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**Report No. 1/16**  
**CASE 12,695**  
REPORT ON THE MERITS

VINICIO ANTONIO POBLETE VILCHES AND FAMILY  
CHILE

Approved by the Commission at its session No. 2060 held on April 13, 2016  
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Organización de los  
Estados Americanos

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**I. SUMMARY**

1. On May 15, 2002, the Inter-American Commission on Human Rights (hereinafter “the Commission,” “the IACHR,” or “the Inter-American Commission”) received a petition filed by Blanca Margarita Tapia Encina, Cesia Leyla Poblete Tapia, and Vinicio Antonio Poblete Tapia (hereinafter “the petitioners”) <sup>1</sup> against the Republic of Chile (hereinafter “Chile” or “the State”), related to the death of Mr. Vinicio Antonio Poblete Vilches, on February 7, 2001, at a public hospital in the city of Santiago.

2. The petitioners alleged that the death of Mr. Vinicio Antonio Poblete Vilches, in a public hospital in Chile, was the responsibility of the attending physicians, who operated on him without informing his family members or requesting their authorization, and who discharged him after the operation without adequately taking into account his serious health problems. In addition, they alleged that when he was admitted to the hospital the second time he did not receive the treatment he needed. They said that they received contradictory information about the cause of death and that they filed a criminal complaint against the attending physicians in 2001, which did not satisfy the requirements of effective access to justice. They indicated that there has been unwarranted delay by the court in carrying out the investigation into the facts and they also alleged having been humiliated by the hospital staff and by the court involved in the matter.

3. For its part, the Chilean State did not present observations in the merits phase. In the admissibility phase the State had argued that Mr. Poblete Vilches’s family members filed a criminal complaint that was found admissible and was going forward. It indicated that the investigation was carried out in compliance with the guarantees established in Article 8 of the Convention and is complex. The State also reported on the status of the investigations.

4. After analyzing the parties’ positions the Inter-American Commission found the State of Chile responsible for violating the rights to life, humane treatment, access to information on health, judicial guarantees, and judicial protection, which are established at Articles 4, 5, 13, 8, and 25 of the American Convention, in relation to the obligations established at Article 1(1) of the same instrument, to the detriment of the persons indicated throughout this report.

**II. PROCEEDINGS BEFORE THE COMMISSION**

5. The processing of the petition from its presentation up to the adoption of the decision on admissibility is described in Admissibility Report No. 13/09.<sup>2</sup> In that report, the IACHR found that the alleged facts could tend to establish violations of the rights enshrined in Articles 4, 8, 24, and 25 of the American Convention, all in conjunction with Article 1.1 thereof.

6. The Commission conveyed Admissibility Report No. 13/09 to the petitioners and the State in a communication dated April 7, 2009, and, in keeping with Article 38.1 of its Rules of Procedure in force at the time, set a deadline of two months for the petitioners to submit additional

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<sup>1</sup> During the processing different persons have been named as petitioners.

<sup>2</sup> IACHR, Report No. 13/09, Petition 339-02, Admissibility, Vinicio Poblete Vilches, Chile, March 19, 2009. Available at: <http://www.cidh.oas.org/annualrep/2009sp/Chile339-02.sp.htm>.

comments on the merits. In addition, in compliance with Article 48.1.f of the American Convention, it made itself available to the parties for reaching a friendly settlement.

7. The Commission received the petitioners' comments on the merits of the case in communications dated May 11, 2009, and June 4 and 8, 2009. On July 22, 2009, in keeping with Article 38.1 of its Rules of Procedure in force at the time, those three submissions were forwarded to the State, with a period of two months for it to return its additional comments on the merits.

8. On June 2, 2009, the petitioners submitted a communication informing the Commission of their willingness to reach a friendly settlement; that was duly conveyed to the State, which, on September 16, 2009, presented information and requested an extension of the deadline. On January 28 and April 8, 2011, the petitioners indicated their wish to terminate the friendly settlement proceedings. On July 2, 2014, they expressed their intent to continue working for a friendly settlement; however, on August 14, 2014, they reported the State's refusal to comply with the friendly settlement proposal.

9. On December 12, 2011, the petitioners reported the death of Mr. Gonzalo Poblete Tapia on December 4, 2011.

10. On December 9, 2014, the Commission asked the petitioners for additional information, and a reply was received from them on January 14, 2015. Specifically, the Commission requested information on the members of the close family who had suffered harm as a result of the alleged human rights violations in this case.

11. In addition to the formalities recorded in the previous paragraphs, the IACHR received information from the petitioners on the following dates: March 12, June 4, August 20, November 30, and December 9, 2009; January 25, June 3, July 21, and October 9, 2010; January 17, February 8, March 31, May 23, July 18, September 9 and 26, October 4, and December 14, 2011; January 12, February 14, 17, 22, and 23, March 15, 23, and 29, April 3, May 9 and 21, June 2, 26, and 29, August 1 and 13, September 3, 24, and 28, October 16, November 28 and 30, and December 21, 2012; January 4 and 29, February 13, March 18 and 20, April 10 and 18, June 18 and 22, July 1 and 17, August 12 and 21, September 27, and October 8, 25, and 28, 2013; January 9 and 17, February 10, 17, and 28, March 13, April 14 and 23, July 28, August 14, 15, 27, 28, and 29, September 8, 10, 22, and 23, and October 31, 2014; January 9, 14, and 28, February 4 and 25, March 4 and 31, April 7 and 22, July 16, September 15, and October 21, 2015.

12. Those communications with substantive contents and that were not identical to previous submissions were forwarded to the State.

### III. POSITIONS OF THE PARTIES

#### A. Position of the Petitioners

13. The petitioners allege that on January 17, 2001, Mr. Vinicio Antonio Poblete Vilches was admitted to the Sótero del Río Public Hospital and that his death, on February 7, 2001, was the result of a series of actions and omissions by the physicians who attended to him and took decisions regarding his health.

14. They claim that Mr. Vinicio Antonio Poblete Vilches "was treated cruelly and tortured by the medical staff at the Sótero del Río Hospital" and that he was starved, tied up by his hands and feet to a bed with thick sensor cables, which hampered his blood circulation, sedated to keep him from waking, and spent most of his time naked, covered only by a sheet. They contend that the way the physicians treated the family was humiliating, that they were denied information on Mr. Poblete Vilches's state of health, and that they were prevented from communicating with him.

15. The petitioners contend that Mr. Vinicio Antonio Poblete Vilches was subjected to major cardiac surgery without his family's consent, for which an authorization was issued on which, given the family's refusal, the signature of his wife Blanca Tapia Encina was forged.

16. They claim that following the surgery, on February 2, 2001, Mr. Poblete Vilches was released even though he was presenting "post-operational septic shock, with open drainage, a high temperature, and in a semiconscious state," and that, since a hospital ambulance was denied, they had to hire a private one. They state that at the time of his release, Mr. Poblete Vilches "had three large wounds on his right side, one stitched and the other two without stitches, and that the wounds were infected." They add that he was given only six and a half days to recover but that, according to one of the doctors, he should have been given three weeks. They claim that a person and a nurse Cecilia Caniqueo Ralil, both from the Hogar de Cristo, witnessed Mr. Poblete Vilches's poor condition but that they never gave statements to the corresponding authorities.

17. They report that Mr. Vinicio Antonio Poblete Vilches was readmitted to the Sótero del Río Hospital, where he spent an entire night and day naked on a stretcher without receiving any assistance. They state that after almost a day, the hospital's director ordered that he be taken to the surgical intensive care unit, but not to the medical ICU which, according to the petitioners, had the instruments that could have saved him, such as an artificial respirator, to which they were refused access with the instruction "get one yourselves." The petitioners add that Dr. Humberto Montecinos told them that "he was not going to give him another opportunity to live" and that "younger people should be given preference." The petitioners allege that although "there was no chance of giving him proper treatment, at no time was the family offered the opportunity of transferring him to another public hospital, as protocol required." The Commission understands that this argument relates to the absence of beds in the ICU and the difficulties to obtain an artificial respirator. This, they argue, constituted an act of passive euthanasia.

18. The petitioners report that there are "contradictions in the different diagnoses of his death": at the morgue, Mr. Vinicio Antonio Poblete Vilches's body had "a strip of tape on its chest saying he had died of pulmonary edema," whereas his death certificate says he died of septic shock and bilateral bronchopneumonia, cardiac arrest, multiorgan failure, and damage to the kidneys. In addition, according to the petitioners, in the hospital morgue, the deceased's forehead and body were covered with bruises. The petitioners state that they requested an autopsy be performed, but the request was denied; they add that they were unable to contact the hospital's director and that no one "explained the reason for those actions, or the real causes behind our father's death." They further contend that the time of Mr. Vinicio Antonio Poblete Vilches's death was falsified.

19. The petitioners claim that the nurse who was with him on the night of his death said, "What are you worrying about? We gave the gentleman an injection and he died." They conclude that "nothing can justify the inhuman treatment he received at that hospital (...) where impunity prevails to this day, with no punishment for the doctors who continue to work in the public health services and to enjoy protection."

20. As regards the domestic proceedings related to these events, the petitioners allege that the courts failed to hear their complaints because they are poor, as can be seen with the numerous formalities they fruitlessly asked the judicial authorities to pursue, as a result of which years that were essential for clearing up this murder went by. Specifically they spoke of the summons served on the physicians responsible, who never appeared before the courts to give statements during more than seven years of proceedings, even though their places of work had been clearly identified. They also noted that no confrontations were held with the physicians and that there are some witnesses who have not given statements. They claim that the arrest warrant was never enforced. On this point, they explained that a warrant for the arrest of Dr. Luis Carvajal Freire was issued in 2005, but that he was never taken into custody, in spite of being employed at the Sótero del Río Hospital. They also claim that Mr. Vinicio Antonio Poblete Vilches's body was not exhumed and that no autopsy was carried out. They add that when they appeared before the court, they were

subjected to harassment and threats. As a result of that, they claim, they went to the Supreme Court of Justice but obtained no favorable outcome. The petitioners also claim there was an unjustified delay in investigating the murder of Mr. Vinicio Antonio Poblete Vilches and that it was the authorities who delayed the proceedings through their various dismissals of the case.

21. In addition, they contend that on repeated occasions, they asked the Ministry of Health to open administrative committal proceedings regarding the Sótero del Río Hospital, which the ministry failed to do.

22. The petitioners allege that they were discriminated against on economic grounds “since [they] never had the economic resources to retain a professional attorney; [they] only had law students who were changed every six months [and] many of them did nothing,” while the doctors responsible for Mr. Vinicio Antonio Poblete Vilches’s death had professional legal counsel. They also state that the judge acted without impartiality and equality with respect to the different lawyers. That discrimination, they claim, could be seen in “the judge’s resistance to pursue formalities that were essential for clearing up the murder.”

23. As regards the impact on Mr. Vinicio Antonio Poblete Vilches’s family, the petitioners contend that they have suffered serious harm arising directly from his death through inexcusable negligence and “passive euthanasia.” Among those repercussions, they include the death of Mrs. Blanca Tapia Encina and the enormous pain and suffering inflicted on the family, in amounts that they allege is impossible to quantify. They add that Vinicio Marco Antonio Poblete Tapia is suffering from constantly declining health, the result of the authorities’ idleness and indifference, and that he is battling cancer, as a result of which he has lost a kidney. They state that Cesia Leyla Poblete Tapia had to leave her job following her parents’ deaths to take care of her brother Gonzalo Poblete Tapia, who is a person with disabilities. They contend that she was affected by depression and attempted suicide in 2010. They add that their home burned down and that, in 2012, the government tried to take their home away from them to cover Mrs. Cesia Leyla Poblete’s hospital bill.

24. They reiterate that they have suffered threats, humiliation, persecutions, and obstacles of all kind from the agencies of the State as a consequence of their quest for justice, including the proceedings before the inter-American system. Finally, the petitioners claim that as consequence of their parents’ deaths, they have descended into extreme poverty.

**B. B. Position of the State**

25. The Commission has not received the State’s comments on the merits. As indicated in the “Processing” section, the exchanges with the State at the merits stage were related to the attempts to reach a friendly settlement. Regardless of that, in this section the Commission will set out the contentions made by the State at the admissibility stage that could bear a relation to the merits of the case.

26. The State maintained that on November 12, 2001, the petitioners filed a criminal complaint for the crime of negligent homicide with respect to Vinicio Antonio Poblete Vilches; after a conflict of jurisdiction was resolved, it was admitted on February 13, 2002, and order for its investigation was issued. It noted that the investigation has been dismissed on two occasions. It added that the petitioners have at all times had access to the case file.

27. It indicated that the case was at the committal stage until June 2004 and that, on February 28, 2004, a warrant was issued for the arrest of Dr. Luis Carvajal Freire, who has not appeared to give a statement.

28. It stated that the ongoing investigation is complex in that it involves culpable homicide resulting from possible medical negligence, and so the judge must rely on the assistance of experts and there are difficulties in accumulating an adequate body of evidence. It maintained that

the judge of the First Court of Puente Alto explained that the proceedings had been delayed to some extent because letters rogatory had to be used to summon and notify the accused, given that they lived outside the court's jurisdiction.

29. It added that the petitioners took more than nine months to file legal action and that they had proper legal counsel, and so the requirement of "diligence on the part of the complainant" was not fulfilled.

#### IV. ANALYSIS OF THE MERITS

##### C. Proven facts

30. Before embarking on an analysis of the evidence available regarding the facts in the case at hand, the Commission would like to note that the documents from the Sótero del Río Hospital are mostly illegible. In its examination of the facts set out below, the Commission will include those sections of the medical file from which legible parts can be extracted.

