

# Vera Rojas et al. v. Chile

## ABSTRACT<sup>1</sup>

*This case is about a child affected by a severe disability and the long fight of her family against a private health insurance company that sought to terminate coverage for her expensive medical care. The Court found unanimously that Chile had violated several articles of the American Convention, including, Article 26 (Duty to Progressively Develop Economic, Social, and Cultural Rights).*

## I. FACTS

### A. Chronology of Events

**July 1, 2005:** Chile’s Superintendent of Health releases a directive in Circular No. 7 regarding optional insurance coverage of catastrophic and serious illnesses, otherwise referred to as Cobertura Adicional para Enfermedades Catastróficas (“CAEC”).<sup>2</sup> This directive specifies that home hospitalization (*hospitalización domiciliaria*) is not covered in case of chronic illness and the patient must pay out-of-pocket for this treatment.<sup>3</sup>

This directive is specific to private health insurance companies (Institución de Salud Previsional; “ISAPRE”) only.<sup>4</sup> Individuals who contract with these private health insurers may be required to contribute 7% of their total wages.<sup>5</sup> These insurance companies are overseen by the Chilean Superintendency of Health.<sup>6</sup>

The directive specifies that any disputes will be settled by the Superintendence of Health.<sup>7</sup> The Superintendence will act as a sort of “arbitrator-judge” to settle issues between the ISAPRES and the parties that contract with them.<sup>8</sup>

**May 12, 2006:** Martina Rebeca Vera Rojas is born in Chile.<sup>9</sup>

**August 2006:** Mr. Ramiro Álvaro Vera Luza and Ms. Carolina Andrea del Pilar Rojas Fariás adopt Martina.<sup>10</sup> Martina is diagnosed with an irreversible and degenerative disease called Leigh syndrome.<sup>11</sup> Commonly, patients with this disease suffer from motor and cognitive impairments, as well as epilepsy.<sup>12</sup> Patients with Leigh syndrome like Martina are often given a life expectancy of only two years.<sup>13</sup> Most patients do not live past the age of six years old.<sup>14</sup>

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<sup>2</sup> Vera Rojas et al. v. Chile, Admissibility Report, Report No. 44/16, Inter-Am. Comm’n H.R., Petition No. 1558-11, ¶ 11 (Nov. 4, 2018); see also Vera Rojas et al. v. Chile, Report on Merits, Report No. 107/18, Inter-Am. Comm’n H.R., Case 13.039, ¶¶ 6, 21 (October 05, 2018).

<sup>3</sup> Vera Rojas et al. v. Chile, Admissibility Report, ¶ 11.

<sup>4</sup> Vera Rojas et al. v. Chile, Report on Merits, ¶ 21.

<sup>5</sup> *Id.* ¶ 19.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* ¶ 22.

<sup>8</sup> *Id.*

<sup>9</sup> Vera Rojas et al. v. Chile, Admissibility Report, ¶ 9.

<sup>10</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 439, ¶¶ 51, 167 (Oct. 1, 2021); see also Vera Rojas et al. v. Chile, Report on Merits, ¶ 1.

<sup>11</sup> Vera Rojas et al. v. Chile, Admissibility Report, ¶ 9; Vera Rojas et al. v. Chile, Report on Merits, ¶ 26.

<sup>12</sup> Vera Rojas et al. v. Chile, Admissibility Report, ¶ 9.

<sup>13</sup> *Id.*

<sup>14</sup> Vera Rojas et al. v. Chile, Report on Merits, ¶ 26.

Martina needs support for joint stiffness, hearing difficulties, and atrophied limbs.<sup>15</sup> Martina lacks the ability to swallow, so she is fed and given medication through a gastronomy tube, and she can only breathe through a tracheostomy tube.<sup>16</sup> There is no cure for Leigh syndrome, and most patients only live comfortably with around the clock, life sustaining care.<sup>17</sup>

**October 2007:** Martina’s parents contract with ISAPRE MasVida for special health insurance coverage for Martina’s condition.<sup>18</sup> This special coverage is the so-called CAEC, for illnesses like Leigh syndrome.<sup>19</sup> This additional coverage is critical to Martina’s continued survival and comfort of living.<sup>20</sup> Martina’s parents diligently pay an additional \$4,887 annually for the CAEC, in addition to the general basic health plan cost.<sup>21</sup>

**November 28, 2007:** At one-and-a-half years old, Martina suffers severe complications from her disease and must be taken by “ambulance plane” to her home in Arica, Chile.<sup>22</sup> From then on, Martina is on home hospitalization, all of which is financed by the CAEC and ISAPRE MasVida.<sup>23</sup> This intense in-home treatment involves the care of various medical professionals and the administering of different medications.<sup>24</sup>

This specialized in-home care is essential because Martina’s hometown lacks the public health services to support her critical and specialized needs.<sup>25</sup> The additional home hospitalization care costs \$12,392 per month, but ISAPRE MasVida’s coverage is restricted to \$7,682 per month.<sup>26</sup> To make up the difference in cost, Martina’s father, Mr. Vera Luza, receives help from his employer, after promising to stay at his job.<sup>27</sup> Home hospitalization allows Martina to have intensive, lifesaving care in the comfort of her own home.<sup>28</sup>

