

## The Justiciability of the Right to Health under the Conventionality Control of the Inter-American Court of Human Rights\*.

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Abstract IT: La giustiziabilità diretta dei diritti economici, sociali, culturali e ambientali è stata riconosciuta a partire dalla condanna del Cile nel caso Poblete Vilches davanti alla Corte interamericana dei diritti umani. Il lavoro si propone quindi di rispondere alla seguente domanda: come è stato trattato il diritto alla salute, nei casi in cui è stata riconosciuta la violazione dell'articolo 26 della Convenzione americana, dalla Corte interamericana dei diritti umani negli ultimi tre anni (2024, 2023 e 2022)? L'arco temporale cerca di analizzare solo i casi più recenti e di verificare l'evoluzione dell'interpretazione maggioritaria in relazione alla condanna cilena del 2018. A tal fine, la ricerca sarà costruita ed elaborata utilizzando il metodo dell'approccio induttivo, il metodo analitico procedurale e la tecnica bibliografica. Verranno analizzate le motivazioni delle decisioni pubblicate, senza però ignorare il contesto storico che ha preceduto le sentenze. Di conseguenza, è possibile constatare che l'opinione maggioritaria adottata dal 2018 (caso Poblete Vilches et al. contro Cile) è stata mantenuta, anche se non all'unanimità dai giudici, ratificando una giurisprudenza che presuppone la diretta giustiziabilità del diritto alla salute e la sua immediata applicabilità.

Abstract EN: The direct justiciability of Economic, Social, Cultural and Environmental Rights has been recognised since the Chilean conviction in the Poblete Vilches case before the Inter-American Court of Human Rights. Thus, the work aims to answer the following question: how has the right to health, in cases in which the violation of Article 26 of the American Convention has been recognized, been dealt with by the Inter-American Court of Human Rights in the last three years (2024, 2023 and 2022)? The time frame seeks to analyse only the most recent cases and verify the evolution of understanding in relation to the Chilean conviction in 2018. To this end, the research will be built and elaborated using the inductive approach method, the analytical procedural method, as well as the bibliographic technique. An analysis will be made of the reasons behind the published decisions, but without ignoring the historical context which preceded the judgements selected. As a result, it is possible to see that the majority view adopted since 2018 (Case of Poblete Vilches et al v. Chile) has been maintained, even if not unanimously by the judges, ratifying a jurisprudence that assumes the direct justiciability of the right to health and its immediate applicability.

Sommario: 1. Introduction. – 2. Historical context for the justiciability and enforceability of the right to health by the Inter-American Court of Human Rights. – 3. Recent convictions arising from violations of the right to health by

the Inter-American Court of Human Rights. – 4. The lessons learned from the judgments issued by the Inter-American Court of Human Rights. – 5. Conclusions.

## **1. Introduction.**

Economic, Social, Cultural and Environmental Rights (*Direitos Econômicos, Sociais, Culturais e Ambientais* - DESCAs) are part of the list of human rights that the American signatory States to the American Convention on Human Rights have recognised and committed to implementing, even if progressively. However, the commitment made by the States has received a new meaning with the change in interpretation by the Inter-American Court of Human Rights (IACtHR) regarding its justiciability and enforceability.

In this scenario, some of the States under the jurisdiction of the IACtHR have been condemned for violations of the right to health, based on the application of Article 26 of the American Convention on Human Rights. This study aims to answer the following question: how has the right to health been dealt with by the Inter-American Court of Human Rights in cases in which a violation of Article 26 has been recognised in the last three years (2024, 2023 and 2022)? The time frame seeks to analyse only the most recent cases and verify the evolution of understanding in relation to the Chilean conviction in 2018. To this end, the research will be constructed and elaborated using the inductive approach method, the analytical procedural method, as well as the bibliographical technique. An analysis will be made of the reasons behind the published decisions, but without ignoring the historical context which preceded the judgements selected.