##### 1. Regarding Mr. Vinicio Antonio Poblete Vilches

31. Mr. Vinicio Antonio Poblete Vilches was born on May 22, 1924, and, at the time of his death, was 76 years old.<sup>3</sup> According to the petitioners' narrative, Mr. Poblete Vilches lived with his wife, Mrs. Blanca Tapia Encina, and their three children, Cesia Leyla, Vinicio Marco Antonio, and Gonzalo, all surnamed Poblete Tapia. In addition, the Commission has information on two grandchildren of Mr. Vinicio Antonio Poblete Vilches: Jorge Alejandro Fuentes Poblete and Alejandra Marcela Fuentes Poblete. Mrs. Blanca Tapia Encina died on January 13, 2003, and Gonzalo Poblete Tapia died on December 4, 2011.

32. The petitioners presented documentation indicating that Gonzalo Poblete Tapia, born on January 10, 1976, had brain damage and was physically an invalid as a result of a chronic ailment of his spine, which deformed his body. In addition, he did not master verbal or written language, his limitations prevent him from communicating and from mobility, he had no sphincter control and had no schooling because of his state of health.

##### 2. First admission of Mr. Vinicio Antonio Poblete Vilches to the Sótero del Río Hospital

33. On January 17, 2001, Mr. Poblete Vilches was admitted to the Sótero del Río Hospital, a public institution in Santiago de Chile, for severe respiratory failure,<sup>4</sup> where he was hospitalized for five days in the Medical Intensive Care Unit.<sup>5</sup> According to his family's narrative, on January 22 he was admitted to the Surgical Intensive Care Unit, where he was tied down with sensor cables and kept sedated.<sup>6</sup>

<sup>3</sup> **Annex 1.** Death certificate of Vinicio Antonio Poblete Vilches, dated March 9, 2001 (annex to the State's submission of September 23, 2008).

<sup>4</sup> **Annex 2.** Statement given to the First Civil Court by Marcelo Adán Garrido on March 3, 2006 (annex to the State's submission of September 23, 2008); and **Annex 3.** Statement given to the First Civil Court by Cesia Leyla Siria Poblete Tapia on September 14, 2006 (annex to the State's submission of September 23, 2008).

<sup>5</sup> **Annex 4.** Statement given to the First Criminal Court by Vinicio Marco Antonio Poblete Tapia on April 6, 2006 (annex to the State's submission of September 23, 2008); and **Annex 5.** Statement given to the First Civil Court by Jorge Alejandro Fuentes Poblete on June 12, 2007 (annex to the State's submission of September 23, 2008).

<sup>6</sup> **Annex 4.** Statement given to the First Criminal Court by Vinicio Marco Antonio Poblete Tapia on April 6, 2006 (annex to the State's submission of September 23, 2008); and **Annex 5.** Statement given to the First Civil Court by Jorge Alejandro Fuentes Poblete on June 12, 2007 (annex to the State's submission of September 23, 2008).



34. The relatives declared that when visiting him the next day, Dr. Alejandra Chacón prevented them from seeing him and that they could hear moaning, including a supplication made by Mr. Poblete Vilches for them “to get him out of there because they were killing him.”<sup>7</sup> The family also state that Dr. Chacón and Dr. Anuch told them that Mr. Poblete Vilches was in good health and that they were going to take him “to the ward” to make a small perforation with a needle, along with a camera, to determine whether he had liquid in his heart and that he would not be operated on.<sup>8</sup>

35. According to the family, on January 26, 2001, Mr. Vinicio Antonio Poblete Vilches was admitted “to the ward” for a heart procedure.<sup>9</sup>

36. The medical case file available to the Commission indicates, dated January 26, 2001, a handwritten annotation signed by “Margarita Tapia” stating that “the surgical procedure to be carried out on my father has been explained to me, and I agree that it be carried out; the risks of the operation have been explained to me and I accept them.”<sup>10</sup>

37. According to the family’s narrative, he emerged from the procedure in the afternoon with three wounds on his right side in which a drainage tube was inserted.<sup>11</sup> The family state that they attempted to communicate with the hospital director with respect to such procedure, but that instead they were received by the deputy director.<sup>12</sup>

38. According to their narrative, on February 2, 2001, Mr. Vinicio Antonio Poblete Vilches’s family received a call from the hospital instructing them to come and collect him.<sup>13</sup> They were forced to hire a private ambulance for the journey because, according to their claims, none were available at the hospital.<sup>14</sup>

39. Mr. Vinicio Antonio Poblete Vilches arrived home that same day and, according to several witnesses, was running a very high fever and his wounds — only one of which was stitched — were suppurating. As a result, on February 5, 2001, his family called a private doctor, Sandra

<sup>7</sup> **Annex 4.** Statement given to the First Criminal Court by Vinicio Marco Antonio Poblete Tapia on April 6, 2006 (annex to the State’s submission of September 23, 2008); **Annex 3.** Statement given to the First Civil Court by Cesia Leyla Siria Poblete Tapia on September 14, 2006 (annex to the State’s submission of September 23, 2008); and **Annex 5.** Statement given to the First Civil Court by Jorge Alejandro Fuentes Poblete on June 12, 2007 (annex to the State’s submission of September 23, 2008).

<sup>8</sup> **Annex 6.** Criminal complaint filed by Blanca Margarita Tapia Encina and Cesia Poblete Tapia on November 12, 2001 (annex to the State’s submission of September 23, 2008); and **Annex 7.** Complaint filed with the First Civil Court by Vinicio Marco Antonio Poblete Tapia on October 7, 2005 (annex to the State’s submission of September 23, 2008).

<sup>9</sup> **Annex 4.** Statement given to the First Criminal Court by Vinicio Marco Antonio Poblete Tapia on April 6, 2006 (annex to the State’s submission of September 23, 2008); and **Annex 3.** Statement given to the First Civil Court by Cesia Leyla Siria Poblete Tapia on September 14, 2006 (annex to the State’s submission of September 23, 2008).

<sup>10</sup> **Annex 8.** Clinical record of Vinicio Antonio Poblete Vilches (annex to the State’s submission of September 23, 2008).

<sup>11</sup> **Annex 6.** Criminal complaint filed with the First Civil Court by Blanca Margarita Tapia Encina and Cesia Poblete Tapia on November 12, 2001 (annex to the State’s submission of September 23, 2008); **Annex 7.** Complaint filed with the First Civil Court by Vinicio Marco Antonio Poblete Tapia on October 7, 2005 (annex to the State’s submission of September 23, 2008); and **Annex 3.** Statement given to the First Civil Court by Cesia Leyla Siria Poblete Tapia on September 14, 2006 (annex to the State’s submission of September 23, 2008).

<sup>12</sup> **Annex 4.** Statement given to the First Criminal Court by Vinicio Marco Antonio Poblete Tapia on April 6, 2006 (annex to the State’s submission of September 23, 2008); and **Annex 3.** Statement given to the First Civil Court by Cesia Leyla Siria Poblete Tapia on September 14, 2006 (annex to the State’s submission of September 23, 2008).

<sup>13</sup> **Annex 9.** Sales receipt issued by Nolberto Jesús Soto Gajardo on February 2, 2001 (annex to the State’s submission of September 23, 2008); and **Annex 7.** Complaint filed with the First Civil Court by Vinicio Marco Antonio Poblete Tapia on October 7, 2005 (annex to the State’s submission of September 23, 2008).

<sup>14</sup> **Annex 9.** Sales receipt issued by Nolberto Jesús Soto Gajardo on February 2, 2001 (annex to the State’s submission of September 23, 2008); and **Annex 7.** Complaint filed with the First Civil Court by Vinicio Marco Antonio Poblete Tapia on October 7, 2005 (annex to the State’s submission of September 23, 2008).

Castillo Momtufar, who ordered that he be taken immediately to the hospital<sup>15</sup> after diagnosing a complicated fever, septic shock, and bilateral bronchopneumonia.<sup>16</sup>

### 3. Second admission of Mr. Vinicio Antonio Poblete Vilches to the Sótero del Río Hospital

40. That same February 5, 2001,<sup>17</sup> Mr. Vinicio Antonio Poblete Vilches was again taken to the Sótero del Río Hospital, where he was admitted to the Emergency Service. According to the family's statements, once there Dr. Luis Carvajal Freire informed them that their father had a "simple bronchopneumonia."<sup>18</sup>

41. According to the family's statements, Mr. Vinicio Antonio Poblete Vilches remained in the Surgical Intensive Care Unit, where a doctor informed his son that he needed a mechanical ventilator and while that facility did not have one, there was one available in the Medical Intensive Care Unit.

42. When Vinicio Poblete Tapia asked one of the doctors about the artificial respirator, he was told that "they would gain nothing by connecting him to one, since he was only going to last another week."<sup>19</sup> The family claim they called to different tv channels and that a journalist informed to them that they got the respirator and informed that to a doctor, but they are unaware what happened with it.<sup>20</sup>

43. The key aspects of the family's narrative of what happened during the second admission are consistent with the legible sections of the medical case file in the IACHR's possession.

44. Thus, under February 6, 2001, it indicates the following:

Released 3 days ago from the medical (illegible), after being in medical (illegible) for APE and cellulitis of left leg. Presented pericardial and pleural effusion drained by video (illegible). Also presented progressive compromised general conditions with coughing, expectoration, and irregular consciousness. Patient received in very serious (illegible) acute respiratory failure.

(...)

<sup>15</sup> **Annex 10.** Statement given to the First Civil Court by Sandra Zoraida Castillo Momtufar on December 3, 2003 (annex to the State's submission of September 23, 2008); **Annex 11.** Prescription issued by Sandra Castillo Momtufar on April 2, 2001 (annex to the State's submission of September 23, 2008); and **Annex 4.** Statement given to the First Criminal Court by Vinicio Marco Antonio Poblete Tapia on April 6, 2006 (annex to the State's submission of September 23, 2008).

<sup>16</sup> **Annex 6.** Criminal complaint lodged with the First Civil Court by Blanca Margarita Tapia Encina and Cesia Poblete Tapia on November 12, 2001 (annex to the State's submission of September 23, 2008), and **Annex 7.** Complaint filed with the First Civil Court by Vinicio Marco Antonio Poblete Tapia on October 7, 2005 (annex to the State's submission of September 23, 2008).

<sup>17</sup> Throughout the file there are inconsistent references as to whether the second admission occurred on February 3 or February 5. From a comprehensive analysis of the available information, the IACHR concludes that it occurred on February 5, 2001.

<sup>18</sup> **Annex 4.** Statement given to the First Criminal Court by Vinicio Marco Antonio Poblete Tapia on April 6, 2006 (annex to the State's submission of September 23, 2008) and **Annex 3.** Statement given to the First Civil Court by Cesia Leyla Tapia Poblete Tapia on September 14, 2006 (annex to the State's submission of September 23, 2008).

<sup>19</sup> **Annex 4.** Statement given to the First Criminal Court by Vinicio Marco Antonio Poblete Tapia on April 6, 2006 (annex to the State's submission of September 23, 2008).

<sup>20</sup> **Annex 4.** Statement given to the First Criminal Court by Vinicio Marco Antonio Poblete Tapia on April 6, 2006 (annex to the State's submission of September 23, 2008).

Plan: Patient to ICU for ventilatory support. No availability currently in medical or surgical ICU.

Will be given intermediate care until an ICU bed is available.

Diagnosis:

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

(...)

23:00 hrs

Patient in arrest:  
Renal.  
Respiratory.  
Circulatory.  
Central nervous system.

Progressive metabolic acidosis.

Patient in multiorgan failure due to prior pathology (illegible).

Discussed with physician from medical ICU. Will be handled with all available measures in inter [incomplete; could read "intermediate"] with no new treatment.<sup>21</sup>

45. Similarly, at 12:10 a.m. on February 7, 2001, the following entry was made:

Serious. Diagnosis already known.  
Pressure more stable, saturating 96 (illegible)  
(illegible) consciousness still affected (illegible)  
Patient with prior cerebral damage.<sup>22</sup>

46. At the same time and date, the following entry was made regarding the family's awareness of the situation:

The seriousness of the situation has been discussed with the family; I have also (illegible) about the decision to keep him in intermediate and not in the ICU because of the patient's condition and prognosis, together with the lack of beds at the

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<sup>21</sup> **Annex 8.** Clinical record of Vinicio Antonio Poblete Vilches (annex to the State's submission of September 23, 2008).

<sup>22</sup> **Annex 8.** Clinical record of Vinicio Antonio Poblete Vilches (annex to the State's submission of September 23, 2008).

present (illegible) The family seems (illegible) but I doubt they fully understand the prognosis and the patient's current illness.<sup>23</sup>

47. In the forensic medical report prepared years later in the context of the judicial proceeding, one finds the following concerning the last hours of Mr. Poblete Vilches's life:

11:20 p.m.: In multiorgan failure and progressive metabolic acidosis. This associated with a prior pathology constitutes a poor prognosis.

In consultations, ICU physician notes patient has toxic loss of consciousness associated with prior cerebral deterioration.

Conversation with family members about the seriousness of patient's situation and the need, due to lack of bed in the ICU, to continue in the Intermediate Service.

Physicians doubts whether family members fully understand the current situation and the patient's prognosis.

5:45 a.m.: Death is verified.

48. The following legible reference in the medical file available to the IACHR indicates that death occurred at 5:40 a.m.<sup>24</sup> Thus, Mr. Vinicio Antonio Poblete Vilches died at 5:40 a.m. on February 7, 2001. According to the death certificate, the cause of death was septic shock and bilateral bronchopneumonia.<sup>25</sup> Regarding the cause of death, Mr. Poblete Tapia said that he was informed by telephone that his father had died from cardiac arrest.<sup>26</sup> In addition, he stated that when he went to the hospital, he was told that his father had died from liver failure.<sup>27</sup> The family states that when they went to collect Mr. Poblete Vilches's body, on his chest there was a piece of tape that give the cause of death as "pulmonary edema."<sup>28</sup> The family asked for an autopsy to be performed.<sup>29</sup> The information available to the Commission indicates that no autopsy was carried out.