**October 13, 2010:** Martina’s parents are informed by ISAPRE MasVida that they will not continue coverage for her disease.<sup>29</sup> The reason provided is that her disease is chronic, and thus not covered.<sup>30</sup>

**October 18, 2010:** ISAPRE MasVida sends a letter indicating that Martina’s home hospitalization will no longer be covered due to the Superintendence of Health’s directive issued in 2005.<sup>31</sup> Moving forward, she may receive care, as needed, at a local hospital.<sup>32</sup>

**October 26, 2010:** Martina’s parents file an action in the Court of Appeals of Concepción (“CAC”) to receive a protection remedy to continue the home hospitalization care.<sup>33</sup> They allege violations of Martina’s right to life, right to property, and humane treatment.<sup>34</sup> Additionally, they argue that

<sup>15</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 51 (Oct. 1, 2021).

<sup>16</sup> *Id.*

<sup>17</sup> Vera Rojas et al. v. Chile, Report on Merits, ¶ 26.

<sup>18</sup> Vera Rojas et al. v. Chile, Admissibility Report, ¶ 10.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Vera Rojas et al. v. Chile, Report on Merits, ¶ 35.

<sup>22</sup> Vera Rojas et al. v. Chile, Admissibility Report, ¶ 10.

<sup>23</sup> *Id.*

<sup>24</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 52.

<sup>25</sup> Vera Rojas et al. v. Chile, Admissibility Report, ¶ 10.

<sup>26</sup> Vera Rojas et al. v. Chile, Report on Merits, ¶ 35.

<sup>27</sup> *Id.*

<sup>28</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 52.

<sup>29</sup> Vera Rojas et al. v. Chile, Admissibility Report, ¶ 11.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Vera Rojas et al. v. Chile, Report on Merits, ¶ 38.

<sup>34</sup> *Id.* ¶ 37.

Martina's condition has not improved or worsened since 2007, when they originally contracted with ISAPRE MasVida, and she should therefore continue to receive the home hospitalization care she desperately needs.<sup>35</sup> Furthermore, the hospital in Arica lacks the ability to provide the specialized care that Martina needs.<sup>36</sup>

**January 26, 2011:** The CAC rules in favor of Martina and orders ISAPRE MasVida to continue providing the home hospitalization care to Martina.<sup>37</sup>

**February 1, 2011:** ISAPRE MasVida appeals the CAC decision to the Constitutional Affairs Chamber of the Supreme Court of Justice ("CSJ").<sup>38</sup>

**May 9, 2011:** The CSJ issues a ruling on ISAPRE MasVida's appeal, holding that ISAPRE MasVida does not have to continue covering the care Martina needs because it is within their legal right to terminate coverage in this case.<sup>39</sup>

Following this ruling, Martina's father's company covers the expenses of her home hospitalization.<sup>40</sup> However, the care is not comparable to the care she received while covered by ISAPRE MasVida and Martina suffers.<sup>41</sup>

**November 4, 2011:** Ms. Karinna Fernández Neira and Mr. Boris Paredes Bustos present a petition on behalf of Martina and her parents to the Inter-American Commission on Human Rights.<sup>42</sup>

**January 10, 2012:** Martina's family files a claim with the Superintendence of Health, hoping to reinstate home hospitalization through ISAPRE MasVida.<sup>43</sup>

**January 11, 2012:** ISAPRE MasVida answers Martina's family's claim, arguing they have a legal right to terminate coverage of the home hospitalization care due in part to the ruling from the CSJ.<sup>44</sup> Martina's family argues that ISAPRE MasVida has the obligation to consider special protections under international law, which include the right to humane treatment and special protections for children with disabilities.<sup>45</sup>

**April 3, 2012:** The National Institute of Human Rights of Chile ("NIHRC") appears in the case at the Superintendence of Health to argue for the restoration of home hospitalization and Martina's in-home care because the lack thereof left, and continues to leave, Martina without vital care.<sup>46</sup> Additionally, the NIHRC argues that this case could set the precedent for other children in need of critical care, leaving them vulnerable to a lack of coverage and healthcare.<sup>47</sup>

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<sup>35</sup> Vera Rojas et al. v. Chile, Admissibility Report, ¶ 12.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* ¶ 13.

<sup>38</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 57.

<sup>39</sup> Vera Rojas et al. v. Chile, Admissibility Report, ¶ 13.

<sup>40</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 58.

<sup>41</sup> *Id.*

<sup>42</sup> Vera Rojas et al. v. Chile, Admissibility Report, ¶ 1.

<sup>43</sup> Vera Rojas et al. v. Chile, Report on Merits, ¶ 40.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* ¶ 42.