To select the cases, it used the search tool provided by the Supreme Court of Justice of the Nation of Mexico (<https://corteidh.scjn.gob.mx/buscador/busqueda#>). The search was carried out on 6<sup>th</sup> September 2024 in two stages. The first used the filter "*Artículos de la Convención Americana sobre Derechos Humanos*" (Articles of the American Convention on Human Rights) to select the cases, delimiting by "*Artículo 26. Desarrollo Progressivo*" (Article 26. Progressive Development), "*Derechos económicos, sociales y culturales*" (Economic, Social and Cultural Rights) and "*Derecho a la salud*" (Right to Health), reaching 104 results (paragraphs) from a total of 6 different judgments. In a second step, the search was carried out using the "*Temas Relevantes*" (Relevant Topics) filter, delimiting by "DESCAs" and "*Derecho a la salud*" (Right to health), reaching 267 results (paragraphs) from a total of 18 different judgments and 2 advisory opinions. Having said that, it narrowed it down to a universe of 4 cases judged by the IACtHR in 2024, 2023 and 2022, which make up the subject of this article and will be presented below.

The work is divided into three stages: first, a brief history of the justiciability and enforceability of the right to health by the IACtHR, showing what preceded

the decisions analyzed by this research. The second stage presents the cases identified by the search. Finally, the aim is to extract some lessons in relation to the right to health from the convictions resulting from the application of Article 26 of the American Convention. This work seeks to show how the IACtHR has assessed the responsibility of States and interpreted the normative provision in the construction of its jurisprudence on the theme.

## **2. Historical context for the justiciability and enforceability of the right to health by the Inter-American Court of Human Rights.**

The main instrument of the Human Rights Protection System at the regional level in the Americas is the American Convention on Human Rights, which was signed in November 1969 and entered into force on July 18, 1978, following the deposit of the eleventh instrument of ratification by an OAS Member State<sup>1</sup>.

In order to protect human rights on the American continent, the Convention created two institutions competent to hear complaints of human rights violations: the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR). On May 22, 1979, the States Parties to the American Convention elected the first judges to make up the IACtHR, which began its work at the end of June 1979.

Although the text of the Convention has remained unchanged since its formulation, the first case in which an American state was condemned for directly violating a right that is included in the Economic, Social, Cultural and Environmental Rights (DESCA), under Article 26 of the American Convention, was the *Lagos del Campo v. Peru* case (IACtHR, 2017). The judgment is a milestone for recognizing the direct justiciability and immediate enforceability of DESCAs:

*Los jueces Ferrer Mac-Gregor y Caldas emitieron votos respaldando el avance jurisprudencial hacia la justiciabilidad directa de los DESC. Asimismo, desarrollaron argumentos para defender la relación existente entre el derecho de asociación del artículo 16 de la Convención Americana y el derecho de asociación en materia laboral, consagrado en artículo 26 del mismo texto, a la luz de lo dispuesto en el artículo 45.c de la Carta de la OEA.*

*En particular, el juez Ferrer Mac-Gregor reiteró que la interpretación evolutiva del artículo 26 abre paso a la “justiciabilidad plena y directa de los derechos económicos, sociales,*

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<sup>1</sup> Twenty-five American nations have ratified or acceded to the Convention: Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Trinidad and Tobago, Uruguay and Venezuela. Trinidad and Tobago denounced the American Convention on Human Rights on May 26, 1998, as did Venezuela, which denounced the Convention on September 10, 2012.

*culturales y ambientales”, y a la protección de derechos no establecidos expresamente en la Convención – consagrados en el artículo 19.6 –, además de que se refiere – por primera vez – a la protección de la libertad de asociación en materia laboral – sin ligarla obligatoriamente a los derechos y protecciones existentes en materia sindical –, en la medida en que se aborda, por primera vez, el estudio de la violación del ya mencionado artículo 26 bajo el marco del artículo 29, dando lugar al nacimiento de una obligación en cabeza del Tribunal de remitirse a la Carta de la OEA para alcanzar la efectividad plena de todos los DESC. El juez Caldas precisó el alcance que el principio iura novit curia tiene en estos casos controvertidos donde cientos de derechos no se involucraron en la litis desde el informe de admisibilidad emitido por la Comisión Interamericana (Vera, 2018, p. 227)<sup>2</sup>.*

However, regarding the right to health, it cannot ignore the existence of previous convictions in which the violation by States was recognized indirectly, cases in which protection occurred through Civil and Political Rights, such as the right to life and personal integrity (Maas; Bosa, 2023, p. 7). An example of this is the case of *Ximenes Lopes v. Brazil* (IACtHR, 2006, p. 55-56), which dealt with the state's responsibility for the death of a victim admitted to a psychiatric clinic. The victim, who was mentally disabled, was tortured and murdered in the custody of the state, which failed to provide the necessary medical care to protect his health, violating his right to life and personal integrity (enshrined in articles 4 and 5 of the Convention), once the Brazilian State's duty to regulate and supervise medical care was recognized.