49. The family stated that they went to the hospital some days after Mr. Poblete Vilches's death and a nurse called Lily told them that their relative had been given an injection so that he would not suffer.<sup>30</sup>

50. The petitioners presented press notes from 2010 and 2012, in which medical bad practice is denounced in the Hospital Sótero del Río. Moreover, they presented a list for the website

<sup>23</sup> **Annex 8.** Clinical record of Vinicio Antonio Poblete Vilches (annex to the State's submission of September 23, 2008).

<sup>24</sup> **Annex 8.** Clinical record of Vinicio Antonio Poblete Vilches (annex to the State's submission of September 23, 2008).

<sup>25</sup> **Annex 1.** Death certificate of Vinicio Antonio Poblete Vilches (annex to the State's submission of September 23, 2008); **Annex 8.** Clinical record of Vinicio Antonio Poblete Vilches (annex to the State's submission of September 23, 2008).

<sup>26</sup> **Annex 7.** Complaint filed with the First Civil Court by Vinicio Marco Antonio Poblete Tapia on October 7, 2005 (annex to the State's submission of September 23, 2008); and **Annex 3.** Statement given to the First Civil Court by Cesia Leyla Siria Poblete Tapia on September 14, 2006 (annex to the State's submission of September 23, 2008).

<sup>27</sup> **Annex 4.** Statement given to the First Criminal Court by Vinicio Marco Antonio Poblete Tapia on April 6, 2006 (annex to the State's submission of September 23, 2008).

<sup>28</sup> **Annex 11.** Tape, dated February 7, 2001, that the petitioners claim to have found on the victim's body (annex to the State's submission of September 23, 2008); and **Annex 7.** Complaint filed with the First Civil Court by Vinicio Marco Antonio Poblete Tapia on October 7, 2005 (annex to the State's submission of September 23, 2008).

<sup>29</sup> **Annex 7.** Complaint filed with the First Civil Court by Vinicio Marco Antonio Poblete Tapia on October 7, 2005 (annex to the State's submission of September 23, 2008); and **Annex 3.** Statement given to the First Civil Court by Cesia Leyla Siria Poblete Tapia on September 14, 2006 (annex to the State's submission of September 23, 2008).

<sup>30</sup> **Annex 4.** Statement given to the First Criminal Court by Vinicio Marco Antonio Poblete Tapia on April 6, 2006 (annex to the State's submission of September 23, 2008) and **Annex 12.** Statement given to the First Civil Court by Alejandra Marcela Fuentes Poblete on June 15, 2007 (annex to the State's submission of September 23, 2008).

[www.reclamos.cl](http://www.reclamos.cl), in which there is reference to claims against Hospital Sótero el Río between 2011 and 2012 both, for medical negligence as well as bad conditions in such place<sup>31</sup>.

51. Blanca Margarita Tapia Encina died on January 13, 2003. The cause of death was sepsis and gallbladder cancer with multiple metastases.<sup>32</sup>

#### 4. Steps taken by the family with state agencies

##### 4.1 Criminal complaints

52. On November 12, 2001, Blanca Margarita Tapia Encina and Cesia Leyla Poblete Tapia lodged a criminal complaint for the crime of culpable homicide with the First Court of Puente Alto (subsequently, “First Civil Court”) against “María Chacón Fernández, Ximena Echeverría Pezoa, Luis Carvajal Freire, Erick or Marcelo Garrido, Anuch, and Montesinos (...) in their capacity as physicians or interns at the Sótero del Río Hospital (...), who attended professionally to our relative, Mr. Vinicio Antonio Poblete Vilches, and who, through their actions, inexplicably and with absolute negligence and culpability, brought about his death.”<sup>33</sup>

53. In that complaint they requested that the following formalities be pursued: (i) summon the defendants to give statements, together with Dr. Sandra Castillo Momtufar, the driver Nolberto Jesús Soto Gajardo, the nun Rosa Gazmuri M., and Cecilia Caniqueo Ralil, a nurse with the Hogar de Cristo; (ii) request the medical records of Mr. Vinicio Antonio Poblete Vilches; and (iii) order the exhumation of Vinicio Antonio Poblete Vilches’s body, in order to perform an autopsy to determine the real cause of his death.<sup>34</sup>

54. On that same date, the First Civil Court ruled itself incompetent because “the commission of the alleged crime (...) began on January 17, 2001, a date when the Third Criminal Court was on duty,” and it referred the proceedings to that court.<sup>35</sup> The Third Criminal Court declined jurisdiction and ruled itself incompetent on November 23, 2001, and returned the case to the original court.<sup>36</sup> The First Court ruled itself incompetent anew on December 11, 2001,<sup>37</sup> and referred the proceedings to the Court of Appeal of San Miguel,<sup>38</sup> which, on February 6, 2002, ruled that the First Civil Court had jurisdiction.<sup>39</sup>

<sup>31</sup> **Annex 13.** Newspaper article, “Medical negligence claim brought against Sótero del Río Hospital for mistreatment of nine-month-old-baby” (annex to the petitioners’ submission of November 28, 2012); **Annex 14.** Newspaper article of May 14, 2012, “Family reports medical negligence at Sótero del Río Hospital” (annex to the petitioners’ submission of November 28, 2012); **Annex 15.** Newspaper article of October 27, 2010, “Sótero del Río Hospital to conduct internal investigation into in-utero death of baby” (annex to the petitioners’ submission of November 28, 2012); and **Annex 16.** Sótero del Río Hospital, full list of complaints made against the company (annex to the petitioners’ submission of November 28, 2012).

<sup>32</sup> **Annex 17.** Death certificate of Blanca Margarita Tapia Encina, issued on January 14, 2003 (annex to the State’s submission of September 23, 2008).

<sup>33</sup> **Annex 6.** Criminal complaint lodged with the First Civil Court by Blanca Margarita Tapia Encina and Cesia Poblete Tapia on November 12, 2001 (annex to the State’s submission of September 23, 2008).

<sup>34</sup> **Annex 6.** Criminal complaint lodged with the First Civil Court by Blanca Margarita Tapia Encina and Cesia Poblete Tapia on November 12, 2001 (annex to the State’s submission of September 23, 2008).

<sup>35</sup> **Annex 18.** First Civil Court, resolution of November 12, 2001 (annex to the State’s submission of September 23, 2008).

<sup>36</sup> **Annex 19.** Third Criminal Court, resolution of November 23, 2001 (annex to the State’s submission of September 23, 2008).

<sup>37</sup> **Annex 20.** First Civil Court, resolution of December 11, 2001 (annex to the State’s submission of September 23, 2008).

<sup>38</sup> **Annex 21.** First Civil Court, resolution of December 24, 2001 (annex to the State’s submission of September 23, 2008).

<sup>39</sup> **Annex 22.** Court of Appeal of San Miguel, resolution of February 6, 2002 (annex to the State’s submission of September 23, 2008).

55. On February 13, 2002, the First Civil Court admitted the complaint, ordered the commencement of committal proceedings, and issued an investigation order to the Homicide Brigade.<sup>40</sup> On October 16, 2002, the Sótero del Río Hospital was asked to present Vinicio Antonio Poblete Vilches's medical records, which were received on 14 November, 2002.<sup>41</sup> On October 28, 2002, the preliminary police report was received from the Homicide Brigade.<sup>42</sup>

56. On April 12, 2003, the police report of the Metropolitan Homicide Brigade of the Chilean Investigations Police was received, along with the report of the criminal forensic physician, who concluded that "the contents of the medical record indicate that [the] patient received timely and effective medical assistance and care; consequently, his death is instead explained (...) by the seriousness of the complications, which outstripped the medical efforts and available means."<sup>43</sup>

57. On May 13, 2003, Ximena del Pilar Echeverría Pezoa gave a statement;<sup>44</sup> on May 20, 2003, Humberto Reinaldo Montecinos Salucci gave his statement;<sup>45</sup> and on December 3, 2003, Sandra Zoraida Castillo Momtufar gave her statement.<sup>46</sup>

58. On August 12, 2003, a senator asked the Minister of Health to conduct a "painstaking investigation" in the case of Mr. Vinicio Poblete Vilches.<sup>47</sup>

59. On February 28, 2004, December 20, 2004, and October 31, 2005, the First Civil Court issued warrants for the arrest of Luis Carvajal Freire<sup>48</sup> and, on April 6, 2004, and January 8, 2005, the 19th Criminal Court ordered his arrest, with a search of his home, if necessary.<sup>49</sup> On February 6, 2006, the First Civil Court ruled Luis Carvajal Freire to be a fugitive from justice.<sup>50</sup>

<sup>40</sup> **Annex 23.** First Civil Court, order of February 13, 2002 (annex to the State's submission of September 23, 2008).

<sup>41</sup> **Annex 24.** First Civil Court, order of October 16, 2002, and order of November 14, 2002 (annex to the State's submission of September 23, 2008).

<sup>42</sup> **Annex 25.** Metropolitan Homicide Brigade of the Chilean Investigations Police, Preliminary Police Report No. 96/01002 of October 23, 2002 (annex to the State's submission of September 23, 2008).

<sup>43</sup> **Annex 26.** Metropolitan Homicide Brigade of the Chilean Investigations Police, report of the criminal forensic physician, dated April 5, 2003 (annex to the State's submission of September 23, 2008).

<sup>44</sup> **Annex 27.** Statement given to the First Civil Court by Ximena del Pilar Echeverría Pezoa on May 13, 2003 (annex to the State's submission of September 23, 2008).

<sup>45</sup> **Annex 28.** Statement given to the First Civil Court by Humberto Reinaldo Montecinos Salucci on May 20, 2003 (annex to the State's submission of September 23, 2008).

<sup>46</sup> **Annex 10.** Statement given to the First Civil Court by Sandra Zoraida Castillo Momtufar on December 3, 2003 (annex to the State's submission of September 23, 2008).

<sup>47</sup> **Annex 29.** Letter from Senator Jaime Naranjo Otriz to the Minister of Health, dated August 12, 2003 (annex to the State's submission of September 23, 2008).

<sup>48</sup> **Annex 30.** First Civil Court, order of February 28, 2004 (annex to the State's submission of September 23, 2008); **Annex 31.** First Civil Court, document No. 261 of February 28, 2004, addressed to the 19th Criminal Court (annex to the State's submission of September 23, 2008); **Annex 32.** First Civil Court, order of December 20, 2004 (annex to the State's submission of September 23, 2008); **Annex 33.** First Civil Court, order of October 31, 2005 (annex to the State's submission of September 23, 2008); and **Annex 34.** First Civil Court, arrest warrant of October 31, 2005 (annex to the State's submission of September 23, 2008).

<sup>49</sup> **Annex 35.** 19th Criminal Court, arrest warrant of April 6, 2004 (annex to the State's submission of September 23, 2008); and **Annex 36.** 19th Criminal Court, arrest warrant of January 8, 2005 (annex to the State's submission of September 23, 2008).

<sup>50</sup> **Annex 37.** First Civil Court, order of February 6, 2005 (annex to the State's submission of September 23, 2008).

60. On July 19, 2005, the First Civil Court sent the proceedings to the Legal Medical Service “for it to report on the medical responsibility incurred by the attending medical staff.”<sup>51</sup>

61. On September 15, 2005, the First Civil Court again ordered the proceedings sent to the Court of Appeal of San Miguel,<sup>52</sup> which resolved, on November 21, 2005, that “since the circumstances provided for in Articles 559 and 560 of the Organic Courts Code are not found in the case at hand,<sup>53</sup> the court resolves not to admit the appointment of the Special Visiting Magistrate to deal with the aforesaid orders. Without prejudice to that resolution, the judge of the First Civil Court of Puente Alto shall give preferential attention to the processing of this case and shall report to this court on its progress every two weeks”; and, with that, the Appeals Court returned the proceedings to the First Civil Court.<sup>54</sup>

62. On October 7, 2005, Vinicio Marco Antonio Poblete Tapia lodged another complaint with the First Civil Court against persons unknown for the crime of culpable homicide committed with respect to Vinicio Antonio Poblete Vilches.<sup>55</sup>

63. On that occasion, Mr. Vinicio Marco Antonio Poblete Tapia requested the following formalities: (i) “that I be summoned to ratify the (...) complaint”; (ii) “that an order to investigate be served on the 5th Department of the Chilean Investigations Police”; (iii) that Nolberto de Jesús Soto Gajardo, Rosa Gazmuri M., Cecilia Caniqueo Ralil, and Sandra Catillo Montufar be summoned as witnesses; (iv) that Drs. Garrido, Ximena Echeverría Pezoa, María Chacón Fernández, Anuch, Lorna Luco, Gonzalo Menchaca, and Luis Carvajal Freire be summoned to give statements and to undergo confrontations; “that an order be served on the Sótero del Río Hospital, for it to (...) present (...) the complete medical records of (...) Vinicio Antonio Poblete Vilches”; (v) “that an order be given for the exhumation of the body” of Mr. Poblete Vilches, “in order to conduct an autopsy to determine the real cause of his death”; and (vi) that this complaint be combined with proceedings No. 75.821.<sup>56</sup>

64. On March 3, 2006, Marcelo Adán Garrido gave a statement to the First Civil Court<sup>57</sup> and, on March 7, 2006, María Carolina Chacón Fernández gave her statement.<sup>58</sup> On April 6, 2006, Vinicio Marco Antonio Poblete Tapia gave his statement.<sup>59</sup>

<sup>51</sup> **Annex 38.** First Civil Court, document No. 1363 of July 19, 2005, addressed to the Legal Medical Service (annex to the State’s submission of September 23, 2008); and **Annex 39.** First Civil Court, order of July 11, 2005 (annex to the State’s submission of September 23, 2008).

<sup>52</sup> **Annex 40.** First Civil Court, order of September 15, 2005 (annex to the State’s submission of September 23, 2008).