<sup>47</sup> *Id.*

**April 19, 2012:** The Superintendence of Health orders that Martina continue receiving home hospitalization care under the CAEC and ISAPRE MasVida's coverage.<sup>48</sup> In this ruling, the Superintendence of Health considers that the hospital in Arica does not have the ability or the capacity to care for Martina.<sup>49</sup> Further, the arbitrator-judge notes in the decision that Martina, now a five-year-old, would simply be living full-time in a hospital ill-equipped to care for her specific health needs and that home hospitalization would be better for Martina's wellbeing.<sup>50</sup> ISAPRE MasVida immediately files for reconsideration on this decision.<sup>51</sup>

**June 12, 2012:** The arbitrator-judge affirms the April 19th, 2012 decision.<sup>52</sup> The opinion notes that the CAEC's restrictions are unsustainable for both sides because a traditional hospitalization will drain both the ISAPREs' and the insured party's resources.<sup>53</sup>

**August 23, 2012:** The Superintendence of Health rules in its final decision that ISAPRE MasVida must cover Martina's home hospitalization care.<sup>54</sup> As a result, ISAPRE MasVida begins home hospitalization coverage again, and reimburses Martina's family for the period between May 9, 2011 and August 23, 2012 during which the family had to personally finance the home hospitalization care with help from other sources.<sup>55</sup> Martina, still living, continues home hospitalization since this point.<sup>56</sup>

#### B. Other Relevant Facts

[None]

### II. PROCEDURAL HISTORY

#### A. Before the Commission

**October 14, 2011:** The Inter-American Commission on Human Rights receives a request for precautionary measures to protect Martina's life and dignity.<sup>57</sup> The request specifically asks that ISAPRE MasVida continue the life-saving care that they had previously suspended without notice.<sup>58</sup>

**November 04, 2011:** The Commission receives a petition on behalf of Martina and her parents, Ms. Rojas Farías and Mr. Vera Luza.<sup>59</sup> This petition alleges that the State has failed its international responsibility to uphold certain public health standards, harming Martina and her parents, Ms. Rojas Farías and Mr. Vera Luza.<sup>60</sup>

**December 16, 2011:** The State responds to the request for precautionary measures.<sup>61</sup>

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<sup>48</sup> Vera Rojas et al. v. Chile, Admissibility Report, ¶ 14.

<sup>49</sup> *Id.*

<sup>50</sup> Vera Rojas et al. v. Chile, Report on Merits, ¶ 43.

<sup>51</sup> *Id.* ¶ 44.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Vera Rojas et al. v. Chile, Admissibility Report, ¶¶ 14-15.

<sup>55</sup> *Id.* ¶ 15.

<sup>56</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 64.

<sup>57</sup> Vera Rojas et al. v. Chile, Admissibility Report, ¶ 6.

<sup>58</sup> *Id.*

<sup>59</sup> Vera Rojas et al. v. Chile, Report on Merits, ¶ 1; *see also*, Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 2; *see generally*, Vera Rojas et al. v. Chile, Admissibility Report.

<sup>60</sup> Vera Rojas et al. v. Chile, Report on Merits, ¶ 1; *see also* Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 2.

<sup>61</sup> Vera Rojas et al. v. Chile, Admissibility Report, ¶ 6.

**April 2, 2013:** The Commission decides to close the precautionary measures request because the domestic courts had previously ordered the continued care of Martina, and that the care will be covered by the insurance company.<sup>62</sup>

**November 14, 2013:** The Commission forwards the applicable sections of the petition to the State and asks for a response within three months.<sup>63</sup>

**July 17, 2015:** The State responds to the petition and the Commission forwards the answer to the petitioners.<sup>64</sup>

**April 5, 2016:** The petitioners communicate to the Commission that Martina's care is not of the same quality she received prior to the court's involvement and the original notice of termination in 2010.<sup>65</sup> The petitioners inform the Commission that they are concerned about ISAPRE MasVida's compliance with the Superintendence of Health's order.<sup>66</sup>

**November 4, 2016:** The Commission issues Admissibility Report No. 44/16, which declares the petition admissible.<sup>67</sup> The Commission finds admissibility with regards to Articles 4 (Right to Life), 5 (Right to Humane Treatment), 8 (Right to a Fair Trial), 19 (Rights of the Child), 25 (Right to Judicial Protection), and 26 (Duty to Progressively Develop Economic, Social, and Cultural Rights) of the American Convention.<sup>68</sup> The Commission denies admissibility regarding Articles 11 (Right to Privacy) and 17 (Rights of the Family) of the American Convention as they have been handled by domestic remedies previously.<sup>69</sup>

**October 5, 2018:** The Commission issues the Report on Merits No. 107/18.<sup>70</sup> In this report, the Commission concludes that the State is responsible for the violations of Articles 4.1 (Prohibition of Arbitrary Deprivation of Life), 5.1 (Right to Physical, Mental, and Moral Integrity), 8.1 (Right to a Hearing Within Reasonable Time by a Competent and Independent Tribunal), 25.1 (Right of Recourse Before a Competent Court), 19 (Rights of the Child), and 26 (Duty to Progressively Develop Economic, Social, and Cultural Rights) of the American Convention.<sup>71</sup>

The Commission recommends that the State: (1) provide full reparations for the violations of human rights found in their report, including nonpecuniary and material damages, as well as adopt measures to compensate economically; (2) arrange for Martina's parents to receive necessary medical treatment for the physical and mental ailments they suffered during the difficulties of this case; (3) make sure Martina is receiving the best in-home care possible for as long as she requires it, taking into consideration that she is a child with a significant disability; and (4) ensure that this case sets the precedent for further cases with the Superintendence of Health to be handled swiftly and to protect the rights of the suffering person's life and health over all else.<sup>72</sup>

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<sup>62</sup> Vera Rojas et al. v. Chile, Admissibility Report, ¶ 8.