Another judgment that demonstrates the IACtHR's historical understanding of indirect violations is the case of *Artavia Murillo v. Costa Rica* (IACtHR, 2012, p. 43-49), in which the State was held responsible for the effects caused to a group of people by the general ban against the practice of *in vitro* fertilization. The practice was authorized and regulated between 1995 and 2000, but the regulations were declared unconstitutional by the country's Constitutional Chamber, prohibiting the procedure. The IACtHR held that this position

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<sup>2</sup> “Judges Ferrer Mac-Gregor and Caldas cast votes supporting the jurisprudential advance towards the direct justiciability of DESCAs. They also developed arguments to defend the relationship between the right of association in Article 16 of the American Convention and the right of association in labor matters, enshrined in Article 26 of the same text, in light of the provisions of Article 45.c of the OAS Charter.

In particular, Judge Ferrer Mac-Gregor reiterated that the evolving interpretation of Article 26 opens the way to the ‘full and direct justiciability of Economic, Social, Cultural and Environmental Rights’, and to the protection of rights not expressly set out in the Convention - enshrined in Article 19.6 -, in addition to the fact that it refers - for the first time - to the protection of freedom of association in labor matters - without obligatorily linking it to existing rights and protections in trade union matters -, insofar as it addresses, for the first time, the study of the violation of the aforementioned Article 26 within the framework of Article 29, giving rise to the birth of an obligation on the Court to refer to the OAS Charter in order to achieve the full effectiveness of all DESCAs. Judge Caldas clarified the scope of the principle *iura novit curia* in these controversial cases where hundreds of rights have not been involved in the dispute since the admissibility report issued by the Inter-American Commission” [free translation].

violated the right to private and family life, personal integrity in relation to autonomy of will, sexual health and the right to enjoy the benefits of scientific and technological progress, expressing the duty of the State to regulate and supervise the provision of health services for the effective protection of the rights to life and personal integrity (IACtHR, 2012, p. 47).

It should be noted that jurists still differ on the systemic integration of instruments other than the American Convention in order to extract an interpretation that recognizes an obligation to signatory States, as observed by Narváez and Ramírez (2017, p.309-310), who are concerned about the lack of consent or even possible opposition to this incorporation. Others, such as Piovesan and Borges (2019, p. 10-12), believe that this reference to elements external to the American Convention is positive in terms of allowing for greater protection of the human rights it guarantees and contributes to harmonizing international law with the formation of a true international *corpus iuris*.

The fact is that the change in the jurisprudence of the IACtHR was significant with the judgment of Lagos del Campo v. Peru (IACtHR, 2017). This case relates to the dismissal of Mr. Alfredo Lagos del Campo on July 1, 1989. Peruvian legislation required that serious misconduct attributed to an employee be duly substantiated, and the Court of Appeals classified the dismissal as "legal and justified". The behaviour was his response to an interview given by the victim as president-elect of the General Assembly of the Electoral Committee of the Industrial Community of the company Ceper-Pirelli, where he worked (IACtHR, 2017, p. 26-27).

Subsequently, Mr. Lagos del Campo filed several appeals, all of which were denied or declared inadmissible. As a result, Mr. Lagos del Campo was unable to access the social security benefits that depended on his employment. The IACtHR found, in this scenario, that the State did not adopt the appropriate measures to protect the worker's right, even if the violation of the right was due to the action of a third party, because his right was not protected (he did not re-establish his job, nor did he receive any compensation or the corresponding benefits, losing his job, the possibility of receiving a pension and exercising his rights as a workers' representative). Finally, the IACtHR declared a violation of the rights to job stability and freedom of association, interpreting Article 26 in relation to Articles 1.1, 13, 8 and 16 of the American Convention (IACtHR, 2017, p. 69).