<sup>53</sup> Article 559 of the Organic Courts Code, in force at the time of the facts, provides that “the Superior Courts of Justice shall order special visits by one of their magistrates to the courts within their territorial jurisdiction whenever so required for the better provision of judicial services.” In turn, Article 560 provides that “in particular, the court shall order such visits in the following cases: (1) When they involve civil matters that could affect international relations and are of the competence of the law courts; (2) When they involve the investigation of facts or the examination of crimes that fall under the jurisdiction of the military courts and that could affect international relations or cause public alarm, and that demand prompt settlement because of their seriousness and harmful consequences; and (3) Whenever necessary to investigate facts that could affect the actions of judges in the exercise of their functions and when there has been a notorious delay in the processing of the matters placed before those judges.” Available at: <http://www.leychile.cl/Navegar?idNorma=25563&r=1>.

<sup>54</sup> **Annex 41.** Court of Appeal of San Miguel, Document No. 2809-05 of December 7, 2005, addressed to the First Civil Court (annex to the State’s submission of September 23, 2008).

<sup>55</sup> **Annex 7.** Complaint filed with the First Civil Court by Vinicio Marco Antonio Poblete Tapia on October 7, 2005 (annex to the State’s submission of September 23, 2008).

<sup>56</sup> **Annex 7.** Complaint filed with the First Civil Court by Vinicio Marco Antonio Poblete Tapia on October 7, 2005 (annex to the State’s submission of September 23, 2008).

<sup>57</sup> **Annex 2.** Statement given to the First Civil Court by Marcelo Adán Garrido on March 3, 2006 (annex to the State’s submission of September 23, 2008).

<sup>58</sup> **Annex 42.** Statement given to the First Civil Court by María Carolina Chacón Fernández on March 7, 2006 (annex to the State’s submission of September 23, 2008).

65. On March 21, 2006, Mr. Vinicio Poblete Tapia's attorney requested the following formalities: (i) the statement of Mr. Poblete Tapia; (ii) the statement of Cesia Leyla Poblete Tapia; and (iii) confrontation between those two and Dr. María Carolina Chacón Fernández. In addition, he also requested that "the formalities be organized as promptly as possible and on an urgent basis" due to Mr. Poblete Tapia's deteriorating health.<sup>60</sup>

66. On April 5, 2006, the attorney of the accused Dr. María Carolina Chacón, filed a motion for the dismissal of the suit,<sup>61</sup> which was denied.<sup>62</sup>

67. On April 18, 2006, Vinicio Poblete Tapia's attorneys requested that statements be taken from Jorge and Alejandra Fuentes Poblete, Rosa Gazmuri M., Cecilia Caniqueo Ralil, two nurses from the Sótero del Río Hospital, and Elizabeth Aviles, the surgeon who operated on Mr. Poblete Vilches.<sup>63</sup>

68. On June 7, 2006, the Legal Medical Service presented Legal Medical Report No. 140-2005,<sup>64</sup> which concluded that:

(1) The patient, Mr. Vinicio Poblete Vilches, suffering type 2 diabetes mellitus, ischemic and atherosclerotic heart disease, was hospitalized on two occasions in the space of three weeks for acute pulmonary edema and high-frequency atrial fibrillation caused by ischemic heart disease and, in addition, an extensive cutaneous infection, compatible with ecthyma and cellulitis of the thigh and right buttock consistent with diabetes mellitus. All these pathologies were duly diagnosed and, on account of their seriousness, they were duly treated, first in the ICU and then in the medical service. (2) On his second hospitalization, following his release, he was readmitted three days later in septic shock and with multiorgan failure due to a hospital-acquired pneumonia — a common situation following a previous hospital stay — which, given his advanced age, preexisting pathologies, and multiple risk factors, led to his death in spite of the numerous and appropriate forms of treatment he was given as soon as he was admitted. (3) Accordingly, the undersigned experts find that there was no professional failing.<sup>65</sup>

69. On June 27, 2006, the attorney of the accused Dr. María Carolina Chacón again filed a motion for dismissal,<sup>66</sup> which was also denied.<sup>67</sup> On September 5, 2006, they presented a new motion,<sup>68</sup> which was also denied.<sup>69</sup>

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<sup>59</sup> **Annex 4.** Statement given to the First Criminal Court by Vinicio Marco Antonio Poblete Tapia on April 6, 2006 (annex to the State's submission of September 23, 2008).

<sup>60</sup> **Annex 43.** Submission made by Vinicio Poblete Tapia's attorneys, March 21, 2006 (annexed to the State's submission of September 23, 2008).

<sup>61</sup> **Annex 44.** Submission made by María Carolina Chacón Fernández's attorneys, received by the First Civil Court on April 5, 2006 (annex to the State's submission of September 23, 2008).

<sup>62</sup> **Annex 45.** First Civil Court, resolution of April 6, 2006 (annex to the State's submission of September 23, 2008).

<sup>63</sup> **Annex 46.** Submission made by Vinicio Poblete Tapia's attorneys on April 18, 2006 (annexed to the State's submission of September 23, 2008).

<sup>64</sup> **Annex 47.** Legal Medical Service, Order No. 11087 of June 7, 2006, addressed to the First Civil Court (annex to the State's submission of September 23, 2008).

<sup>65</sup> **Annex 48.** Legal Medical Service, Legal Medical Report No. 140-2005 of June 8, 2006 (annex to the State's submission of September 23, 2008).

<sup>66</sup> **Annex 49.** Submission by María Carolina Chacón Fernández's attorneys, received on June 27, 2006, by the First Civil Court (annex to the State's submission of September 23, 2008).

<sup>67</sup> **Annex 50.** First Civil Court, resolution of July 26, 2006 (annex to the State's submission of September 23, 2008).



70. On September 14, 2006, Cesia Leyla Poblete Tapia gave a statement to the First Civil Court.<sup>70</sup> On October 18, 2006, Lili Marlene Rojas Hernández gave a statement to the First Civil Court.<sup>71</sup>

71. On November 21, 2006, the attorney of the accused Dr. María Carolina Chacón again filed a motion for the dismissal of the case.<sup>72</sup> The following day, the First Civil Court declared the committal proceedings closed.<sup>73</sup> On December 7, 2006, those same attorneys requested that the Court “close the committal proceedings and issue formal charges against the defendant or order her temporary or permanent dismissal from the case.”<sup>74</sup> In response, the First Civil Court resolved that “based on the facts, the existence of the alleged crime has not been sufficiently established by the proceedings” and “this case is temporarily dismissed, until new and better evidence for the investigation is collected.”<sup>75</sup>

72. On January 29, 2007, Vinicio Poblete Tapia’s attorneys requested that the committal proceedings be reopened on the grounds that “the investigation undertaken previously (...) lacks important background details with a direct relation to the case, which have not been taken into consideration because they were not pursued by the Court, even though they were requested during the committal proceedings.” They also requested that the following formalities be carried out: (i) that statements be taken from Alejandra and Jorge Fuentes Poblete; (ii) that summonses again be served, by means of notification at their current workplaces, on the surgeon Elizabeth Aviles Castillo, the nurse Ana Yáñez Torres, and Marcelo Garrido Salvo; (iii) that Vinicio Antonio Poblete Tapia’s body be exhumed; and (iv) that the Ministry of Health report on the progress of administrative committal proceedings against the personnel of the Sótero del Río Hospital.<sup>76</sup>

73. On February 17, 2007, the First Civil Court withdrew the case from the archive<sup>77</sup> and, on April 17, 2007, reopened the committal stage.<sup>78</sup>

74. On May 23, 2007, the First Civil Court verified that Dr. Luis Carvajal Freire was still working at the Sótero del Río Hospital.<sup>79</sup>

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<sup>68</sup> **Annex 51.** Submission by María Carolina Chacón Fernández’s attorneys, received on September 5, 2006, by the First Civil Court (annex to the State’s submission of September 23, 2008).

<sup>69</sup> **Annex 52.** First Civil Court, resolution of September 14, 2006 (annex to the State’s submission of September 23, 2008).

<sup>70</sup> **Annex 3.** Statement given to the First Civil Court by Cesia Leyla Siria Poblete Tapia on September 14, 2006 (annex to the State’s submission of September 23, 2008).

<sup>71</sup> **Annex 53.** Statement given to the First Civil Court by Lily Marlene Rojas Hernández on October 18, 2006 (annex to the State’s submission of September 23, 2008).

<sup>72</sup> **Annex 54.** Submission of María Carolina Chacón Fernández’s attorneys, received on November 21, 2006, by the First Civil Court (annex to the State’s submission of September 23, 2008).

<sup>73</sup> **Annex 55.** First Civil Court, resolution of November 22, 2006 (annex to the State’s submission of September 23, 2008).

<sup>74</sup> **Annex 56.** Submission of María Carolina Chacón Fernández’s attorneys, received on December 7, 2006, by the First Civil Court (annex to the State’s submission of September 23, 2008).

<sup>75</sup> **Annex 57.** First Civil Court, order of December 11, 2006 (annex to the State’s submission of September 23, 2008).

<sup>76</sup> **Annex 58.** Submission of Vinicio Poblete Tapia’s attorneys of January 29, 2007 (annex to the State’s submission of September 23, 2008).

<sup>77</sup> **Annex 59.** First Civil Court, order of February 17, 2007 (annex to the State’s submission of September 23, 2008).

<sup>78</sup> **Annex 60.** First Civil Court, order of April 17, 2007 (annex to the State’s submission of September 23, 2008).

<sup>79</sup> **Annex 61.** Order of the First Civil Court of May 23, 2007 (annex to the petitioners’ submission of June 4, 2007).

75. On June 12, 2007, the First Civil Court took a statement from Jorge Alejandro Fuentes Poblete<sup>80</sup> and, on June 15, 2007, from Alejandra Marcela Fuentes Poblete.<sup>81</sup>

76. On January 21, 2008, the First Civil Court ordered a “report on the mental faculties of Cesia Pob[le]te Tapia and Vinicio Pob[le]te Tapia.”<sup>82</sup> In an order dated May 30, 2008, the Legal Medical Service reported that it had received no such request.<sup>83</sup>

77. On March 6, 2008, the Supreme Court of Justice resolved as follows: “Let the petitioner know that the undersigned President has no powers to intervene in proceedings before other courts of the Republic, and that the filing of procedural remedies — in the ways, instances, and occasions indicated by law — is the optimal way to lodge claims regarding judicial rulings that the parties deem unfavorable to their interests.”<sup>84</sup>

78. On May 3, 2008, the case file was admitted to the docket of the Court of Appeal of San Miguel and was returned to the first-instance Court on May 14, 2008.<sup>85</sup>

79. On June 11, 2008, the First Civil Court ruled the committal proceedings closed<sup>86</sup> and, on June 30, issued a second dismissal of the case, stating that: “Whereas: based on the facts gathered in the proceedings, the existence of the alleged crime has not been sufficiently established (...) and also bearing in mind the provision of Article 409, section No. 1, of the Code of Criminal Procedure, this case is temporarily dismissed until new and better evidence for the investigation is collected.”<sup>87</sup>

80. On August 4, 2008, the plaintiffs’ attorneys requested that the case be withdrawn from the archive in light of the existence of new and better evidence;<sup>88</sup> and on August 5, 2008, the First Civil Court ordered the case withdrawn from the archive.<sup>89</sup>

81. On August 28, 2008, the Supreme Court of Justice requested that the First Civil Court submit a copy of the proceedings in case No. 75.821, against María Chacón Fernández and others for the crime of homicide,<sup>90</sup> which was provided on September 9, 2008.<sup>91</sup>

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<sup>80</sup> **Annex 5.** Statement given to the First Civil Court by Jorge Alejandro Fuentes Poblete on June 12, 2007 (annex to the State’s submission of September 23, 2008).

<sup>81</sup> **Annex 12.** Statement given to the First Civil Court by Alejandra Marcela Fuentes Poblete on June 15, 2007 (annex to the State’s submission of 23 September 2008).

<sup>82</sup> **Annex 62.** First Civil Court, order of January 21, 2008 (annex to the State’s submission of September 23, 2008).

<sup>83</sup> **Annex 63.** Legal Medical Service, Order No. 10187 of May 30, 2008, addressed to the First Civil Court (annex to the State’s submission of September 23, 2008).

<sup>84</sup> **Annex 64.** Supreme Court of Justice, resolution of March 6, 2008 (annex to the petitioners’ submission of May 3, 2008).

<sup>85</sup> **Annex 65.** Court of Appeal of San Miguel, order of May 3, 2008 (annex to the State’s submission of September 23, 2008); and **Annex 66.** Court of Appeal of San Miguel, order of May 14, 2008 (annex to the State’s submission of September 23, 2008).

<sup>86</sup> **Annex 67.** First Civil Court, order of June 11, 2008 (annex to the State’s submission of September 23, 2008).

<sup>87</sup> **Annex 69.** First Civil Court, order of June 30, 2008 (annex to the State’s submission of September 23, 2008).

<sup>88</sup> **Annex 70.** Submission of the plaintiffs’ attorneys, received on August 4, 2008 (annex to the State’s submission of September 23, 2008).

<sup>89</sup> **Annex 71.** First Civil Court, order of August 5, 2008 (annex to the State’s submission of September 23, 2008).

<sup>90</sup> **Annex 72.** Supreme Court of Justice, Order No. 4824 of August 28, 2008, addressed to the First Civil Court (annex to the State’s submission of September 23, 2008).

<sup>91</sup> **Annex 73.** First Civil Court, order of September 9, 2008 (annex to the State’s submission of September 23, 2008).

