San Salvador or the Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights, expressly indicating its intent to not grant jurisdiction to international bodies as to economic, social, and cultural rights. In this regard, it stated that this should be interpreted as "an example of the importance of respecting States' expressions of intent within the framework of international law." Furthermore, the State noted that the jurisdictional authority of an international court must be express and, thus, cannot be derived from interpretation. Thus, as Chile has not ratified the Protocol of San Salvador, no body of the inter-American system would have jurisdiction to hear violations of said agreement, and it disagrees that the Court has jurisdiction to hear violations of the Charter of the OAS. The State said it supports the justiciability of economic, social, and cultural rights by way of related actions.

30. The ***representatives*** argued that the preliminary objection is based on a "disagreement of the Chilean State" with the position established by the Court regarding its jurisdiction to declare violations of Article 26 of the Convention, established in the *Case of Acevedo Buendía et al. v. Peru* and reiterated in several cases. They asked the Court to reaffirm its material jurisdiction to hear violations of Article 26 of the Convention and noted that the implications of said jurisdiction are part of the merits of the matter.

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[17] *Cf. Case of Las Palmeras v. Colombia. Preliminary Objections.* Judgment of February 4, 2000. Series C No. 67, para. 32, and *Case of Petro Urrego v. Colombia*, *supra*, para. 32.

[18] *Cf. Case of Castañeda Gutman v. Mexico. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of August 6, 2008. Series C No. 184, para. 39, and *Case of Petro Urrego v. Colombia*, *supra*, para. 32.

31. The ***Commission*** argued that it is necessary to distinguish between a preliminary question such as the Court establishing whether it has material jurisdiction to rule on an alleged violation of Article 26 of the American Convention, and a determination on the merits such as deciding whether the facts of the case constitute a violation of the article, given that only the former constitutes a preliminary objection. It noted that, according to Article 62(3) of the American Convention, the Court has jurisdiction to hear any case related to the interpretation and application of the Convention's provisions, without making a distinction between civil and political rights and economic, social, and cultural rights. In addition, it noted that the Court has material jurisdiction with respect to Article 26 and that, in any case, its interpretation would be part of the merits, so the State's argument is not a preliminary objection and must be declared inadmissible.

C.2. Considerations of the Court

32. The Court recalls that, as with any court or tribunal, ithas the inherent authority to determine the scope of its own competence *(compétence de la compétence*). To make that determination, the Court must bear in mind that the documents recognizing the optional clause of obligatory jurisdiction (Article 62(1) of the Convention) presuppose the acknowledgment by the States submitting it of the right of the Court to resolve any dispute concerning its jurisdiction.[19] Furthermore, the Court has established its jurisdiction to hear and resolve disputes related to Article 26 of the American Convention, as an integral part of the rights enumerated in the same, regarding which Article 1(1) confers obligations of respect and assurance on the States.[20]

33. In particular, this Court has noted that a literal, systematic, teleological, and evolutive interpretation regarding the scope of its jurisdiction allows for the conclusion that Article 26 of the American Convention protects those rights derived from economic, social, educational, scientific, and cultural articles in the Charter of the OAS. Because the scope of these rights must be understood in relation to the rest of the clauses of the American Convention, they are subject to the general obligations contained in Articles 1(1) and 2 of the Convention and can be subject to oversight by this Court under the terms of Articles 62 and 63. This conclusion is based not only on formal issues, but also on the interdependence and indivisibility of civil and political rights and economic, social, cultural, and environmental rights, as well as their compatibility with the object and purpose of the Convention, which is the protection of the fundamental rights of human beings. In each specific case requiring an analysis of economic, social, cultural, and environmental rights, it will be necessary to determine if a human right protected by Article 26 of the American Convention is explicitly or implicitly derived from the OAS Charter, as well as the scope of that protection.[21]

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[19] *Cf. Case of Ivcher Bronstein v. Peru. Competence.* Judgment of September 24, 1999. Series C No. 54, paras. 32 and 34, and *Case of San Miguel Sosa et al. v. Venezuela. Merits, Reparations, and Costs.* Judgment of February 8, 2018. Series C No. 348, para. 220.

[20] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Peru. Preliminary Objection, Merits, Reparations, and Costs.* Judgment of July 1, 2009. Series C No. 198, para. 97-103, *Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of August 31, 2017. Series C No. 340, para. 142 and 154, and *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 21, 2019. Series C No. 394, para. 33.

[21] *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary Objection, Merits, Reparations, and Costs.* Judgment of August 23, 2018. Series C No. 359, paras. 75 to 97, and *Case of National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*, *supra*, para. 33.

34. Furthermore, the Court has concluded that the rights to health and social security are protected by Article 26 of the American Convention, as both are derived from the OAS Charter– the former from Articles 34(i), 34(l), and 45(h),[22] and the latter from Articles 3(j), 45(b), 45(h), and 46.[23] In addition, it has noted that the obligations contained in Articles 1(1) and 2 of the American Convention are ultimately the basis for determining the international responsibility of a State for violations to rights recognized by the Convention within the framework of dispute proceedings, including those recognized under Article 26.[24] However, the Court has established that the the Convention makes express reference to the norms of international law for its interpretation and application, specifically through Article 29, which, as mentioned above, establishes the principle of *pro persona*.[25] In this way, as has been its regular practice, the Court can interpret the rights and obligations contained in the Convention's articles in light of other relevant treaties and laws.[26]

35. On the basis of the above, given that Chile is a party to the American Convention and is therefore bound to meet its obligations derived from Article 26 of the Convention, over which the Court has material jurisdiction to hear violations of the rights protected therein, the Court rejects the preliminary objection presented by the State. Therefore, it will rule on the merits of the matter in the corresponding section.

V
PRELIMINARY CONSIDERATIONS

A. Delimitation of the factual framework

A.1. Arguments of the State and observations of the Commission and the representatives

36. The ***State*** argued that the representatives included certain facts in their motions, pleadings, and evidence brief, that were not included in the Commission's Merits Report and that took place both before and after said report, and which therefore exceed the factual framework and should not be taken into consideration. It added that the same is true regarding the matter of reparations. Specifically, the State referred to the following facts: (a) criticisms of the system for funding benefits within the health system of Chile; (b) the personal lives of the parents of Martina Vera, including prior to her adoption; (c) the refusal in 2006 of Isapre MasVida to add Martina to her parents' health plan; (d) the recognition of Ramiro Vera as a member of an indigenous community; (e) the complaints filed before the Superintendency of Health against

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[22] *Cf. Case of Poblete Vilches et al. v. Chile. Merits, Reparations, and Costs.* Judgment of March 8, 2018. Series C No. 349, para. 106, and *Case of Hernández v. Argentina. Preliminary Objection, Merits, Reparations, and Costs.* Judgment of November 22, 2019. Series C No. 395, para. 64.

[23] *Cf. Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of March 6, 2019. Series C No. 375, para. 173, and *Case of National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*, supra, para. 156.

[24] *Cf. Case of Hernández v. Argentina. Preliminary Objection, Merits, Reparations, and Costs.* Judgment of November 22, 2019. Series C No. 395, para. 65, and *Rights to freedom to organize, collective bargaining, and strike, and their relation to other rights, with a gender perspective (interpretation and scope of Articles 13, 15, 16, 24, 25, and 26 in relation to Articles 1(1) and 2 of the American Convention on Human Rights; Articles 3, 6, 7, and 8 of the Protocol of San Salvador; Articles 2, 3, 4, 5, and 6 of the Convention of Belém do Pará; Articles 34, 44, and 45 of the Charter of the Organization of American States; and Articles II, IV, XIV, XXI, and XXII of the American Declaration on the Rights and Duties of Man)*. Advisory Opinion OC-27/21 of May 5, 2021. Series A No. 27, para. 48.

[25] *Cf. Case of Pacheco Tineo Family v. Bolivia. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 25, 2013. Series C No. 272, para. 143, and Advisory Opinion OC-27/21, *supra*, para. 48.

[26] *Cf. Case of Muelle Flores v. Peru, supra*, para. 176, and Advisory Opinion OC-27/21, *supra*, para. 48.

the Isapre in the year 2017 for problems with the company providing home hospitalization for Martina; and (f) the alleged harm to Martina's wellbeing after the issuance of the Merits Report.

37. The ***representatives*** did not comment on the preliminary consideration raised by the State. The ***Commission*** maintained that the arguments presented by the State do not constitute a preliminary objection, so analysis of them must be conducted during the merits stage. It noted that the statements of the representatives concerning the Chilean health system are in fact part of the factual framework of the case because in paragraphs 71 to 79 of its Merits Report, it referred to the "regulation and oversight of the health systems" and analyzed Martina's case with respect to the functioning of the health system of Chile, such that those facts clarify and deepen the factual framework, in addition to contextualizing the situation of the Vera Rojas family.

A.2. Considerations of the Court

38. This ***Court*** has established that the factual framework of the proceedings before it is constituted by the facts contained in the Merits Report submitted to the Court's consideration. Accordingly, it is not admissible to assert new facts that differ from those included in the report, except those that explain, clarify, or reject the facts that were mentioned in the complaint or that correspond to the claims of the petitioner (also called "complementary facts"). The exception to this principle are facts that are classified as supervening, which can be forwarded to the Court at any stage of the proceedings prior to the delivery of the judgment.[27]

39. Regarding the State's request to exclude certain facts presented by the representatives, the Court notes that, according to the Merits Report submitted by the Commission to the Court, the present case concerns: (a) background information, (b) Martina, her diagnosis, and her current situation, (c) the initiation and discontinuation of the home hospitalization, (d) the protection appeal, (e) the case before the Superintendency of Health, and (f) the situation after the resumption of home hospitalization. The Court also notes that the Commission analyzed the design of the Chilean health system's funding through private insurers as part of its legal arguments in the section titled "analysis of the case of Martina Vera Rojas in her condition as a child with disabilities."[28]

40. Regarding the above, the Court considers that all of the factual issues related to said events will be part of the analysis of the present judgment. Therefore, (a) the events related to the personal life of Martina's parents before her adoption, including references to the ethnic identity of Ramiro Vera; and (b) the refusal in 2006 of Isapre MasVida to add Martina to her parents' health plan prior to the diagnosis of her illness, are outside the factual framework presented by the Commission. This does not apply to the arguments related to: (c) the criticisms of the funding of the health system of Chile, or (d) Martina's parents' complaints before Isapre MasVida regarding the medical care their daughter had received since the year 2015, including specifically the complaints presented before the Superintendency of Health in the year 2017,[29]

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[27] *Cf. Case of Vera Vera et al. v. Ecuador. Preliminary Objection, Merits, Reparations, and Costs.* Judgment of May 19, 2011. Series C No. 226, para. 32, and *Case of Bedoya Lima et al. v. Colombia. Merits, Reparations, and Costs.* Judgment of August 26, 2021. Series C No. 431, para. 16.

[28] *Cf.* Report No. 107/18, Case 13.039, Martina Rebeca Vera Rojas with regard to Chile, October 5, 2018 (merits file, folios 26 to 28).

[29] The Commission referred in its Merits Report to the following complaints: (a) May 4, 2017, letter to the Isapre, (b) June 8, 2017, and August 3, 2017, letters to the Superintendency, (c) April 5, 2017, letter to the Superintendency and March 28, 2017, letter to the Isapre (evidence file, folio 20).

as they are issues addressed by the Commission in its Merits Report and that may be relevant for determining the merits of the dispute and potential reparations in the case.

B. Question related to representation in the case

B.1. Arguments of the State and observations of the Commission and the representatives

41. In its answering brief, the ***State*** raised some "additional questions related to the petitioner's representatives."[30] Specifically, the State asked the Court to rule on the desirability of strengthening and clarifying provisions aimed at regulating and guarding against potential conflicts of interest among officials of bodies within the inter-American system. The State asserted that the alleged victim's representatives worked as officials of the Inter-American Commission when the case was analyzed by the Commission, and at least one of them was involved in drafting the Merits Report of the case, which was later presented to the members of the Commission. The State asserted that this represents a conflict of interest, as officials who may have participated in the analysis of a specific case while they worked at the Inter-American Commission should not be allowed to subsequently take on the role of representatives for the same case. The State maintained that preventing this kind of situation is fundamental for preserving the appearance of impartiality and transparency that should characterize the inter-American system. In this regard, it considered it important for rules to be established to regulate the participation as representatives of professionals who work in bodies of the system.

42. The ***representatives*** stated that there is no provision in the Convention, Rules of Procedure or Statue prohibiting their participation in the proceedings as representatives of the alleged victims. Regarding the State's position, they argued that impartiality is not relevant for representatives of alleged victims. They asserted that the Statute of the Court regulates the system for "Disqualification" of judges of the Court. Similarly, Article 8 of the Statute of the Commission and Article 4 of its Rules of Procedure regulate incompatibilities with respect to the members of the Inter-American Commission. They indicated that there are also related provisions concerning the possibility of calling upon an expert witness. In this regard, they asserted that the above-mentioned provisions are based on possible conflicts of interest related to judges, commissioners, and expert witnesses, not to other roles, for which they are not applicable. Furthermore, they declared that there are no regulatory provisions prohibiting the assumption of representative responsibilities after completion of work at the Inter-American Commission. The ***Commission*** did not submit observations.

B.2. Considerations of the Court

43. The Court notes that Karinna Fernández Neira acted as representative of the alleged victims from the initial petition before the Inter-American Commission until April 14, 2017, when she resigned from that role because she was starting work at the Executive Secretariat of the Inter-American Commission. Subsequently, after leaving her position at the Commission, Fernández resumed her work as a representative in the case for the alleged victims, a role she has continued to fulfill throughout the proceedings before this Court.[31] Silvia Serrano Guzmán,

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[30] The state referred specifically to the attorneys Karinna Fernández Neira and Silvia Serrano Guzmán.

[31] In one of their written comments, the representatives stated that "to safeguard the principle of impartiality of the IACHR and in consideration of her previous role in the representation of the case, Karinna Fernández left that position on April 14, 2017, and made it clear to the Executive Secretariat of the IACHR that she could not be involved with the matter in any way during her employment." *Cf*. Comments on the October 23, 2020, request of Chile (merits file, folio 584).

according to the State, had worked for the Commission while it was hearing the case until the Merits Report was issued on October 6, 2018. The Court notes that after leaving that position, Serrano started working at the O'Neill Institute for National and Global Health Law, which has acted as one of the representing organizations for the alleged victims in the proceedings before the Court.[32] This situation has been described by the State as a possible conflict of interest that calls into question the impartiality and transparency of the inter-American system, which is why it asked the Court for a ruling.

44. First, the Court notes that the Inter-American Court's Rules of Procedure contains provisions constraining the participation in the proceedings of individuals whose objectivity and impartiality may be compromised. Article 48 of the Court's Rules of Procedure establishes the possibility of disqualifying an expert because "he or she is, or has been, an officer of the Inter-American Commission on Human Rights with knowledge of the contentious case in which his or her expert opinion is required." Article 19 of the Statute of the Court regulates the disqualification of judges from hearing cases. In this regard, it is clear that no provision of the Rules of Procedure or the Statute prohibits the representation of alleged victims by individuals who have been officials of the Inter-American Commission and who have by virtue of that position gained knowledge of the issues related to said representation. In any case, these provisions cannot be applied by analogy to the present case because judges and experts are in fact obligated to act with objectivity and impartiality, whereas the representatives of the alleged victims are not.

45. Second, the Court notes that Article 4 of the Rules of Procedure of the Commission regulates the grounds for declaring incompatibility of Commission members (or commissioners), and it specifically establishes that they will commit to "not to represent victims or their relatives, or States, in precautionary measures, petitions and individual cases before the IACHR for a period of two years, counted from the date of the end of their term as members of the Commission."[33] Similarly, Article 12(3) establishes that "the Executive Secretary shall undertake not to represent victims or their relatives, or States, in precautionary measures, individual petitions or cases before the IACHR for a period of two years, counted from the time he or she ceases to discharge the functions of Executive Secretary."[34] The Court notes that Fernández and Serrano are not in the circumstances described in the Commission's Rules of Procedure, as they did not act as representatives before the Commission and were neither commissioners nor executive secretary. Therefore, their participation in the present dispute does not constitute a failure to comply with the provisions they were subject to when they worked at the Commission.

46. Thus, there is no provision in the Statues or Rules of Procedure of the Commission or the Court that prohibits former Commission officials to act as representatives in the present case. However, this Court notes the importance of the existence of a regulation on incompatibilities and conflicts of interest of former officials of the Commission or the Court for participation in cases regarding which they were able to gain knowledge through their work in the two institutions.

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[32] In their written comments, the representatives stated that "Silvia Serrano Guzman, currently an attorney with the Healthy Families Initiative at the O'Neill Institute for National and Global Health Law of Georgetown University, where she currently serves as adjunct professor, joined the team of representatives of the present case for the first time several months after leaving her position at the IACHR Executive Secretariat and when the case had already been submitted and was pending before the Court. It should be mentioned that she is serving with the representatives, not in a personal capacity, but on behalf of the Healthy Families Initiative of the institute in which she works." *Cf.* Comments on the October 23, 2020, request of Chile (merits file, folio 583).

[33] Rules of Procedure of the Inter-American Commission on Human Rights, Article 4(1).

[34] Rules of Procedure of the Inter-American Commission on Human Rights, Article 12(3).

VI
EVIDENCE

A. Admissibility of the documentary evidence

47. The Court received various documents presented as evidence by the Commission, the representatives, and the State (*supra* paras. 1, 7, and 9), which, as in other cases, it admits on the understanding that they were presented at the proper procedural time (Article 57 of the Rules of Procedure)[35] and their admissibility was not contested or opposed. In this regard, the ***representatives*** indicated that Annexes 1, 2, 3, and 4 provided by the State with its final written arguments are not relevant for the analysis of the State's responsibility or reparations, so "they asked that the dates of the answering brief and of the majority of these documents that do not constitute supervening evidence be taken into consideration." The ***Commission***, for its part, stated that it had no comments on the annexes presented by the State. The ***State*** did not comment on these objections.

48. The Court recalls that evidence submitted outside the appropriate procedural stage is not admissible, except in the cases established in Article 57(2) of the Rules of Procedure, namely, *force majeure*, serious impediment, or if it relates to a fact that took place after the established procedural limits.[36] For this reason, regarding the documents presented by the State with its final written arguments, the Court notes that Annex 1[37] refers to events that occurred after the presentation of the answering brief and that relate to the facts of the present case, so it is inadmissible. Regarding Annexes 2,[38] 3,[39] and 4,[40] the Court notes that they contain information requested by Judge Humberto Antonio Sierra Porto during the public hearing of the present case, concerning the organization and functioning of the appeals system with respect to orders of the Superintendency of Health, so they are admissible pursuant to Article 58(b) of the Rules of Procedure.

B. Admissibility of the testimonial and expert evidence

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[35] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, para. 140, and *Case of Garzón Guzmán et al. v. Ecuador. Merits, Reparations, and Costs.* Judgment of September 1, 2021. Series C No. 434, para. 33.

[36] *Cf. Case of Barrios Family v. Venezuela. Merits, Reparations,* and Costs. Judgment of November 24, 2011. Series C No. 237, para. 17, and *Case of Garzón Guzmán et al. v. Ecuador, supra*, footnote 16.

[37] Annex 1 to the final written arguments of the state, titled "Superintendency of Health. Subdepartment of Conflict Resolution. Ord. IF/N° 1618. Order dated January 19, 2021, which resolves one of the last submissions filed by Ramiro Vera Luza regarding the in-home care of his daughter" (evidence file, folio 5817).

[38] Annex 2 to the final written arguments of the state, titled "Maturana Miquel, Cristián. Law report. Court with jurisdiction to hear the appeal against the Superintendency of Health with the aim of issuing a second instance judgment to resolve the appeal against the judgment of the Funds and Insurance Authority Director to resolve a dispute between the beneficiaries and the health insurance providers. April, 2015." (evidence file, folio 5823).

[39] Annex 3 to the final written arguments of the state, titled "Supplementary case law report, produced by Supreme Court member Ángela Vivanco Martínez, which reviews the evolution of the case law of the Supreme Court and the Court of Appeals concerning the denial or suspension of CAEC coverage for home hospitalization by the Isapre for the period from 2009 to 2019" (evidence file, folio 5855).

[40] Case law analysis carried out by the Office of Studies of the Supreme Court. "Protection of the right to life and physical and psychological integrity in the event of medication coverage denial," December 31, 2019, (evidence file, folio 5901).

49. This Court will admit the statements provided by affidavit[41] and during the public hearing[42] insofar as they are in keeping with the purpose defined by the President in the requesting order and the purpose of this case.[43]

VII
FACTS

50. Based on the arguments presented by the parties and the Commission and the decision set forth above in the chapter on preliminary considerations, the relevant facts of the case are described below in the following order: (a) Martina Vera Rojas, her illness, treatment, and the decision by Isapre MasVida to discontinue the home hospitalization (hereinafter "RHD" for the Spanish *Régimen de Hospitalización Domiciliaria*); (b) the complaints and appeals made by Martina's parents to resume the RHD, especially the motion for protection before the Court of Appeals in Concepción and the complaint before the Superintendency of Health; (c) the situation of Martina Vera after the resumption of the RHD; and (d) the applicable legal framework with respect to the Chilean health system and other regulations relevant to the present case.

A. Martina Vera Rojas, her illness, treatment, and the decision to discontinue the RHD

A.1. The alleged victim and her illness

51. Martina Vera Rojas was born on May 12, 2006. She was adopted by Carolina Rojas and Ramiro Vera in August of 2006. The Vera Rojas family lives in Arica, a border city located in northern Chile. In the year 2007, Martina was diagnosed with "Leigh syndrome," which is a "mitochondrial, neurodegenerative disease with an approximate prevalence of 1 in 40,000 newborns."[44] Martina experienced a variety of neurological and muscular symptoms as her illness progressed, which led to "a significant deterioration of the cognitive level of motor function, epilepsy."[45] According to a report presented in the year 2010, the alleged victim has needed respiratory support, has suffered from atrophied extremities and joint stiffness, is hard of hearing and enjoys limited social interaction, lacks sphincter control and the ability to swallow, breathes through a tracheostomy tube, and is administered food and medication through a gastrostomy tube.[46]

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[41] Statements made by Carolina Andrea del Pilar Rojas Farías on January 13, 2021 (merits file, folios 713 to 722); Guillermo Patricio Rojas Farías on January 13, 2021 (merits file, folios 723 to 727); Karla Vera Luza on January 11, 2021 (merits file, folios 728 to 732); and expert opinions made by Claudia Sanhueza on January 18, 2021 (merits file, folios 673 to 681), Claudia Acevedo on January 9, 2021 (merits file, folios 963 to 712); Cristian Rodrigo Peña on January 16, 2021 (merits file, folios 693 to 710); Víctor Faundes Gómez on January 7, 2021 (merits file, folios 682 to 692); Judith Bueno de Mezquita on January 27, 2021 (merits file, folios 809.1 to 809.34); and Tatiana Cristina Muñoz Caro on January 28, 2021 (merits file, folios 754 to 770).