Although it does not deal with the right to health, which is the subject of this paper, its importance stems from the change in jurisprudence seen in this judgment, which held a State signatory to the American Convention directly responsible for the application of article 26. Respect for this provision involves various rules of the OAS Charter that derive from it, such as the Protocol of San Salvador (which establishes the content of the DESCAs), in other words, a

set of rights that can be inferred depending on the argumentative technique used (Vera, 2018, p. 192-193). Since the 2017 decision mentioned above, other judgments have corroborated the understanding that ensures greater protection for the DESCAs.

It was the following year, in 2018, that the IACtHR recognized for the first time the violation of the right to health and its viability for direct justiciability based on Article 26 of the American Convention, understanding it as a subjective right. In this case, the Inter-American Court upheld health as an interdependent and indivisible human right, disregarding any distinction between individual and collective rights. This is the case of *Poblete Vilches et al. v. Chile* (IACtHR, 2018), in which the Court was confronted with the clinical negligence of the service provided to the victim, Mr. Poblete Vilches, during the time he was treated in a public hospital in Chile, where he did not receive the emergency care he needed, which resulted in his death. The case resulted in recognition of the interdependence and justiciability of the right to health:

*[...] del contenido del artículo 26 se desprenden dos tipos de obligaciones. Por un lado, la adopción de medidas generales de manera progresiva y por otro lado la adopción de medidas de carácter inmediato. Respecto de las primeras, a las cuales hizo referencia el Estado en el presente caso, la realización progresiva significa que los Estados partes tienen la obligación concreta y constante de avanzar lo más expedita y eficazmente posible hacia la plena efectividad de los DESCAs durante su periodo de implementación, dichas obligaciones se priven de contenido específico, lo cual tampoco implica que los Estados puedan aplazar indefinidamente la adopción de medidas para hacer efectivos los derechos en cuestión, máxime luego de casi cuarenta años de la entrada en vigor del tratado interamericano. Asimismo, se impone por tanto, la obligación de no regresividad frente a la realización de los derechos alcanzados. Respecto de las obligaciones de carácter inmediato, éstas consisten en adoptar medidas eficaces, a fin de garantizar el acceso sin discriminación a las prestaciones reconocidas para cada derecho. Dichas medidas deben ser adecuadas, deliberadas y concretas en aras de la plena realización de tales derechos. En virtud de lo anterior, las obligaciones convencionales de respeto y garantía, así como de adopción de medidas de derecho interno (artículos 1.1 y 2), resultan fundamentales para alcanzar su efectividad<sup>3</sup> (IACtHR, 2018, p. 33-34).*

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<sup>3</sup> “[...] the content of Article 26 gives rise to two types of obligations. On the one hand, the adoption of general measures in a progressive manner and, on the other hand, the adoption of measures of an immediate nature. With regard to the former, to which the State referred in the present case, progressive realization means that the States Parties have a concrete and constant obligation to advance as expeditiously and effectively as possible towards the full effectiveness of the DESCAs during their implementation period, These obligations have no specific content, which does not imply that States can indefinitely delay the adoption of measures to make the rights in question effective, especially after almost forty years since the entry into force of the inter-American treaty. As such, the obligation of non-return to the realization of the rights achieved is imposed. Regarding the obligations of an immediate nature, these consist of adopting effective measures to guarantee access without discrimination to the services recognized for each right. These measures must be appropriate, deliberate and concrete in order to achieve the full realization of these rights. In view of the above, the

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Next, it will look at the cases involving the violation of article 26 due to the right to health in the last three years (2024, 2023 and 2022), according to the object of the research.

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conventional obligations of respect and guarantee, as well as the adoption of domestic law measures (Articles 1.1 and 2), are fundamental to achieving their effectiveness” [Free translation].

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### **3. Recent convictions arising from violations of the right to health by the Inter-American Court of Human Rights.**

As stated in the introduction, this research was based on an examination of the most recent cases involving the right to health in the jurisdiction of the IACtHR, more precisely with the condemnation of States subject to its jurisdiction based on the application of article 26 of the American Convention in the last 3 years (2024, 2023 and 2022). To select the cases, it used the search tool provided by the Supreme Court of Justice of Mexico, which was consulted on the website <https://corteidh.scjn.gob.mx/buscador/busqueda#> on 09/06/2024. The result identified four cases, which will be discussed below.