82. On July 8, 2011, the Supreme Court of Justice resolved an application presented by Vinicio Poblete Tapia in the following terms: “Let the petitioner know that the undersigned President has no powers to hear the matter in question since he is unable to intervene in judicial proceedings that have been concluded.”<sup>92</sup>

83. On August 20, 2012, the Supreme Court of Justice resolved: “Regarding the presentation made by Mr. Vinicio Poblete Tapia: Since this submission is a repetition of the previous request in this case, please refer to the resolution on page 11.”<sup>93</sup>

84. On March 14, 2013, the Supreme Court of Justice resolved an application filed by Vinicio Poblete Tapia in the following terms: “Let the petitioner know that the President of the Supreme Court has no legal powers to hear, intervene in, or modify the resolution of judicial matters that have been processed by the competent courts.”<sup>94</sup>

85. On January 8, 2015, the Supreme Court of Justice again resolved: “Let the petitioner know that the President of the Supreme Court lacks the legal power to hear the matter in question because the claims he makes have been heard and resolved by a competent Court, specifically by this Court on August 14, 2014, and the order contained therein cannot be modified.”<sup>95</sup>

86. Other than these rulings by the Supreme Court of Justice, the Commission has no information on the state of the criminal investigation after it was reopened.

#### 4.2 Other proceedings

87. The Commission is in possession of documents that appear to indicate the existence of another case brought domestically against the Hospital Sótero del Río and its staff on January 13, 2006, during which two mediation hearings were held as described below.

88. On April 4, 2006, the State Defense Council held a first mediation hearing as part of the proceedings that began with the claim filed by Vinicio Marco Antonio Poblete Tapia against the Sótero del Río Hospital and its staff on January 13, 2006. The hearing was attended by the applicant and by Cesia Leyla Poblete Tapia and Jorge Fuentes Poblete, and by the attorney Hernán Pardo Roche representing the hospital. According to the minutes, on that occasion Mr. Poblete stated that “the lack of information can be summarized in three facts that he deemed most serious, to wit: the failure to perform the incision in the described fashion, his release while still in a grave condition, and the refusal to perform an autopsy. Finally, he claimed that Dr. Chacón treated the family inappropriately, in way that he describes as humiliating.” However, the hearing did not take place because the defendant physicians did not appear.<sup>96</sup>

89. A second hearing on mediation was held on April 27, 2006, which was attended by Leyla Poblete Tapia and the attorney María Francisca Jiménez for the family, and by the attorney

<sup>92</sup> **Annex 74.** Supreme Court of Justice, resolution of July 8, 2011 (annex to the petitioners’ submission of July 18, 2011).

<sup>93</sup> **Annex 75.** Supreme Court of Justice, resolution of August 20, 2012 (annex to the petitioners’ submission of September 3, 2012).

<sup>94</sup> **Annex 76.** Supreme Court of Justice, resolution of March 14, 2013 (annex to the petitioners’ submission of April 10, 2013).

<sup>95</sup> **Annex 77.** Supreme Court of Justice, resolution of January 8, 2015 (annex to the petitioners’ submission of February 14, 2015).

<sup>96</sup> **Annex 78.** Mediation Unit of the State Defense Council, Minutes of First Mediation Hearing, April 4, 2006 (annex to the petitioners’ submission of September 25, 2008).

Hernan Pardo Roche and Dr. Luis Carvajal Freire for the hospital. The hospital handed over a copy of the medical audit.<sup>97</sup>

90. The Commission has no further information on those proceedings.

91. Finally, the information available indicates that as of January 11, 2010, at the least, no administrative proceedings had been launched at the Sótero del Río Hospital in connection with Mr. Vinicio Poblete Vilches's death.<sup>98</sup>

#### **D. Legal analysis**

92. Taking into account the parties' positions, as well as the facts that have been established, the Commission will analyze the instant case in the following order: (1) The right to informed consent in relation to health (Article 13 in relation to articles 4 and 5 of the American Convention); (2) The right to life, humane treatment, and health with respect to the care received by Mr. Poblete Vilches (Articles 4 and 5 of the American Convention); (3) The right to humane treatment in light of the alleged mistreatment received by Mr. Poblete Vilches and his next-of-kin (Article 5 of the American Convention); and (4) The rights to judicial guarantees and judicial protection (Articles 8(1) and 25(1) of the American Convention).

##### **1. The right to informed consent in relation to health (Article 13 in relation to Articles 4 and 5 of the American Convention)**

93. As a preliminary matter, the Commission notes that in its admissibility report it did not expressly include Article 13 of the American Convention among the rights that could be considered in the merits phase. Nonetheless, of all the arguments and evidence available in the merits phase, the IACHR considers it relevant to analyze the component of the facts related to the alleged lack of informed consent, in light of Article 13 of the American Convention in relation to the right to health, which is incorporated, in turn based on its interconnectedness, in Articles 4 and 5 of the same instrument.

94. The Commission notes that throughout the admissibility and merits stages the State had knowledge of the facts on which the alleged lack of informed consent was based. Considering this, and applying the principle of *iura novit curia*, the Commission will analyze whether in the instant case the State violated Article 13 of the American Convention<sup>99</sup>.

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<sup>97</sup> **Annex 79.** Mediation Unit of the State Defense Council, Minutes of First Mediation Hearing, April 27, 2006 (annex to the petitioners' submission of August 28, 2014).

<sup>98</sup> **Annex 80.** Document No. 005-10 of the Committee on Human Rights, Nationality, and Citizenship of the Chamber of Deputies, dated January 11, 2010 (annex to the petitioners' submission of January 25, 2010); **Annex 81.** Order C. No. 4181 of the Ministry of Health, dated December 15, 2009 (annex to the petitioners' submission of January 25, 2010); **Annex 82.** Order C. No. 3630 of the Ministry of Health, dated October 30, 2009 (annex to the petitioners' submission of January 25, 2010); and Order of the Director of the South East Metropolitan Health Service, received on November 21, 2009 (annex to the petitioners' submission of January 25, 2010).

<sup>99</sup> The Inter-American Court has established that inclusion by the IACHR of new articles of the American Convention in the merits phase whose possible violation is to be examined "does not imply a violation of the [State's] right to defense" in cases in which the state has had knowledge of the facts that are the basis of its alleged violation." See: I/A Court HR, *Case of Furlan and Family v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 50.

95. The petitioners argue that Mr. Vinicio Poblete Vilches was subjected to a major procedure without the consent of his family members. The Commission will analyze this argument in light of the available evidence, recalling first the relevant standards regarding the concept of informed consent in the health care setting, and second, applying those standards to the information available in the instant case.

## 1.1 General considerations on informed consent in the health care setting

96. The IACHR has recognized that the right of access to information – included under Article 13 of the American Convention<sup>100</sup> – is essential for a person to be in a position to make free and reasoned decisions with respect to intimate aspects of his or her health, body, and personality<sup>101</sup>, including decisions on medical procedures or treatments. The Commission has referred in particular to informed consent as an ethical principle of respect for the autonomy of persons that requires that they understand the distinct treatment options available to them and are involved in their own health care.<sup>102</sup>

97. The European Court has pointed out that compliance with the State's positive obligation to secure for their citizens their right to effective respect for their physical and psychological integrity may necessitate, in turn, the adoption of regulations concerning access to information about an individual's health.<sup>103</sup>

98. The international community has recognized informed consent<sup>104</sup> as an active and continuing process that seeks to ensure that no treatment is performed without the agreement of the person to be treated and without the person having been duly informed of its effects, risks, and consequences.<sup>105</sup> The IACHR has specified that informed consent is an appropriate process of divulging all the information necessary for a patient to be able to freely make the decision to grant (or deny) his or her consent for treatment or a medical intervention. This process seeks to ensure that persons' human rights are fully respected in the area of health care, and that they make truly free choices.<sup>106</sup>

99. In this respect, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, stated: "Informed consent is not mere acceptance of a medical intervention, but a voluntary and sufficiently informed

<sup>100</sup> I/A Court HR, *Case of Claude Reyes and others Vs. Chile*, Merits, Reparations and Costs. Judgment of September 19, 2006, Series C No. 151, para. 77.

<sup>101</sup> IACHR. Report No. 72/14. Case 12.655. Merits. I.V. Bolivia. August 15, 2014. Para 115. Quoting: IACHR, *Access to Information on Reproductive Health from a Human Rights Perspective*, November 22, 2011; IACHR. *Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights*, July 19, 2008, indicators on the right to health, p. 48.

<sup>102</sup> IACHR. Report No. 72/14. Case 12.655. Merits. I.V. Bolivia. August 15, 2014. Para 115. Quoting: IACHR, *Access to Information on Reproductive Health from a Human Rights Perspective*, November 22, 2011, para. 43.

<sup>103</sup> European Court of Human Rights, *R.R. v. Poland*, Application 27617/04, May 26, 2011, paragraph 188; Also, see IACHR, *Access to Information on Reproductive Health from a Human Rights Perspective*, November 22, 2011, paragraph 61. For a different treatment of related issues, see: United Nations, Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/22/53, February 1, 2013, paragraphs 32, 46 and 48.

<sup>104</sup> IACHR. Report No. 72/14. Case 12.655. Merits. I.V. Bolivia. August 15, 2014. Para 116. "Informed consent" is the most commonly used term. Nonetheless, some argue that the term may be misinterpreted and that it should be replaced by the term "informed choice." This is because the choice not to give consent is essential to the integrated concept of voluntary or consent voluntarily given. See, B.M. Dickens, R.J Cook, *Dimensions of informed consent to treatment, Ethical and legal issues in reproductive health*, International Journal of Gynecology & Obstetrics 85 (2004), pp. 309-314.

<sup>105</sup> IACHR. Report No. 72/14. Case 12.655. Merits. I.V. Bolivia. August 15, 2014. Para 116. Quoting: United Nations, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover*, presented in accordance with Human Rights Council resolution 6/29, A/64/272 of August 10, 2009; United Nations, Committee on the Elimination of Discrimination against Women, *Communication No. 4/2004, Case of A.S. v. Hungary*, August 29, 2006, CEDAW/C/36/D/4/2004, para. 11.3. For example, the Amsterdam Declaration on Patients' Rights provides: "Patients have the right to be fully informed about their health status, including the medical facts about their condition; about the proposed medical procedures, together with the potential risks and benefits of each procedure; about alternatives to the proposed procedures, including the effect of non-treatment; and about the diagnosis, prognosis and progress of treatment." (ICP/HLE 121, 1994).

<sup>106</sup> IACHR. Report No. 72/14. Case 12.655. Merits. I.V. Bolivia. August 15, 2014. Para 118. Quoting: IACHR, *Access to Information on Reproductive Health from a Human Rights Perspective*, November 22, 2011, para. 42.

decision, protecting the right of the patient to be involved in medical decision-making, and assigning associated duties and obligations to health-care providers.”<sup>107</sup>

100. The European Convention on Human Rights and Biomedicine<sup>108</sup> also refers to this matter at Article 5, which provides: “An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks....”

101. A systematic interpretation of the applicable standards in this area allows one to establish that a process of informed consent should include the following three elements, which are intimately interconnected: (i) inform as to the nature of the procedure, treatment options, and reasonable alternatives, which includes the possible benefits and risks of the procedures proposed; (ii) take into account the needs of person and ensure that the person understands the information provided; and (iii) ensure that the consent that is given is free and voluntary. This process includes adopting legislative, public policy, and administrative measures and extends to the physicians, health professionals, and social workers at both public and private hospitals and other health institutions as well as detention centers.<sup>109</sup>

102. As regards the first element in the informed consent process – informing on the nature of the procedure, treatment options, and reasonable alternatives, which includes the potential benefits and risks of the proposed procedures – the Commission has indicated that the information that is provided to the patient should be complete, accessible, reliable, timely, and diligent.<sup>110</sup> In order for the information to be thorough, the health professionals must obtain and divulge all of the relevant information, and information of the highest quality, on the diagnosis and the treatment proposed, including its effects, risks, as well as alternatives. In order for it to be accessible, it must be “presented in a manner culturally and otherwise acceptable to the person consenting,”<sup>111</sup> which includes the use of translation and interpretation services. In addition to being complete and accessible, the information must also be reliable. Finally, the information must be provided in a timely and diligent manner, i.e. prior to applying the procedure and without any need for a direct request.

103. With respect to the second element of informed consent – take into account the needs of the person and ensure that he or she understands the information provided – the IACHR observes that medical professionals have an important duty to ensure that information given is understood, the aim being for the patient or his representatives to make a truly informed decision with respect to the intervention and/or treatment proposed. In this sense, one should pay special

<sup>107</sup> IACHR. Report No. 72/14. Case 12.655. Merits. I.V. Bolivia. August 15, 2014. Para 117. Quoting: United Nations, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover*, presented in keeping with resolution 6/29 of the Human Rights Council, A/64/272, of August 10, 2009, para. 9.

<sup>108</sup> IACHR. Report No. 72/14. Case 12.655. Merits. I.V. Bolivia. August 15, 2014. Para 116. Quoting: Council of Europe, *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, signed April 4, 1997 in Oviedo, Spain, entered into force on December 1, 1999.

<sup>109</sup> IACHR. Report No. 72/14. Case 12.655. Merits. I.V. Bolivia. August 15, 2014. Para 119. Quoting: IACHR, *Access to Information on Reproductive Health from a Human Rights Perspective*, November 22, 2011, para. 44.

<sup>110</sup> IACHR. Report No. 72/14. Case 12.655. Merits. I.V. Bolivia. August 15, 2014. Para 120. Quoting: IACHR, *Access to Information on Reproductive Health from a Human Rights Perspective*, November 22, 2011, para. 45.