[42] Statements made by Ramiro Álvaro Vera Luza and Oscar Darrigrande at a public hearing held on February 1 and 2, 2021, and expert opinions made by Carmen Gloria Droguett González and Víctor E. Abramovich at the same hearing.

[43] The purposes of the statements are set forth in the December 4, 2020, Resolution of the President of the Court.

[44] Expert assessment of Tatiana Cristina Muñoz Caro on the level of care necessary for individuals with Leigh syndrome (evidence file, folio 756). Expert witness Víctor Faúndes explained that Leigh syndrome "is a genetic illness that affects the correct functioning of mitochondria, which leads to a deficit in the energy production of cells and a deterioration of tissues that use high levels of energy, such as the brain, retina, etc." Expert assessment of Víctor Faúndes on the characteristics of Leigh syndrome (evidence file, folio 689).

[45] Statement made during the public hearing by Óscar Darrigrande, attending physician for Martina Vera Rojas (public hearing transcript, page 50).

[46] *Cf.* Medical report of Dr. Rodrigo Vargas Saavedra on September 30, 2010 (evidence file, folios 165 to 166).

A.2. Health insurance and the decision to discontinue the RHD

52. In September of 2007, Ramiro Vera contracted with the private company Isapre MasVida, a health insurer with "special coverage for catastrophic diseases" (hereinafter "CAEC" for the Spanish, *Cobertura Adicional para Enfermedades Catastróficas*).[47] This insurance required the payment of an additional deductible.[48] Because of this, Martina Vera received home hospitalization care starting on November 28, 2007, through the company Clinical Service. RHD allows a patient to receive in-home treatment of the same complexity, intensity, and duration as the care they would receive in the hospital. The RHD thus allowed Martina, who was using tracheostomy and gastrostomy tubes, to have a ventilator, a special bed, an anti-bedsore mattress, saturation monitors, and a secretion aspirator in her home. Local providers included a physical therapist, two nurses, three medical aides, and a doctor.[49]

53. On October 13, 2010, the Isapre sent a letter to Mr. Vera informing him that the RHD would be discontinued. The letter indicated that, pursuant to Circular IF/No. 7 of the Superintendency of Health, in effect since July 1, 2005 (*infra* par. 68), treatment of chronic diseases is excluded from the RHD.[50] Therefore, "the care Martina has been receiving at home should be covered under the Supplementary Health Plan, so as of the date on which her third CAEC period ends, October 28, 2010, CAEC coverage will no longer be applicable." In addition, Mr. Vera was informed that if Martina suffered a medical complication requiring hospitalization, the Hospital of Arica was the designated provider.[51]

54. The Isapre's conclusion was based on the expert assessment of Dr. Rodrigo Vargas Saavedra, which he carried out for presentation to the Isapre. He concluded that "the damage to Martina is severe and irreparable, presenting a grim prognosis of increasing damage due to the progressive nature of her illness as well as potential secondary complications because she is bedridden and unresponsive to therapy."[52]

B. Remedies sought by Mr. Vera Rojas

B.1. Request before the ISAPRE

55. On October 13, 2010, Mr. Vera filed a complaint before the Superintendency of Health, which then sent the records to the Isapre because the insurer needed to be informed of the

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47 The additional coverage for catastrophic diseases is "100% financing of copays resulting from catastrophic illnesses that exceed the deductible, calculated according to letter (f) of the present article." Letter (f) indicates that "[t]he deductible is equivalent to thirty times the contribution agreed upon in the health plan, for each beneficiary who uses it, with a minimum of 60 UF and a maximum of 126 UF, for each catastrophe." *Cf.* Superintendency of Isapres. Circular No. 59 of February 29, 2000. Annex: Conditions of the additional coverage for catastrophic diseases in Chile.

48 The representatives reported that for the year 2019, payment of said deductible reached USD 4,485 (merits file, folio 160).

49 *Cf.* Medical report of Dr. Óscar Darrigrande on October 25, 2011 (evidence file, folios 178 to 179). Statement of Carolina Andrea del Pilar Rojas Farías (merits file, folio 714).

50 *Cf.* Superintendency of Health Circular No. 7 of July 1, 2005. Annex: Conditions of the additional coverage for catastrophic diseases in Chile. The relevant part of said Annex notes the following: "10. CAEC HOME HOSPITALIZATION. Home hospitalization coverage will be provided after prior request to the Isapre and identification by the Isapre of a provider for it. To this end, all of the following conditions must be met: [...] All treatment of chronic diseases and antibiotic treatment is excluded."

51 *Cf.* Letter of Isapre MasVida S.A. of October 13, 2010 (evidence file, folios 3626 to 3627).

52 *Cf.* Medical report of Dr. Rodrigo Vargas Saavedra on September 30, 2010 (evidence file, folios 165 to 166).

complaints in the first instance.[53] In response to the complaint, the Isapre stated on November 3, 2010, that, "after analysis of the records, given the irreversible chronic condition that has remained largely unchanged for the last four years, [it] decided not to provide CAEC coverage for home hospitalization for a new period because CAEC coverage does not cover chronic diseases. Therefore, it is appropriate to provide [...] Martina in-home care [...] only from her current Supplementary Health Plan." As a consequence, it decided that "[h]aving reviewed the records, Isapre Masvida S.A. cannot grant the request. We note that the Isapre has adjusted its procedure to current regulations. If you disagree with this response, you can request that it be reviewed by the Superintendency of Health, including a copy of this letter and the records sent by this institution."[54]

B.2. The motion for protection

56. On October 26, 2010, Martina's family filed for a protection remedy before the Court of Appeals of Arica, arguing that the Isapre's decision to discontinue Martina's RHD was arbitrary and unlawful.[55] On January 26, 2011, the Court of Appeals of Concepción heard the case and decided to order protection. Accordingly, it told the Isapre to continue providing CAEC in the form of RHD to Martina Vera. Among its considerations, the Court noted that the change in CAEC modality on the part of the Isapre had no logical explanation, and that the possibility of excluding RHD for chronic diseases "cannot include those benefits necessary for maintaining the life and health of the patient, especially if they would be put at risk by being treated in a hospital facility."[56]

57. On February 1, 2011, the Isapre appealed the decision. On May 9, 2011, the Supreme Court of Justice overturned the decision of the Court of Appeals of Concepción and rejected the protection appeal for Martina Vera. Among its considerations, the Supreme Court of Justice held that "Isapre MasVida S.A. has been able to legitimately reject the application for catastrophic coverage, as it has acted within the rules governing the provision of this exceptional benefit." It also held that "the appellants have no title or right to demand that said private health entity provide the required coverage if the conditions set forth in the rules for acquiring it are not met." It therefore ruled that "the action in question [was] not unlawful or arbitrary, as it was in accordance with the regulations in force."[57]

58. The consequence of the decision by the Supreme Court of Justice was discontinuation of the CAEC for home hospitalization of Martina Vera. Because of this situation, the company in which Ramiro Vera worked covered the home hospitalization expenses through a welfare fund. However, the medical care received by the alleged victim decreased because of a lack of access to benefits previously covered by the CAEC.[58] In this regard, during the public hearing, Mr. Vera Luza stated that due to this situation, "[Martina] received less physical therapy support, less nursing support, the care took more time, and it was not possible to do an annual checkup because Arica does not have the specialists or technology to do the kind of checkup Martina requires."[59]

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53 *Cf.* Decision of Superintendency of Health S.A. of October 13, 2010 (evidence file, folio 3656).

54 *Cf.* Letter of Isapre MasVida S.A. of November 3, 2010 (evidence file, folios 3630 to 3632).

55 *Cf.* Protection appeal filed before the Court of Appeals of Concepción (evidence file, folio 3677).

56 *Cf.* Judgment of the Court of Appeals of Concepción on January 26, 2011 (evidence file, folios 3785 to 3788).

57 *Cf.* Judgment of the Supreme Court of Chile on May 9, 2011 (evidence file, folios 3840 to 3841).

58 Public hearing statement of Ramiro Vera Luza (public hearing transcript, page 32).

59 Public hearing statement of Ramiro Vera Luza (public hearing transcript, page 13).

B.3. Request for precautionary measures before the Inter-American Commission

59. In light of the rejection of the motion for protection, Martina's parents initiated a request for precautionary measures before the Inter-American Commission. In response to that request, the State reported that "the provision or denial of agreed-upon coverage by the Isapre can be reviewed and canceled by [the] Superintendency." In this regard, it noted that there was no direct request for intervention from the Superintendency regarding the merits of the disputed issue in the specific case. With respect to this, it noted that "the Superintendency is capable, in its role as Special Court of the Republic, to hear the dispute between Mr. Vera and Isapre MasVida S.A., but that action cannot be initiated *ex officio*. Rather, the party concerned must file a complaint [before] that Special Court in order for the Court to be able to act on it."[60] The representatives withdrew the request for precautionary measures due to the April 19, 2012, and August 23, 2012, decisions of the Superintendency of Health (*infra* paras. 61 to 64).[61]

B.4. Proceedings before the Superintendency of Health

60. After the State's response to the request for precautionary measures before the Inter-American Commission, Carolina Rojas Farías filed a complaint before the Superintendency of Health on December 23, 2011.[62] On January 11, 2012, the Isapre submitted its answer to the complaint.[63] On April 19, 2012, the judge-arbitrator hearing the case ruled in favor of resuming the RHD for Martina Vera and ordered the payment of the expenses that had not been covered by the insurer plus the interest accrued during that period. Among her considerations, the judge-arbitrator concluded that depriving the child of the CAEC for her home hospitalization and keeping her solely on the health plan would make it impossible for her parents to provide the RHD over time, due to Martina's fragile condition, the technology and infrastructure of the medical care she needs to stay alive, and the costs involved, which would require Martina to be readmitted to a health facility in order to continue her treatment with traditional hospitalization.[64]

61. In this situation, the judge-arbitrator noted that the technical insufficiency of the Hospital of Arica would determine in practice the need to hospitalize Martina under catastrophic coverage with a provider outside of the region, increasing the costs of the benefit, both for the Isapre and for the parents. Because of this, she concluded that the Isapre's rejection of the RHD for Martina was unsupported by the financial reasoning upon which the institution had based its decision. She considered that, to the contrary, given Martina's age and fragile health, keeping her in traditional hospitalization is contrary to the right to life and health. By that same reasoning, she considered that "the Isapre lacks a legitimate reason and has not asserted in these proceedings any logical grounds meriting the change in modality of benefit provision."[65]

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[60] *Cf.* Response of the state to the information request of the Inter-American Commission concerning the request for precautionary measures MC 390-11 (evidence file, folio 3850).

[61] *Cf.* Letter from Karinna Fernández Neira on August 30, 2016, to the Inter-American Commission on Human Rights (evidence file, folios 336 to 338).

[62] *Cf.* Letter of December 22, 2011 from Carolina Rojas Farías to the Superintendency of Health (evidence file, folio 3844).

[63] *Cf.* Response letter of January 11, 2012, from Isapre MasVida to the complaint of Carolina Rojas Farías (evidence file, folio 3888).

[64] *Cf.* Judgment of Judge-Arbitrator Liliana Escobar Alegría, Health Care Funds and Insurance Authority, on April 19, 2012 (evidence file, folios 294 to 298).

[65] *Cf.* Judgment of Judge-Arbitrator Liliana Escobar Alegría, Health Care Funds and Insurance Authority, on April 19, 2012 (evidence file, folios 294 to 298).

62. The Isapre filed a motion for reversal of the judgment on April 19, 2012.[66] That appeal was rejected by the judge-arbitrator, who noted that "no information has come to light that would warrant a modification or reversal of what was decided in the appealed judgment." Furthermore, she reiterated that if Martina Vera is deprived of the CAEC for her home hospitalization, the policy holder would find it impossible to maintain the treatment over time, which is more onerous for both parties and riskier for the patient. In this regard, she stated that "the law allows this Court to base its judgments on principles of prudence and equity in order to give each party what they deserve; it can depart from current regulations only in exceptional cases when circumstances so justify or demand, with the aim of reaching a more just resolution." From this perspective, the judge-arbitrator declared that the Isapre must provide the CAEC necessary to maintain home hospitalization.[67]

63. The Isapre filed an appeal before the Superintendent of Health.[68] On August 23, 2012, the Superintendent of Health rejected the appeal. In his reasoning, he fully agreed with the decision of the Health Care Funds and Insurance Authority in the first instance, as no circumstance existed that had not been duly considered and that would allow for the reversal of the decision. Furthermore, he indicated that, even though in principle Martina Vera's illness would be excluded due to its chronic nature, the extremely unique circumstances of the present case justified the Isapre's continuation of the benefit under the terms described by the Health Care Funds and Insurance Authority.[69] Thus, on August 27, 2012, CAEC coverage for the home hospitalization of Martina Vera was reestablished. In addition, the Isapre made a payment to Mr. Vera Luza for expenses incurred while the Isapre was not covering the RHD.[70] That payment was deposited into the welfare fund of the company where he worked.[71]

C. Situation after the decision of the Superintendency of Health

64. CAEC coverage for home hospitalization has been maintained since the decision of the Superintendency of Health.[72] However, Martina's parents have filed several complaints before the Isapre and the Superintendency of Health about problems or uncertainty regarding the medical care. Those complaints have included problems with the care stemming from the lack of availability of employees of the health care provider, leading to delays in the monthly supplies needed for Martina's care;[73] disagreement concerning the lack of a visit from a speech pathologist focused on swallowing;[74] or the complaint regarding the lack of medication,

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[66] *Cf.* Motion for reversal submitted by ISAPRE Más Vida against the resolution of April 19, 2012 (evidence file, folio 300).

[67] *Cf.* Judgment of Judge-Arbitrator Liliana Escobar Alegría, Health Care Funds and Insurance Authority, on June 12, 2012 (evidence file, folios 315-317).

[68] *Cf.* Appeal submitted by Isapre MasVida against the resolution of June 12, 2012 (evidence file, folio 319).

[69] *Cf.* Judgment of Superintendent Luis Romero Strooy, Superintendent of Health, on August 23, 2012 (evidence file, folios 4034 to 4036).

[70] *Cf.* Letter of Isapre MasVida of June 18, 2013 (merits file, folio 3643).

[71] *Cf.* Public hearing statement of Ramiro Vera Luza (public hearing transcript, page 32).

[72] *Cf.* Public hearing statement of Ramiro Vera Luza (public hearing transcript, page 30).

[73] *Cf.* Letter from Carolina Rojas Farias on May 4, 2017, to the General Manager of Nueva Más Vida (evidence file, folio 326).

[74] *Cf.* Letter from Ramiro Vera Luza on June 8, 2017, to the Superintendency of Health of Arica (evidence file, folio 328) and letter from Ramiro Vera Luza on August 3, 2017, to the Superintendency of Health of Arica (evidence file, folio 329).

ventilators in disrepair, lack of communication with the provider, or lack of specialists.[75] Also, the Inter-American Commission received information about the representatives' concern regarding a communication from the Isapre in which it informed Mr. Vera Luza that "the Isapre has the authority to periodically assess fulfillment of the conditions justifying home hospitalization."[76]

65. Currently, Martina Vera Rojas is 15 years old, has catastrophic insurance coverage, and receives in-home hospital care.[77]

D. Relevant legal framework

66. Concerning the relevant legal framework, the Court notes that Article 19(9) of the Constitution of the Republic ensures for all people "the right to the protection of health," in the following terms:

> The State protects the free and equal access to measures aimed at promoting, protecting, and recovering the health and rehabilitation of the individual.
> Furthermore, the State will be responsible for coordinating and overseeing measures related to health.
> It is a central duty of the State to ensure the implementation of health measures, whether provided by public or private institutions, in the way and under the conditions determined by law, which can set compulsory contributions.
> Each individual will have the right to choose their health system, whether public or private.[78]

67. This constitutional provision led to the creation of a mixed social insurance system, which allows for the participation of private health care providers. Decree with Force of Law No. 1 of 2005 (hereinafter "D.F.L. No. 1")[79] establishes that the National Health Care System consists of "the natural or legal persons, whether public or private, that work together in health care, within the framework established by the Ministry of Health, toward fulfilling the regulations and plans approved by that ministry."[80] Public participation in the health care system takes place through the National Health Fund (Fonasa). Private participation in the health care system takes place through Health Insurance Institutions (Isapres), which can receive funds from the compulsory health contributions. Individuals can choose to stay in Fonasa or join an Isapre.[81] Coordination

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75 *Cf.* Letter from Carolina Rojas Farias on April 5, 2017, to the Superintendency of Health (evidence file, folio 332).

76 *Cf.* Merits Report (merits file, folio 20) and Letter from ISAPRE Más Vida on March 28, 2017, to Ramiro Vera Luza (evidence file, folio 334).

77 Martina's father stated during the public hearing that she is currently receiving good health care but that at any moment that care could fail. *Cf.* Statement of Ramiro Vera Luza (public hearing transcript, page 30); for her part, the state's expert witness, Tatiana Cristina Muñoz, stated that "it is possible to affirm that Martina currently has an excellent home hospitalization program, which includes a complete health care team and equipment that meets her medical needs" (merits file, folio 760).

78 Political Constitution of the Republic of Chile, text current as of October 2010, Article 19(9).

79 *Cf.* Decree with Force of Law No. 1 of 2005, which contains merged, coordinated, and systematized text from Decree Law No. 2,763 (from 1979) and Laws No. 18,933 and No. 18,469 (evidence file, folios 2280 to 2293, 2931 to 3097).

80 D.F.L. No. 1, Article 2.

81 *Cf.* Expert assessment of Dr. Claudia Sanhueza Riveros (merits file, folio 673); Law 18,933 of 1990, modified by Law 19,381 of 1995 (evidence file, folios 2931 to 3097).

of the health care system takes place through the Ministry of Health and several bodies within the health care sector.[82]

68. The Isapres finance health services and benefits drawing on the minimum contribution or a higher amount established in a private contract with the Isapre of the person's choice, for a set time period, subject to certain regulations enforced by the Superintendency of Health.[83] The Isapres offer CAEC to broaden the coverage for catastrophic events, and they charge an additional fee for those health plans. With this coverage plan, the insured pays a deductible that allows for financing up to 100% of the expenses for high-cost illnesses. The CAEC can include home hospitalization and is regulated through circulars issued by the Superintendency of Health. At the time of the facts of the present case, said regulation took place via Circular No. 7 of July 1, 2005, which established the conditions warranting home hospitalization.[84] The relevant part of this circular states:

> 10. CAEC HOME HOSPITALIZATION
> Home hospitalization coverage will be provided after prior request to the Isapre and identification by the Isapre of a provider for it. To this end, all of the following conditions must be met:
> The patient must be hospitalized and receiving treatment that requires the presence of an attending physician.
> The attending physician must be different from the supervising physician of the company providing the home hospitalization service.
> The patient is not have discharged, but instead transferred from a network provider so that services are continued in place of intermediate or intensive hospitalization. Hospitalization is not justified solely on the basis of medication administration.
> The illness must warrant home hospitalization.
> The order for home hospitalization, as well as its duration, must come from the attending physician. The Isapre will make the referral to a home hospitalization service, indicating the duration of that home hospitalization, taking into consideration the order of the attending physician of the network.
> The company providing this home hospitalization service must be certified and in compliance with any relevant health-related legal and regulatory provisions. It must also have responsible medical management and maintain patient charts.
> The Isapre has the authority to periodically assess fulfillment of the conditions justifying home hospitalization, for the purposes of readmission to the hospital, discharge, or discontinuation due to conditions no longer meeting the above-mentioned requirements for home hospitalization.
> All treatment of chronic diseases and antibiotic treatment is excluded.

69. The last bullet point of number 10, "CAEC home hospitalization," was modified by Circular IF/No. 282 on January 26, 2017, which eliminated the phrase "treatment of chronic diseases." In the introduction to that circular, the regulating entity asserted that "the exclusion in the CAEC of home hospitalization for treatment of chronic diseases constitutes arbitrary discrimination based on individuals' health, which directly infringes on the basic principles of social security, the right to life, and the protection of health." Thus, as of the date that circular entered into

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[82] *Cf.* D.F.L. No. 1, Article 4.

[83] *Cf.* Law 18,933 of 2005, Articles 29 and 33 (evidence file, folios 2931 to 3097).

[84] *Cf.* Superintendency of Health Circular No. 7 of July 1, 2005. Annex: Conditions for the additional coverage for catastrophic diseases in Chile (evidence file, folios 3135 to 3145).

force, "the exclusion from CAEC of home hospitalization for treatment of chronic diseases cannot be applied to contracts currently in force or in contracts entered into subsequently."[85]

70. The Superintendency of Health is the body responsible for "overseeing and monitoring the social health insurance institutions."[86] Regarding the procedures for specific complaints against insurers, Article 117 of D.F.L. No. 1 establishes that "[t]he Superintendency, through the Health Care Funds and Insurance Authority Director, who acts as 'arbitrator-judge,' settles disputes that arise between the Isapres or the National Health Fund and their contributors or beneficiaries, provided that they fall within the sphere of the Superintendency's oversight and control, and although the insured is still entitled to recourse through the instance referred to in Article 120 or the regular courts."[87] Said complaint procedure is set forth in Articles 117 to 120 of D.F.L. No. 1 and detailed in Circular IF/No. 8 of July 8, 2005.[88]

71. Article 18 of Law 19,937 establishes that administrative complaints before the respective Authority against health care providers can be submitted only after they have been heard and resolved by the appropriate entity, so "if the relevant Authority receives a complaint without the above-mentioned requirements having been met, it will send the complaint to the appropriate person."[89] Circular IF/No. 4 of May 6, 2005, establishes the Superintendency's instructions on the steps that must be taken in response to member complaints before the Isapres or Fonasa. With regard to this, Article 1(2) notes that "[t]he entity against which a complaint is filed must formally receive all the complaints directly submitted to it or sent to it by the Superintendency or other public bodies with which the Superintendency has an agreement for such purposes."[90]

VIII
MERITS

72. The Court notes that the main dispute raised in the present case is to determine whether the State fulfilled its obligation to respect and ensure the rights to life, dignity, personal integrity, rights of the child, health, and social security, in conjunction with the obligation to ensure rights without discrimination and the duty to adopt domestic legal provisions, with respect to the decision of Isapre MasVida to discontinue the benefit of home hospitalization for Martina Vera Rojas, who suffers from Leigh syndrome. Furthermore, because the State argued that it had fully remedied the violations alleged before the inter-American system (*supra* par. 24), the Court must determine whether the alleged violations of the case have in fact ceased and been remedied, applying the principle of complementarity. Therefore, the Court will analyze the merits of the present case in two chapters. In the first chapter, it will assess the arguments regarding: (a) the alleged violation of the rights to life, dignity, personal integrity, health, rights of the child, and social security, in conjunction with the obligation to ensure rights without discrimination and the duty to adopt domestic legal provisions, and (b) it will determine whether those violations,

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[85] *Cf.* Health Care Funds and Insurance Authority. Subdepartment of Regulation. Circular IF/No. 282 of January 26, 2017, which gives instructions on additional coverage for catastrophic illnesses in home hospitalization, page 3.

[86] *Cf.* D.F.L. No. 1, Article 107.