<sup>63</sup> *Id.* ¶ 4.

<sup>64</sup> *Id.*

<sup>65</sup> Vera Rojas et al. v. Chile, Report on Merits, ¶ 45.

<sup>66</sup> *Id.*

<sup>67</sup> Vera Rojas et al. v. Chile, Admissibility Report, ¶ 33.

<sup>68</sup> *Id.* "Decides" ¶ 1.

<sup>69</sup> *Id.* "Decides" ¶ 2.

<sup>70</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 2(b).

<sup>71</sup> Vera Rojas et al. v. Chile, Report on Merits, ¶ 95.

<sup>72</sup> *Id.* "Recommends" ¶¶ 1-4.

**December 6, 2018:** The Commission notifies the State of Merits Report No. 107/18 and gives it a two-month period to report on its compliance.<sup>73</sup>

**February 6, 2019:** The State requests three extensions from the Commission to comply with the given recommendations.<sup>74</sup> The Commission grants two extensions but denies the third because no progress has been made and Martina's fragile health requires care.<sup>75</sup>

### B. Before the Court

**September 6, 2019:** The Commission submits the case to the Court, after the State failed to adopt its recommendations.<sup>76</sup>

**February 3, 2020:** The Petitioners present their motions, pleadings, and evidence to the Court, in which they agree with the arguments and conclusions of the Commission.<sup>77</sup> Additionally, the Petitioners argue for specific compensation and remedies for the harm Martina and her family suffer.<sup>78</sup>

**July 13, 2020:** The State presents its preliminary objections and answers to the submission of the case.<sup>79</sup> The three preliminary objections from the State are 1) domestic remedies had not yet been exhausted, 2) the Petitioner's complaint, dated August 27, 2012, is not admissible, and 3) the Court lacks jurisdiction to hear violations of Article 26 of the American Convention.<sup>80</sup>

Around the same time, the Court receives two amicus briefs from: (1) the Program of Action for Equality and Social Inclusion (the proper Spanish acronym is "PAIIS") of the Law School of the University of the Andes; and (2) the Legal Clinic on Disability and Human Rights of the Pontifical Catholic University of Peru.<sup>81</sup>

#### 1. Violations Alleged by Commission<sup>82</sup>

Article 4.1 (Prohibition of Arbitrary Deprivation of Life)

Article 5.1 (Right to Physical, Mental, and Moral Integrity)

Article 8.1 (Right to a Hearing Within Reasonable Time by a Competent and Independent Tribunal)

Article 19 (Rights of the Child)

Article 25.1 (Right of Recourse Before a Competent Court)

Article 26 (Duty to Progressively Develop Economic, Social, and Cultural Rights)

*all in relation to:*

Article 1(1) (Obligation of Non-Discrimination)

Article 2 (Obligation to Give Domestic Legal Effect to Rights) of the American Convention

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<sup>73</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 3.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* ¶ 4.

<sup>77</sup> *Id.* ¶ 7.

<sup>78</sup> *Id.* ¶ 7.

<sup>79</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 9.

<sup>80</sup> *Id.* ¶ 18.

<sup>81</sup> *Id.* ¶ 12.

<sup>82</sup> Vera Rojas et al. v. Chile, Report on Merits, ¶ 5.

2. Violations Alleged by Representatives of the Victims<sup>83</sup>

Same Violations Alleged by the Commission.

## III. MERITS

A. *Composition of the Court*<sup>84</sup>

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

Romina I. Sijniensky, Deputy Secretary

B. *Decision on the Merits*

**October 1, 2021:** The Court issues its Judgment on Merits, Reparations, and Costs.<sup>85</sup>

The Court unanimously dismisses the State's three preliminary objections because:<sup>86</sup>

*The Court has interpreted that it has the jurisdiction to rule on the rights covered by Article 26.<sup>87</sup> This is so because these rights, which are derived from the OAS Charter, relate back to the Article 1(1) and 2 of the Convention.<sup>88</sup> Health, as well as social security rights, fall squarely within Article 26.<sup>89</sup> Chile, as a party to the Convention, is therefore obligated to safeguard rights under Article 26; as a result, the Court rejected the State's preliminary objections and instead decided to go forward on the merits.<sup>90</sup>*

The Court found unanimously that Chile had violated:

Articles 4(1) (Prohibition of Arbitrary Deprivation of Life), 5(1) (Right to Physical, Mental, and Moral Integrity), 19 (Rights of the Child), and 26 (Duty to Progressively Develop Economic, Social, and Cultural Rights) of the Convention, in relation to Articles 1(1) (Obligation of Non-Discrimination) and 2 (Obligation to Give Domestic Legal Effect to Rights) of the Convention, to the detriment of Martina Vera Rojas,<sup>91</sup> because:

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<sup>83</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶¶ 2, n.2, 7, 160. Ms. Magdalena Garcés, Ms. Karinna Fernández, Mr. Boris Paredes, and the Healthy Families Initiative (HFI) of the O'Neill Institute for National and Global Health Law served as representatives of Martina Rebeca Vera Rojas and her parents, Ms. Rojas Fariás and Mr. Vera Luza.