<sup>111</sup> IACHR. Report No. 72/14. Case 12.655. Merits. I.V. Bolivia. August 15, 2014. Para 120. Quoting: United Nations, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover*, presented in keeping with resolution 6/29 of the Human Rights Council, A/64/272, of August 10, 2009, para. 23.

attention to the needs and situation of the patient, as well as the methods used to provide the information.<sup>112</sup>

104. As regards the third element of informed consent – ensuring that the consent given is free and voluntary – the Commission considers that to be effective the consent must be granted through a process free of any coercion or manipulation. Due to the unequal power relations that characterize the relationship between health professionals and their patients, it has been recognized that the time and manner in which the information is provided may unduly influence the decision to accept or not accept the treatment proposed. The Commission recognizes that while consent may be granted verbally or in writing, for the purposes of safeguarding the rights involved, the State should take measures to ensure that the consent is given in writing.<sup>113</sup>

105. Finally, the Commission recognizes that there are exceptional situations in which consent does not apply. Those exceptions are related to emergencies, for example when a person must receive medical treatment to preserve his or her life or health but neither the person or any close family member can give consent.<sup>114</sup>

## **1.2 Analysis of whether there was informed consent in the instant case with respect to the procedure and treatment given to Mr. Poblete Vilches**

106. From the facts as established, the Commission identifies at least two relevant moments for the analysis of whether the medical staff at the public hospital upheld the above-mentioned standards regarding informed consent. The first is related to the procedure performed on Mr. Poblete Vilches on January 26, 2001 in the context of his first admission to the hospital. The second is related to the decision to keep him in “intermediate treatment” in the hours leading up to his death in the context of the second admission to the hospital.

107. With respect to the first moment, the Commission observes that throughout the inter-American procedure, and in the context of the domestic criminal complaints, Mr. Poblete Vilches’s family members have consistently indicated that they were not duly informed of the procedure that would be performed on him. In effect, from the description given by the family members to the IACHR regarding that procedure, to this day they have not been given clear information and do not have a clear understanding of what was done.

108. As indicated in the facts proven, the only reference in the medical record to the existence of alleged consent by the family with respect to this procedure indicates: “I was given an explanation of the surgical procedure to be performed on my father and I agree that it be done, it has been explained to me and I accept the risks of the operation,” signed by Margarita Tapia.<sup>115</sup>

109. First, the Commission does not have information that would make it possible to understand whether an attempt was made to obtain the informed consent directly from Mr. Poblete Vilches prior to the procedure. While some documents in the medical record indicate that there his consciousness was compromised, other parts indicate that said compromise had diminished. No reference appears from the medical record indicating that Mr. Poblete Vilches was unable to give his consent, and, therefore, that it was necessary to turn to family members to request it.

<sup>112</sup> IACHR. Report No. 72/14. Case 12.655. Merits. I.V. Bolivia. August 15, 2014. Para 121.

<sup>113</sup> IACHR. Report No. 72/14. Case 12.655. Merits. I.V. Bolivia. August 15, 2014. Para 121.

<sup>114</sup> IACHR. Report No. 72/14. Case 12.655. Merits. I.V. Bolivia. August 15, 2014. Para 122. Quoting: IACHR, *Access to Information on Reproductive Health from a Human Rights Perspective*, November 22, 2011, para. 74.

<sup>115</sup> **Annex 8.** Clinical data sheet for Vinicio Antonio Poblete Vilches (Attached to the communication from the State of September 23, 2008).



110. Second, the Commission observes that the alleged consent given by the family raises serious doubts about the way in which it was obtained and its authenticity, for what is written indicates “the procedure ... that will be performed on my father” when the signature that appears below the legend is that of Margarita Tapia, Mr. Poblete Vilches’s wife. In this respect, the Commission notes that on July 11, 2006, Mr. Vinicio Poblete Tapia’s representative filed a brief with the First Civil Court in which he indicated that said authorization was counterfeit, since Margarita Tapia was Mr. Poblete Vilches’s wife and not his daughter.<sup>116</sup> Despite this filing and the doubts it gives rise to, from a mere reading of the purported consent it does not appear that the domestic authorities, in the context of the investigation, undertook any actions aimed at clarifying this situation and in particular verifying whether informed consent was or was not obtained from the family.

111. Third, the medical record does not include any information or record that would suggest that the purported consent was given in compliance with the three above-mentioned requirements. That is, from the record it does not appear (i) that anyone was informed of the nature of the procedure, the treatment options, and reasonable alternatives, including risks and benefits; (ii) that the needs of the family members were taken into account to ensure they understood the information given; or (iii) that it was ensured that the consent was free and voluntary. The Commission considers that the reference cited in the medical record is by any measure insufficient to evaluate whether informed consent was obtained incorporating each of these elements.

112. Finally, the Commission observes that while the lack of consent may be based on emergency situations or if it impossible to reach family members, in the instant case there is no element to indicate that it was impossible, on January 26, 2001, to obtain the family members’ consent. Nor is there information that enables the IACHR to consider that the failure to satisfy each of the elements mentioned was due to an emergency situation that made it impossible to adequately inform the family members so that they could understand the procedure and give their consent in proper form. In effect, in the record it appears that it was indicated that Mr. Poblete was more stable at the moment the procedure was performed. In any event, as a basis for arguing that an element of informed consent was missing one must indicate just what the emergency situation is and that information must be included in the medical record, making it possible to verify the suitability of the course of action adopted by the medical personnel. The medical record does not include any reference either before or after the procedure indicating that the basis for not obtaining consent, in light of the standards cited, was a pressing emergency situation.

113. As regards the second time Mr. Poblete Vilches was admitted to the Hospital Sótero del Río, the Commission observes that even though he was considered a patient in need of intensive treatment in the ICU, due to the lack of beds it was decided to keep him in “intermediate treatment.” The IACHR will analyze this situation in the next section of this report, which addresses the rights to life, humane treatment, and health of Mr. Poblete Vilches. For the purposes of analyzing informed consent, the Commission observes that the medical record includes an entry according to which medical personnel who spoke with the family about the decision “to manage [him] in intermediate care (and not in the ICU)” expressed doubts as to whether they understood the situation.

114. The Commission underlines that the medical personnel acknowledged the lack of clarity of the family members with respect to the situation. Moreover, the totality of the indicia indicate there they were not adequately informed and consulted with respect to the options and needs of the patient. On the contrary, the Hospital personnel explained to them the situation of lack of beds but not with the aim for them to consent. The Hospital indicated to them that Mr. Poblete Vilches was not going to receive the intensive treatment but were not consulted on that matter, they had no option to choose between alternatives. The Commission considers that this reference in the

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<sup>116</sup> **Annex 83.** Brief from the representative of Vinicio Poblete Tapia filed with the First Civil Court on July 11, 2006 (Attached to the communication from the State of September 23, 2008).

medical record, like the previous one, is insufficient to determine whether the medical personnel obtained the family's consent to proceed with the decision to offer intermediate and not intensive treatment to Mr. Poblete Vilches. In addition, and taking into account that it was a medical decision based not on the patient's needs but on structural situations of the hospital such as the lack of beds, it was all the more important that the family fully understood the situation, and, as the case may be, that the family be able to make decisions, including possible alternatives for transfer to a hospital where he could receive the intensive treatment indicated. In addition, and with respect to the second element of the informed consent regarding the particular needs of patients or their families, the Commission observes that despite the doubts of the medical personnel as to whether they understood the situation, there is no reference in the medical records to corrective measures being adopted to ensure such understanding through information more detailed or presented in a language that the family was in a position to understand.

115. In view of the foregoing considerations, the Commission concludes that neither in the context of the proceeding performed on Mr. Poblete Vilches January 26, 2001, nor in the context of the decision regarding treatment after he was admitted to the hospital a second time, did the medical staff fulfill their obligations in relation to informed consent. As it is a public hospital, this situation is directly attributable to the State. Accordingly, the Commission considers that the State of Chile violated the right of access to information for choosing health services, which is protected by Article 13 of the American Convention, in relation to the obligation established at Article 1(1) and the rights to life, integrity, and health established at Articles 4 and 5 of that same instrument, to the detriment of Mr. Vinicio Antonio Poblete Vilches and his family members.

**2. The right to life, humane treatment, and health with respect to the care received by Mr. Poblete Vilches (Articles 4 and 5 of the American Convention)**

116. Article 4(1) of the American Convention provides:

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

117. Article 5 establishes, in part:

1. Every person has the right to have his physical, mental, and moral integrity respected.

118. Article 1(1) of the American Convention establishes:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

119. The Commission will analyze the parties' arguments and the information available on the alleged lack of adequate medical care for Mr. Poblete Vilches, establishing, first, the relevant standards, and second analyzing the facts of the case in light of those standards.

## 2.1 General considerations on the rights to life and humane treatment in relation to the right to health

120. The Inter-American Commission and Court have repeatedly interpreted Article 5(1) of the American Convention to be directly and immediately linked to attention to human health<sup>117</sup> and it has noted that the absence of adequate medical care may lead to a violation of this provision.<sup>118</sup> This intrinsic relationship is an expression of the interdependence and indivisibility between civil and political rights, on the one hand, and economic, social, and cultural rights on the other. In the words of the Court, both groups of rights should be “fully understood as human rights, without any rank and enforceable in all the cases before competent authorities.”<sup>119</sup>

121. The Court has indicated: “The eventual provision of medical care in institutions without the proper authorization, the infrastructure and hygiene of which are inadequate for the provision of medical services, or by professionals who do not have the appropriate qualifications for such activities, could have a significant impact on the rights to life and to integrity of the patient.”<sup>120</sup>

122. In order to prevent violations of life and integrity as the result of inadequate provision of health services, the services must satisfy the principles of availability, accessibility, acceptability, and quality of medical services. Those obligations should be “geared” to satisfying those principles<sup>121</sup>, which were conceptualized by the Committee on Economic, Social and Cultural Rights in its General Comment No. 14 as “essential and interrelated” in the following terms:

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<sup>117</sup> IACHR. Report No. 102/13. Merits. TGGL. Ecuador. November 5, 2013. Para. 138; I/A Court HR. *Case of Suárez Peralta v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2013. Series C No. 261, para. 130; and *Case of Vera Vera and one other v. Ecuador*. Preliminary Objection, Merits, Reparations and Costs. Judgment of May 19, 2011. Series C No. 226, para. 43.

Regarding inter-American regulation and developments of components of the right to health that may be relevant when analyzing cases such as the instant case, the Court has recapitulated: “The American Declaration of the Rights and Duties of Man establishes at Article XI that every person has the right “to the preservation of his health through sanitary and social measures relating to ... medical care, to the extent permitted by public and community resources.” Article 45 of the Charter of the OAS requires that the member states “dedicate every effort to the ... [d]evelopment of an efficient social security policy.” In this regard, Article 10 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, ratified by Ecuador on March 25, 1993, establishes that every person has the right to health, understood as the enjoyment of the highest level of physical, mental, and social well-being, and it indicates that health is a public good. In addition, in July 2012, the General Assembly of the Organization of American States emphasized the quality of health facilities, assets, and services, and requires the presence of trained medical personnel, as well as adequate sanitary conditions.” See also. I/A Court HR. *Albán Cornejo and others v. Ecuador*. Merits, Reparations and Costs. Judgment of November 22, 2007. Series C No. 171, para. 117.

<sup>118</sup> IACHR. Report No. 102/13. Merits. TGGL. Ecuador. November 5, 2013. Para. 138; I/A Court HR. *Case of Suárez Peralta v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2013. Series C No. 261, para. 130. See *Case of Tibi v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C No. 114, para. 157, and *Case of Vera Vera and one other v. Ecuador*. Preliminary Objection, Merits, Reparations and Costs. Judgment of May 19, 2011. Series C No. 226, para. 44.

<sup>119</sup> *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. 101. Along the same lines, see United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights. General Comment 9, *supra*, para. 10. See also: *Case of Airey v. Ireland*, No. 6289/73. Judgment of October 9, 1979, para. 26 and *Case of Sidabras and Dziantas v. Lithuania*, Nos. 55480/00 and 59330/00. Second Section Judgment of July 27, 2004, para. 47. In the case of *Airey v. Ireland* the European Court noted: “Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.”

<sup>120</sup> I/A Court HR. *Case of Suárez Peralta v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2013. Series C No. 261, para.149, citing United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights. General Comment No. 14.

<sup>121</sup> I/A Court HR. *Case of Suárez Peralta v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2013. Series C No. 261.

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

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

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

(d) *Quality*. As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, inter alia, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.<sup>122</sup>

123. On the other part and in order to give more content to the right to health in connection with the rights to life and personal integrity, the Commission note that in comparative law it the essential components of the medical obligation have been developed, that is: integrality, opportunity and identity<sup>123</sup>.

## 2.2 Analysis of the facts of the case

124. The petitioners argued that the death of Mr. Vinicio Poblete Tapia was the result of medical negligence on the part of his attending physicians at the Hospital Sótero del Río for the following reasons: (i) the surgery was performed without the consent of the family members; (ii) after the surgery, Mr. Vinicio Antonio Poblete Vilches was discharged even though he was in critical health; (iii) when readmitted to the Hospital Sótero del Río, Mr. Vinicio Antonio Poblete Vilches was denied the care needed – he was not admitted to the Intensive Care Medical Unit, and he was not given access to an artificial respirator; and (iv) Mr. Poblete Vilches’s death was caused by an injection.

125. The first point is related to the analysis of informed consent in the previous section of this report. As for the fourth point, the Commission observes that it does not have sufficient information to make a pronouncement in this respect, without prejudice to the analysis in the section regarding the rights to judicial guarantees and judicial protection. The Commission underlines moreover that in the instant case it is not called to analyze the general compliance with the state obligations in relation to health for every person under its jurisdiction, but the case is regarding a concrete health situation of an individualized person and, therefore, the Commission will address the decision to discharge Mr. Poblete Vilches, as well as the treatment he received after being admitted to the hospital the second time.

### 2.2.1 As regards the decision to discharge Mr. Poblete Vilches

126. Mr. Poblete Vilches’s family members have consistently declared that after his first admission to the Hospital Sótero del Río, where a procedure was performed on him, he returned home with a very high fever, with fluid emanating from what they identified as “three wounds.” In addition, they have indicated that in response to the worsening of Mr. Poblete Vilches’s health

<sup>122</sup> United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights. General Comment No. 14.