[87] *Cf.* D.F.L. No. 1, Article 117.

[88] *Cf.* Superintendency of Health Circular No. 8 of July 8, 2005. It establishes instructions on the arbitration procedure for hearing, processing, and resolving disputes that arise between the Isapres or the National Health Fund and their contributors or beneficiaries (evidence file, folio 3180).

[89] *Cf.* Law 19,937, which modifies D.L. No. 2,763, with the aim of establishing a new vision of public health authority and distinct management modalities, and to strengthen citizen participation. Article 18.

[90] *Cf.* Superintendency of Health Circular No. 4 of May 6, 2005. Provides instructions on complaint procedures before the national health fund and Isapres. Article 1(2).

if they did occur, have in fact ceased and been remedied. In the second chapter, it will analyze (c) the alleged violation of the right to personal integrity of Martina Vera's parents.

VIII-1
RIGHT TO LIFE,[91] RIGHT TO HUMANE TREATMENT,[92] RIGHTS OF THE CHILD,[93] RIGHT TO HEALTH,[94] AND RIGHT TO SOCIAL SECURITY,[95] READ IN CONJUNCTION WITH THE OBLIGATION TO ENSURE RIGHTS WITHOUT DISCRIMINATION,[96] AND TO ADOPT DOMESTIC LEGAL EFFECTS[97]

A. Arguments of the Commission and the parties

73. The ***Commission*** noted that the State's duty to regulate and supervise entities that provide health services can be extended to private insurance companies that by virtue of their functions can have an impact on the rights to health, life, and personal integrity of persons under the jurisdiction of the State, as is the case with the Isapres. It considers that the regulation and supervision of health systems, including their financing through private insurers, is a prerogative of the State and is part of its obligation to create the conditions that ensure medical care and services in case of illness, which demonstrates the indivisibility of the right to social security with respect to health plans and the right to health. It asserted that when such plans are managed by private companies, the State is obligated to ensure that the design and functioning of the insurance takes into account the content of the rights to health and social security; consequently, the suppression, reduction, or suspension of services to which people have a right must be limited based on reasonable grounds and in accordance with national legislation. Furthermore, the Commission argued that the regulation and oversight of treatment through public or private financing systems must give special consideration to children with disabilities. In its final written arguments, the Commission clarified that its intent is not to challenge the general design of the Chilean health system but to analyze the responsibility of the State with respect to the rights of Martina Vera.

74. In this specific case, the Commission argued that the State failed to fulfill its duty to regulate, monitor, and supervise medical coverage and health services to the detriment of Martina. It asserted that the regulation in force, that is, Circular No. 7, allowed for the discontinuation of Martina Vera's home-based care on the basis of chronicity through a simple communication. In this regard, it stated that the determination of the status of the illness contained an important margin of ambiguity and discretion, and that the alleged victim lacked safeguards that would be necessary to assess the repercussions of the discontinuation on the rights to health, life, and personal integrity, or with respect to her special condition. The Commission also argued that the State did not take steps to protect the continuity of the RHD or to compensate for the impact of the reduction in medical coverage, thereby affecting the affordability Martina needed due to her illness, and that it has not demonstrated that the complaint mechanisms are designed to handle cases like this one. In light of the above, the Commission concluded that the State is responsible for violating the rights to health, social

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91 Article 4 of the American Convention.

92 Article 5 of the American Convention.

93 Article 19 of the American Convention.

94 Article 26 of the American Convention.

95 Article 26 of the American Convention.

96 Article 1(1) of the American Convention.

97 Article 2 of the American Convention.

security, life, integrity, and special protection for children recognized in Articles 4(1), 5(1), 19, and 26 of the American Convention, read in conjunction with the obligations established in Articles 1(1) and 2 of the same instrument, against Martina Vera Rojas.

75. The ***representatives*** argued that the Isapre's decision in the case, later validated by the Supreme Court, in the context of wide discretion and lack of oversight, constituted a violation of the right to health—both directly and in relation to Martina's rights to life and personal integrity. They stated that the rights to life and personal integrity entail not just the obligation to respect them but also the adoption of the appropriate measures to protect them, in both the public and private spheres, and that the Court has held that the lack of proper medical care can lead to infringement of the right to personal integrity. In this regard, they maintained that the general obligation to protect health translates into the duty to ensure access to essential health services, guaranteeing effective, quality medical care. The representatives indicated that in this case, the Isapre's decision directly affected the availability, accessibility, acceptability, and quality standards of the right to health because, beyond jeopardizing Martina's life and personal integrity and affecting her right to a decent life, the discontinuation of the treatment she had been receiving exacerbated her extreme vulnerability as a child with a disability.

76. Concerning Article 19 of the Convention, the representatives noted the Court has incorporated into its interpretational jurisdiction the text of the Convention on the Rights of the Child, which necessitates the adoption of special protection measures for health and social security—particularly important for children with disabilities. In this regard, they stated that the Isapre's actions—and the actions of the Chilean State in allowing and approving said actions—must be analyzed in along with the standards on the right to health, life, and personal integrity, in light of the special protection obligations, the principle of the best interests of the child, the special obligations derived from her disabled condition, and the principle of non-discrimination with special emphasis on the myriad vulnerabilities Martina experienced as a child with a serious illness and a number of severe disabilities. In addition, the representatives stated that the case should be analyzed in the context of the privatization of health and the participation of for-profit institutions, as well as the legislation in force at the time of the facts. They concluded that the State is responsible for the violation of Articles 4(1), 5(1), and 26 of the Convention to the detriment of Martina, read in conjunction with the obligations set forth in Articles 19, 1(1), and 2.

77. The ***State*** argued that it has not failed to meet its obligations under Article 1(1) of the Convention, read in conjunction with Articles 4(1), 5(1), 26, and 19. In this regard, it stated that the Isapres do not exercise any public authority but rather provide health care services by acting as an insurer, so that the decision of Isapre MasVida is not in itself attributable to the State. Concerning the argument on the alleged lack of appropriate mechanisms for countering the Isapre's decision, the State asserted that this lacks merit because in the case, the alleged victims made use of a remedy applicable to their rights and their special situation, which led to their claims being received by the judge arbitrator as well as through the motion for reversal and appeal before the Superintendent. It added that this case does not concern an "assessment of the institutional design" of the Chilean health system, but rather the imputation of an omission contrary to human rights, which in reality did not occur, as the remedy was effective "at satisfying the claims of the alleged victims."

78. The State argued that although the judge-arbitrator addressed the cost analysis because it was the basis for the Isapre's position, it would be incorrect to suggest that its decision had been based on "a financial calculation," but rather in the best interests of the child and the protection of her rights as described in *considerandum* 14, taking into consideration also the costs for the Vera Rojas family. Furthermore, the State asserted that it has the freedom to

determine the most appropriate institutional design and to use multiple mechanisms to remedy human rights violations, so that if one fails, others can compensate for that failure. What matters, ultimately, is "the result of the system as a whole." It noted, in the same vein, that there are appropriate measures for supervision and oversight, that there is no duty to provide "proactive" mechanisms in each case, and that the oversight mechanisms can adopt different arrangements, both adjudicatory and punitive. In this case, the State maintained that it implemented an adjudication mechanism, without prejudice to the existence of other relevant oversight mechanisms.

79. The State asserted that Martina never stopped receiving appropriate medical attention, as the Isapre's decision did not entail discontinuing the hospitalization or terminating the financing, but rather changing it. It explained that this was not an absolute denial of health care but a restriction. It asserted that the home hospitalization was never suspended, so there was never a risk to Martina Vera's safety or life. It pointed out that the difference in financing for home hospitalization, after the copay, was covered by the special insurance offered by the company where Martina's father worked, which is possible under Chilean law. In this regard, it stated that the State's role in this area is not necessarily to provide insurance directly but to allow for conditions that ensure adequate access to the best health care. The State referred to the Superintendency's oversight authority and claimed that, if in the case of *Poblete Vilches et al. v. Chile* the Court had considered that the State had fulfilled its obligations under Article 2 in conjunction with Article 26, then the same conclusion should be affirmed in this case.

B. Considerations of the Court

80. The ***Court*** notes that, in accordance with the legal framework of the State (*supra* par. 68), health care in Chile is provided in a mixed social security system in which both public and private institutions provide health care services. Public participation takes place through Fonasa, and private participation takes place through the Isapres. The latter can collect the compulsory health contributions, and in this way, they grant and finance health services in private institutions. The Isapres are in turn monitored by the Superintendency of Health, which issues regulations and establishes a complaint mechanism, which can be used once a complaint against an Isapre has already been heard and decided by the Isapre itself. On this matter, because the Court considers that the present case refers to the actions of Isapre MasVida, which is a private insurer and part of the Chilean social security system, it understands that this case must be analyzed with respect to the State's human rights obligations regarding the actions of individuals, protected by the regulations in force at the time of the facts.

B.1. Right to life, right to a decent life, right to personal integrity, right to health, right to social security, rights of the child, and right to be free from discrimination, read in conjunction with the obligation to regulate, monitor, and supervise health services

B.1.1. The obligation of the State to regulate, monitor, and supervise the provision of private health care

81. From its first judgments, the Court has noted that the The first obligation assumed by the States Parties under Article 1 (1) is "to respect the rights and freedoms" recognized by the Convention. The exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State. The protection of human rights, particularly the civil and political rights set forth in the Convention, is in effect based on the affirmation of the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of

governmental power. There are individual domains that are beyond the reach of the State or to which the State has but limited access. Thus, the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power.[98]

82. The second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. The Court recalls that the obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation–it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.[99]

83. Similarly, his Court has established that the obligation of guarantee extends beyond the relations between State agents and the persons subject to their jurisdiction, and encompasses the duty to prevent third parties, in the private sphere, from violating the protected rights.[100] However, the Court has taken the view that a State cannot be responsible for any human rights violation committed by individuals within its jurisdiction. The *erga omnes* nature of States' obligations under the Convention to ensure rights does not mean States have unlimited responsibility for all actions of individuals. Thus, even if a particular action, omission, or fact results in the violation of the rights of another person, this is not automatically attributable to the State; rather, the particular circumstances of the case must be examined to determine whether the obligation to ensure rights has been met.[101]

84. Concerning the State's obligations with respect to business activities, this Court has noted that the Human Rights Council adopted the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (hereinafter "Guiding Principles").[102] Specifically, the Court has highlighted the three pillars of the Guiding Principles, as well as the foundational principles derived from these pillars, which are fundamental for determining the scope of States' and companies' human rights obligations:[103]

I. The State duty to protect human rights

- States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

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98 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 165, and *Case of Opario Lemonte Morris et al. ("Miskitu Divers") v. Honduras. Judgment of August 31, 2021.* Series C No. 432, para. 42.

99 *Cf. Case of Velásquez Rodríguez v. Honduras*, *supra*, para. 166 and 167, and *Case of Opario Lemonte Morris et al. ("Miskitu Divers") v. Honduras*, *supra*, para. 43.

100 *Cf. Case of the "Massacre of Mapiripán" v. Colombia.* Judgment of September 15, 2005. Series C No. 134, para. 111, and *Case of Opario Lemonte Morris et al. ("Miskitu Divers") v. Honduras*, *supra*, para. 44.

101 *Cf. Case of the Massacre of Pueblo Bello v. Colombia.* Judgment of January 31, 2006. Series C No. 140., para. 123, and *Case of Opario Lemonte Morris et al. ("Miskitu Divers") v. Honduras*, *supra*, para. 44.

102 *Cf.* Human Rights Council. *Human rights and transnational corporations and other business enterprises.* A/HRC/17/31, July 6, 2011, operative paragraph 1.

103 *Cf. Case of the Miskito divers (Lemoth Morris et al.) v. Honduras, supra*, para. 47, and Office of the United Nations High Commissioner for Human Rights (OHCHR). *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, HR/PUB/11/04, 2011.

- States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

II. The corporate responsibility to respect human rights

- Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

- The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.

- The responsibility to respect human rights requires that business enterprises:

  (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

  (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

- The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.

- In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

  (a) A policy commitment to meet their responsibility to respect human rights;

  (b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

  (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

III. Access to remedy

- As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

85. Because of this, within the framework of the obligations to ensure rights and to adopt domestic legal effects derived from Article 1(1) and 2 of the American Convention, the Court has emphasized that States have a duty to prevent human rights violations by private companies; therefore, they must adopt legislative and other measures to prevent said violations and to investigate, punish, and remedy said violations when they occur. States thus have a duty

to make regulate companies so that their actions respect the human rights recognized in the different instruments of the inter-American system of human rights protection, including the American Convention and the Protocol of San Salvador. Under this regulation, companies must ensure that their activities do not cause or contribute to human rights violations, and they must take steps to remedy said violations. The Court considers that the responsibility of companies applies regardless of size or sector but that their responsibilities can be differentiated in legislation according to the activity and risk involved for human rights.[104]

86. Furthermore, this Court has considered that in pursuit of these goals, States must adopt measures to ensure that companies have: (a) appropriate policies for the protection of human rights; (b) human rights due-diligence processes to identify, prevent, and correct human rights violations, as well as to ensure dignified and decent work; and (c) processes allowing the company to remedy any human rights violations resulting from of its activities, especially when those violations affect individuals who live in poverty or belong to vulnerable groups.[105] The Court has taken the view that in this context, States must encourage companies to incorporate good corporate governance practices focused on stakeholders, which involve measures guiding business activity toward compliance with human rights laws and regulations, including and promoting the participation and commitment of all concerned parties, as well as reparation for those affected.[106]

87. In addition, the Court recalls that the first subparagraph of the American Convention establishes that "[e]veryone 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..."[107] In this way, States must ensure the existence of legal or other mechanisms that are effective at redressing human rights violations. States thus have an obligation to remove existing legal and administrative barriers that restrict access to justice, and to adopt measures to promote justice. The Court has emphasized the need for States to address those cultural, social, physical, and financial barriers that impede vulnerable individuals' access to legal and other mechanisms.[108]

88. The Court has noted, in the same vein, that companies are the first line of responsibility for ensuring proper conduct in their activities, as their active participation is fundamental for respecting and ensuring human rights. Companies must independently adopt preventive measures to protect the human rights of their employees, as well as measures designed to prevent their activities from negatively affecting the communities where they are located or the

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104 *Cf. Case of the Miskito divers (Lemoth Morris et al.) v. Honduras*, para. 48; *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *supra*, principles 1 to 14; Inter-American Commission on Human Rights. *Business and Human Rights: Inter-American Standards*, REDESCA, November 1, 2019, paras. 89 and 121, and Inter-American Juridical Committee. "Corporate Social Responsibility in the Area of Human Rights and the Environment in the Americas" Resolution, CJI/RES. 205 (LXXXIV-O/14); and Inter-American Juridical Committee. *Guidelines on Corporate Social Responsibility in the Area of Human Rights and the Environment in the Americas*, February 24, 2014, CJI/doc.449/ 14 rev.1, corr. 1, points a and b.

105 *Cf. Case of the Miskito divers (Lemoth Morris et al.) v. Honduras, supra*, para. 49, and *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *supra*, principles 15 to 24.

106 *Cf. Case of the Miskito divers (Lemoth Morris et al.) v. Honduras, supra*, para. 49.

107 *Cf. Case of Velásquez Rodríguez v. Honduras*, *supra*, para. 91, and *Case of the Miskito divers (Lemoth Morris et al.) v. Honduras, supra, para.* 50.

108 *Cf. Case of the Miskito divers (Lemoth Morris et al.) v. Honduras, supra*, para. 50, and *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *supra*, principles 25 to 31.

environment.[109] In this sense, the Court has considered that the regulation of business activities does not require companies to guarantee results but that it should aim to ensure that they carry out continuous assessments of the risks to human rights, and respond through effective and proportional measures to mitigate the risks caused by their activities, in view of their resources and possibilities, and with accountability mechanisms to remedy any damage caused. This obligation must be assumed by companies and regulated by the State.[110]

89. With regard to the impacts on rights of third-party actions in health service provision, this Court has established that, given that health is a public good whose protection is the State's responsibility, the State has an obligation to prevent third parties from unduly interfering in the exercise of the rights to life and personal integrity, which are particularly vulnerable when someone is receiving health care. In this way, States have the duty to regulate and supervise all health care provided to individuals under their jurisdiction, as a special duty to protect life and personal integrity, regardless of whether the entity providing those services is public or private. The State's obligation is not limited to hospitals providing public services but rather encompasses any and all health institutions.[111]

90. Regarding the substance of the regulatory obligation, the Court has noted the following:

> [T]he States are responsible for regulating [...] at all times the rendering of services and the implementation of the national programs regarding the performance of public quality health care services so that they may deter any threat to the right to life and the physical integrity of the individuals undergoing medical treatment. They must, *inter alia*, create the proper mechanisms to carry out inspections at [...] institutions, submit, investigate, and solve complaints and take the appropriate disciplinary or judicial actions regarding cases of professional misconduct or the violation of the patients' rights.[112]

91. The Committee on Economic, Social, and Cultural Rights (hereinafter "CESCR") has stated that the right to health, like all human rights, imposes three types of obligations: to respect, to protect, and to comply. The obligation to respect means that States must refrain from taking actions that undermine the right to health. The obligation to protect means that States must adopt measures to keep third parties from interfering in the implementation of established guarantees for the right to health. The obligation to comply means that States must adopt appropriate legislative, administrative, legal, or other measures to achieve the full effectiveness of the right to health.[113] Likewise, the Committee on the Rights of the Child has established the obligation of States to adopt necessary, appropriate, and reasonable measures

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[109] *Cf. Case of the Miskito divers (Lemoth Morris et al.) v. Honduras, supra*, para. 51, and Inter-American Juridical Committee. *Guidelines on Corporate Social Responsibility in the Area of Human Rights and the Environment in the Americas*, *supra*, point a.

[110] *Cf. Case of the Miskito divers (Lemoth Morris et al.) v. Honduras, supra*, para. 51.

[111] *Cf. Case of Ximenes-Lopes v. Brazil. Judgment of July 4, 2006.* Series C No. 149, para. 89, and *Case of Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of September 1, 2015. Series C No. 298., para. 175.

[112] *Cf. Case of Ximenes-Lopes v. Brazil, supra,* para. 99, and *Case of Gonzales Lluy et al. v. Ecuador, supra,* para. 177.

[113] Committee on Economic, Social, and Cultural Rights. General Comment No. 24 (2017) on the obligations of states under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, August 10, 2017, para. 33.

to prevent and remedy violations committed by private actors, or that have otherwise been tolerated by the State.[114]

92. On this point, the Court considers it important to recall that the State has delegated the function of ensuring the right to health to private institutions, including the Isapres. These institutions operate on the basis of a system of private insurance, and they are authorized to administer the compulsory health contribution, such that they finance the provision of health care and payments for medical licenses. For this reason, the Court considers that as financing is a central part of access to the health services offered by private institutions in the Chilean social security system, the State is obligated to regulate and supervise their actions, because their activities can pose severe risks to people's health care access and even give rise to the State's international responsibility for failing to fulfill its duty to respect rights. This is because in situations like the present one, even if the private institution is performing an insurance function, it is acting in the sphere of a service that is by nature public, exercising functions inherent to public authority, which health care is.

B.1.2. Right to life, in conjunction with the obligation to regulate and supervise health services

93. This Court has established that the right to life plays a fundamental role in the American Convention, as it is the prerequisite for the exercise of the other rights.[115] Compliance with Article 4, read in conjunction with Article 1(1) of the American Convention, means not only that no one is deprived of life arbitrarily (a negative obligation), but also that States must adopt all appropriate measures to protect and preserve the right to life (a positive obligation), in accordance with the duty to ensure full and free exercise of the rights of all people within its jurisdiction.[116] Because of this fundamental nature, the Court has held that approaches that restrict the right to life are inadmissible and that this right encompasses the right to be free from conditions that impede or inhibit access to a decent life.[117]

B.1.3. Right to personal integrity in conjunction with the obligation to regulate and supervise health services

94. Moreover, the American Convention expressly recognizes the right to personal integrity, both physical and psychological, the infringement of which "is a category of violation that has several gradations and [...] varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation."[118] The Court has established that personal integrity is directly and immediately linked to human health

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[114] Committee on the Rights of the Child. General Comment No. 16 (2013) on the obligations of states with respect to the impact of the private sector on the rights of the child, April 17, 2013, paras. 28 and 29.

[115] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 144, and *Case of Vicky Hernández et al. v. Honduras. Merits, Reparations,* and Costs. Judgment of March 26, 2021. Series C No. 422, para. 85.

[116] *Cf. Case of Juan Humberto Sánchez v. Honduras. Preliminary Objection, Merits, Reparations, and Costs.* Judgment of June 7, 2003. Series C No. 99, para. 110, and *Case of Vicky Hernández et al. v. Honduras, supra,* para. 85.

[117] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 144, and *Case of National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*, *supra*, para. 186.

[118] *Cf. Case of Loayza Tamayo v. Peru. Merits. Judgment of September 17, 1997.* Series C No. 33, para. 57, and *Case of Vicky Hernández et al. v. Honduras, supra,* para. 86.

care[119] and that the lack of adequate medical care may entail the violation of Article 5(1) of the Convention.[120] In this sense, the Court has held that protecting the right to personal integrity presupposes the domestic regulation of health services as well as the implementation of a set of mechanisms designed to protect the effectiveness of said regulation.[121]

B.1.4. Right to health in conjunction with the obligation to regulate and supervise health services

95. Furthermore, this Court recalls that Article 26 of the American Convention included economic, social, cultural, and environmental rights (hereinafter "ESCER") in its list of protected rights, deriving them from the recognized provisions of the Charter of the OAS, as well as from the rules of interpretation set forth in Article 29 of the Convention. The Court has held that this article restricts efforts to limit or exclude the enjoyment of rights set forth in the American Declaration, including those recognized domestically. Moreover, in accordance with a systematic, teleological, and evolutive interpretation, the Court has drawn upon international and national law on the subject to give content specific to the scope of rights protected by the Convention, with the aim of deriving the scope of the specific obligations of each right.[122]

96. In addition, the Court has reiterated that there are two types of obligations derived from the recognition of ESCER, pursuant to Article 26 of the Convention: those that are immediately enforceable and those that are progressive. In this regard, the Court recalls that concerning the former (obligations that are immediately enforceable), States must adopt effective measures to ensure access without discrimination to the services recognized as part of the right to health, ensure equality of rights between men and women, and generally make progress toward the full effectiveness of ESCER. With respect to the latter (progressive obligations), States Parties have the specific and continuous obligation to move as expeditiously and effectively as possible toward the full realization of those rights, subject to available resources, by legislation or other appropriate means. There is also an obligation of *non-retrogression* regarding the realization of the rights attained. Accordingly, the obligations under the Convention to respect and ensure rights, as well as to adopt domestic legal measures (Articles 1(1) and 2), are critical for their effectiveness.[123]

97. Therefore, the Court has noted that Article 34(i)[124] and 34(l)[125] of the Charter of the OAS establish, among the basic goals of integral development, that of the "[p]rotection of man's

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[119] *Cf. Case of Albán Cornejo et al. v. Ecuador. Merits, Reparations, and Costs.* Judgment of November 22, 2007. Series C No. 171, para. 117, and *Case of Cuscul Pivaral et al. v. Guatemala, supra,* para. 161

[120] *Cf. Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of September 7, 2004. Series C No. 114, paras. 156 and 157, and *Case of Cuscul Pivaral et al. v. Guatemala, supra,* para. 161

[121] *Cf. Case of Ximenes-Lopes v. Brazil, supra,* paras. 89 and 90, and *Case of Cuscul Pivaral et al. v. Guatemala, supra,* para. 161.