<sup>84</sup> Judge Eduardo Vio Grossi did not take part in this case due to being a Chilean national, as per Articles 19(1) and 19(2) of the Court's Rules of Procedure. Pablo Saavedra Alessandri, the Secretary, did not participate in this judgment's deliberation and signing. *Id.* at n.\*.

<sup>85</sup> *Id.* ¶ 1, 16.

<sup>86</sup> *Id.* "Decides" ¶¶ 1-3.

<sup>87</sup> *Id.* ¶ 33.

<sup>88</sup> *Id.*

<sup>89</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 34.

<sup>90</sup> *Id.* ¶ 35.

<sup>91</sup> *Id.* "Declares" ¶ 4.



The Court held that the State failed to protect Martina's rights from third party interference.<sup>92</sup> The Court noted that healthcare was provided through a social security system in which both private and public institutions rendered services; thus, the case must be examined by looking at the State's obligations for human rights violations committed by individuals.<sup>93</sup> As health is a public good, the State had a responsibility to protect it.<sup>94</sup> The State, through the use of the ISAPREs as private insurers, delegated their obligation to ensure individuals' right to health.<sup>95</sup> However, because the State's social security system funds the ISAPREs, the State was still obligated to protect individuals receiving services from the ISAPREs.<sup>96</sup>

The Court determined that the State did not comply with its obligations under Articles 4(1) (Prohibition of Arbitrary Deprivation of Life), 5(1) (Right to Physical, Mental, and Moral Integrity), 26 (Duty to Progressively Develop Economic, Social, and Cultural Rights), and 19 (Rights of the Child) for several reasons.<sup>97</sup> The State did not adopt appropriate measures to protect the right to life of its citizens because Martina was unable to live the best life she could.<sup>98</sup> The Court held in previous cases that the right to personal integrity is intrinsically linked to healthcare, and a lack of proper healthcare is a violation of Article 5(1) (Right to Physical, Mental, and Moral Integrity).<sup>99</sup> Martina was deprived of proper healthcare for a period of time, and the ISAPRE MasVida would have deprived her of further care had the domestic courts not intervened.<sup>100</sup> Thus, the State violated the international obligation of the right to healthcare and personal integrity.<sup>101</sup> The Court determined that the right to health is protected under Article 26 (Duty to Progressively Develop Economic, Social, and Cultural Rights) of the Convention, and that the State must protect the Economic, Social, and Cultural Rights of its citizens and cannot allow these rights to regress in any way.<sup>102</sup> Because the State constitutionally recognized the right to health, the Court emphasized the need for accessibility to quality health services, which was lacking in Martina's case.<sup>103</sup>

The Court considered that the right to health is related to the right to social security and thus, access to proper healthcare is part of protecting the right to social security.<sup>104</sup> The Court noted that the right to social security is fundamental to ensuring individual's dignity.<sup>105</sup> Even though a private actor can be involved in ensuring the right to health and the right to social security, the State still has a duty to guarantee that the individuals are not arbitrarily subjected to unreasonable restrictions on privately provided healthcare coverage.<sup>106</sup> As the State recognized the right to social security in its constitution, and because the right to social security is interconnected with the right to health, the right to social security is protected under Article 26 (Duty to Progressively Develop Economic, Social, and Cultural Rights).<sup>107</sup>

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<sup>92</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶¶ 124, 135.

<sup>93</sup> *Id.* ¶ 80.

<sup>94</sup> *Id.* ¶¶ 89, 124.

<sup>95</sup> *Id.* ¶ 92.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* ¶ 193.

<sup>98</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶¶ 93, 109, 132, 135.

<sup>99</sup> *Id.* ¶ 94.

<sup>100</sup> *Id.* ¶¶ 124, 135.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* ¶ 96.

<sup>103</sup> *Id.* ¶¶ 99-100, 135.

<sup>104</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 113.

<sup>105</sup> *Id.* ¶ 114.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* ¶¶ 113, 116, 118.



*The Court held that Circular No. 7 harmed the right to social security because it allowed an ISAPRE to discriminate against Martina for arbitrary reasons.<sup>108</sup> This discrimination was a direct result of the State's failure to regulate the private insurer.<sup>109</sup> Thus, the State failed its duty to prevent a third party from endangering Martina's right to social security and right to health.<sup>110</sup>*

*Circular No. 7 was issued in 2005, after a separate circular was issued in 2000 that included coverage for chronic diseases.<sup>111</sup> The Court worried that Circular No. 7 could regress the access to healthcare previously offered, which the State cannot allow per Article 26 (Duty to Progressively Develop Economic, Social, and Cultural Rights).<sup>112</sup>*

*The Court held that Article 19 (Rights of the Child) provides additional protective measures for children.<sup>113</sup> The primary goal is to ensure that the best interests of the child are taken into consideration.<sup>114</sup> The Court emphasized that, even when a private actor is providing the healthcare, the State still has a duty to protect a child's best interest.<sup>115</sup> Thus, the Court addressed the State's failure to protect Martina's rights specifically through Article 19 (Rights of the Child).<sup>116</sup>*