<sup>123</sup> Regarding the content of each element see: *Consejo de Estado, Colombia*, Third Section. Judgment of February 18, 2010; rad 18524; CP. Enrique Gil Botero. See also: Constitutional Court of Colombia. Judgment T- 536, 2007 (MP Humberto Antonio Sierra Porto), T- 421 of 2007 (MP Nilson Pinilla Pinilla), Constitutional Court. Judgment T- 635, 2001 (MP Manuel José Cepeda Espinosa).

situation they consulted a private physician three days later who indicated that he had a complicated situation with fever; she diagnosed him with septicemic shock and bilateral bronchopneumonia.<sup>124</sup>

127. Without prejudice to the considerations made on the lack of informed consent at the moment of performing the procedure, the Commission does not have sufficient information to show that the situation of Mr. Poblete Vilches was the result of inadequate medical care in the context of the first admission to the hospital.

128. Nonetheless, the Commission observes that there are several elements to take into consideration regarding the decision to discharge Mr. Poblete Vilches.

129. The Commission notes first of all that the very seriousness of his diagnosis – which included pneumonia and septic shock, only three days after he was discharged from the hospital – is an indication that Mr. Poblete Vilches should have remained hospitalized. In addition, the Commission notes that the lack of information on the procedure that was performed on Mr. Poblete Vilches could have had a negative impact on the family’s difficulties providing the care he needed after he was discharged from the hospital. The Commission observes that the clinical record does not show that any information was given to Mr. Poblete Vilches’s family members about the care he needed or about his diagnosis and prognosis at the time he was discharged. To the contrary, the family members have recounted that when called they were only asked to pick up Mr. Poblete Vilches and told that they could not have a hospital ambulance for his transfer. The Commission observes, moreover, that, as discussed below, there are indicia of structural deficiencies at the Hospital Sótero del Río in terms of the availability of beds and sufficient infrastructure. This information, together with the serious diagnosis received days later, suggests that the discharge of Mr. Poblete Vilches may have been due to those structural conditions and not to his health needs.

130. The Commission also observes that no explanation was obtained immediately after the death, or in the context of the criminal investigation in the case that would allow one to understand the reasons for Mr. Poblete Vilches’s severe deterioration from the moment he was discharged and for the three days following until his re-admission to the hospital in extremely critical condition.

131. Based on all the above information examined as a whole, the Commission considers that there is a sufficient basis to infer that the decision to discharge Mr. Poblete Vilches and the way in which it was done could have contributed to his rapid deterioration in the days immediately after his exit from the hospital and his subsequent death after being admitted the second time.

### **2.2.2 With respect to the medical care offered when he was admitted to the hospital the second time**

132. The Commission established that on February 5, 2001, after the diagnosis by the private physician who attended to Mr. Poblete Vilches, he was admitted once again to the Hospital Sótero del Río. Mr. Poblete Vilches’s diagnosis was extremely critical upon the second admission, including septic shock and pneumonia, among other organ failures. According to the facts proven, in the section of the medical record on the second admission it is noted that he is a “Patient to ICU for ventilatory support.” In the same section it indicates “No availability currently in medical or surgical ICU. Will be given intermediate care until an ICU bed is available.” This situation of lack of beds in the

<sup>124</sup> **Annex 6.** Criminal complaint filed November 12, 2001 by Blanca Margarita Tapia Encina and Cesia Poblete Tapia before the First Civil Court (attached to the communication from the State of September 23, 2008); **Annex 7.** Criminal complaint filed by Vinicio Marco Antonio Poblete Tapia on October 7, 2005 before the First Civil Court (attached to the communication from the State of September 23, 2008); **Annex 10.** Statement by Sandra Zoraida Castillo Momtufar of December 3, 2003 before the First Civil Court (attached to the communication from the State of September 23, 2008); **Annex 11.** Rp. issued by Sandra Castillo Momtufar on April 2, 2001 (attached to the communication from the State of September 23, 2008); and, **Annex 4.** Statement by Vinicio Marco Antonio Poblete Tapia of April 6, 2006 before the First Criminal Court (attached to the communication from the State of September 23, 2008).

ICU persisted throughout the day on February 6, 2001, and Mr. Poblete Vilches died in the early morning hours of February 7, 2001.

133. According to these facts, the Commission observes that even though, considering Mr. Poblete Vilches's diagnosis he needed intensive care in the ICU, due to the lack of beds for more than 24 hours he received "intermediate" treatment. This decision, as indicated in the section on informed consent, occurred without the family members effectively understanding the situation and without exploring other alternatives, such as, for example, transferring Mr. Poblete Vilches to another medical center to receive the intensive treatment he needed.

134. In a similar case, the European Court recently established that for the determination on whether the State breached the material aspect of the right to life, it corresponds to evaluate if the authorities did everything that could be reasonably expected from them and, in particular, if they satisfied the obligation to protect the patient<sup>125</sup>. In the same case, it established that in order to declare the substantive violation of the right to life, it does not have to speculate on the possibilities of survival of the victim, but it is sufficient to establish the existence of a deficiency in the public service of the hospital<sup>126</sup>.

135. In the same line, the Commission considers that for purposes of determining the international responsibility of the State for failing to uphold one of the principles associated with the right to health and tied by its interconnectedness to the rights to life and integrity, it is not necessary to establish the cause of death by clear and convincing evidence. It is sufficient to determine that even though the treatment indicated was the intensive one with the infrastructure of the ICU, it wasn't possible to provide it due to the shortcoming at the public hospital that consisted of the lack of beds in that unit, without any corrective or alternative measure being adopted so that Mr. Poblete Vilches could receive care in keeping with his health needs. As a result, the Commission considers that there were measures that the State, through the public Hospital Sótero del Río, could have adopted and did not adopt in order to provide Mr. Poblete Vilches the treatment he needed in view of his condition.

136. Moreover, the Commission considers that all the circumstances analyzed caused in Mr. Poblete Vilches physical and mental suffering at the moment of being discharged in conditions of gravity, in the context of his stay at home with a rapid deterioration and in absence of information on the part of his relatives on how to take care of him, and during his stay at the Hospital after his second entry until the moment of his death.

### 2.3 Conclusion

137. In view of the foregoing considerations, the Commission considers that both the decision to discharge Mr. Poblete Vilches from the public hospital and the failure to provide the intensive treatment he required in his second admission to the same hospital allow one to conclude that the State is responsible for violating the rights to life, humane treatment, and health established at Articles 4 and 5 of the American Convention, in conjunction with Article 1(1) of the same instrument, to the detriment of Mr. Vinicio Antonio Poblete Vilches.

### 3. The right to humane treatment for the alleged mistreatment received by Mr. Poblete Vilches and his family members (Article 5 of the American Convention)

<sup>125</sup> ECHR. Case Lópes de Sousa Fernandes v. Portugal. December 15, 2015. Para. 110.

<sup>126</sup> ECHR. Case Lópes de Sousa Fernandes v. Portugal. December 15, 2015. Para. 114.

138. The petitioners alleged that Mr. Poblete Vilches was mistreated and tortured at the Hospital Sótero del Río. In addition, they argued that the family members were also accorded treatment at odds with their dignity.

139. In this regard, Ms. Cesia Leyla Poblete Tapia stated that:

From outside we would hear when my father would shot and ask for us to take him away from that place, the few times we were able to see my father they had him tied down by the feet and hands and he asked us to take him away from that place.<sup>127</sup>

140. For his part, Mr. Vinicio Poblete Tapia testified:

On January 23 ... a nightmare began for my father because ... they began to tie my father down by the feet and hands with thick cables, it was a kind of torture that my father received, he was drugged, unconscious.<sup>128</sup>

141. A grandson of Mr. Vinicio Antonio Poblete Vilches testified:

I went to see my grandfather, it struck me that they had tied him by the feet and hands to the bars of the bed with catheters; in addition he was sedated.... On one of these visits my grandfather reacted, and he told me, "Jorgito get me out of here because they want to kill me."<sup>129</sup>

142. Despite these statements, the Commission does not have additional elements that allow it to establish as proven, and, therefore, to effectuate a legal analysis of the alleged mistreatment suffered by Mr. Poblete Vilches and his family. Nonetheless, the Commission takes note that since the complaint was filed on November 12, 2001, the State knew that purportedly, during Mr. Poblete Vilches's stay at the Hospital Sótero del Río, both he and his family members were subjected to acts incompatible with their integrity. In that regard, the Commission will analyze whether the State of Chile fulfilled the duty to investigate those allegations in the section on the rights to judicial guarantees and judicial protection.

**4. The rights to judicial guarantees and judicial protection (Articles 8(1) and 25(1) of the American Convention)**

143. Article 8 (1) of the American Convention provides:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

...

144. Article 25 of the American Convention indicates, at the relevant part:

<sup>127</sup> **Annex 3.** Statement by Cesia Leyla Siria Poblete Tapia of September 14, 2006 before the First Civil Court (attachment to the communication from the State of September 23, 2008).

<sup>128</sup> **Annex 4.** Statement by Vinicio Marco Antonio Poblete Tapia of April 6, 2006 before the First Criminal Court (attachment to the communication from the State of September 23, 2008).

<sup>129</sup> **Annex 5.** Statement by Jorge Alejandro Fuentes Poblete of June 12, 2007, before the First Civil Court (attachment to the communication from the State of September 23, 2008).

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

145. The Court has indicated that under the American Convention:

States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8 (1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1).<sup>130</sup>

146. The case-law of the inter-American system has established that while the obligation to investigate is an obligation of means and not of results, it should be assumed by the state as a legal duty of its own, and not as a mere formality preordained to be ineffective<sup>131</sup>, or as merely a step taken by of private interests that depends on the initiative of the victims or their family members, or as a private offer of evidence.<sup>132</sup>

147. The Court has determined that the investigations carried out by the state must be done with due diligence such that the investigations are carried out by the means available and are aimed at determining the truth.<sup>133</sup> On this point the Inter-American Commission has stated:

[T]he fact that no one has been convicted in the case or that, despite the efforts made, it was impossible to establish the facts does not constitute a failure to fulfill the obligation to investigate. However, in order to establish in a convincing and credible manner that this result was not the product of a mechanical implementation of certain procedural formalities without the State genuinely seeking the truth, the State must show that it carried out an immediate, exhaustive and impartial investigation.<sup>134</sup>

148. The Inter-American Court has established that a prolonged delay may itself constitute a violation of judicial guarantees<sup>135</sup>, thus it is up to the state to both state and prove the reason why it has required more time than would be reasonable to hand down a final judgment in a

<sup>130</sup> I/A Court HR, see *Case of Godínez Cruz v. Honduras*. Preliminary Objections. Judgment of June 26, 1987. Series C No. 3, para. 93. See also *Case of the Rochela Massacre v. Colombia*, *supra* note 7, para. 145, and *Case of the Miguel Castro Castro Prison v. Peru*, Judgment of November 25, 2006. Series C No. 160, paras. 183.

<sup>131</sup> I/A Court HR, *Case of Velásquez Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C No. 4, para. 177; I/A Court HR, *Case of Cantoral Huamaní and García Santa Cruz v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 131; and I/A Court HR, *Case of Zambrano Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 120.

<sup>132</sup> I/A Court HR, *Case of Velásquez Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C No. 4, para. 177; I/A Court HR, *Case of Zambrano Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 120.

<sup>133</sup> I/A Court HR, *Case of García Prieto et al. v. El Salvador*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 168, para. 101.

<sup>134</sup> IACHR, 1997 Annual Report, Report No. 55/97, *Case of 11,137 (Juan Carlos Abella et al.)*, Argentina, para. 412. On the same issue, see also IACHR, 1997 Annual Report, Report No. 52/97, *Case of 11,218 (Arges Sequeira Mangas)*, Nicaragua, paras. 96 and 97.

<sup>135</sup> I/A Court HR, *Case of García Asto and Ramírez Rojas v. Peru*. Judgment of November 25, 2005. Series C No. 137, para. 166; *Case of Gómez Palomino v. Peru*. Judgment of November 22, 2005. Series C No. 136, para. 85; *Case of the Moiwana Community v. Suriname*. Judgment of June 15, 2005. Series C No. 124, para. 160.



particular case.<sup>136</sup> The reasonableness of the time should be weighed in relation to the total duration of the criminal proceeding. In criminal matters the time begins when the first procedural act is filed directed against a named person as the person likely responsible for a certain criminal offense and ends when the final and firm judgment is handed down.<sup>137</sup>

149. In their consistent case-law, the organs of the inter-American system have taken into consideration three factors that are relevant for the analysis of the instant case, namely: (a) the complexity of the matter, (b) the conduct of the judicial authorities, and (c) the procedural activity of the interested party.<sup>138</sup> The Court has also established that in addition to these elements, one should take into account the interest at stake and the impact caused of the duration of the procedure on the situation of the person involved, in the following terms:

the Court finds it pertinent to clarify that, in this analysis of reasonableness, the adverse effect of the duration of the proceedings on the judicial situation of the person involved in it must be taken into account; bearing in mind, among other elements the matter in dispute. If the passage of time has a relevant impact on the judicial situation of the individual, the proceedings should be carried out more promptly so that the case is decided as soon as possible.<sup>139</sup>

150. The Commission will analyze whether, through the investigations begun domestically, the State has satisfied its obligation to investigate the facts of the instant case pursuant to the standards described above. This analysis will be done, first, with respect to due diligence in the investigation, and second with respect to implementation of the guarantee of a reasonable time.

#### **4.1 On the duty to investigate with due diligence**

151. The Commission observes that the first criminal complaint was filed by the family members of Mr. Poblete Vilches in November 2001. Due to several courts finding themselves without jurisdiction, it was only in February 2002 that a decision was made as to which judicial authority had jurisdiction to hear the above-referenced criminal complaint. Once the jurisdiction was determined, the Commission does not have any information indicating that any investigative steps were taken until October 2002, eight months later, when the Hospital Sótero del Río was asked for the first time for a fundamental piece of evidence, consisting of Mr. Poblete Vilches's clinical file.