[122] *Cf. Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of August 31, 2017. Series C No. 340, paras. 141 to 149, and *Case of the Miskito divers (Lemoth Morris et al.) v. Honduras, supra,* para. 62.

[123] *Cf. Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of March 6, 2019. Series C No. 375, para. 190, y *Case of the Miskito divers (Lemoth Morris et al.) v. Honduras*, *supra*, para. 66.

[124] Article 34(i) of the Charter of the OAS establishes: "[t]he 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) Protection of man's potential through the extension and application of modern medical science."

[125] Article 34(l) of the Charter of the OAS establishes: "[t]he 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

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." Article 45(h)[126] stresses that "man can only achieve the full realization of his aspirations within a just social order." Therefore, States agree to make efforts to apply principles such as: "(h)[d]evelopment of an efficient social security policy." Thus, as it has indicated in several cases, the Court reiterates that there is a reference with a sufficient degree of specificity to infer the existence to the right to health in the OAS Charter. Consequently, the Court reaffirms that the right to health is a right protected under Article 26 of the Convention.[127]

98. Concerning the substance and scope of this right, the Court recalls that Article XI of the American Declaration allows for the identification of the right to health when it states that every 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."[128] Likewise, Article 10 of the Protocol of San Salvador establishes that everyone has the right to health, understood to mean the enjoyment of the highest level of physical, mental, and social wellbeing.[129] The same article establishes that in order to ensure the right to health, States must promote "universal immunization against the principal infectious diseases," "prevention and treatment of endemic, occupational and other diseases," and "satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable."

99. Furthermore, the right to health is recognized constitutionally in Chile, in Article 19(9) of the Constitution.[130] Also, the Court observes a broad regional consensus in the consolidation of the right to health, which is explicitly recognized in many constitutions and domestic laws of States in the region, including: Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Uruguay, and Venezuela.[131]

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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: [...] (l) Urban conditions that offer the opportunity for a healthful, productive, and full life."

126 Article 45(h) of the Charter of the OAS establishes: "[t]he 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."

127 *Cf. Case of Poblete Vilches et al. v. Chile. Merits, Reparations, and Costs. Judgment of March 8, 2018.* Series C No. 349, para. 106, and *Case of the Miskito divers (Lemoth Morris et al.) v. Honduras*, *supra*, para. 80.

128 Approved at the Ninth Pan-American Conference held, Bogotá, Colombia, 1948.

129 Article 10(1) of the Protocol of San Salvador establishes that: "[e]veryone 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; [and] (b) Extension of the benefits of health services to all individuals subject to the State's jurisdiction."

130 Article 19(9) establishes that: "The Constitution guarantees all persons: 9. The right to health protection. The state protects the free and equal access to measures aimed at promoting, protecting, and recovering the health and rehabilitation of the individual. Furthermore, the state will be responsible for coordinating and overseeing measures related to health. It is a preferential duty of the state to ensure the implementation of health measures, whether provided by public or private institutions, in the way and under the conditions determined by law, which can set compulsory contributions. Each individual will have the right to choose their health system, whether public or private."

131 Constitutional provisions of States Parties to the American Convention include: Argentina (Art. 10); Barbados (Art. 17(2)(A)); Bolivia (Art. 35); Brazil (Art. 196); Chile (Art. 19) Colombia (Art. 49); Costa Rica (Art. 46); Ecuador (Art. 32); El Salvador (Art. 65); Guatemala (Arts. 93 and 94); Haiti (Art. 19); Mexico (Art. 4); Nicaragua (Art. 59);

100. The Court has also established that the general obligation to protect health means that the States are obliged to ensure that everyone has access to essential health services, guaranteeing quality and effective medical services, as well as promoting the improvement of the health conditions of the population.[132] This right encompasses timely and appropriate health care in accordance with the principles of availability,[133] accessibility,[134] acceptability,[135] and quality,[136] whose application will depend on prevailing conditions in each State.[137] The State's compliance with the obligation to respect and ensure this right must give special consideration to vulnerable and marginalized groups and must be carried out in accordance with the resources progressively available and with applicable national legislation.[138]

B.1.4. Rights of the disabled in conjunction with the obligation to regulate and supervise health services

101. The Court recalls that disabled persons are entitled to the rights set forth in the American Convention. The Court has established that disability is a protected category under Article 1(1) of the American Convention, so any law, action, or practice that discriminates on the basis of real or perceived disability of the person is prohibited. Consequently, no domestic law, decision,

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Panama (Art. 109); Paraguay (Art. 68); Peru (Art. 70); Dominican Republic (Art. 61); Suriname (Art. 36); Uruguay (Art. 44), and Venezuela (Art. 83).

132 *Cf. Case of Poblete Vilches et al. v. Chile, supra*, para. 118, and *Case of the Miskito divers (Lemoth Morris et al.) v. Honduras, supra,* para. 83.

133 Availability. Public health facilities, goods, and services must be available in sufficient quantity, and also comprehensive health programs. The precise nature of the facilities, goods, and services will vary depending on numerous factors, including the State Party's developmental level. They will include, however, 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 receiving competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs.

134 Accessibility. Health facilities, goods, and services have to be accessible to everyone without discrimination, within the jurisdiction of the State Party. Accessibility has four overlapping dimensions: (i) 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. (ii) Physical accessibility: health facilities, goods, and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities, and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities. (iii) Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households. (iv) Information accessibility: accessibility includes the right to seek, receive, and impart information and ideas concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.

135 Acceptability. All health facilities, goods, and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.

136 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.

137 *Cf. Case of Poblete Vilches et al. v. Chile, supra*, paras. 120 and 121, and *Case of the Miskito divers (Lemoth Morris et al.) v. Honduras*, *supra*, para. 83.

138 *Cf*. Case of *Cuscul Pivaral et al. v. Guatemala, supra,* para. 107, and *Case of the Miskito divers (Lemoth Morris et al.) v. Honduras*, *supra*, para. 51.

or practice, whether on the part of State or private entities, can reduce or restrict in a discriminatory way the rights of a person based on their disability.[139] Furthermore, the Court has noted that States must provide the health services necessary for preventing possible disability, as well as preventing and reducing to the extent possible the emergence of new disabilities.[140]

102. The Court notes that in 1999, the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities was adopted, and it was ratified by Chile on February 26, 2002. This Convention takes into consideration the social model of disability, which means that disability is not defined exclusively by the presence of a physical, psychological, intellectual, or sensory deficiency, but rather, is interconnected with social barriers to or limitations on the full exercise of rights.[141] The kinds of limits or barriers encountered in society by individuals with functional differences are those related to physical or architectural issues, communications, attitudes, and socioeconomic issues.[142]

B.1.4. Rights of the child in conjunction with the obligation to regulate and supervise health services

103. In the present case, the alleged violations to the rights of life, a a decent life, personal integrity, and health must be interpreted in light of international case law on the protection of children. As this Court has asserted on other occasions, this case law must serve to define the content and scope of the obligations the State has assumed with respect to the rights of children.[143] In this regard, the analysis of the facts of this case will take particular note of the Convention on the Rights of the Child.[144]

104. The Court has understood that, pursuant to Article 19 of the American Convention, the State is obligated to advance special protection measures in the best interests of children, carrying out its role as guarantor with greater caution and responsibility because of their unique vulnerability. The Court has established that the ultimate goal of protecting children is the development of children's personalities and the enjoyment of their recognized rights. Children thus have special rights, which call for specific duties on the part of families, society, and the State. Furthermore, their status necessitates special protection by the State, and this must be

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139 *Cf. Case of Guachalá Chimbo et al. v. Ecuador. Merits, Reparations, and Costs.* Judgment of March 26, 2021. Series C No. 423, para. 79.

140 *Cf. Case of Guachalá Chimbo et al. v. Ecuador*, *supra*, para. 143, citing *Cfr.* Committee on Economic, Social, and Cultural Rights, General Comment No. 5: Disabled persons, E/1995/22, December 9, 1994, para. 34; Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by the United Nations General Assembly, 48th session, annex to Resolution 48/96, Article 3; Declaration on the Rights of Disabled Persons, proclaimed by the United Nations General Assembly in Resolution 3447 (XXX) of December 9, 1975, para. 6; World Programme of Action Concerning Disabled Persons, approved by the General Assembly on December 3, 1982 in Resolution 37/52, para. 98, and CRPD, Article 25(b).

141 *Cf. Case of Furlán and Family v. Argentina, supra*, para. 133, and *Case of Guachalá Chimbo et al. v. Ecuador*, para. 85.

142 *Cf. Case of Furlán and Family v. Argentina, supra*, para. 133, and *Case of Guachalá Chimbo et al. v. Ecuador*, supra, para. 85.

143 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 194, and *Case of Rochac Hernández et al. v. El Salvador. Merits, Reparations, and Costs.* Judgment of October 14, 2014. Series C No. 285, para. 106.

144 Chile ratified the Convention on the Rights of the Child on August 13, 1990, and it entered into force on September 2, 1990.

understood as an additional right, supplementing the other rights the Convention recognizes for all people.[145]

105. The Court also notes that the best interests of children constitutes a guiding legal principle for children's rights that is rooted in the dignity of human beings, the characteristics of children, and the need to foster children's development.[146] In this regard, Article 3 of the Convention on the Rights of the Child states that in "all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

106. For its part, the Committee on the Rights of the Child has noted, in its observation number 14, that the concept of best interests "is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention [on the Rights of the Child]."[147] Thus, it has been established the the best interest of the child is a threefold concept: (a) a substantive right: the right of the child to have his or her best interests assessed and taken as a primary consideration when adopting a decision affecting them; (b) a fundamental, interpretive legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen; and (c) a rule of procedure: whenever a decision is to be made that will affect children, the decision-making process must include an evaluation of the possible impacts on them.[148]

107. The Court also notes that the same committee has considered that States must give central importance to the best interests of the child in all decisions affecting their health and development, including those decisions involving actions that have an impact on children's health.[149] In this regard, the committee has indicated that States must review the legal context and modify laws and public policies to ensure the right to health.[150] Regarding non-state actors, it has held that the State "is responsible for realizing children's right to health regardless of whether or not it delegates the provision of services to non-state actors."[151] This gives rise to the duty of non-state actors to recognize, respect, and fulfill their responsibilities toward children.[152]

108. The Court considers that the best interests principle constitutes a mandate to prioritize the rights of children in any decision that could affect them (positively or negatively) in the areas of law, administration, and legislation. The State must therefore ensure that its laws and actions not affect the right of children to enjoy the highest level of health and access to treatment for illnesses, and that this right is not infringed by the actions of third parties.

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145 *Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002*. Series A No. 17, paras. 53, 54, 60, 86, 91, and 93, and *Case of Ramírez Escobar et al. v. Guatemala. Merits, Reparations, and Costs.* Judgment of March 9, 2018. Series C No. 351, para. 149.

146 *Cf.* Advisory Opinion OC-17/02*, supra*, para. 56.

147 *Cf.* Committee on the Rights of the Child. General Comment No. 14. The right of the child to have his or her best interests taken into account as a primary

consideration (Article 3, para. 1), May 29, 2013, para. 1.

148 *Cf.* Committee on the Rights of the Child. General Comment No. 14, *supra*, para. 6.

149 *Cf.* Committee on the Rights of the Child. General Comment No. 15. The right of the child to enjoy the highest attainable standard of health, April 17, 2013, para. 13.

150 *Cf.* Committee on the Rights of the Child. General Comment No. 15, *supra*, para. 72.

151 Committee on the Rights of the Child. General Comment No. 15, *supra*, para. 75.

152 *Cf.* Committee on the Rights of the Child. General Comment No. 15, *supra*, para. 75.

B.1.5. Specific standards on respecting and ensuring the rights to life, personal integrity, health, and rights of the child and the disabled, in conjunction with the obligation to regulate and supervise health services

109. In view of the above, the Court understands that treatments for disability rehabilitation and palliative care are essential services for children's health.[153] The Court notes that Article 24 of the Convention on the Rights of the Child declares that States shall "strive to ensure that no child is deprived of his or her right of access to such health care services,"[154] and the Committee on the Rights of the Child has indicated that the article encompasses timely and appropriate preventive care, health promotion, palliative services, treatments, rehabilitation services, and the right of children to grow and develop their potential to the utmost and to live in conditions that allow them to enjoy the highest attainable standard of health.[155]

110. This Court believes that States must ensure health services of rehabilitation and pediatric palliative care in accordance with the standards of availability, accessibility, acceptability, and quality (*supra* par. 100), taking into consideration the particularities of the medical treatment children with disabilities need.[156] Specifically, concerning *accessibility*, the Court considers that to the extent possible, rehabilitation treatment and pediatric palliative care must prioritize home-based medical care, or care in a place close to home, with an interdisciplinary system of support and guidance for the child and the family, and provide for the preservation of the child's family and community life.[157]

111. In this regard, the Court notes that the Convention on the Rights of Persons with Disabilities establishes that States must provide disabled persons with health services as close to their communities as possible, including in rural areas, as well as access to home-based and residential assistance services.[158] Similarly, the Committee on the Rights of the Child has maintained that "[c]hildren with disabilities are best cared for and nurtured within their own family environment provided that the family is adequately provided for in all aspects."[159] Ultimately, the Court considers that the special care and assistance necessary for a child with disabilities must include, as a fundamental element, support to the families responsible for their care during treatment, especially mothers, upon whom caregiving work traditionally falls.[160]

112. Furthermore, regarding access to information as part of accessibility in health care, the Court considers that children and their caregivers should have access to information related to their illnesses or disabilities, including causes, treatment, and prognosis.[161] This information must be accessible to attending physicians and to other institutions that may be involved in the

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153 *Cf.* Expert opinion of Victor Abramovich (merits file, folio 882).

154 Convention on the Rights of the Child, Article 24.

155 *Cf.* Committee on the Rights of the Child, General Comment No. 15, *supra*, paras. 2 and 25.

156 *Cf.* Expert opinion of Victor Abramovich (merits file, folio 884).

157 *Cf.* Committee on the Rights of the Child, General Comment No. 15, *supra*, para. 36.

158 *Cf.* Convention on the Rights of Persons with Disabilities, Articles 19 and 25, and Committee on Persons with Disabilities, General Comment No. 5 on the right to live independently and to be included in the community, 2017, para. 87.

159 Committee on the Rights of the Child. General Comment No. 9 (2006). The rights of children with disabilities, February 27, 2007, para. 41.

160 *Cf.* International Labor Organization. *Care work and care jobs for the future of work*, July 1, 2019, p. 53.

161 Committee on the Rights of the Child, General Comment No. 9, *supra*, para. 37.

child's treatment. This includes institutions responsible for managing private insurance, which are central for accessing health services. Therefore, the State must ensure that those with private insurance have access to information on effective treatment conditions, which includes conditions for coverage of services and available means of recourse in case of grievances by the insured.

B.1.6. Right to social security in conjunction with the obligation to regulate and supervise health services

113. In addition, the Court considers that the protection of the right to health is closely linked to the right to social security, so health care is part of ensuring the right to social security.[162] The Committee on Economic, Social, and Cultural Rights has thus noted that social security has nine principal branches, one of which is health care;[163] it has established that:

> States Parties have an obligation to guarantee that health systems are established to provide adequate access to health services for all. In cases in which the health system foresees private or mixed plans, such plans should be affordable, in conformity with the essential elements enunciated in the present general comment. The Committee notes the particular importance of the right to social security in the context of endemic diseases such as HIV/AIDS, tuberculosis and malaria, and the need to provide access to preventive and curative measures.[164]

114. The Court agrees with the Committee that the right to social security is fundamental for ensuring individual dignity and for addressing circumstances that restrict the free exercise of other rights,[165] such as the right to health. Although States retain the freedom to decide how to ensure the right to social security, which can be accomplished with private sector involvement, as in Chile, the State must ensure respect for the essential elements of the right to social security.[166] States must therefore ensure that people are not subjected to arbitrary or unreasonable restrictions on existing social coverage, whether public or private.[167] Moreover, ensuring the right to social security necessitates a system that is structured and operates under the principles of availability and accessibility, encompassing health care and disability, and that has sufficient funding and duration.[168]

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162 *Cf.* Expert opinion of Judith Bueno de Mesquita (merits file, folio 809.1 a 809.34).

163 *Cf.* Committee on Economic, Social, and Cultural Rights. General Comment No. 19, The right to social security (Article 9), November 23, 2007, para. 12.

164 *Cf.* Committee on Economic, Social, and Cultural Rights. General Comment No. 19, *supra*, para. 13.

165 *Cf.* Committee on Economic, Social, and Cultural Rights. General Comment No. 19, *supra*, para. 1.

166 *Cf.* General Comment No. 19, *supra*, para. 3.

167 *Cf.* General Comment No. 19, *supra*, para. 4.

168 *Cf.* General Comment No. 19, *supra*, paras. 11 to 28.

115. Accordingly, the Court has noted that Articles 3(j),[169] 45(b),[170] 45(h),[171] and 46 of the OAS Charter establish a set of rules that point to the right to social security.[172] Specifically, the Court has noted that Article 3(j) of the Charter of the OAS establishes that "social justice and social security are bases of lasting peace." Also, Article 45(b)[173] of the Charter of the OAS establishes that "(b) [w]ork is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working." Moreover, Article 45(h)[174] of the Charter establishes that "man can only achieve the full realization of his aspirations within a just social order," so States agree to make efforts to apply the principles and mechanisms, including the "(h) [d]evelopment of an efficient social security policy." In Article 46 of the Charter, the States recognize that "in order to facilitate the process of Latin American regional integration, it is necessary to harmonize the social legislation of the developing countries, especially in the labor and social security fields, so that the rights of the workers shall be equally protected, and they agree to make the greatest efforts possible to achieve this goal."

116. The Court therefore has found that the OAS Charter makes sufficiently specific reference to the right to social security to infer its existence and implicit recognition. Consequently, the right to social security is a right protected under Article 26 of the Convention.[175]

117. Regarding the content and scope of this right, the Court has noted that Article XVI of the American Declaration allows for the identification of the right to social security by stating that every person has the right to "social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make

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169 Article 3(j) of the Charter of the OAS establishes: "[t]he American States reaffirm the following principles: (j) [s]ocial justice and social security are bases of lasting peace."

170 Article 45(b) of the Charter of the OAS establishes: "[t]he 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: (b) [w]ork is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working."

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172 *Cf. Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of March 6, 2019. Series C No. 375, para. 173, and *Case of National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*, *supra*, para. 156.

173 Article 45(b) of the Charter of the OAS establishes: "[t]he 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: (b) [w]ork is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working."

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175 *Case of Muelle Flores v. Peru, supra*, para. 173, and *Case of the Miskito divers (Lemoth Morris et al.) v. Honduras, supra,* para. 86.

it physically or mentally impossible for him to earn a living."[176] Likewise, Article 9 of the Protocol of San Salvador establishes that "(1) [e]veryone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence. In the event of the death of a beneficiary, social security benefits shall be applied to his dependents;" and (2) "[i]n the case of persons who are employed, the right to social security shall cover at least medical care and an allowance or retirement benefit in the case of work accidents or occupational disease and, in the case of women, paid maternity leave before and after childbirth."

118. Furthermore, the right to social security is recognized constitutionally in Chile, in Article 19(18) of the Constitution.[177] The provision reads, "State action will be directed to ensure the access of all inhabitants to uniform basic benefits, whether they are granted through public or private institutions. The law may establish compulsory contributions. The State shall supervise the proper exercise of the right to social security."

B.2. Analysis of this case

119. The Court recalls that Martina Vera Rojas is a child who suffers from Leigh syndrome, which is a mitochondrial, neurodegenerative disease that causes an acute loss of psychomotor abilities. Due to her illness, Martina has multisystemic damage, which severely alters her cognitive abilities, motor functions, atrophied extremities, stiffness, poor hearing and capacity for social interaction, and other damage to her physical and mental capacities, including episodes of epilepsy. Martina therefore needs constant, multidisciplinary medical care and rehabilitation therapy.[178] Though these treatments are not curative, they prolong Martina's life, slowing down the degenerative process of the illness. In this situation, Martina's parents took out insurance with special coverage for catastrophic illnesses so that she could receive home hospitalization starting on November 28, 2007, allowing her to receive medical care for her illness.

120. The Court recalls that at the time of the facts, Chile's Circular No. 7 of July 1, 2005, was the specific regulation establishing instructions for the Isapres to be able to provide CAEC.[179] The goal was for the Isapres to uniformly apply the conditions for provision of CAEC, as well as the different conditions under which CAEC could be excluded from coverage. The regulation set the conditions for CAEC to allow home hospitalization and the requirements for its application. These conditions established, *inter alia*, that "treatment for chronic illnesses and antibiotic treatment are excluded."[180] In addition, Circular No. 7 noted that the Superintendency of Health "will enforce these instructions, exercising its authority under Law No. 18,933 and Law 19,937,

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176 Approved at the Ninth Pan-American Conference held, Bogotá, Colombia, 1948.

177 ARTICLE 19(18)- "The Constitution guarantees all persons: The right to social security. The laws governing the exercise of this right shall be of qualified quorum. State action will be directed to ensure the access of all inhabitants to uniform basic benefits, whether they are granted through public or private institutions. The law may establish compulsory contributions. The state shall supervise the proper exercise of the right to social security."

178 Medical care for patients with Leigh syndrome must be performed by a multidisciplinary team including a pediatric neurologist, physiatrist, gastroenterologist, bronchopulmonologist, ophthalmologist, cardiologist, nephrologist, otolaryngologist, hematologist, and endocrinologist. For rehabilitation, it must include physical therapists, an occupational therapist, and a speech pathologist. *Cf.* Expert assessment of Tatiana Cristina Muñoz Castro on the level of care necessary for individuals with Leigh syndrome (merits file, folio 754).

179 *Cf.* Superintendency of Health Circular No. 7 of July 1, 2005, *supra*.

180 Superintendency of Health Circular No. 7 of July 1, 2005, *supra*, bullet point 10.

and it will provide rules to clarify the stipulations contained in the document containing the coverage conditions."[181]

121. Moreover, the Court recalls that on October 13, 2010, Isapre MasVida notified the father of Martina Vera Rojas that, pursuant to Circular IF/No. 7 of the Superintendency of Health, the CAEC medical coverage for RHD that had been in effect for Martina since November 28, 2007, and which had allowed her to receive home-based hospital care, would no longer apply as of October 28, 2010. In addition, Mr. Vera was informed that if Martina suffered a medical complication requiring hospitalization, the Hospital of Arica was the designated provider. In response to this decision, Mr. Vera Rojas submitted a complaint to the Superintendency of Health, which sent the records to the Isapre, which in turn denied the claim. Martina's family filed for a protection remedy, which was ultimately rejected by the Supreme Court. Because of this decision, Martina's parents covered the cost of the home hospitalization through a fund at the company where Ramiro Vera worked.