*First, the provision of Circular No. 7 that excluded chronic diseases did not contain objective elements allowing for clear determination of which illnesses would be included.<sup>117</sup> The Court noted that the word "chronic" created ambiguity because it granted providers broad discretion in denying coverage.<sup>118</sup> This ambiguity caused a lack of predictability over which diseases might be covered.<sup>119</sup> Further, the Court considered that Circular No. 7 might allow a private insurer to arbitrarily discontinue care without just cause.<sup>120</sup> The provision allowing for discontinuation of care needed to consider the risk that vulnerable patients might be denied critical care.<sup>121</sup>*

*Although the purpose of the additional CAEC and contract with an ISAPRE is to ensure ongoing coverage of essential medical care for severe illnesses, Circular No. 7 allowed private insurers to decide who could receive home hospitalization based on how long the patient had had the disease and whether it had progressed.<sup>122</sup> The Court held that this was arbitrary because the duration of a disease is irrelevant to determining the appropriateness of in-home medical care.<sup>123</sup> Thus the distinctions made in Circular No. 7 were discriminatory, especially regarding the right to life, the right to health, the rights of the child, and the right to personal integrity.<sup>124</sup>*

*Second, the medical advice ISAPRE MasVida used to discontinue Martina's care never used the word "chronic," but instead used the words "irreversible" and "progressive."<sup>125</sup> A doctor's expert*

<sup>108</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶¶ 127, 132.

<sup>109</sup> *Id.* ¶ 125.

<sup>110</sup> *Id.* ¶¶ 130, 135.

<sup>111</sup> *Id.* ¶ 134.

<sup>112</sup> *Id.* ¶¶ 96, 134.

<sup>113</sup> *Id.* ¶ 104.

<sup>114</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 105.

<sup>115</sup> *Id.* ¶ 107.

<sup>116</sup> *Id.* ¶ 104.

<sup>117</sup> *Id.* ¶ 125.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 126.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* ¶ 127.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* ¶ 128.

testimony noted that a progressive disease is not the same as a chronic one.<sup>126</sup> The Court held that the ambiguous nature of Circular No. 7 allowed a progressive illness to be conflated with a chronic illnesses, despite their distinctions.<sup>127</sup> This ambiguity led to the discontinuation of medical care for and the discrimination of Martina.<sup>128</sup>

The Court noted that ISAPRE MasVida made their decision to discontinue care knowing that Martina needed in-home care.<sup>129</sup> According to expert witnesses who had spoken at public hearings, had home hospitalization been discontinued, Martina's quality of life would have severely decreased.<sup>130</sup>

The Court emphasized that the end of the home hospitalization further would have limited access to quality care and forced her to receive treatment from a hospital that was not adequately equipped to care for Martina's disease.<sup>131</sup> Martina's family would not have been able to continue paying the cost of home hospitalization, so Martina's right to health and the access required by that right would have been severely harmed.<sup>132</sup> The Court additionally noted that, as a disabled child, it was not within Martina's best interest to relocate for care because the State had an obligation to allow for the continuation of care in Martina's own home, with her family.<sup>133</sup>

The Court concluded that the State failed to regulate health services because they allowed Circular No. 7 to dictate care, and thus failed to protect its citizens' rights.<sup>134</sup> ISAPRE MasVida's decision to arbitrarily cease care critically jeopardized the right to life, right to physical integrity, rights of the child, right to health, and right to social security as a result of the State's failure to fulfill its duty to its citizens.<sup>135</sup> Because the State failed in its obligation, the Court found the State was in violation of Articles 4(1) (Prohibition of Arbitrary Deprivation of Life), 5(1) (Right to Physical, Mental, and Moral Integrity), 19 (Rights of the Child), and 26 (Duty to Progressively Develop Economic, Social, and Cultural Rights) of the American Convention.<sup>136</sup>

The Court noted that technically Martina's care never ceased because her parents were able to cover the cost of her care while they battled in court.<sup>137</sup> However, had her parents been unable to pay, Martina would not have received critical care while her parents were litigating ISAPRE MasVida's cessation of coverage.<sup>138</sup> Martina's parents had been in constant conflict with ISAPRE MasVida and the Superintendence of Health due to issues regarding quality of care, which the State failed to address, and thus ISAPRE MasVida's wrongful actions continued without remedy.<sup>139</sup>

The Court did not rule on:

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<sup>126</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 128.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* ¶ 129.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* ¶ 130.

<sup>132</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 130.

<sup>133</sup> *Id.* ¶ 131.

<sup>134</sup> *Id.* ¶ 135.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* ¶ 143.

<sup>138</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 143.

<sup>139</sup> *Id.* ¶¶ 144-147.