152. According to the evidence in the record before the Commission, it was only in 2003, more than a year-and-a-half after the complaint was filed, that some persons were called to testify. The Commission observes that from 2003 to 2008, i.e. during a five-year period, the authorities in charge of the investigation did no more than receive some statements and request one expert

<sup>136</sup> I/A Court HR, Case of Ricardo Canese v. Paraguay. Judgment of August 31, 2004. Series C No. 111, para. 142.

<sup>137</sup> I/A Court HR, Case of López Álvarez v. Honduras. Judgment of February 1, 2006. Series C No. 141, para. 129; Case of Acosta Calderón v. Ecuador. Judgment of June 24, 2005. Series C No. 129, para. 104; and Case of Tibi v. Ecuador. Judgment of September 7, 2004. Series C No. 114, para. 168.

<sup>138</sup> IACHR, Report on the Merits No. 77/02, Waldemar Gerónimo Pinheiro and José Víctor dos Santos (Case 11,506), December 27, 2002, para. 76. See also I/A Court HR, Case of López Álvarez. Judgment of February 1, 2006. Series C No. 141, para. 132; Case of García Asto and Ramírez Rojas. Judgment of November 25, 2005. Series C No. 137, para. 166; and Case of Acosta Calderón. Judgment of June 24, 2005. Series C No. 129, para. 105; UN Doc. CCPR/C/GC/32 of August 23, 2007, Human Rights Committee, General Comment No. 32, para.35.

<sup>139</sup> I/A Court HR, Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 192, para. 155. See also, I/A Court HR, Case of Kawas Fernández v. Honduras. Merits, Reparations and Costs. Judgment of April 3, 2009 Series C No. 196, paras. 112 and 115; I/A Court HR, Case of Anzualdo Castro v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of September 22, 2009. Series C No. 202, para. 156; I/A Court HR, Case of Garibaldi v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 23, 2009. Series C No. 203, para. 133; I/A Court HR, Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2009. Series C No. 209, para. 244. See also, IACHR. Report 83-10. 12,584. Merits. July 13, 2010. Para. 77.

medical report. The Commission considers that the delay in beginning to take the steps aimed at producing evidence in the investigation necessarily had an impact on the possibilities of clarifying the facts, for as the Inter-American Court has established repeatedly, it is in the initial stages of the investigation in which all measures should be taken to safeguard the evidence.

153. The Commission also observes that despite the request from the family on at least three occasions to have the exhumation of the body and the respective autopsy ordered, to date it has not been done. The State has not offered an explanation that would enable one to understand the lack of response with respect to the request for an autopsy, even though it is crucial evidence<sup>140</sup> for establishing the causes of death of Mr. Poblete Vilches and the possibility that his death occurred as the result of negligence by the medical personnel at the hospital. In addition, an autopsy would have made it possible to investigate the acts of torture and cruel treatment alleged by Mr. Poblete Vilches's family members on several occasions.

154. The Commission observes that the expert medical report by the Forensic Medicine Service (Servicio Médico Legal), which indicates that there was no breach of the professional standards<sup>141</sup> and that Mr. Poblete Vilches died as the result of his serious health situation, does not get into a detailed analysis as to whether the decision to discharge Mr. Poblete Vilches was in keeping with his health needs. Nor does it provide an explanation of the severe deterioration suffered by Mr. Poblete Vilches just three days after leaving the hospital, consisting of pneumonia and septicemia. Along the same lines, that report only affirms that in the second hospital admission it was not possible to give Mr. Poblete Vilches intensive care treatment but only intermediate care treatment, due to the lack of beds, but it does not offer any analysis of the way in which this situation may or may not have led to Mr. Poblete Vilches's death in the ensuing hours. Despite these omissions in the expert medical report, the Commission does not have information that indicates that corrective measures were adopted to obtain an expert opinion that responds to these essential questions to determine possible responsibilities for the death of Mr. Poblete Vilches.

155. The Commission also takes note that the statement by the accused Luis Carvajal Freire was never taken, even though the First Civil Court verified that he continued working at the Hospital Sótero del Río. Nor were some of the statements requested in the proceeding by Mr. Poblete Vilches's next-of-kin obtained; nonetheless, according to them, those statements might offer information on the care provided to their loved one, as well as his condition when discharged.

156. The Commission emphasizes that despite these evidentiary omissions and even though fundamental investigative steps were not pursued, the judicial authorities ordered the case dismissed on two occasions, in December 2006 and June 2008, under the argument that "based on the facts gathered in the proceedings, the existence of the alleged crime has not been sufficiently established." In addition, the Commission observes that since the second re-opening of the investigation it has no information that allows it to establish that efforts have been made to correct those omissions. Indeed, the Commission does not have information about the current state of the investigations.

157. Finally, the Commission has argued that in the cases in which human rights violations have been committed by public officials, the states also have the obligation to investigate the systemic failures that led to those violations, so as to avoid their repetition.<sup>142</sup> In addition, both the inter-American system and the United Nations system have recognized that states must hold

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<sup>140</sup> See I/A Court HR. Ximenes Lopes. Para. 187; and IACHR. Report on the Merits No. 119/10, Case 12,004, Marco Bienvenido Palma Mendoza et al, Ecuador, October 22, 2010, para. 118.

<sup>141</sup> **Annex 48.** Forensic Medical Service, Pericia médico legal No. 140-2005 of June 8, 2006 (attached to communication from the State of September 23, 2008).

<sup>142</sup> IACHR, Report No. 80/11, Case 12,626, Jessica Lenahan (Gonzales) et al., United States, Merits, July 21, 2011, para. 17. IV 170.

public officials accountable – administratively, disciplinarily, or criminally – when their actions are not in keeping with the law.<sup>143</sup>

158. In this respect, the IACHR notes that the family members of Mr. Poblete Vilches have indicated repeatedly that they did not give consent for the procedure performed on January 26, 2001. In addition, from a mere reading of the medical record it is clear that the supposed consent did not satisfy the minimum characteristics to be able to be considered adequate. One also learns from reading the medical record that the physician in charge in Mr. Poblete Vilches's second admission explicitly indicated that he was not certain that the family members had understood. Despite that, there was no investigation into the possible criminal or administrative liabilities arising from this situation.

159. Based on all these elements, taken together, the Commission considers that the Chilean State did not investigate the facts of the instant case with due diligence.

#### 4.2 On the duty to investigate in a reasonable time

160. With respect to the alleged breach of the judicial guarantee of criminal proceedings going forward in a reasonable time, the Commission will examine the four criteria established in the relevant case-law: (i) the complexity of the matter; (ii) the procedural activity of the interested party; (iii) the conduct of the judicial authorities; and (iv) the impact on the legal situation of the person involved in the proceeding.<sup>144</sup>

161. The Court has taken into account several criteria for determining the complexity of a matter. These include the complexity of the evidence, the plurality of plaintiffs or the number of victims, the time elapsed since the violation, the characteristics of the remedy as set forth in the domestic legislation, and the context in which the violation occurred.<sup>145</sup>

162. The Commission observes that the instant case has to do with an alleged manslaughter to the detriment of a single victim, which occurred in a public hospital, in which some physicians were purportedly involved. The Commission does not find any grounds to consider that the instant case involved a level of complexity that would justify the more than 14 years during which it has remained pending.

163. As regards the activity of the family members, the Commission observes that it was at their initiative, through the criminal complaints lodged, that the investigations were begun and given impetus. There is no information whatsoever in the record that would allow one to consider that the delay was due to their acts or omissions. To the contrary, one can glean that most of the judicial actions took place at the initiative of the family members. In those petitions they requested repeatedly, among other things, that the court carry out the relevant investigative steps for obtaining the statements from persons who potentially bear liability and witnesses, as well as the exhumation and autopsy of the corpse of Mr. Poblete Vilches. Moreover, on two occasions they asked that the case be reactivated after it was dismissed on more than one occasion.

164. With respect to the activity of the judicial authorities, the Commission refers to the analysis in the previous section on the breach of the duty to investigate with due diligence. Moreover,

<sup>143</sup> IACHR, Report No. 80/11, Case 12,626, Jessica Lenahan (Gonzales) et al., United States, Merits, July 21, 2011, para. 178; IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II, Doc. 68 (January 20, 2007), para. 77; United Nations, *Crime prevention and criminal justice measures to eliminate violence against women*, resolution adopted by the United Nations General Assembly, A/RES/52/86, February 2, 1998, Annex, Section II. IV 170.

<sup>144</sup> See *Case of Valle Jaramillo et al. v. Colombia*. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 192, para. 155, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 255. Tgg1298

<sup>145</sup> See, *inter alia*, *Case of Genie Lacayo v. Nicaragua. Preliminary Objections*. Judgment of January 27, 1995. Series C No. 21, para. 78, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 260. Tgg1 298

the Commission underlines that the reopening of the investigation in two opportunities has not activated the realization of procedures in order to correct the deficiencies of the investigation. On the contrary, since the reopening in 2008 and up to date, there is no information on the activity of the file besides the responses given by the Supreme Court of Justice in view of the requests of intervention on the part of the family members.

165. The Commission considers that in view of what has been indicated thus far, it is not necessary to analyze the fourth prong of the analysis regarding reasonable time related to the impact on the legal situation of the interested parties. Even so, the Commission notes that in such cases, the outcome of the criminal proceeding may impact prospects for reparation.

166. In conclusion, the Commission considers that the investigations carried out domestically did not satisfy the guarantee of reasonable time.

### 4.3 Conclusion

167. In view of the foregoing considerations, the Commission concludes that the State of Chile has not investigated the facts of the instant case with due diligence or within a reasonable time. Accordingly, the Commission concludes that the State of Chile violated the rights to judicial guarantees and judicial protection established at Articles 8 and 25 of the American Convention in relation to the obligations established at Article 1(1) of the same instrument.

## 5. The right to humane treatment respect the family members (Article 5 of the American Convention)

168. The right to humane treatment, concealed in article 5(1) of the American Convention establishes: “Every person has the right to have his physical, mental, and moral integrity respected”.

169. The case law of the Inter-American Court has established that the victims’ next of kin may, in turn, be affected by the violation of their right to mental and moral integrity.<sup>146</sup> Thus, the Inter-American Court has considered the right of the victims’ next of kin to mental and moral integrity violated because of the additional suffering they have undergone as a consequence of the specific circumstances of the violations committed against their loved ones<sup>147</sup> and the acts or omissions by the State authorities in relation to the facts.<sup>148</sup>

170. In the present case the Commission has established that the relatives of Mr. Poblete did not provide an informed consent, did not have minimum information not they had the option to make decisions regarding the procedures and treatments given to his beloved one. Moreover, the Commission determined that the State did not adopt all the measures that reasonably could have adopted to provide Mr. Poblete the intensive treatment that the doctors said he required. The Commission also established that the domestic investigations were not diligent nor permitted the elucidation of what happened to their relatives. Based on all these factors, jointly considered, the Commission considers that it can infer the harm to the moral integrity of the family members of Mr.

<sup>146</sup> I/A Court H.R., *Case of Juan Humberto Sánchez v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 7, 2003. Series C No. 99, para. 101; *Case of the Las Dos Erres Massacre v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 24, 2009. Series C No. 211, para. 206; and *Case of Heliodoro Portugal v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 186, para. 163.

<sup>147</sup> I/A Court H.R., *Case of the Miguel Castro Castro Prison v. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, para. 335; *Case of Vargas Areco v. Paraguay*. Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 155, para. 96; and *Case of Goiburú et al. v. Paraguay*. Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153, para. 96.

<sup>148</sup> I/A Court H.R., *Case of Manuel Cepeda Vargas v. Colombia*. Preliminary Objections, Merits and Reparations. Judgment of May 26, 2010. Series C No. 213, para. 195.

Poblete Vilches and the consequent violation of Article 5.1 of the American Convention to their detriment.

V. **CONCLUSIONS**

171. Based on the foregoing considerations of fact and law, the Inter-American Commission concludes that the State of Chile is responsible for:

(i) The violation of the right of access to information on health matters, established at Article 13 of the Convention in relation to the rights to life, humane treatment, and health established at Articles 4 and 5 of the Convention, and to the obligations established at Article 1(1) of the same instrument, to the detriment of Vinicio Antonio Poblete Vilches and his family members;

(ii) The violation of the rights to life, humane treatment, and health established at Articles 4 and 5 of the American Convention in relation to the obligations established at Article 1(1) of the same instrument, to the detriment of Vinicio Antonio Poblete Vilches; and,

(iii) The violation of the rights to personal integrity, to judicial guarantees and judicial protection established at Articles 5, 8 and 25 of the American Convention in relation to Article 1(1) of the same instrument, to the detriment of the family members of Mr. Vinicio Antonio Poblete Vilches.

172. In light of the foregoing conclusions,

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS  
RECOMMENDS TO THE STATE OF CHILE, THAT IT**

1. Make full reparation to Mr. Vinicio Antonio Poblete Vilches's next-of-kin for the human rights violations found in this report, including appropriate compensation for the material and moral harm caused, as well as other measures of moral satisfaction.

2. Undertake a thorough and effective investigation into the human rights violations found in this report so that the next-of-kin of Mr. Poblete Vilches can know the truth of what happened and, if appropriate, so that the corresponding sanctions be imposed. To that effect, the State must continue with the investigation reopened in 2008 or, if the case, initiate a new investigation with the aim of overcoming the obstacles identifies in this report that have impeded effective access to justice.

3. Put in place mechanisms of non-repetition that include: (i) legislative, administrative, and other measures that may be required for implementing informed consent in the area of health in keeping with the standards established in this report; (ii) the measures needed, including budgetary measures, to ensure that the Hospital Sótero del Río has the resources and infrastructure needed to provide adequate care, particularly when intensive therapy is required; and (iii) the education and training measures for judicial officers regarding the duty to investigate possible liabilities arising from the death of a person as the result of inadequate health care.