The first of these was the case of Valencia Campos et al. v. Bolivia (IACtHR, 2022b), which dealt with serious human rights violations that occurred during a police operation in December 2001. The case involved arbitrary detentions, torture and other cruel treatment, including sexual violence, during a nighttime search and seizure procedure, actions committed by state agents that affected 26 victims, including children and women. The facts that gave rise to the lawsuit stemmed from a robbery of a cash-in-transit truck in La Paz, resulting in the death of two police officers, an incident that led the Bolivian police to illegally carry out search and seizure operations in four homes, four days after the incident. During these actions, 17 people were detained and subjected to physical and psychological violence. In addition, they were presented to the media as guilty before any formal judicial process.

The victims' right to health was an important point of the decision, which highlighted the case of a victim who suffered an abortion due to sexual violence suffered during her detention and did not receive proper medical care, which characterized a violation of the right to health. Another victim died due to a lack of adequate medical care after suffering a Cerebral Vascular Accident, also constituting a violation of the right to life and health. The IACtHR pointed out that: “[...] *el Estado tiene el deber, como garante de la salud de las personas bajo su custodia, de proporcionar a los detenidos revisión médica regular y atención y tratamiento médicos adecuados cuando así se requiera*”<sup>5</sup> (IACtHR, 2022b, p. 71). The judgment, in addition to recognizing the violation of rights by acts of torture, violating the right to physical integrity, liberty, dignity and due process of law, also condemned the violation of the right to health enshrined in Article 26 in relation to Article 1.1 (IACtHR, 2022b, p. 100).

Another judgment taken from the research was the case of Brítez Arce et al. v. Argentina (IACtHR, 2022a). The case involves the responsibility of the Argentine State for the death of Cristina Brítez Arce in 1992, when she was more than 40 weeks pregnant. Cristina was admitted to the Sardá Maternity Hospital with various complaints related to her state of health and, after being

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<sup>5</sup> “[...] the State has the duty, as guarantor of the health of persons in its custody, to provide detainees with regular medical review and adequate medical care and treatment when required” [free translation].

diagnosed with fetal death, she underwent an induced childbirth. A few hours later, she died (IACtHR, 2022a, p. 9). The Court concluded that Cristina Brítez Arce was a victim of obstetric violence (gender-based violence that occurs during access to health services in the context of pregnancy, childbirth or the postpartum period). The victim did not receive adequate medical care, nor was she informed about treatment alternatives and their implications. This scenario exposed her to risks that culminated in her death (IACtHR, 2022a, p. 25-26). The judgment highlighted the State's obligation to guarantee adequate and specialized health services for pregnant women, in order to prevent maternal mortality (IACtHR, 2022a, p. 20). The Argentine State's failure to provide adequate treatment and exposure to obstetric violence constituted a serious violation of human rights, especially with regard to the right to health, among other violations found in the case (IACtHR, 2022a, p. 37). The case is an important milestone in Inter-American jurisprudence for explicitly recognizing obstetric violence as a human rights violation.

The third case is *Rodríguez Pacheco et al. v. Venezuela* (IACtHR, 2023b). The victim, Balbina Rodríguez Pacheco, underwent a caesarean section and, due to medical failures and inadequate decisions, developed severe complications that resulted in several subsequent surgical interventions. These interventions left her with permanent disabilities, affecting her quality of life and reducing her ability to work. The victim did not receive adequate treatment and suffered violations of her rights to health and human dignity, that configures another case of obstetric violence. The victim initiated a series of lawsuits in the legal system seeking justice and redress for her situation, including criminal proceedings and disciplinary complaints against the doctors involved. However, due to the time that has passed, the statute of limitations has expired (IACtHR, 2023b, p. 11-30).

The IACtHR has clarified that states must provide adequate health policies with trained personnel to provide adequate care in childbirth, with policies aimed at preventing maternal mortality through prenatal and postpartum care, as well as legal and administrative instruments to properly document cases of maternal mortality (IACtHR, 2023b, p. 36). Likewise, the State has the obligation to establish effective mechanisms to investigate the cases in which obstetric violence by non-state agents is noted, as well as to take due diligence and to provide the victim with redress beyond fair and effective means of compensation, because the lack of access to an adequate complaint and redress mechanism impacts on the right to health and personal integrity. It also recognized the duty to adopt legislative and other measures to prevent violations by private companies (IACtHR, 2023b, p. 38).