122. Furthermore, Carolina Rojas filed a complaint before the Superintendency of Health on December 23, 2011, which was settled on April 19, 2012 through an arbitral decision, confirmed on August 23, 2012, by virtue of which the resumption of RHD for Martina Vera was ordered as well as payment for expenses incurred during the period when coverage had been suspended. Since then, the CAEC coverage has been covered by the Isapre. Also, the Court recalls that the last bullet point of number 10, "CAEC home hospitalization," established in Circular No. 7 and applied in the case of Martina, was modified by Circular IF/282 on January 26, 2017, which eliminated the phrase "treatment of chronic diseases." That circular states that "the exclusion from CAEC of home hospitalization for treatment of chronic diseases cannot be applied to contracts currently in force or in contracts entered into subsequently."[182]

123. Given these facts and the considerations previously noted (*supra* paras. 81 to 118), the Court will proceed to analyze whether the State failed to meet its obligations to ensure the rights to life, a dignified life, personal integrity, rights of the child, and right to health and social security, as well as the prohibition on discrimination against Martina Vera Rojas. To that end, the Court will analyze whether the State failed to meet its duty to regulate and supervise health services, specifically the services of Isapre MasVida. A subsequent analysis will examine whether, as the State argues, the alleged failures were remedied by the decisions of the Superintendency of Health and the legal changes made in the RHD regulations.

B.2.1. The duty to regulate and supervise the services of private insurers

124. The Court recalls that personal integrity and life are directly and immediately linked to human health care, such that the lack of adequate medical care may entail the violation of Articles 4, 5, and 26 of the Convention. In this regard, given that health is a public good that States are responsible for protecting, States have an obligation to prevent undue third party interference in the enjoyment of the rights to life, personal integrity, health, and social security, as well as the rights of children, who are particularly vulnerable when they are receiving treatment that requires palliative care and rehabilitation due to a progressive illness that causes disability for those suffering from it. Consequently, States have a duty to ensure the provision of those services and to regulate and supervise the activities of private health companies, including the services of insurers, as their actions fall within the realm of public service, which means they are acting on behalf of the State (*supra* paras. 81 to 92).

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[181] Superintendency of Health Circular No. 7 of July 1, 2005, *supra*.

[182] *Cf.* Health Care Funds and Insurance Authority. Subdepartment of Regulation. Circular IF/No. 282 of January 26, 2017, which gives instructions on additional coverage for catastrophic illnesses in home hospitalization, page 3.

125. In the instant case, in line with the arguments raised by the Commission and the representatives, the Court will proceed to analyze whether the State fulfilled its duty to regulate the services of insurers. First, the Court considers that the provisions of Circular No. 7, which made it possible to exclude catastrophic illnesses considered "chronic diseases" from RHD, lacked objective elements for clearly determining which illnesses qualified for the exclusion. This is because a determination on the "chronic" nature of a disease has to do with its duration and progression, which allows for wide discretion with respect to diseases categorized as such and that can thus be excluded from coverage.[183] For those with CAEC, the ambiguity of the provision gives rise to a problem of predictability and clarity regarding care for their illnesses, in addition to producing legal uncertainty regarding the scope of their health benefits.

126. In addition, this Court considers that the substantive content of Circular No. 7, in establishing the exclusion from home hospitalization for treatment of chronic diseases, allowed the insurer—regardless of the severity of the patient's illness and the possible risks involved in discontinuing RHD, while adhering to the criteria of duration and progression of the disease—to discontinue coverage for medical care that could be essential for preserving the health, personal integrity, and life of individuals. The Court advises that this provision, by not establishing any additional prerequisite for discontinuation of RHD beyond the requirement about the "chronic" nature of the disease, constituted a risk to human rights, as it could restrict access to a medical treatment that could be fundamental for preserving the health, integrity, and life of individuals, especially children with illnesses such as Martina's, as well as those with a disability that made them particularly vulnerable. On this matter, the Court takes the position that provisions permitting the modification or discontinuation of medical care must allow for adequate consideration of the risks involved to the rights of individuals in specific situations, as well as the special vulnerabilities of patients.[184]

127. The Court also notes that the provision allowed insurers to determine who could receive RHD based on the duration and progression of their disease, even though the purpose of the CAEC is to enable the insured to have access to coverage for expenses for essential medical attention for severe and expensive illnesses. In this way, the distinction the law gave rise to, which allowed the exclusion of RHD for chronic diseases, is arbitrary, because from a medical standpoint, the duration and progressivity of an illness is not a factor determining the appropriateness of medical treatment requiring home hospitalization. Thus, the existence of the grounds set forth in Circular No. 7 under consideration here had the practical effect that individuals who had CAEC and who found themselves in those circumstances—i.e., in need of medical care like RHD in order to preserve their health, personal integrity, and life—were excluded from the benefit because their disease was chronic. This distinction, based on a temporal judgment, and which did not take into account the medical needs of individuals with severe illnesses, as in the case of Martina (who is also a disabled child), is discriminatory with respect to ensuring the rights of health, rights of the child, and rights to personal integrity and life.

128. Second, in the present case, the Court advises that the regulatory problems of Circular No. 7 allowed Isapre MasVida, through the letter sent to Mr. Vera Luza on October 13, 2010, to discontinue the RHD solely on the basis of Martina's "progressive and irreversible" condition,

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[183] The World Health Organization classifies chronic diseases as those diseases with a long duration and generally slow progression.

[184] *Cf.* Expert report of Tatiana Cristina Muñoz Caro (merits file, folio 766). The expert explained that the appropriateness of home hospitalization must be decided on a case-by-case basis according to the severity of each patient's illness.

which was excluded because it was a "chronic" disease. The Court notes that the Isapre's decision was based on the expert medical opinion of Dr. Rodrigo Vargas Saavedra, who called the illness "progressive and irreversible" but never "chronic."[185] Dr. Oscar Darrigrande subsequently noted that it is a conceptual error to equate a progressive illness with a chronic illness, as progressivity implies variation in the illness, which necessitates home-based medical care.[186] Concerning this matter, the Court considers that the ambiguity of the regulation and the failure to provide for other regulatory conditions that would permit the continuation of the RHD, such as the consequences its discontinuation would have on health, personal integrity, and life, as well as special vulnerabilities, allowed a progressive illness to be equated to a chronic one, leading to the exclusion of RHD for the medical treatment of Martina, who is a disabled child.

129. Concerning this last point, the Court recalls that the Isapre's decision was made even though insurer knew that Martina needed to continue her medical treatment in her home. In this regard, the Court considers that it is fully proven that the insurer understood the risk to Martina if the RHD were discontinued when she had Leigh syndrome. Specifically, the medical report of Dr. Vargas Saavedra, on which the discontinuation of the RHD was based, clearly stated that "clinical support therapy in the home is critical for the child's wellbeing."[187] This conclusion was also established by the Court of Appeals of Concepción in its January 26, 2011, decision, in the context of the protection remedy sought by Martina's parents (*supra* par. 58), and by the arbitral decision of April 19, 2012, confirmed on August 23, 2012 (*supra* par. 62). Furthermore, during the public hearing, expert witness Oscar Darrigrande asserted that if the home hospitalization had been discontinued for Martina, her prospects and her quality of life would have been severely affected because she would have been exposed to other respiratory illnesses due to her tracheostomy and gastrostomy tubes.[188]

130. The Court notes with respect to this that the regulatory problems of Circular No. 7 allowed the insurer to make a decision that—in addition to excluding RHD for Martina, which entailed risk to her health, personal integrity, and life—forced Martina to continue with her medical treatment under conditions that were not appropriate for her health status and her special needs as a child with a disability, thereby harming her chances of having a decent life. Ending the home hospitalization would have jeopardized accessibility to health care. This is because the health care facilities in Arica, which were the geographically accessible ones for continuing the treatment after the decision of the Isapre, were inadequate for her medical care, which meant that the family would have had to transfer her to another hospital far away. In addition, the expenses stemming from the lack of coverage for RHD would affect the family's ability to access that medical care.[189] In this regard, the Court recalls that, in accordance with the requirement of accessibility, treatments for pediatric rehabilitation and palliative care must privilege, to the extent possible, care at home or in a location close to the child's home (*supra* par. 100).

131. In addition, the decision of the Isapre jeopardized the acceptability of the health care services, as Martina would have been forced to relocate in order to receive medical treatment in a setting that would have been ill-suited to her needs as a disabled child. The Court considers

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185 *Cf.* Letter from the Isapre on October 13, 2010; Medical report of Dr. Rodrigo Vargas Saavedra on September 30, 2010 (evidence file, folio 164); and witness testimony of Rodrigo Vargas Saavedra during the arbitral trial (evidence file, folio 201).

186 *Cf.* Medical report of Dr. Óscar Darrigrande on July 15, 2011 (evidence file, folios 180 to 183).

187 *Cf.* Medical report of Dr. Rodrigo Vargas Saavedra on September 30, 2010 (evidence file, folios 165 to 166) and expert opinion during the public hearing by Dr. Óscar Darrigrande (transcription of public hearing, page 51).

188 *Cf.* Expert testimony of Dr. Óscar Darrigrande during public hearing (public hearing transcript, page 52).

189 *Cf.* Expert testimony of Dr. Óscar Darrigrande during public hearing (public hearing transcript, page 53).

that, in accordance with the above-mentioned criteria and bearing in mind the best interests of the child, which necessitate prioritizing her rights, the best way to care for a disabled child is within the family environment, which in the present case is essential—both from the perspective of Martina's right to health and to fulfill the obligation to support her family, which was responsible for her care. The Court recalls that, as the Committee on the Rights of the Child has stated, "[c]hildren with disabilities are best cared for and nurtured within their own family environment provided that the family is adequately provided for in all aspects."[190]

132. In addition, the Court recalls that, in accordance with the requirement for quality in health care, health facilities, goods, and services must be scientifically and medically appropriate and of good quality. This must include appropriate medical care, which in the case of Martina was home hospitalization. In this regard, expert witness Oscar Darrigrande stated during the public hearing that for the palliative and rehabilitative care to be efficient and effective, it must be carried out in Martina's home by a stable group of professionals; it must take place within the family environment.[191] Likewise, as noted above, the health facilities in Arica, besides being unable to provide the appropriate palliative and rehabilitative care she needs, constituted a risk to Martina's health, personal integrity, and life due to the risk of respiratory infections because of her tracheostomy and gastrostomy tubes.

133. Moreover, the Court recalls that the right to health is closely linked to the right to social security. States are obligated to organize their health systems such that individuals can access appropriate health care services, which must also include access to preventive and curative measures as well as sufficient support for people with disabilities.[192]. For this reason, the Court considers that the regulatory deficiencies of Circular No. 7 harmed the right to social security because they allowed the Isapre to set an arbitrary and discriminatory limit on Martina's access to the health care services necessary for her illness and that were provided for in the Chilean health care system. This occurred as a result of the failure of the State to adequately regulate the provision of services by the insurer, and State therefored failed in its its duty to prevent the actions of third parties from jeopardizing Martina's ability to fully enjoy RHD, which—because it was included in the CAEC—constituted one of the health benefits offered by the social security system.

134. Furthermore, the Court advises that the present case raises a question of regressivity under the terms of Article 26 of the Convention. The Court notes that prior to the adoption of Circular No. 7, the CAEC was regulated by Circular No. 059 of February 29, 2000.[193] This circular did not exclude treatment for chronic diseases from CAEC coverage. However, Circular No. 7, once adopted, introduced new grounds for excluding coverage. These grounds established an arbitrary and discriminatory distinction—an issue that was pointed out by the State itself in the introduction to Circular No. IF/282 of January 26, 2017 (*supra* par. 69)—which meant a restriction of the rights to health and social security, the Court considers that it is a deliberately regressive measure that has no justification in the context of the State's international obligations, specifically its obligation of progressive development of economic, social, cultural, and environmental rights.

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190 Committee on the Rights of the Child, General Comment No. 9, *supra*, para. 41.

191 *Cf.* Expert testimony of Dr. Óscar Darrigrande during public hearing (public hearing transcript, page 53).

192 *Cf. Case of the Miskito divers (Lemoth Morris et al.) v. Honduras, supra*, para. 90, and Committee on Economic, Social, and Cultural Rights. General Comment No. 19, *supra*, paras. 11, 13, 17, 21, and 22.

193 *Cf.* Superintendency of Isapres. Circular No. 59 of February 29, 2000. Annex: Conditions of the additional coverage for catastrophic diseases in Chile.

135. In light of all of the above, this Court concludes that the State, by adopting the provisions of Circular No. 7 of July 1, 2005, failed in its duty to regulate health services and thus, its obligations to protect rights. The Circular allowed Isapre MasVida to decide whether to exclude Martina Vera from the RHD coverage she needed for appropriate medical care, especially considering her status as a disabled child. The private insurer's decision—a result of the State's failure to fulfill its regulatory duty—jeopardized the rights of life, a decent life, personal integrity, rights of the child, and rights to health and social security, read in conjunction with the obligation to ensure rights without discrimination and the duty to adopt domestic legal provisions, against Martina Vera, protected by Articles 4, 5, 19, and 26 of the American Convention, read in conjunction with Articles 1(1) and 2 thereof. Furthermore, the existence of these regulations constituted a failure to meet the progressive development obligations of Article 26 of the American Convention.

B.2.1. Application of the principle of complementarity

136. The State noted that the arbitral court of the Superintendency of Health decided, in a final judgment confirmed on August 23, 2012, that the Isapre had an obligation to resume financing for Martina's home hospitalization and to fully compensate Martina's parents for the expenses they had incurred during the period when the Isapre was denying coverage. In light of this, the State argued, the situation that was the subject of complaint before the inter-American system was completely remedied by State institutions. It maintained that, in fact, the competent judge under national law remedied the grievance claimed by the petitioner before the inter-American system after the presentation of the petition, and as a consequence, since the date of Isapre's appeal before the Superintendency, Martina's home hospitalization treatment has been financed without interruption. Consequently, the State declared that given the complementary nature of the Court's jurisdiction, deciding on the merits of the case is unnecessary. The Court will analyze this argument as applied to the principle of complementarity.

137. First, it is important to reiterate that the inter-American system shares with national systems the jurisdiction for ensuring the rights and freedoms set forth in the Convention, and for investigating and when applicable trying and punishing any infractions committed. Second, if a specific case is not resolved domestically, the Convention provides for an international level in which the main bodies are the Commission and the Court. The Court has stated in this regard that when an issue has been resolved domestically, according to the provisions of the Convention, it is not necessary to bring it before the Inter-American Court for approval or confirmation. The foregoing rests on the principle of complementarity, which informs the entire inter-American system of human rights, which is, as the Preamble of the American Convention states, "reinforcing or complementing the protection provided by the domestic law of the American States."[194]

138. This complementary nature of international jurisdiction means that the system of protection instituted by the American Convention does not replace national jurisdictions, but complements them.[195] The State is thus the principal guarantor of the human rights of individuals, so if an action violates said rights, it is the State that must come to a decision on the matter domestically and, when applicable, remedy it, before having to answer to

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[194] *Cf. Case of Las Palmeras v. Colombia. Preliminary Objections.* Judgment of February 4, 2000. Series C No. 67, para. 33, and *Case of Petro Urrego v. Colombia. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of July 8, 2020. Series C No. 406, para. 102.

[195] *Cf. Case of Tarazona Arrieta et al. v. Peru. Preliminary Objection, Merits, Reparations, and Costs. Judgment of October 15, 2014. Series C No. 286*, para. 137, and *Case of Petro Urrego v. Colombia*, *supra*, para. 103.

international bodies.[196] Recent case law has recognized that all the authorities of a State Party to the Convention have the obligation to exercise Convention-based judicial review, so that the interpretation and application of national law is consistent with the State's international obligations with respect to human rights.[197]

139. It follows from the above that in the inter-American system there is dynamic and complementary review of States' obligations under the Convention to respect and ensure human rights, jointly among domestic authorities (where primary responsibility lies) and at the international level (as a complement), so that the decision criteria and protection mechanisms, both national and international, can be harmonized and adapted to each other.[198] Thus, the Court's case law includes cases in which—in accordance with international obligations—domestic bodies, instances, or courts have adopted appropriate measures to remedy the situation that gave rise to the case;[199] have already resolved the alleged violation;[200] have ordered reasonable reparations;[201] or have conducted Convention-based judicial review.[202] In this regard, the Court has noted that the State's responsibility under the Convention can be claimed at the international level only after the State has had the opportunity to recognize a violation of a right, when applicable, and to remedy on its own any harm done.[203]

140. In the present case, the Court confirms that the judge-arbitrator's April 19, 2012 decision concluded that the Isapre, in denying Martina Vera the CAEC for her home hospitalization, made it untenable for her care to continue over time due to the health status of the patient, the technology and infrastructure needed to keep her alive, and the associated costs. Given this situation, she believed the patient's need for hospitalization—within a hospital facility under the catastrophic coverage—would increase the costs both for the Isapre and for Martina. She therefore saw no economic rationale for the Isapre's denial of the CAEC, including RHD, and considered it contrary to the child's rights to life and health. She thus held that the Isapre lacked a legitimate, reasonable logical grounds for a change of modality. The judge-arbitrator consequently decided to grant the claim, ordering the continuation of the CAEC in RHD and the recovery of adjusted payments that would have been made during the suspension of the service. In the words of the judge-arbitrator:

> 13. That, in light of the foregoing, this Court concludes that depriving the insured's beneficiary of the CAEC for her home hospitalization and keeping her only on the health

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196 *Cf. Case of Acevedo Jaramillo et al. v. Peru. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs*, para. 66, and *Case of Petro Urrego v. Colombia*, *supra*, para. 103.

197 *Cf. Case of Andrade Salmón v. Bolivia. Merits, Reparations, and Costs.* Judgment of December 1, 2016. Series C No. 330, para. 93, and *Case of Petro Urrego v. Colombia*, *supra*, para. 103.

198 *Cf. Case of the Massacre of Pueblo Bello v. Colombia. Preliminary Objections, Merits, and Reparations.* Judgment of November 30, 2012. Series C No. 259, para. 143, and *Case of Petro Urrego v. Colombia*, *supra*, para. 104.

199 *Cf. Case of Tarazona Arrieta et al. v. Peru, supra,* párrs. 139 to 141, and *Case of Colindres Schonenberg v. El Salvador. Merits, Reparations, and Costs.* Judgment of February 4, 2019. Series C No. 373. para. 80.

200 See, for example, *Case of Amrhein et al. v. Costa Rica*. *Preliminary Objections, Merits, Reparations, and Costs.* Judgment of April 25, 2018. Series C No. 354, paras. 97 to 115, and *Case of Colindres Schonenberg v. El Salvador, supra,* para. 80.

201 See, for example, *Case of the Massacre of Santo Domingo v. Colombia, supra,* paras. 334 to 336, and *Case of Colindres Schonenberg v. El Salvador, supra,* para. 80.

202 See, for example, *Case of Gelman v. Uruguay*. *Merits and Reparations.* Judgment of February 24, 2011. Series C No. 221, para. 239, *Case of Andrade Salmón v. Bolivia, supra*, para. 100, and *Case of Petro Urrego v. Colombia*, *supra*, para. 108.

203 *Cf. Case of the Massacre of Pueblo Bello v. Colombia, supra*, para. 143, and *Case of Petro Urrego v. Colombia*, *supra*, para. 104.

plan's coverage makes it untenable for the insured to maintain the continuity of said benefit over time, given the patient's fragile health, the technology and medical infrastructure needed to keep her alive, and the costs of the same, such that the lack of additional coverage will undoubtedly force the patient to be readmitted to a health facility in order to continue her treatment under the benefit through traditional hospitalization.

In this situation, the technical insufficiency of the Hospital of Arica will determine in practice the need to hospitalize the patient under the catastrophic coverage with a CAEC Network provider outside of the Fifteenth Region, which will obviously increase the costs of the benefit for both the Isapre and the parents.

14. That, given the context described above, the court has arrived at the conclusion that the denial of Additional Financial Coverage I for Catastrophic Illnesses for the home hospitalization of the beneficiary of Ramiro Vera Luza for her chronic disease is not justified by the economic reasoning offered as grounds for exclusion from the CAEC, as the costs for the Isapre would be higher even with no damages against it. To the contrary, for the minor, given her age and fragile health status, it is beneficial because keeping her in traditional hospitalization is contrary to the right to life and health.

Furthermore, this judge considers that the Isapre lacks legitimate grounds and has not asserted in these proceedings any rationale meriting the change in modality of benefit provision.

15. That, moreover, Benefits Circular IF No. 14, 14.04.2005 must be taken into consideration, which "Provides instructions on coverage for home hospitalization," and which establishes that: *"home hospitalization is an alternative to traditional hospitalization that enables improved quality of life and patient care and that contributes to keeping costs down through the rational use of hospital resources."*

Compared to traditional hospitalization, home hospitalization is not only better for the patient, whose quality of life and medical care can be improved, but it is also advantageous financially for the Isapre, with respect to the cost of hospital benefits, which it is obligated to cover by virtue of its health contract.

16. That, consequently, in light of the reasoning in the 14th *considerandum*, this court concludes that it is more prudent and equitable for Isapre MasVida S.A. to continue providing the additional coverage for catastrophic illnesses (CAEC) for home hospitalization for the minor Martina Vera Rojas, despite the chronic nature of her illness, starting from the date on which her third CAEC period ends, October 28, 2010.

17. That, by virtue of the foregoing and the special powers granted by law to this judge, I hereby

DECIDE:

I. To grant the claim filed by Carolina Rojas Farías against Isapre MasVida S.A., so that the latter must continue providing the additional coverage for catastrophic illnesses for the home hospitalization of the minor Martina Vera Rojas, despite the chronic nature of her disease, as it has been doing since 2007.

2. The payment will be adjusted according to the variation in the Consumer Price Index, determined by the National Institute of Statistics, between the month before it should have been made and the month before the one in which it is made available to the insured's dependent, plus the interest accrued during that period.

3. The insurer must inform this court of compliance with the judgment within ten business days of being notified. To that end, the Isapre must adhere to the general instructions

contained in the 8th subparagraph of Circular IF/No. 8, of 2005, of the Health Care Funds and Insurance Authority.

141. The Court considers that the judge-arbitrator's April 19, 2012 decision, confirmed by the Superintendent of Health on August 23, 2012, in effect ended the primary fact that gave rise to the violations to the rights of life, a decent life, personal integrity, rights of the child, and rights to health, and social security, read in conjunction with the obligation to ensure rights without discrimination, against Martina Vera Rojas as a result of the Isapre's October 13, 2010, decision, and established measures of reparation for said violations. The judge-arbitrator's decision took due consideration of the risks to Martina Vera's health and life of the decision to discontinue her home hospitalization, ordered that it be resumed for Martina, and ordered the payment of expenses that had not been covered by the insurer during the time when the family had to bear them. Those payments were in fact made, and Martina's home-based medical treatment was also reestablished.