Articles 8(1) (Right to a Hearing Within Reasonable Time by a Competent and Independent Tribunal) and 25(1) (Right of Recourse Before a Competent Court) in relation to Articles 1(1) (Obligation of Non-Discrimination) and 2 (Obligation to Give Domestic Legal Effect to Rights) of the Convention<sup>140</sup> because:

*The arbitrator-judge's decision in the final Superintendence of Health appearance ended the suspension of Martina's home hospitalization.<sup>141</sup> Prior to the Court's consideration of the case, ISAPRE MasVida was ordered to reimburse Martina's family for the time of coverage suspension.<sup>142</sup>*

The Court found unanimously that Chile had violated:

Article 5(1) (Right to Physical, Mental, and Moral Integrity) of the Convention, as well as Article 1(1) (Obligation of Non-Discrimination) of the Convention, to the detriment of Ms. Rojas Fariás and Mr. Vera Luza,<sup>143</sup> because:

*The Court held that close family members of human rights violations victims can be victims as well because of the pain they suffer as a result of their loved one's suffering.<sup>144</sup> Martina's parents suffered extreme stress and pain as a result of their uncertainty after ISAPRE MasVida's letter regarding the cessation of Martina's care.<sup>145</sup> Mr. Vera Luza stated that he suffered severe health issues that were a direct result of stress, like migraines, stomach pain, hypertension, and visual impairment issues.<sup>146</sup> Expert witness testimony showed that Mr. Vera Luza had chronic anxiety and post-traumatic stress disorder attributable to his prolonged concern over his daughter's healthcare.<sup>147</sup> The Court also noted that Mrs. Rojas Fariás suffered from post-traumatic stress disorder.<sup>148</sup> The Court expressed that Martina's vulnerable state compounded her parents' psychological and physical distress.<sup>149</sup> The Court determined that, had the State protected Martina's human rights, Mr. Vera Luza and Mrs. Rojas Fariás would not have suffered these harms.<sup>150</sup>*

### C. Concurring Separate Opinion of Judge Humberto Antonio Sierra Porto

Judge Humberto Antonio Sierra Porto was concerned over the Court's declaration of conclusions in operative paragraphs, which betrays internal disagreement with respect to including the right to health within Article 26 (Duty to Progressively Develop Economic, Social, and Cultural Rights) of the Convention.<sup>151</sup> Concerned about inconsistencies in the Court's rulings and whether an autonomous violation of Article 26 actually exists, Judge Sierra Porto expressed that the Court was too quick to express the right to health in conjunction with the right to life or the right to personal integrity, and that this requires closer scrutiny.<sup>152</sup>

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<sup>140</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 149.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* "Declares" ¶ 5.

<sup>144</sup> *Id.* ¶ 153.

<sup>145</sup> *Id.* ¶ 154.

<sup>146</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 155.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* ¶ 156.

<sup>150</sup> *Id.* ¶ 157.

<sup>151</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Sierra Porto, Inter-Am. Ct. H.R. (ser. C) No. 439, ¶¶ 1, 5 (Oct. 1, 2020).

<sup>152</sup> *Id.* ¶ 7.

Concluding that the State had already adequately remedied the harms, Judge Sierra Porto disagreed with the Court's recognition of the State's ongoing responsibility to Martina and her family.<sup>153</sup> Because Martina's home hospitalization was resumed, Judge Sierra Porto cautioned that the Court should have ruled separately on what actually happened and what *could* have happened had the violations continued.<sup>154</sup>

#### D. Concurring Separate Opinion of Judge Ricardo C. Pérez Manrique

Judge Ricardo C. Pérez Manrique wrote separately to discuss whether Article 26 (Duty to Progressively Develop Economic, Social, and Cultural Rights) was needed in this case and express an alternative approach to children's rights.<sup>155</sup> The concurring opinion considered whether Article 26 (Duty to Progressively Develop Economic, Social, and Cultural Rights) needs to be invoked as its own violation, or if violations of this article are indivisible from other violations of human rights.<sup>156</sup> Judge Pérez Manrique found that the right to health in this case was justiciable because it coexisted with other violations in the case, without needing to draw on Article 26 at all.<sup>157</sup>

Regarding the rights of the child, Judge Pérez Manrique noted that the Court emphasized that the best interests of the child be taken into consideration and agreed that children need additional, special protection.<sup>158</sup> In order to better serve the best interests of the child, he suggested that the analysis should contain two central components: (1) the guarantee of a legal limit with respect to the State's activity; and (2) the protection of the child's rights.<sup>159</sup> Through this, the best interests of the child analysis takes into consideration objective evidence, the right to be heard, and the progressive development of children's rights.<sup>160</sup> Additionally, a fundamental right under Article 9 (Rights of the Child) is that the child not be separated from the parents.<sup>161</sup> If Martina's care had been fully interrupted, she would have not have been able to live at home with her parents.<sup>162</sup>

Judge Pérez Manrique reiterated the importance of a company's responsibilities concerning the violations of human rights.<sup>163</sup>

## IV. REPARATIONS

The Court ruled unanimously that the State had the following obligations:

### A. Specific Performance (Measures of Satisfaction and Non-Repetition Guarantee)

#### 1. Judgment as a Form of Reparation

The Court noted that the Judgment itself is a form of reparation.<sup>164</sup>

#### 2. Enact a Legal Provision to Protect Care

<sup>153</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Sierra Porto, ¶ 11.

<sup>154</sup> *Id.* ¶¶ 12-14.

<sup>155</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Ricardo C. Pérez Manrique, Inter-Am. Ct. H.R. (ser. C) No. 439, ¶ 4 (Oct. 1, 2020).

<sup>156</sup> *Id.* ¶¶ 5-9.