Finally, the last judgment is the case of *La Oroya Population vs. Peru* (IACtHR, 2023a), which examines the responsibility of the Peruvian State in relation to

violations of the rights of the inhabitants of the city of La Oroya, affected by environmental pollution caused by a metallurgical plant operated since 1922, in the Complejo Metalúrgico de La Oroya (CMLO), nationalized in 1974 and subsequently acquired in 1997 by the company Doe Run Peru. Its activity was focused on smelting and refining polymetallic concentrates with a high content of lead, copper, zinc, silver, gold, bismuth, selenium, tellurium, cadmium, antimony, indium and arsenic (IACtHR, 2023a, p. 27-28).

The local inhabitants expressed their concern after a series of studies and reports indicated alarming levels of atmospheric and soil pollution in La Oroya, with concentrations of metals far above the safe limits established by environmental guidelines (IACtHR, 2023a, p. 31-34). The affected community, especially the segment most vulnerable to environmental contamination, such as children, pregnant women and the elderly, had their right to health and a healthy environment violated by the situation (IACtHR, 2023a, p. 89-90).

These high levels of pollution were associated with a significant increase in respiratory diseases, neurological problems, problems with the bone, kidney and cardiovascular systems, among other negative impacts on the health of the local population, and the IACtHR recognized the existence of scientific evidence that pointed to the relationship between mere exposure to high levels of contaminants and significant health risks. The Peruvian authorities failed to adopt adequate and effective measures to mitigate the risks and protect public health, which created a situation of significant risk of contracting the diseases and developing illnesses. They also failed to take sufficient action to control the effects of atmospheric contamination and the absence of adequate medical care. These factors led to the attribution of responsibility for the violation of the right to health (IACtHR, 2023a, p. 83-84).

The IACtHR also pointed out that the absence of scientific certainty about the effects of environmental contamination is not enough to remove the State's duty under the precautionary principle to prevent the violation of people's rights in cases where there are plausible indicators that the activity could cause serious and irreversible damage to the environment (IACtHR, 2023a, p. 80-81). This omission has led to a continuous deterioration of living and health conditions in the region.

Therefore, the Court has emphasized (IACtHR, 2023a, p. 100-101) that the right to health requires the State to adopt reasonable and adequate measures to ensure that the population has access to a healthy environment. This includes the implementation of public policies to control and reduce pollution, as well as the adoption of preventive and corrective measures to protect the health of those affected. In addition, the Court emphasized that the Peruvian State had an obligation to protect the health of the inhabitants of La Oroya, which included regulating, supervising and overseeing industrial activities, implementing measures to mitigate environmental risks and guaranteeing access to adequate

health services for those affected. The State's inaction and lack of an adequate response amounted to a serious violation of human rights.

In the last section of this article, it will demonstrate the important contributions made by the judgments. It should be noted that the reasonings provide significant support to guide American States in meeting the minimum standards of protection necessary to prevent further violations of the right to health.

#### **4. The lessons learned from the judgments issued by the Inter-American Court of Human Rights.**

The discussion on the indivisibility and interdependence of human rights, for equal attention to be paid about the application of DESCAs in relation to Civil and Political Rights, has been going on since the middle of the last century (Trindade, 1994, p. 42-44). Overcoming this understanding for a more effective protection of those rights is still in progress, since the aforementioned decisions did not have unanimous verdicts, and the majority position that provides for the justiciability of these rights is very recent (since 2017) and has been built over years with dissenting votes that have been gaining support until forming the current majority, but which remains “[...] *un conflicto genuino respecto a como interpretar el artículo 26 de la Convención*”<sup>6</sup> (Vera, 2020, p. 233).

The cases of Brítez (IACtHR, 2022a, p. 15-16) and Rodríguez Pacheco (IACtHR, 2023b, p. 39-40) confirm the understanding that Civil and Political Rights are inseparable from DESCAs, since both categories must be understood in an integral and global way as human rights, without hierarchies between them and applicable before the competent authorities. Their recognition and enjoyment are guided by the principles of universality, indivisibility, interdependence and interrelation, which is why the right to health (taken from Article 26, which derives from Articles 34.i, 34.l and 45.h of the OAS Charter) also includes the right to sexual and reproductive health as a human right, as set out in General Comment No. 22 of the Committee on Economic, Social and Cultural Rights (United Nations, 2016). Health is thus understood not only as the absence of disease or infirmity, but as a complete state of physical, mental and social well-being (IACtHR, 2022a, p. 17).