142. Furthermore, this Court advises that Circular IF/282 of the Funds and Insurance Authority of Chile on January 26, 2017, ordered the removal of the bullet point that had allowed the exclusion of RHD for the treatment of chronic diseases, which had been in Circular No. 7 of July 1, 2005, and which was the grounds by which RHD was discontinued in the specific case of Martina Vera. By this act, the State remedied the legal deficiency that had allowed human rights to be violated in the present case. The Court stresses that in the introduction to said circular, the regulating entity stated that the exclusion of chronic diseases from the CAEC constitutes arbitrary discrimination by the State against individuals. It is thus shown that RHD cannot be excluded from CAEC for individuals with chronic diseases.

143. Nevertheless, the Court considers it important to recall that the inappropriate regulation concerning conditions for excluding RHD from the CAEC allowed Isapre MasVida to make a decision that jeopardized Martina's enjoyment of the rights of health, personal integrity, life, a decent life, rights of the child, and access to social security, and those facts are attributable to the State (*supra* par. 135). The Court is aware that in reality Martina's RHD was not discontinued, due to the efforts of her parents, who had access to a welfare fund at the company where Ramiro Vera worked, though this was insufficient to ensure the same level of medical care as before the RHD was discontinued (*supra* par. 58). Unquestionably, the child in this case has not suffered severe consequences—because of her parents' social position and ability to prevent them—but it is clear that the State is at fault because if the parents' circumstances had been different or worse, this omission on the part of the State could have been fatal. This highlights a severe selectivity in benefits and in the protection of the child's rights.

144. In addition, the Court advises that since the resumption of the RHD, Martina's parents have experienced constant conflict with the Isapre and the Superintendency due to the health providers' services. This can be seen in the various claims and complaints made about problems with Martina's medical care (*supra* par. 64). Those complaints have included problems with the care stemming from the lack of availability of employees of the health care provider, leading to delays in the monthly supplies needed for Martina's care;[204] disagreement concerning the lack of a visit from a speech pathologist focused on swallowing;[205] or the complaint regarding the lack of medication, ventilators in disrepair, lack of communication with the provider, or lack of

[204] *Cf.* Letter from Carolina Rojas Farías on May 4, 2017, to the General Manager of Nueva Más Vida (evidence file, folio 326).

[205] *Cf.* Letter from Ramiro Vera Luza on June 8, 2017, to the Superintendency of Health of Arica (evidence file, folio 328) and letter from Ramiro Vera Luza on August 3, 2017, to the Superintendency of Health of Arica (evidence file, folio 329).

specialists.[206] This situation was described by Mr. Vera Rojas, who stated during the public hearing that after the resumption of the RHD, the family feel that they have been made invisible by the Isapre and by the State as regards oversight of the service Martina receives.[207]

145. With respect to this, the Court recalls that because health is a public good, States have an obligation to regulate and supervise all health assistance provided by private entities, as a special duty to protect rights that can be infringed by the inadequate provision of health care services. It is equally important to note that private companies are the ones with primary responsibility to act responsibly, which means they must take steps necessary to prevent their activities from jeopardizing human rights, remedy any human rights violations that occur, and adopt practices aimed at ensuring that their activities respect human rights. This latter requirement is particularly important when a private company is providing a public service and is performing functions inherent to public power, as is the case of the Isapres in the Chilean health system.

146. The Court recalls that the health services of rehabilitation and pediatric care must be provided in accordance with the principles of availability, accessibility, acceptability, and quality of the health services, taking into account the particular requirements of medical treatment for children with disabilities. Thus, the Court advises that even after the resumption of RHD, the complaints filed by Martina's parents show a lack of sufficient medical workers for the child's care, delays in the delivery of sufficient supplies by the company providing the service, and deficiencies in basic supplies such as medications and ventilators. These failures constitute problems in the quality and availability of health services provided by the companies, as this evidence shows that in health care, one must have enough services and professionally trained medical personnel, and that the goods and services must be appropriate from a scientific and technical standpoint (*supra* par. 100).

147. Martina's extreme vulnerability requires an appropriate environment for the enjoyment of her rights. The Court considers that the Isapre's actions, which occurred due to the poor regulation of health services and jeopardized the continuation of Martina's home hospitalization, and which therefore had an impact on her rights due to her status as a disabled child, have not completely ended. The subsequent provision of the home hospitalization service, which has given rise to claims and complaints by the parents, points to the conclusion that the risk to Martina's rights persists. The Court therefore considers that, even though the judge-arbitrator's April 19, 2012 decision, confirmed by the Superintendent of Health on August 23, 2012, was a commendable action on the part of the State, the internationally wrongful act did not completely end and was not comprehensively remedied.

148. Accordingly, the Court considers that the State is responsible for violating the rights to life, a decent life, personal integrity, the rights of the child, and the rights to health and social security, read in conjunction with the obligation to ensure rights without discrimination and the duty to adopt domestic legal effects, established in Articles 4(1), 5(1), 19, and 26 of the American Convention on Human Rights, read in conjunction with Articles 1(1) and 2, against Martina Vera Rojas.

149. Nevertheless, the Court considers that, since the judge-arbitrator's decision essentially ended the suspension of the RHD, which had been the principal fact giving rise to the violations analyzed in this case, and ordered reimbursement for the sums incurred by Martina's father during the time of the RHD's suspension, it is not necessary to rule on the alleged failure of the

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206 *Cf.* Letter from Carolina Rojas Farías on April 5, 2017, to the Superintendency of Health (evidence file, folio 332).

207 *Cf.* Statement of Ramiro Vera Luza during the public hearing (transcript of the public hearing, page 15).

State to supervise the actions of Isapre MasVida or the alleged violations of the right to have access to a simple and effective remedy for the protection of rights, set forth in Articles 8(1) and 25 of the American Convention, in conjunction with Articles 1(1) and 2 of the same instrument.

VIII-2
RIGHT TO HUMANE TREATMENT[208]

A. Allegations of the Commission and the parties

150. The ***Commission*** pointed to the Court's case law that the psychological and emotional integrity of victims' families can be harmed by the experiences they suffered due to the acts or omissions of domestic authorities and that, in the case of the victims' right to health, this kind of violation must be proven. It stated that in this case it was documented that "the mother and father suffer from post-traumatic stress arising from the suffering caused by the uncertainty of access to the treatment that keeps their daughter alive," in addition to the suffering caused by the "highly litigious relationship" with the Isapre due to the unilateral changes to their access to proper treatment and the lack of adequate regulation of RHD discontinuation. Furthermore, the Commission pointed out that given the search for treatment by means of the above-mentioned litigation and "the obviously close family bond between the parents and their daughter in her seriously vulnerable condition, the alleged suffering can be clearly inferred." It thus argued that the State is responsible for the violation of the right to psychological and emotional integrity established in Article 5(1) of the American Convention, in conjunction with the obligations of Article 1(1) of the same instrument, against Martina's parents.

151. The ***representatives*** argued that the Court has held that the families of victims of human rights violations can be considered victims in their own right and that it decided in the *Case of Cuscul Pivaral v. Guatemala* that the victims' family members experienced "feelings of pain, anguish, and uncertainty" as a result of the lack of timely medical care and because they lacked the economic resources to provide the necessary treatment, which "affected the family dynamics of the victims." They stated that Martina's parents suffered from "fear and anxiety" due to the "extremely severe impact" that the Isapre's unilateral decision could have on "Martina's most vital processes," which is why they had to search desperately for alternatives to pay for the basic elements of treatment for their daughter, in addition to their uncertainty about the sustainability of such alternatives, frustration at the vulnerability caused by the Supreme Court's decision and the lack of immediate intervention by the Superintendency of Health, and constant fear that the events would be repeated due to the lack of regulation and oversight. Furthermore, they noted that this has had serious psychological effects on both of them as well as a loss of vision for the father, so that the State is responsible for the violation against them under Article 5(1) of the Convention, in conjunction with the obligation contained in Article 1(1), against Martina's father and mother.

152. The ***State*** argued that the Court has established that the violation of Article 5(1) of the Convention depends on the severity of the physical, psychological, and emotional harm to the person, and the alleged violation of the integrity of Martina's parents must be proven rather than assumed. It added that the facts of the case alone do not support the conclusion that the conduct of the authorities has caused a disproportionate impact on the integrity of Martina's parents, given that: (a) the stress is not attributable to the State but rather was caused by the Isapre, a private entity, and (b) the State took the appropriate steps to protect the child's health and in that sense the courts helped to minimize the stress. It indicated that the expert report of

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[208] Article 5 of the American Convention.

February 2017 shows that responsibility for the anxiety and stress of Martina's parents lies with the Isapre, which is a private agent, and thus its actions are not attributable to the State. Likewise, it concluded that there is no evidence proving a causal nexus between the alleged violations of Martina's rights and the actions of the State. Especially considering that it remedied the situation causing the parents' stress and anxiety, it cannot be concluded that the State failed to meet its obligations under Article 5(1) of the Convention, in conjunction with Article 1(1) of the same instrument.

B. Considerations of the Court

153. The Court has taken the view that family members of the victims of human rights violations can be victims in their own right.[209] The Court has thus considered the right to psychological and emotional integrity to have been violated against victims' families due to the additional suffering experienced as a result of the specific circumstances of the violations committed against their loved ones, and due to the subsequent actions or omissions of State authorities in response to the events,[210] taking into consideration, *inter alia*, the steps taken to achieve justice and the existence of close family bonds.[211] It has also found this right to have been violated due to the suffering caused by acts committed against their loved ones.[212] In addition, this Court has noted that the State's role in creating or exacerbating a person's vulnerability has a significant impact on the integrity of people around them, especially close family members who are faced with the uncertainty and insecurity caused by the violation against their nuclear or immediate family.[213]

154. In this regard, the Court notes that Martina's parents—Ramiro Vera and Carolina Rojas—experienced times of extreme stress, pain, and abandonment because of the uncertainty that gave rise to the risk their daughter faced after the announcement of the discontinuation of the RHD, and because of the different processes before the Isapre and the courts, which they carried out in the attempt to reestablish the home hospitalization. Carolina Rojas stated with respect to this that as a result of this struggle, her "family has had to endure painful times, stress—especially Ramiro's fear of losing his job when it was his employer that was covering the home hospitalization expenses—and constant uncertainty about how long they would be able to cover it."[214] Similarly, relatives of Martina's parents described how, when they found out about the RHD being discontinued, "the entire family became stressed and profoundly dejected" and felt "great sadness and despair."[215] This situation lasted throughout the time when the RHD was suspended, and it was emotionally and financially draining for the Vera Rojas family.[216]

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209 *Cf. Case of Castillo Páez v. Peru. Merits.* Judgment of November 3, 1997. Series C No. 34, fourth operative paragraph, and *Case of Bedoya Lima et al. v. Colombia, supra*, para. 158.

210 *Cf. Case of Blake v. Guatemala. Merits.* Judgment of January 24, 1998. Series C No. 36, para. 114, and *Case of Bedoya Lima et al. v. Colombia, supra*, para. 158.

211 *Cf. Case of Blake v. Guatemala. Merits.* Judgment of January 24, 1998. Series C No. 36, para. 114, and *Case of Bedoya Lima et al. v. Colombia, supra*, para. 158.

212 *Cf. Case of Bámaca Velásquez v. Guatemala. Merits.* Judgment of November 25, 2000. Series C No. 70, para. 162 and 163, and *Case of Bedoya Lima et al. v. Colombia, supra*, para. 158.

213 *Cf. Case of the Yean and Bosico Girls v. Dominican Republic*. Judgment of September 8, 2005. Series C No. 130, para. 205, and *Case of Cuscul Pivaral et al. v. Guatemala, supra,* para. 191.

214 *Cf.* Statement of Carolina Andrea Rojas Farías (merits file, folio 719).

215 *Cf.* Statement of Guillermo Rojas Farías (merits file, folio 724), and statement of Karla Antonieta Vera Luza (merits file, folio 720).

216 *Cf.* Statement of Guillermo Rojas Farías (merits file, folio 724), and statement of Karla Antonieta Vera Luza (merits file, folio 720).

155. The impacts of the stressful situation described above produced several physical and psychological effects in Martina's parents.[217] Mr. Vera stated during the public hearing that he faced health problems such as "stomach pain, intense headaches, hypertension, vision problems; I have a 25% visual impairment," which were directly related to the stress. He said this has meant he can no longer go to work because he is a "high-risk" person.[218] Expert witness Cristian Rodrigo Peña stated that "with a high degree of certainty, Mr. Vera presents with moderate chronic anxiety and chronic post-traumatic stress symptoms, as a result of unexpectedly losing his insurance for catastrophic illnesses [...] and of having had to challenge the Chilean health system in order to ensure his daughter's wellbeing."[219] As far as Mrs. Rojas, the expert witness noted that the meetings with the State about her daughter's situation have given her "episodes of intense malaise, expressed as allergic reactions" and that she has symptoms of post-traumatic stress.[220]

156. On this point, the Court considers it important to stress that the experiences of Martina's parents increased their feeling of personal vulnerability.[221] As Mr. Vera noted during the public hearing, the Isapre's decision triggered a "severe psychological crisis" for him and his wife because not only was Martina's life at risk, but they were being denied their ability to live their lives because of the constant need to think about how to pay for their daughter's treatment.[222] Moreover, due to Martina's extreme vulnerability, which makes her completely dependent on her parents for her wellbeing, the Court believes that the psychological and physical effects suffered by Mr. Vera and Mrs. Rojas had an impact on the stability of their household.[223]

157. Consequently, the Court concludes that the State is responsible for the violation of Article 5(1) of the American Convention, in conjunction with Article 1(1) of said instrument, against Ramiro Vera Luza and Carolina Rojas Farias.

IX
REPARATIONS

158. Pursuant to the provisions of Article 63(1) of the American Convention, the Court has indicated that that every violation of an international obligation which results in harm creates a 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.[224] Furthermore, this Court has established that reparations must have a causal

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217 *Cf.* Testimony of Ramiro Vera, describing his problems with stress due to constantly struggling with the Isapre, January 2017 (evidence file, folio 5003 to 5004); Result of vision exam of Ramiro Vera, February 9, 2017 (evidence file, folios 5006 to 5018); Medical certificate of biliary dyskinesia of Ramiro Vera related to chronic stress, July 11, 2018 (evidence file, folio 5020); and Medical certificate attesting to eye damage of Ramiro Vera, of January 16, 2017 (evidence file, folio 5022).

218 *Cf.* Public hearing statement of Ramiro Vera Luza (public hearing transcript, page 16).

219 *Cf.* Psychological/Psychiatric Expert Report of Cristian Rodrigo Peña (merits file, folio 708).

220 *Cf.* Psychological/Psychiatric Expert Report of Cristian Rodrigo Peña (merits file, folio 708).

221 *Cf.* Psychological/Psychiatric Expert Report of Cristian Rodrigo Peña (merits file, folio 709).

222 *Cf.* Public hearing statement of Ramiro Vera Luza in response to a question from Judge Eduardo Ferrer MacGregor (public hearing transcript, page 25).

223 *Cf. Case of Pacheco Tineo Family v. Bolivia. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 25, 2013. Series C No. 272, para. 207, and *Case of Cuscul Pivaral et al. v. Guatemala, supra,* para. 193.

224 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*. Judgment of July 21, 1989. Series C No. 7, paras. 24 and 25, and *Case of Garzón Guzmán et al. v. Ecuador*, *supra*, para. 95.

nexus with the facts of the case, the violations declared, the harm proven, and the measures requested to redress the respective harm. Accordingly, the Court must analyze the concurrence of these factors in order to rule appropriately and in keeping with law.[225]

159. Accordingly, without prejudice to any kind of reparation that may subsequently be agreed upon between the State and the victim, and in accordance with the above considerations on the merits and the violations of the Convention declared in the present judgment, the Court will proceed to analyze the claims put forth by the Commission and the victims' representatives, as well as the State's observations on them, in light of the criteria established in its case law concerning the nature and scope of the obligation to remedy, with the purpose of stipulating measures designed to redress the harm caused.[226]

A. Injured Party

160. Pursuant to Article 63(1) of the Convention, this Court considers that an injured party is anyone who has been declared a victim of the violation of any right recognized in this instrument. This Court therefore considers Martina Vera Rojas, Carolina Andrea del Pilar Rojas Farías, and Ramiro Álvaro Vera Luza to be "injured parties," who as victims of the violations declared in Chapter VIII will be considered beneficiaries of any reparations the Court orders.

B. Measures of restitution and rehabilitation

B.1. Requests of the Commission and the parties

161. The ***Commission*** requested that the State ensure the sustainability of Martina's home hospitalization, taking into consideration international standards and her best interests as a disabled child, and adopt the measures necessary for the physical and emotional rehabilitation of Ramiro Vera and Carolina Rojas in a concerted manner.

162. The ***representatives*** requested as measures of restitution that: (a) Martina's home hospitalization be maintained as long as she needs it, both in terms of current services and any she may need in the future, for which they request that the State enact a law ensuring the implementation of this measure, and that it ensure that the RHD not be unilaterally terminated by the Isapre; (b) the State provide the same level of medical care in the event of her parents' death or her father's dismissal, illness, or salary reduction, or any other circumstance precluding him from paying the deductible for the special coverage for catastrophic illnesses, or in case of bankruptcy of the Isapre in question; and (c) that it provide an appropriate neurological wheelchair for transporting Martina; (d) as a measure of rehabilitation, the representatives requested that the State provide proper care for the physical and psychological ailments of Martina's parents, in common agreement with them, including medications, transportation, and related expenses.

163. The ***State*** argued that there are no precedents in fact or in law to sustain claims of its international responsibility, but that in fact it has adopted the measures necessary to make reparation to the victims. In this regard, it reiterated that this case has no object, so the Court should not rule on reparations for costs and expenses. The State maintained that if the Court

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[225] *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 Bedoya Lima et al. v. Colombia, supra*, para. 165.

[226] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*, *supra*, paras. 25 and 26, and *Case of Moya Solís v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of June 3, 2021. Series C No. 425, para. 113.

determines that the State has committed a violation of human rights, the measures of reparation sought by the representatives and the Commission should be denied, as the violations were already remedied. Regarding the measures requested by the Commission, the State indicated that comprehensive reparation had already been provided, that the representatives noted that the pecuniary damage had already been remedied, and that although the aspects related to the home-based care of Martina and the rehabilitation of Mr. and Mrs. Vera Rojas are pending, these have not been advanced by the decision of the Commission to submit the case to the Court.

B.2. Considerations of the Court

164. This Court concluded that the State is responsible for violating the rights to life, a decent life, personal integrity, rights of the child, and rights to health, and social security, in conjunction with the obligation to ensure rights without discrimination and the duty to adopt domestic legal effects, against Martina Vera Rojas. Moreover, it determined that Martina's parents suffered psychological and physical harm, thereby affecting the entire household, and to that extent these constituted violations of the right to their personal integrity. On this matter, the Court stresses that the physical effects suffered by Mr. Vera Luza, who is the financial provider of the Vera Rojas family, caused a visual impairment that has even harmed his ability to go to work.

165. Accordingly, this Court considers that—given Martina Vera's fragile health status and the ailments her parents suffered when faced with the discontinuation of the RHD, which could jeopardize their future ability to cover the costs of the CAEC—as a measure of restitution, the State shall ensure the continuation of Martina Vera's medical treatment, both in terms of her current services and any treatments she may need in the future due to her illness. The State shall ensure this treatment in the event of her parents' death or their inability to pay for the Isapre's health plan or to pay the deductible for CAEC coverage, due to illness, old age, or salary level. The State shall, within six months of the date when notice of this judgment is served, enact a legal provision to provide legal certainty regarding compliance with this obligation.[227]

166. Furthermore, the Court recalls that Martina's extreme vulnerability requires proper surroundings to preserve her health, life, personal integrity, and enjoyment of a decent life. In addition, this Court notes that there have been problems with the health care services of Martina's providers and that due to her health condition it can be necessary to move her to a hospital for specialized medical treatment. In this regard, the Court considers it appropriate to order the State to provide Martina, within six months, a neurological wheelchair that would enable her transportation to the hospital when necessary. This chair must meet medical and technological requirements for her safe transport to a hospital facility, preventing possible risks during the move.

167. In addition, given the harm to the personal integrity of Martina's parents, the Court orders the State, as a measure of rehabilitation, to immediately provide free of charge—through specialized public health institutions or specialized health personnel—timely, proper, and effective medical treatment and psychological and/or psychiatric treatment to Carolina Andrea del Pilar Rojas Farías and Ramiro Álvaro Vera Luza. This treatment shall include the following: (a) psychotherapy, applied relaxation, and meditation; (b) pharmacological and non-pharmacological management for anxiety symptoms; and (c) cognitive behavioral therapy focused on the trauma they experienced, to combat symptoms of post-traumatic stress.[228]

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[227] *Cf. Case of I.V. v. Bolivia. Monitoring Compliance with Judgment. Resolution of the Inter-American Court of Human Rights of November 21, 2018*, *Consideranda* 11 to 14, and *Cases of Fernández Ortega et al. and Rosendo Cantú et al. v. Mexico. Monitoring Compliance with Judgment.* Resolution of the Inter-American Court of Human Rights of November 21, 2014, paras. 16 to 18.

[228] *Cf.* Psychological/Psychiatric Expert Report of Cristian Rodrigo Peña (merits file, folios 709 and 710).

C. Measures of satisfaction

C.1. Requests of the Commission and the parties

168. The ***representatives*** requested: (a) publication of the judgment in its entirety in the Official Gazette and publication of the official summary of the judgment in two newspapers with broad national circulation, as well as publication, within six months of notification, of the entirety of the judgment on the official websites of the Superintendency of Health, the judiciary, and Isapre MasVida; and (b) the publication on a website of the Superintendency of a link to the legal background of Martina's case, including at a minimum the judgments in the arbitration process and the admissibility and merits reports of the Commission. The ***Commission*** and the ***State*** did not make specific reference to this measure.

C.2. Considerations of the Court

169. The Court orders, as it has in other cases,[229] that the State publish, within six months of the notification of this judgment, in a legible and appropriate font size: (a) the official summary of this judgment prepared by the Court, only once, in the Official Gazette and in a newspaper with national circulation; and (b) this judgment in its entirety, available for a period of one year, on the official website of the Superintendency of Health, the judiciary, and Isapre MasVida. The publication at the Superintendency of Health shall include the legal background of Martina Vera's case, including at a minimum the judgments of the arbitration process, as well as the Commission's admissibility and merits reports. The State must inform this Court immediately when it has made each of the publications ordered, irrespective of the one-year time frame for presenting its first report, established in the thirteenth operative paragraph of this judgment.

D. Guarantees of non-repetition

D.1. Requests of the Commission and the parties

170. The ***representatives*** requested, as a measure of non-repetition, that authority be granted to the Children's Protection Office to ensure its participation in legal proceedings or proceedings before the Superintendency that involve the best interests of children. The ***Commission*** and the ***State*** did not make specific reference to this request.