<sup>157</sup> *Id.* ¶ 10.

<sup>158</sup> *Id.* ¶¶ 15, 33.

<sup>159</sup> *Id.* ¶ 26.

<sup>160</sup> *Id.*

<sup>161</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Pérez Manrique, ¶ 31.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* ¶ 35.

<sup>164</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, "Establishes" ¶ 6.

The Court ordered the State to enact a legal provision ensuring Martina's ongoing care regardless of her parent's death or ability to pay for the CAEC coverage within six months of this Judgment.<sup>165</sup>

### 3. Provide Wheelchair

The Court ordered the State to provide a neurological wheelchair for Martina through her parents, to enable transportation to the hospital as needed within six months of this Judgment.<sup>166</sup>

### 4. Psychological and Rehabilitative Treatment

The Court ordered the State to provide Martina's parents, Mr. Vera Luza and Ms. Rojas Fariás timely and proper medical care as needed for the harms they suffered.<sup>167</sup> The Court noted a wide variety of care to be provided, included psychotherapy, pharmacological treatment for anxiety symptoms, non-pharmacological management for anxiety, and cognitive behavioral therapy to address symptoms of post-traumatic stress.<sup>168</sup>

### 5. Publish the Judgment

The Court ordered the State to publish this Judgment within six months in the Official Gazette one time; in a national newspaper one time; on the Superintendence of Health's website for one year; the judiciary's website for one year; and ISAPRE MasVida's website for one year.<sup>169</sup> The Court noted that the State must immediately notify the Court once each publication is made available regardless of any time restriction.<sup>170</sup>

### 6. Adopt Legislative Measures for Children's Protection Office

The Court ordered the State to adopt legislative changes or other necessary measures, within a reasonable time frame, to allow the Children's Protection Office to participate in all Superintendence of Health proceedings or in other legal proceedings where a private insurer's actions might affect children's rights.<sup>171</sup>

## B. Compensation

The Court award the following amounts:

### 1. Pecuniary Damages

No pecuniary damages were awarded because the Vera Rojas family had already been reimbursed.<sup>172</sup>

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<sup>165</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 165.

<sup>166</sup> *Id.* ¶ 166.

<sup>167</sup> *Id.* ¶ 167.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* ¶ 169.

<sup>170</sup> *Id.*

<sup>171</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 171.

<sup>172</sup> *Id.* ¶ 182.

## 2. Non-Pecuniary Damages

Non-pecuniary damages were awarded in the following amounts: (1) \$30,000 for Martina, deliverable to her parents, Mr. Vera Luza and Ms. Rojas Fariás; (2) \$12,500 to Ms. Rojas Fariás; and (3) \$12,500 to Mr. Vera Luza.<sup>173</sup>

## 3. Costs and Expenses

The Court awarded \$20,000 for the costs and expenses of litigation, to be divided equally between the two representatives.<sup>174</sup>

### 4. Total Compensation (including Costs and Expenses Ordered):

\$75,000

### C. Deadlines

The State must comply with the order of the Court to enact legal provisions to protect Martina's care within six months of this Judgment.<sup>175</sup>

Within one year, the State must release a report on compliance measures.<sup>176</sup> The State must also pay compensation for non-pecuniary damages, and cost and expenses within one year of this Judgment.<sup>177</sup>

## V. INTERPRETATION AND REVISION OF JUDGMENT

[None]

## VI. COMPLIANCE AND FOLLOW-UP

[None]

## VII. LIST OF DOCUMENTS

### A. Inter-American Court

#### 1. Preliminary Objections

[None]

#### 2. Decisions on Merits, Reparations and Costs

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<sup>173</sup> Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, ¶ 182.

<sup>174</sup> *Id.* ¶ 186.

<sup>175</sup> *Id.* ¶ 165.

<sup>176</sup> *Id.* ¶ 193.

<sup>177</sup> *Id.* ¶ 187.

Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 439 (Oct. 1, 2021).

Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Pérez Manrique, Inter-Am. Ct. H.R. (ser. C) No. 439 (Oct. 1, 2020).

Vera Rojas et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Sierra Porto, Inter-Am. Ct. H.R. (ser. C) No. 439 (Oct. 1, 2020).

### 3. Provisional Measures

Vera Rojas et al. v. Chile, Resolution of the President, Inter-Am Ct. H.R. (ser. C) No. 439 (Dec. 4, 2020).

### 4. Compliance Monitoring

[None]

### 5. Review and Interpretation of Judgment

[None]

## *B. Inter-American Commission*

### 1. Petition to the Commission

[None]

### 2. Report on Admissibility

Vera Rojas et al. v. Chile, Admissibility Report, Report No. 44/16, Inter-Am. Comm'n H.R., Report No. 1558-11 (Nov. 4, 2018).

### 3. Provisional Measures

[None]

### 4. Report on Merits

Vera Rojas et al. v. Chile, Report on Merits, Report No. 107/18, Inter-Am. Comm'n H.R., Case 13.039 (Oct. 5, 2018).

### 5. Application to the Court

Vera Rojas et al. v. Chile, Letter of Submission, Inter-Am. Comm'n H.R., Case No. 13.039 (Sept. 6, 2019).



VIII. BIBLIOGRAPHY

[None]