It is also important to highlight the speech of Ramírez (2003, p. 139), who points out that “[...] *las obligaciones generales contenidas en los artículos 1 y 2 abarcan todos los derechos abarcados por el tratado, no apenas aquellos que figuran en el capítulo IP*”<sup>7</sup>. Vera, in turn, reinforces that “[...] *debería ser prevalente una interpretación que intenta otorgar*

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<sup>6</sup> “[...] a genuine conflict regarding how to interpret article 26 of the Convention” [free translation].

<sup>7</sup> “[...] the general obligations contained in Articles 1 and 2 cover all the rights covered by the treaty, not just those in Chapter II” [free translation].

*primacía al valor normativo de las relaciones entre los artículos 1.1 e 2 con el artículo 26, asumiendo que el Protocolo de San Salvador no puede restar valor normativo a dicho artículo 26 si expresamente no se planteó tal objetivo*<sup>8</sup> (Vera, 2018, p. 233).

In any case, the IACtHR's understanding of its jurisdiction goes beyond the analysis of compliance with the obligations of progressive development and non-regression, entering the right to health and discussing the DESCAs in an individualized way (such as the right to health). Thus, in the *Brítez* case, for example, it takes the view that the right to health during pregnancy, childbirth and the postpartum period must satisfy the elements of availability, acceptability, quality and accessibility<sup>9</sup>. Regarding the last element, the IACtHR

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<sup>8</sup> “[...] an interpretation should prevail that tries to give primacy to the normative value of the relationship between articles 1.1 and 2 with article 26, assuming that the Protocol of San Salvador cannot give normative value to said article 26 if it expressly did not set itself such an objective” [free translation].

<sup>9</sup> In order to better explain what each element represents, the IACtHR in the *Poblete Vilches* case take up the lessons:

*“En vista de ello, esta Corte estima que para efectos de las prestaciones médicas de urgencia, los Estados deben garantizar, al menos, los siguientes estándares:*

*a) Respecto a la calidad, se debe contar con la infraestructura adecuada y necesaria para satisfacer las necesidades básicas y urgentes. Esto incluye cualquier tipo de herramienta o soporte vital, así como también disponer de recurso humano calificado para responder ante urgencias médicas.*

*b) Respecto a la accesibilidad, los establecimientos, bienes y servicios de emergencias de salud deben ser accesibles a todas las personas. La accesibilidad entendida desde las dimensiones superpuestas de no discriminación, accesibilidad física, accesibilidad económica y acceso a la información. Proveyendo de esta forma un sistema de salud inclusivo basado en los derechos humanos.*

*c) Respecto a la disponibilidad, se debe contar con un número suficiente de establecimientos, bienes y servicios públicos de salud, así como de programas integrales de salud. La coordinación entre establecimientos del sistema resulta relevante para cubrir de manera integrada las necesidades básicas de la población.*

*d) Respecto de la aceptabilidad, los establecimientos y servicios de salud deberán respetar la ética médica y los criterios culturalmente apropiados. Además, deberán incluir una perspectiva de género, así como de las condiciones del ciclo de vida del paciente. El paciente debe ser informado sobre su diagnóstico y tratamiento, y frente a ello respetar su voluntad [...]”* (IACtHR, 2018, p. 40)

“In view of this, this Court considers that, for the purposes of emergency medical services, States must guarantee at least the following standards:

a) Regarding to quality, there must be adequate infrastructure to meet basic and urgent needs. This includes any type of tool or life support, as well as having a qualified human resource to respond to medical emergencies.

b) Regarding to accessibility, emergency health facilities, goods and services must be accessible to all people. Accessibility is understood from the overlapping dimensions of non-discrimination, physical accessibility, economic accessibility and access to information. Thus, providing an inclusive health system based on human rights.

c) Regarding to availability, there must be a sufficient number of public health facilities, assets and services, as well as comprehensive health programs. Coordination between the system's facilities is important to cover the basic needs of the population in an integrated manner.

d) Regarding to acceptability, health facilities and services must respect medical ethics and culturally appropriate criteria. In addition, they must include a gender perspective, as well as the conditions of the patient's life cycle. The patient must be informed about their diagnosis and treatment, and their will must be respected [...]” [free translation].

includes accessibility to information, which includes the right to seek, receive and disseminate information related to sexual and reproductive health, as well as to receive information about one's state of health (IACtHR, 2022a, p. 21).