D.2. Considerations of the Court

171. The Court recalls that in accordance with the American Convention, the State is obligated to adopt special protection measures that safeguard the best interests of children, taking into consideration their special vulnerability. In this matter, the Court has established that children have special rights that correspond to special duties of the family, society, and the State. Because children's development can be affected by decisions of private insurers regarding aspects of their health care, this Court considers it appropriate to order the State to adopt within a reasonable time frame the legislative or other measures necessary for the Children's Protection Office to be informed of and, when necessary, participate in all proceedings before the Superintendency of Health, or in legal proceedings, in which the rights of children could be affected by the actions of private insurers.

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[229] *Cf. Case of Cantoral Benavides v. Peru. Reparations and Costs.* Judgment of December 3, 2001. Series C No. 88, para. 79, and *Garzón Guzmán et al. v. Ecuador, supra*, para. 117.

E. Other measures requested

E.1. Requests of the Commission and the parties

172. The ***Commission*** requested that the State: (a) establish mechanisms of non-repetition, including that proceedings before the Superintendency of Health concerning disputes between the Isapres and insurers over the withdrawal of medical benefits for severe illnesses, comply with the standards established in the Merits Report, and (b) ensure the existence of appropriate and expeditious legal remedies for contesting decisions of the Isapres that affect the rights to health, social security, life, and personal integrity.

173. The ***representatives*** requested that the State: (a) incorporate treatments of speech therapy, swallowing, and splints for bedridden individuals, as well as treatments for urinary infections, into the National Health Fund, so that they will be approved by the Isapres; (b) effective, permanent, periodic, ex officio oversight on the part of the Superintendency of Health of the actions of the Isapre and the home hospitalization and other treatments for Martina, delivering biannual reports to the Court with copies to the victims; (c) recognize its international responsibility and apologize to the family in a public ceremony that must be broadcast on television or radio at peak viewing/listening times, with the presence of the full Supreme Court, the Minister of Foreign Affairs, and the Minister of Health, and with the participation of the alleged victims, whose expenses for participating must be covered by the State; and (d) the creation, within two years of the publication of this judgment, of a playground for disabled children in the name of Martina Vera Rojas at the Hospital of Arica.

174. The representatives also requested, as a measure of non-repetition, that Chilean regulations be adjusted with respect to: (a) the establishment of limits on the discretionary power of private subjects participating in the provision of health services in Chile, especially the Isapres; (b) the expansion of the Superintendency of Health's authority regarding ex officio and periodic oversight and supervision of the actions of the Isapres; (c) the modification of any constitutional laws that restrict legal claims for the right to health through protection remedies; (d) the adoption of measures that allow, while the above-mentioned measures are being implemented, the modification of any legal practices that are restrictive with respect to the right to health; (e) that one of the laws enacted in the implementation of the above measures carry the name of Martina; and (f) the acquisition of a swing for Martina's yard.

175. In addition, the representatives requested from the State: (a) an analysis of the legal and administrative barriers precluding access to health services by individuals suffering from catastrophic illnesses, which should refer to the role of the Superintendency of Health and protection remedies against the Isapres; (b) mandatory training for the personnel of the Superintendency of Health and the Isapres on the right to health, the duty to supervise private subjects who affect the exercise of said right, and the special protection obligations for disabled children; and (c) the design and publication of an informational pamphlet, available at public and private hospitals in Chile and on the websites of the Superintendency of Health and the Isapres, on the rights of individuals concerning catastrophic illnesses, high-cost treatments, and proceedings before the Superintendency of Health due to violations of the right to health.

176. The ***State*** requested that the Court deny the representatives' claim regarding the modification of the legal order because the legal order functioned appropriately to protect the life and personal integrity of Martina. It added that the Superintendency of Health modified point 10 of Resolution No. 7 to exclude Leigh's syndrome from the list of chronic diseases, which ensures that Martina's treatment will be covered by the Isapre. The State also requested the rejection of the claim concerning constitutional amendments and modification of legal practices

with respect to claims for the right to health, because in a study of the case law, the judiciary found that in 65% of the cases adjudged from 2009 to 2019, the appeals courts have granted protection remedies, and in 33% they have overturned a judgment, and they have based their decisions on harm to the rights to life and personal integrity and even the right to health, even basing their judgments on the medical history showing the need for home-based care, and have begun to take into account the international standards enshrined in the Convention on the Rights of the Child. It also stated that it is finalizing a project to modify the National Health Fund. Regarding authorities for the Children's Protection Office and the other measures of reparation, the State maintained that they are not connected to the facts of the case or the alleged harm and that they are unnecessary because appropriate regulations already exist and the representatives have not submitted evidence of legal insufficiency.

E.2. Considerations of the Court

177. In the present case, the Court determined that the State failed to fulfill its duty to regulate health services through the provisions of Circular No. 7 of July 1, 2005. This regulation allowed the Isapre MasVida to exclude coverage for Martina's home hospitalization, which was necessary for her appropriate medical treatment, on October 13, 2010. The decision of the private insurer, a result of the State's failure to fulfill its regulatory duty, breached the rights to life, a decent life, personal integrity, rights of the child, and rights to health, and social security, in conjunction with the obligation to ensure rights without discrimination and the duty to adopt domestic legal effects, against Martina Vera. However, this Court arrived at the conclusion that said harm was partially remedied by the State through the judge-arbitrator's April 19, 2012, decision. Also, the Court verified that the legal order that gave rise to the rights violations in the present case was negated by the the entry into force of Circular IF/282 of the Funds and Insurance Authority of Chile and thus cannot constitute a source of future violations to human rights in situations similar to those of the present case.

178. Accordingly, given that in the present case the resumption of Martina's RHD has been verified and the State has not been declared internationally responsible for the constitutional or legal order that regulates the Chilean health system in general or for the legal remedies, the Court considers it does not have grounds to order measures of reparation concerning the regulation of medical treatment (such as incorporating treatments of speech therapy, swallowing, or splints into the list of medical benefits of Fonasa for subsequent standardization), the adoption of measures aimed at modifying the system of supervision and oversight of the Isapres, or the laws regulating legal procedures in Chile. Furthermore, the Court considers that issuing the present judgment and ordering the publication of its summary in the Official Gazette and of the judgment itself on the website of the judiciary, are sufficient measures of satisfaction in this case. Therefore, it does not deem it appropriate to order an apology to the family at a public ceremony, the construction of a playground for disabled children at the Hospital of Arica, or the acquisition of a swing for Martina's yard.

F. Compensation

F.1. Requests of the Commission and the parties

F.1.1. Pecuniary damage

179. The ***Commission*** requested that the State comprehensively remedy the rights violations declared in the Merits Report, including both pecuniary and non-pecuniary aspects. Regarding pecuniary damage, the representatives indicated that due to "exceptional circumstances," the alleged victims did not suffer pecuniary damage as a consequence of the Isapre's decision to

discontinue home hospitalization. The ***State*** indicated that comprehensive reparation has already take place and that the pecuniary damage was already reimbursed.

F.1.2. Non-pecuniary damage

180. The ***Commission*** requested that the State comprehensively remedy the rights violations declared in the Merits Report, including both pecuniary and non-pecuniary aspects. Regarding non-pecuniary damage, the representatives indicated that Martina's parents suffer from "profound psychological damage" as a consequence of the facts of the case, so they requested the payment of USD 150,000.00. The ***State*** maintained that the payment of compensation is not appropriate because the harm to Martina's rights resulted from the actions of a private subject, so the petitioners can bring an action for compensation against the Isapre, a remedy which has not yet been exhausted. The State also indicated that there are no "objective precedents" to justify the high amount requested for compensation and that reparations must respect the principle of not enriching the victims.

F.2. Considerations of the Court

181. International case law has established that a judgment constitutes a form of reparation in itself.[230] However, this Court has developed the concept of non-pecuniary damage and has established that this can encompass pain and suffering caused to the direct victims and their immediate families, harm to values of great importance to the individuals, and changes of a non-pecuniary nature in the living conditions of the victims or their relatives.[231]

182. Therefore, considering the circumstances of the present case, the suffering of the victims due to the rights violations, and the other effects of a non-pecuniary nature they suffered, the Court deems it appropriate to set, in equity, for non-pecuniary damage, compensation equivalent to USD 30,000 (thirty thousand United States dollars) for Martina Vera Rojas, which must be delivered to the father and mother of the victim. Furthermore, the Court deems it appropriate to set as compensation for non-pecuniary damage a total of USD 25,000 (twenty-five thousand United States dollars) for Carolina Andrea del Pilar Rojas Farías and Ramiro Álvaro Vera Luza This sum must be delivered in equal parts to each of them (i.e., each will receive USD 12,500). With respect to pecuniary damage, given that the expenses the Vera Rojas family incurred during the suspension of the RHD have already been reimbursed, the Court considers that it is not appropriate to order a measure of compensation.

G. Costs and expenses

183. The representatives requested that they be reimbursed their fees for their pro bono legal representation of the alleged victims from September 2011 to April 2017 and July 2019 to the present by Karinna Fernández, and from April 2017 to the present by Magdalena Garcés, as well as for their expenses for transportation from Arica to Santiago, which total USD 1,909, and expenses for legal processes. Similarly, they requested reimbursement of future expenses that could arise from proceedings of the case before the Court, for which they stated they will submit updated documentation at the appropriate time.

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230 *Cf. Case of Neira Alegría et al. v. Peru. Reparations and Costs*. Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Garzón Guzmán et al. v. Ecuador*, *supra*, para. 97.

231 *Cf. 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 Garzón Guzmán et al. v. Ecuador*, *supra*, para. 132.

184. The ***State*** asked that the representatives' claims regarding costs and expenses be denied and noted that, in the event of a condemnatory judgment, only reimbursement of duly confirmed expenses could be sought. It added that the amount for transportation from Arica to Santiago should not be considered because the relationship between the plane tickets and the facts of the case is proven, the cost of the tickets is illegible, and María Farías, one of whose tickets was attached to the brief with motions, pleadings, and evidence, is not part of the trial.

185. The Court reiterates that, pursuant to its case law,[232] costs and expenses are part of the concept of reparation in all cases in which the efforts of the victims in seeking justice, both nationally and internationally, entail expenditures that must be compensated for when the international responsibility of the State is declared in a condemnatory judgment. With respect to reimbursement for costs and expenses, it is the Court's responsibility to prudently assess their scope, which includes expenses incurred before domestic legal authorities, as well as those incurred in proceedings before the inter-American system, keeping in mind the circumstances of the specific case and the nature of international jurisdiction for the protection of human rights. This assessment can be done on the basis of the principle of equity and taking into consideration the expenses declared by the parties, provided the amounts are reasonable.[233]

186. In the present case, the Court notes that the file lacks precise evidentiary support regarding costs and expenses incurred by the representatives during case proceedings before the Commission and the Court. However, the Court considers that such proceedings necessarily involved monetary outlays, so it determines that the State must give the representatives Karinna Fernández and Magdalena Garcés a total of USD 20,000 (twenty thousand United States dollars) for costs and expenses, which must be shared equally between the two representatives. The funds must be rendered directly to the representatives. At the stage of monitoring compliance with the present judgment, the Court may order the State to reimburse the victim or her representatives for reasonable expenses incurred during that procedural stage.[234]

H. Method of compliance with the payments ordered

187. The State must render the payments ordered as compensation for non-pecuniary damage and as reimbursement of costs and expenses, directly to the individuals indicated within one year of the date of notification of the present judgment.

188. In the event that the beneficiaries die before their respective compensation is rendered to them, the compensation will be paid directly to their heirs in accordance with applicable domestic law.

189. The State shall comply with its monetary obligations by payment in United States dollars or the equivalent in the national currency, calculated using the published market exchange rate or calculated by a relevant banking or financial authority, on the date closest to the date of the payment.

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[232] *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 Garzón Guzmán et al. v. Ecuador*, *supra*, para. 137.

[233] *Cf. Case of Garrido and Baigorria v. Argentina, supra*, para. 82, and *Case of Garzón Guzmán et al. v. Ecuador, supra*, para. 137.

[234] Cf. *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala. Interpretation of the Judgment on Merits, Reparations, and Costs*. Judgment of August 19, 2013. Series C No. 262, para. 62 and *Case of Bedoya Lima et al. v. Colombia, supra*, para. 214.

190. If, for reasons attributable to the beneficiaries of the compensation or their heirs, it is not possible to pay the amount determined within the indicated time frame, the State shall deposit the amount 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 permitted by banking law and practice. If the corresponding compensation is not claimed within ten years, the amount shall be returned to the State along with the interest accrued.

191. The amounts set in the present judgment as compensation for non-pecuniary damage and as reimbursement for costs and expenses shall be rendered to the stated individuals in full, in accordance with the provisions of this judgment, with no reductions resulting from taxes.

192. If the State falls behind, it shall pay interest on the amount owed corresponding to banking interest on arrears in the Republic of Chile.

X
OPERATIVE PARAGRAPHS

193. Therefore,

THE COURT

DECIDES,

Unanimously:

1. To reject the preliminary objection regarding the failure to exhaust domestic remedies, pursuant to paragraphs 22 to 23 of this judgment.

2. To reject the preliminary objection regarding the inadmissibility of the petitioner's complaint due to a lack of object, pursuant to paragraphs 27 to 28 of this judgment.

3. To reject the preliminary objection regarding the Court’s lack of jurisdiction to hear violations of Article 26 of the American Convention on Human Rights, pursuant to paragraphs 32 to 35 of this judgment.

DECLARES,

unanimously, that:

4. The State is responsible for violating the rights to life, a decent life, personal integrity, rights of the child, and rights to health and social security, read in conjunction with the obligation to ensure rights without discrimination and the duty to adopt domestic legal effects, established in Articles 4(1), 5(1), 19, and 26 of the American Convention on Human Rights, read in conjunction with Articles 1(1) and 2 thereof, against Martina Vera Rojas, in the terms of paragraphs 80 to 149 of this judgment.

5. The State is responsible for violating the right to personal integrity, recognized in Article 5.1 of the American Convention on Human Rights, read in conjunction with the obligation to ensure said right, enshrined in Article 1(1), against Carolina Andrea del Pilar Rojas Farías and Ramiro Álvaro Vera Luza, in the terms of paragraphs 153 to 157 of the present judgment.

AND ESTABLISHES,

unanimously, that:

6. This judgment constitutes, per se, a form of reparation.

7. The State, within a period of six months, shall enact a legal provision binding it to ensure medical treatment for Martina Vera, in the terms of paragraph 165 of the present judgment.

8. The State, within a period of six months, shall provide a neurological wheelchair to Martina Vera, through her parents, in the terms of paragraph 166 of the present judgment.

9. The State shall ensure through its health institutions the medical, psychological, and/or psychiatric treatment for Martina Vera's parents, in the terms set in paragraph 167 of the present judgment.

10. The State shall make the publications indicated in paragraph 169 of this judgment.

11. The State shall adopt legislative or other measures for the Children's Protection Office to participate in proceedings before the Superintendency of Health or in legal proceedings, in which the rights of children could be affected by the actions of private insurers, in the terms of paragraph 171 of the present judgment.

12. The State shall pay the amounts established in paragraphs 182 and 186 of this judgment as compensation for non-pecuniary damage and for the reimbursement of costs and expenses, in the terms of paragraphs 187 to 192 of the present judgment.

13. The State, within one year of notification of this judgment, shall provide the Court with a report on the measures taken to comply with it, without prejudice to the provisions of paragraph 169 of the present judgment.

14. The Court will monitor full compliance with this judgment in exercise of its authority 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 all its provisions.

Judges Humberto Antonio Sierra Porto and Ricardo Pérez Manrique advised the Court of their separate concurring opinions.

Done in Spanish in San José, Costa Rica, in a virtual session, on October 1, 2021.

I/A Court HR. *Case of Vera Rojas et al. v. Chile.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of October 1, 2021. Judgment adopted in San Jose, Costa Rica in a virtual session.

Elizabeth Odio Benito
President

L. Patricio Pazmiño Freire

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Eugenio Raúl Zaffaroni

Ricardo C. Pérez Manrique

Romina I. Sijniensky
Deputy Registrar

So ordered,

Elizabeth Odio Benito
President

Romina I. Sijniensky
Deputy Registrar

CONCURRING OPINION OF
JUDGE HUMBERTO ANTONIO SIERRA PORTO

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF VERA ROJAS ET AL. V. CHILE

JUDGMENT OF October 1, 2021
(Preliminary Objections, Merits, Reparations, and Costs)

1. With my usual respect for majority decisions of the Inter-American Court of Human Rights (hereinafter "the Court"), this vote is aimed at explaining my partial disagreement with operative paragraph 4, in which the international responsibility of the State of Chile (hereinafter "the state" or Chile) was declared for the joint violation of the rights of life, dignified life, personal integrity, childhood, health, and social security, in conjunction with the obligation to ensure rights without discrimination and the duty to adopt domestic legal provisions, against Martina Vera Rojas. The vote complements the position already expressed in my partially dissenting votes in the cases of *Lagos del Campo v. Peru,*[1] *Dismissed Employees of Petroperú et al. v. Peru,*[2] *San Miguel Sosa et al. v. Venezuela,*[3] *Cuscul Pivaral et al. v. Guatemala,*[4] *Muelle Flores v. Peru,*[5] *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru,*[6] *Hernández v. Argentina,*[7] Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina,[8] *Guachalá Chimbo et al. v. Ecuador;*[9] as well as my concurring opinions in the cases of *Gonzales*

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[1] *Cf. 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 Antonio Sierra Porto.

[2] *Cf. Case of the Dismissed Employees of Petroperú 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 Antonio Sierra Porto.

[3] *Cf. 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 Antonio Sierra Porto.

[4] *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary Objection, Merits, Reparations, and Costs.* Judgment of August 23, 2018. Series C No. 359. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[5] *Cf. Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of March 06, 2019. Series C No. 375. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[6] *Cf. Case of National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 21, 2019. Series C No. 394. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[7] *Cf. Case of Hernández v. Argentina. Preliminary Objection, Merits, Reparations, and Costs.* Judgment of November 22, 2019. Series C No. 395. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[8] *Cf. Case of Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, Reparations, and Costs.* Judgment of February 06, 2020. Series C No. 400. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[9] *Cf. Case of Guachalá Chimbo et al. v. Ecuador.* Merits, Reparations, and Costs. Judgment of March 26, 2021. Series C No. 423. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

Lluy et al. v. Ecuador,[10] *Poblete Vilches et al. v. Chile,*[11] *and Casa Nina v. Peru,*[12] in conjunction with the justiciability of Article 26 of the American Convention on Human Rights (hereinafter "the Convention" or "ACHR").

2. To that end, I will first reiterate my stance on problems of interpretation and legal substantiation of the theory of justiciability of Article 26 of the American Convention, and the practice the Court has adopted of addressing the alleged violations in the same operative paragraph. Second, I will present some considerations regarding the nature of the right to health and the effects thereof in the present case, particularly with respect to the principle of complementarity.

I. THE JUSTICIABILITY OF ECONOMIC, SOCIAL, CULTURAL, AND ENVIRONMENTAL RIGHTS AND THE PRACTICE OF ADDRESSING THE ALLEGED VIOLATIONS IN THE SAME OPERATIVE PARAGRAPH

3. In prior separate opinions, I have detailed multiple arguments demonstrating the logical and legal contradictions and inconsistencies of the theory of direct and autonomous justiciability of economic, social, cultural, and environmental rights (hereinafter "ESCER") through Article 26 of the American Convention. Indeed, this position—adopted by the majority of the Court's judges since the *Lagos del Campo v. Peru* case—disregards the clear wording of the American Convention as a treaty that grants jurisdiction to the Court; ignores the rules of interpretation of the Vienna Convention on the Law of Treaties;[13] alters the nature of the progressivity obligation enshrined with complete clarity in Article 26;[14] ignores the will of the states as reflected in Article 19 of the Protocol of San Salvador;[15] and undermines the Court's regional legitimacy,[16] just to mention a few arguments.

4. I do not intend at this time to delve into the above arguments but rather to focus on a practice related to this legal stance, which is demonstrated when violations are declared in operative paragraphs as well as when arguments are addressed in the same chapter.

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10 *Cf. 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.

11 *Cf. Case of Poblete Vilches et al. v. Chile.* Merits, Reparations, and Costs . Judgment of March 08, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra Porto.

12 *Cf. Case of Casa Nina v. Peru.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2020. Series C No. 419. Concurring opinion and partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

13 *Cf. Case of Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of March 06, 2019. Series C No. 375.

14 *Cf. Case of Cuscul Pivaral et al. v. Guatemala.* Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 23, 2018. Series C No. 359.

15 *Cf. Case of Poblete Vilches et al. v. Chile*. Merits, Reparations, and Costs. Judgment of March 08, 2018. Series C No. 349.

16 *Cf. Case of the Dismissed Employees of Petroperú et al. v. Peru.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2017. Series C No. 344.

5. As I noted in the cases of *ANCEJUB-SUNAT v. Peru,*[17] *Hernández v. Argentina,*[18] *Casa Nina v. Peru,*[19] *and Guachalá Chimbo v. Ecuador,*[20] the Court has adopted the practice of expressing its conclusions in the operative part of judgments, which makes internal disagreements on the scope of Article 26 invisible. This method, which groups in only one operative paragraph the declaration of all the violations forming the basis for the international responsibility of the state, prevents me from expressing through the vote my position against the justiciability of ESCER. This reasoning is what motivates my separate opinion because, though I agree with the declaration that Articles 4(1), 5(1), and 19 in conjunction with Articles 1(1) and 2 of the Convention were violated, and accordingly expressed my vote in favor of operative paragraph 4, I must reiterate my position against the justiciability of the right to health through Article 26 of the American Convention, especially considering the arguments I outline in the next point.

II. THE RIGHT TO HEALTH

6. The Court recalled in the judgment, in line with its precedents in the cases of *Poblete Vilches v. Chile,*[21] *Cuscul Pivaral v. Guatemala,*[22] *Hernández v. Argentina,*[23] *and Guachalá Chimbo v. Ecuador,*[24] that "*[...] the general obligation to protect health translates into the State's obligation to ensure that everyone has access to essential health services, guaranteeing quality and effective medical services, as well as promoting the improvement of the health conditions of the population. This right encompasses timely and appropriate health care in accordance with the principles of availability, accessibility, acceptability, and quality, whose application will depend on prevailing conditions in each state.*"[25] However, the Court is again unclear when it identifies the substance of the obligations derived from the right to health autonomously, because in order to substantiate the State of Chile's responsibility, it makes repeated reference to the risks derived from said violations with respect to the rights to life and personal integrity.

7. In the judgment, the Court found that the change in the regulation of services for individuals with catastrophic illnesses (Circular No. 7)—which allowed health treatment to be excluded on the basis of a questionable "chronic diseases" standard, and which

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[17] *Cf. Case of National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 21, 2019. Series C No. 394. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, par. 6.

[18] *Cf. Case of Hernández v. Argentina. Preliminary Objection, Merits, Reparations, and Costs.* Judgment of November 22, 2019. Series C No. 395. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, par. 17.

[19] Cf. *Case of Casa Nina v. Peru*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2020. Series C No. 419. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, par. 7.

[20] *Cf. Case of Guachalá Chimbo et al. v. Ecuador*. Merits, Reparations, and Costs. Judgment of March 26, 2021. Series C No. 423. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, par. 6

[21] *Cf.* Case of Poblete Vilches et al. v. Chile. Merits, Reparations, and Costs. Judgment of March 08, 2018. Series C No. 349. par. 103.

[22] *Cf.* Case of Cuscul Pivaral et al. v. Guatemala. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 23, 2018. Series C No. 359, par. 73.

[23] *Cf.* Case of Hernández v. Argentina. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 22, 2019. Series C No. 395, par. 64.

[24] *Cf.* Case of Guachalá Chimbo et al. v. Ecuador. Merits, Reparations, and Costs. Judgment of March 26, 2021. Series C No. 423, par. 100.

[25] *Cf. Case of Vera Rojas et al. v. Chile*, par. 100.

produced an unjustified difference in treatment between individuals with catastrophic illnesses—impeded Martina Vera Rojas's access to the health treatment that had been ordered for her. On the basis of this, it considered the state responsible for violating Articles 4(1), 5(1), 19, and 26 of the Convention. What I want to highlight is that the Court construed the violation of the right to health (Article 26) in terms of the concept of risk to the right to life or integrity that could have led to a lack of access to medical treatment. Therefore, it is again unclear if an autonomous violation of the right to health exists or if it is only construed in conjunction with the rights set forth in Articles 4 and 5 of the American Convention.

8. I refer specifically to where it notes that "*The Court advises that this provision, by not establishing any additional prerequisite for discontinuation of RHD beyond the requirement about the 'chronic' nature of the disease, constituted a risk to human rights, as it could restrict access to a medical treatment that could be fundamental for preserving the health, integrity, and life of individuals.*"[26] Similarly, I refer to where the judgment states that "the Court notes with respect to this that the regulatory problems of Circular No. 7 allowed the insurer to make a decision that—in addition to excluding RHD for Martina, which entailed risk to her health, personal integrity, and life—forced Martina to continue with her medical treatment under conditions that were not appropriate for her health status and her special needs as a child with a disability, thereby harming her chances of having dignified existence."[27]

9. Furthermore, I must note that this time, apart from the inconsistencies in this reasoning related also to the nature of the obligations derived from the right to health, the apparent regional consensus on its scope and content, and the challenges of interfering in health care systems, without taking into account the unique economic, social, and political characteristics of each state, resulted in a questionable interpretation of the principle of complementarity, which I will discuss in the next section.

III. THE PRINCIPLE OF COMPLEMENTARITY

10. The judgment recognizes that the state, through the judge-arbitrator, granted the request submitted by Martina's parents and remedied and compensated the child's situation because it considered that the change to Circular No. 7 disregarded her fundamental rights, and it thus ordered the resumption of the services and compensation for the harm caused during the period in which the ISAPRE did not provide the health services.[28] The Court also took into consideration that Circular IF/282 of the Funds and Insurance Authority of Chile negated Circular No. 7 and removed the exclusion for chronic diseases from the health care plans for individuals with catastrophic illnesses.[29] However, in the decision, it is argued that the internationally wrongful act did not end, considering the arguments. First, that "*unquestionably, the child in this case has not suffered severe consequences—because of her parents' social position and ability to prevent them—but it is clear that the state is at fault because if the parents' circumstances had been different or worse, this omission on the part of the state could have been fatal. This highlights a severe selectivity in benefits and in the protection of the child's rights*."[30] Second, that "*the subsequent provision of the home hospitalization service, which has given rise to claims and complaints by the parents, allows for the*

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26 *Cf. Case of Vera Rojas et al. v. Chile*, par. 126.
27 *Cf. Case of Vera Rojas et al. v. Chile*, par. 130.
28 *Cf. Case of Vera Rojas et al. v. Chile*, par. 140-141.
29 *Cf. Case of Vera Rojas et al. v. Chile*, par. 142.
30 *Cf. Case of Vera Rojas et al. v. Chile*, par. 145.

conclusion that the risk to Martina's rights persists. Therefore, [...] the internationally wrongful act did not completely end and was not comprehensively remedied."[31]

11. I consider that the above arguments were insufficient grounds for Chile's responsibility in light of the principle of subsidiarity on which the existence of the inter-American system of human rights protection is based. The facts analyzed in the judgment show that the risk to Martina from the insurer's decision ended after the judge-arbitrator's decision and that it was remedied, as the reimbursement of expenses her family had incurred was ordered and the regulation that had allowed the discontinuation of the home hospitalization was modified. Taking the principle of complementarity seriously in this kind of situation would mean not only using it as a merely expository element but according it full legal effect, and for the Court to therefore refrain from declaring international responsibility when the state has already adopted appropriate measures to remedy a violation of rights.

12. This approach would not only meet the standard of justice but would also advance the goal—contained in the preamble of the Convention—of states having the primary responsibility to respect and ensure rights under the Convention and to remedy them through domestic procedures for circumstances in which rights could be violated. Thus, the Court should not only refrain from intervening when this behavior is demonstrated by the domestic authorities but should recognize the importance of their commitment to honoring their international obligations. That is what the American Convention states[32] and what the Court recognizes in its case law, where it has developed approaches related to the principles and scope of subsidiarity and complementarity in international jurisdiction.[33]

13. The foregoing would also be consistent with the position taken by the Court concerning the nature of conventionality review as an obligation arising from the American Convention, with the aim that all domestic judges and authorities would act as inter-American judges and it would be unnecessary to come to the Court in San José in order to attain a resolution regarding state actions or omissions that disregard the obligations to respect and ensure human rights.

14. Furthermore, regarding the assertion that Martina's rights to life, personal integrity, health, and social security are at risk, as demonstrated through her parents' legal actions against the ISAPRE, and that therefore the state has not ended the international wrongful act, I believe those elements should have been analyzed

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[31] *Cf. Case of Vera Rojas et al. v. Chile*, par. 147.

[32] American Convention. Preamble: "Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states."

[33] See: *Case of Las Palmeras v. Colombia. Preliminary Objections.* Judgment of February 04, 2000. Series C No. 67, par. 33; *Case of Gelman v. Uruguay. Merits and Reparations.* Judgment of February 24, 2011. Series C No. 221, par. 239; *Case of the Massacre of Pueblo Bello v. Colombia. Preliminary Objections, Merits, and Reparations.* Judgment of November 30, 2012. Series C No. 259, par. 143; *Case of Tarazona Arrieta et al. v. Peru. Preliminary Objection, Merits, Reparations, and Costs. Judgment of October 15, 2014. Series C No. 286*, par. 137; *Case of Andrade Salmón v. Bolivia. Merits, Reparations, and Costs.* Judgment of December 01, 2016. Series C No. 330. par. 93; *Case of Amrhein et al. v. Costa Rica. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of April 25, 2018. Series C No. 354, par. 97 to 115; *Case of Colindres Schonenberg v. El Salvador. Merits, Reparations, and Costs.* Judgment of February 04, 2019. Series C No. 373. par. 80; *Case of Petro Urrego v. Colombia. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of July 8, 2020. Series C No. 406. par. 102-103.

autonomously in the case and not as part of the analysis of violations that could have occurred as a result of the discontinuation of the home hospitalization (which, as has been noted, was resumed). Analyzing the two issues jointly resulted in the declaration of international responsibility of the state, which in my opinion is inconsistent with the facts presented in the case and with the principle of complementarity. In the future, this type of analysis should be done separately, allowing for greater legal precision in the determination of the extent of international responsibility of states in cases like the present one.

Humberto Antonio Sierra Porto
Judge

Romina I. Sijniensky
Deputy Secretary

CONCURRING OPINION OF
JUDGE RICARDO C. PÉREZ MANRIQUE

Case of Vera Rojas et al. v. Chile

I. INTRODUCTION

1. The present case analyzes human rights violations committed due to a lack of regulation, monitoring, and adequate complaint systems for oversight of the decision of the health insurer ISAPRE MásVida regarding the discontinuation of the "home hospitalization" of Martina Rebeca Vera Rojas (hereinafter "Martina"), a child diagnosed with Leigh syndrome.

2. The judgment finds the Republic of Chile responsible for violating the rights of life, dignified life, personal integrity, childhood, health, and social security, in conjunction with the obligation to ensure rights without discrimination and the duty to adopt domestic legal provisions, established in Articles 4(1), 5(1), 19, and 26 of the American Convention on Human Rights (hereinafter the "Convention"), in conjunction with Articles 1(1) and 2 of the same instrument, against Martina.

3. It also finds the state responsible for violating the right to personal integrity, recognized in Article 5(1) of the Convention, against Martina's parents, Carolina Andrea del Pilar Rojas Farías and Ramiro Álvaro Vera Luza. This is due to their great stress, pain, and feelings of abandonment caused by the uncertainty that gave rise to the risk their daughter faced after the announcement of the discontinuation of the RHD. This caused a series of physical and psychological effects for the victims. That said, this opinion will focus on the analysis of the violation of Martina's rights.

4. I concur with what has been established in the judgment: (1) I will discuss how I believe the I/A Court should approach cases that involve violations of economic, social, cultural, and environmental rights, based on the universality, indivisibility, interdependence, and interrelatedness of all human rights as the foundation for their justiciability in conjunction with the right to health; and (2) I will discuss the analysis of the case from the perspective of the rights of children and the application of the principle of the best interests of Martina as a child victim of multiple rights violations.

II. DIRECT JUSTICIABILITY OF THE ESCER

5. The justiciability of economic, social, cultural, and environmental rights has been debated both academically and within the I/A Court, and there are three positions on the issue, as I mentioned in my concurring opinion on the November 21, 2019, judgment in the case of *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*, among others.[1] The first position argues that individual violations of economic, social, cultural, and environmental rights should be analyzed exclusively in relation to the rights expressly recognized by Articles 3 and 25 of the Convention and on the basis of what is expressly allowed by the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (hereinafter "Protocol of San Salvador") in its Article 19(6).[2] The

[1] *Cf. Case of National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 21, 2019. Series C No. 394.

[2] *Cf. Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of September 2, 2004. Series C No. 112. Or the *Case of the Indigenous Community of Yakye Axa v. Paraguay. Merits, Reparations, and Costs.* Judgment of June 17,

second perspective asserts that the Court has jurisdiction to hear autonomous violations of economic, social, cultural, and environmental rights pursuant to Article 26 of the Convention, in the understanding that they would be justiciable individually.[3]

6. As I have mentioned in previous concurring opinions and reiterating the arguments made in them,[4] I take a different stance that rests on the universality, indivisibility, interdependence, and interrelatedness of human rights, to uphold the jurisdiction of the Court to hear individual violations of economic, social, cultural, and environmental rights. I take this position with the firm belief that human rights are interdependent and indivisible, such that civil and political rights are interconnected with economic, social, cultural, and environmental rights, and they cannot be separated in situations such as those of the present case.

7. In this way, I have affirmed that interdependence and indivisibility allow for seeing the human being comprehensively as fully endowed with rights, and this influences the justiciability of their rights. A similar perspective is affirmed in the Preamble of the Protocol of San Salvador: *"Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified."*

8. In this perspective, Article 26 of the Convention functions as a framework article, with the understanding that it refers in a general way to economic, social, cultural, and environmental rights, the interpretation and determination of which point us to the Charter of the OAS. The Protocol of San Salvador individualizes and gives substance to economic, social, cultural, and environmental rights. The Protocol notes the importance of these (rights) being reaffirmed, developed, perfected, and protected (see Preamble). Finally, there is a body of instruments from inter-American case law that also make reference to ESCER.

9. My view is that the present judgment shows the coexistence of several of the victims' rights, which are indivisible and justiciable before this Court *per se*. Consequently, Article 19(6) of the Protocol of San Salvador does not in any way

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2005. Series C No. 125. To mention two examples, such as in the *Case of Gonzales Lluy et al. v. Ecuador*. *Preliminary Objections, Merits, Reparations, and Costs.* Judgment of September 1, 2015. Series C No. 298.

[3] *Cf. Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of August 31, 2017. Series C No. 340, par. 142 and 154; *Case of the Dismissed Employees of Petroperú et al. v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 23, 2017. Series C No. 344, par. 192; *Case of San Miguel Sosa et al. v. Venezuela. Merits, Reparations,* and Costs. Judgment of February 8, 2018. Series C No. 348, par. 220; *Case of Poblete Vilches et al. v. Chile. Merits, Reparations, and Costs.* Judgment of March 8, 2018. Series C No. 349, par. 100; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary Objection, Merits, Reparations, and Costs.* Judgment of August 23, 2018. Series C No. 359, par. 75 to 97; *Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of March 6, 2019. Series C No. 375, par. 34 to 37; *Case of National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 21, 2019. Series C No. 394, par. 33 to 34; *Case of Hernández v. Argentina. Preliminary Objection, Merits, Reparations, and Costs.* Judgment of November 22, 2019. Series C No. 395, par. 62, and *Case of Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, Reparations, and Costs.* Judgment of February 6, 2020. Series C No. 400, par. 195.

[4] *Cf.* Concurring opinion in the November 21, 2019, judgment in the *Case of National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*; in the November 22, 2019, judgment in the *Case of Hernández v. Argentina*, *Case of Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, and the July 15, 2020, judgment in the *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. Brazil*.

constitute an impediment to the Court's consideration of their joint violation.

10. In the present case, as expressed in Operative Paragraph No. 4, the Court declared the violation of the rights of life, dignified life, personal integrity, childhood, health, and social security, in conjunction with the obligation to ensure rights without discrimination and the duty to adopt domestic legal provisions, established in Articles 4(1), 5(1), 19, and 26 of the American Convention on Human Rights, in conjunction with Articles 1(1) and 2 of the same. My view is that, on the basis of my approach to the interpretation and application of the American Convention, the right to health is justiciable as a function of the coexistence of the violation of several rights under the Convention, without the need to draw upon justifications that invoke Article 26 of the Convention autonomously. Invoking Article 26 is in my opinion unnecessary or at least excessive.

III. ANALYSIS OF THE CASE FROM THE PERSPECTIVE OF CHILDREN'S RIGHTS

11. Martina is a child who suffers from a disease called Leigh syndrome. It is an incapacitating disease that necessitates constant home-based care. Her two parents have set up their home such that Martina can receive the appropriate treatment there, always surrounded by the care and affection of her family. I note that during the procedural hearings for the case, she was constantly accompanied by her parents.

12. That care had been provided by Isapre MásVida until it was interrupted when regulatory reasons were invoked because of the chronic nature of the disease, according to the service provider. The alternative was to transfer the child to receive ordinary care in a hospital facility, far from her home and without the constant presence of her parents. That meant a reduction in the quality of service, affecting the child's life, physical integrity, quality of life, and living conditions in the context of her severe illness. This situation remained unchanged from November 28, 2007, to October 28, 2010, and finally after the intervention of the IACHR, an arbitral decision restarted the service.

13. In fact, however, the service was never interrupted because Martina's parents were able to get their employer to cover Martina's care.

14. In my opinion, the Isapre's action in the context of a health system that is notoriously unequal with respect to service providers, constituted a violation of several of Martina's rights, as described in the judgment. That was made possible by regulatory and oversight problems, attributable to the State of Chile, which also failed to ensure a level playing field between provider and beneficiary that would have allowed Martina and her family to contest and reverse the ISAPRE's decision. The intervention of the inter-American system of human rights was required in order to rectify the situation.

15. As the judgment argues in paragraph 103 and those that follow, the violations to the rights of life, a dignified life, personal integrity, and health and the state's obligations with respect to them must be interpreted in light of international case law on the protection of children. The best interests of the child must be the guiding principle for interpreting the scope of special protection the state must ensure for children. This is based on the special vulnerability of children as developing individuals. Thus, the Court has established that the ultimate goal of protecting children is the development of children's personalities and the enjoyment of their recognized rights.

16. One of the main objectives of this concurring opinion is to highlight the fundamental importance of considering the child as a developing subject of rights, applying the concept of progressive development and prioritizing the best interests of the child in assessing the harm to her wellbeing. This concept of the subject of rights is related to the best interests of the child through the right to be heard. Hearing children does not mean just taking their statements into account, but also making decisions with a generational perspective that observes and considers their characteristics, vulnerabilities, and needs as developing individuals. Because of the unique circumstances in the present case, it was not possible to hear Martina in a literal sense. Considering that the needs of children are rights within the framework of the comprehensive protection doctrine enshrined in the Convention on the Rights of the Child, it is clear that several of Martina's rights were violated, and she is severely vulnerable in cross-cutting ways given her dependence on complex health care for survival.

IV. THE RIGHT TO HEALTH

17. The Convention on the Rights of the Child establishes in its Article 24:

> "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."
> The CRC also establishes that States Parties shall ensure the full implementation of this right:
> "To ensure the provision of necessary medical assistance and health care to all children..."

18. The obligations of society and the state to provide special protection for children should be interpreted in light of these provisions.

19. General Comment No. 15 (2013) of the United Nations Committee on the Rights of the Child on the right of the child to the enjoyment of the highest attainable standard of health (Article 24) develops and elaborates on this right for children. The Committee states that it:

> "...interprets children's right to health as defined in article 24 as an inclusive right, extending not only to timely and appropriate prevention, health promotion, curative, rehabilitative and palliative services, but also to a right to grow and develop to their full potential and live in conditions that enable them to attain the highest standard of health through the implementation of programmes that address the underlying determinants of health. A holistic approach to health places the realization of children's right to health within the broader framework of international human rights obligations."

20. The document also recalls that both state authorities and private health care providers must develop health care programs with a comprehensive understanding of the human rights involved in order to fulfill the right to health from the perspective of children's rights as users and beneficiaries of the services.

21. Those standards were undoubtedly disregarded in the first resolution of the disruption of service, whose consequences were mitigated by the actions of Martina's parents in obtaining replacement home-based care.

V. THE BEST INTERESTS OF MARTINA

22. On the basis of paragraph 105 and those that follow, the Court analyzes the scope of the principle of the best interests of children. It establishes that this principle is rooted in human dignity, in the characteristics of children, and in the need to promote their development. The analysis draws upon Article 3 of the Convention on the rights and on General Comment No. 14 of the Committee on the Rights of Children.

23. The concept of the best interests of the child has three components: a substantive right, a fundamental principle of legal interpretation, and a procedural rule. Therefore, the best interests of the child should be at the center of all state decisions that affect the health and development of children. Concerning the present case, the state is also responsible when it delegates the protection of one of the rights to non-state actors. The Court also argues that this concept applies to the legal, administrative, and legislative spheres. Thus, the scope of the state's obligation is to ensure that state and non-state rules and actions do not harm the right of children to enjoy the highest standard of health and access to treatment for illness when necessary.

24. The substantive and intrinsic definition of the best interests of the child as an undefined concept presents a challenge,[5] which is why a relational definition is drawn upon regarding respect for all of the rights established in the Convention. This is why the Committee on the Rights of the Child has noted that it is a dynamic concept that must be assessed in each context.[6] This is related to the fact that it is a general principle, which by definition entails a certain degree of indeterminacy, as legislators cannot foresee all possible situations in which the interests of children should be addressed.[7]

25. The best interests of children are essentially a requirement for priority: when children's rights are involved with other rights, they must take precedence in the application and interpretation of the right in the specific case, with preference given to solutions that best provide for and, if necessary, enhance them.

26. Without prejudice to the foregoing, I believe that the best interests of children always entail two essential components: guarantee, seen as a legal limit on state activity, and protection, which serves to protect rights. Therefore, when it is necessary to apply the law, the following should always be taken into consideration: (a) the objective evidence shown, (b) the volitional element in relation to respecting the child's right to be heard, as it is impossible to determine the best interests of children without first listening to them, and (c) progressive development.

27. In this way, the best interests of children are applied as a principle interpreting and integrating a right with an element of protection and guarantee for children. Thus, the protective aspect lies in recognizing and respecting the rights inherent to every person. The guarantee element cannot be used to weaken rights, especially not to negate or suppress them.

28. I have previously affirmed the importance of defining the best interests of the child as a positive legal condition, which is identified with those conditions by

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[5] Pérez Manrique, Ricardo. "El interés superior del Niño" in *Revista Uruguaya de Derecho de Familia*, No. 16, 2002, p. 81 et seq.

[6] Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, par. 1) CRC/C/GC/14

[7] Pérez Manrique, Ricardo. "El interés superior del Niño" in *Revista Uruguaya de Derecho de Familia*, No. 16, 2002, p. 81 et seq.

which certain individuals or groups should be treated preferentially by authorities in terms of their rights.[8] The best interests of children obligate adult society in its entirety (public and private social welfare institutions, courts, legislative authorities and bodies, parents) to give special consideration to the holistic, respectful protection of the rights of children as developing individuals. This obligates adult society, both institutionally and individually, to give children special consideration, which cannot be invoked to adopt paternalistic solutions and which is antithetical to authoritarianism.

29. Regarding the best interests of children, General Comment No. 15 establishes the following criteria: (1) the duty to respect them in all health-related decisions; (2) its determination will be based on their physical, emotional, and educational needs, age, sex, relationship with parents and caregivers, and their family and social background, and after having heard their views according to Article 12 of the Convention; (3) urges states to place children's best interests at the center of all decisions affecting their health and development; (4) the best interests of the child should: (a) guide treatment options, superseding economic considerations where feasible, and (b) aid the resolution of conflicts of interest between parents and health workers; (5) the importance of the best interests of the child as a basis for all decision-making with regard to providing, withholding, or terminating treatment for all children.

30. I believe that in Martina's case, her best interests consisted in the need to preserve her right to the highest standard of health possible given her illness. That calls for the uninterrupted continuity of her home-based care, fulfilling all of the conditions necessary for maintaining it, in terms of both material and personnel support. Her best interests were not provided for through the decision to discontinue the health care service, nor through adequate facilitation to resolve the conflict.

31. I note that one right of children under Article 9 of the Convention of the Rights of the Child is that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In this case, the administrative decision to interrupt the health service also affected Martina's right to live with her parents, against her best interests.

VI. CONCLUSION

32. The economic, social, cultural, and environmental rights violated by the state are enforceable under the Convention and justiciable through individual petitions before this Court, due to the universality, indivisibility, interdependence, and interconnectedness of all of the rights violated in this specific case.

33. I stress the importance of considering children as subjects of rights who are afforded special protection as developing individuals. To that end, it is critical to appropriately apply the principle of the best interests of the child, both in analyzing the case and in establishing reparations that are not solely adult-centric, but rather have a generational perspective.

34. That is what is required to apply the principle of the best interests of the child, bearing in mind the circumstances of the case. It is for this reason that in analyzing the present case, the need arises to highlight the importance of a defense

[8] Cairoli Martinez, Milton; Pérez Manrique, Ricardo. "Reflexiones sobre la Ley de Seguridad Ciudadana," Ed. Universidad, Montevideo, 1996.

focused on the child and her best interests when there is a conflict between the interests of a private health care provider and the rights of a child suffering from multiple cross-cutting vulnerabilities. Hence the measure of non-repetition that orders the Children's Protection Office to act in cases such as the present one.

35. I stress that the judgment develops the responsibility of companies to respect human rights, especially important when these services relate to a child's health care and right to a dignified life.

Ricardo C. Pérez Manrique
Judge

Romina I. Sijniensky
Deputy Secretary