It is important to note that the doctrine has long been defending the possibility of adopting measures to give full effect to the DESCAs, such as Abramovich and Rossi (2007, p. 40-42), who argue that the literal interpretation of article 26 allows the conclusion that it is not announcing mere programmatic objectives, but rather rights. Progressivity means that these rights can be achieved gradually, but it still imposes an obligation on the State to implement them in order to gradually improve the conditions for their exercise and enjoyment and, above all, not to go back on the achievements already secured. The task then is to understand which rights are allowed to be interfered with under the OAS Charter, what the scope of the progressive development clause is and how state obligations in relation to these rights operate (Vera, 2018, p. 190). It should be noted that the recent jurisprudence of the IACtHR has constantly understood the direct justiciability and immediate enforceability of Article 26 of the American Convention, including for the right to health.

This can be seen in the Valencia Campos judgment (IACtHR, 2022b, p. 70-71), which clearly establishes that the right to health has immediate enforceability and a progressive nature. Because of its immediate enforceability, the Court mentions that States must adopt effective measures to guarantee access without discrimination until the full effectiveness of the DESCAs is achieved. It also confirms a progressive realization, a concrete and constant obligation to move as quickly and effectively as possible towards full effectiveness, to the extent of the resources available, whether through legislation or other appropriate means. The decision is clear that there is an obligation not to go backwards.

Not only does the case prohibit retrogression, but it also shows that States have a duty to provide health care, as it guarantees the right of people in their custody. This means, according to the decision, providing people deprived of their liberty with regular medical check-ups and adequate medical care and treatment (IACtHR, 2022b, p. 71).

The strength of the right to health is also related to the right to non-discrimination, since the jurisprudence which is the object of this study shows special attention to vulnerable groups. Thus, people deprived of their liberty and pregnant women, for example, demand state action that considers their vulnerability when assessing the State's duty to protect them. For this reason, in *Brítez*, the decision highlights the fact that obstetric violence is gender-based violence, as can be seen in the justification:

*75. Este Tribunal se ha pronunciado de forma específica sobre la violencia ejercida durante el embarazo, el parto y después del parto en el acceso a los servicios de salud, y ha sostenido*

*que constituye una violación de derechos humanos y una forma de violencia basada en género denominada violencia obstétrica, la cual “abarca todas las situaciones de tratamiento irrespetuoso, abusivo, negligente, o de denegación de tratamiento, durante el embarazo y la etapa previa, y durante el parto o postparto, en centros de salud públicos o privados”.*

*76. Sobre este asunto, en virtud de lo dispuesto en el artículo 7 de la Convención de Belém do Pará, la Corte recuerda que los Estados tienen el deber de prevenir, sancionar y erradicar la violencia contra las mujeres, para lo cual deben abstenerse de incurrir en actos constitutivos de violencia de género, incluidos aquellos que ocurran durante el acceso a servicios de salud reproductiva.*

*[...] 77. Conforme a lo anterior, la Corte encuentra que a la luz de la Convención de Belém do Pará, las mujeres tienen derecho a vivir una vida libre de violencia obstétrica y los Estados están en la obligación de prevenirla, sancionarla y abstenerse de practicarla, así como de velar porque sus agentes actúen en consecuencia, tomando en consideración la especial vulnerabilidad que implica encontrarse en embarazo y en periodo posparto<sup>10</sup> (IACtHR, 2022a, p. 22).*

This understanding is reinforced in the Rodríguez Pacheco case (IACtHR, 2023b, p. 35). Therefore, the case law analyzed highlights that obstetric violence is gender-based violence, and that it is expressed, although not exclusively, in the dehumanized, disrespectful, abusive or negligent treatment of women.

Added to this understanding is the Valencia Campos case (IACtHR, 2022b, p. 72), in which obstetric violence against female victims is aggravated by the situation of vulnerability caused by the fact that the victim is in state custody. The decision considers that, in respect of the principle of equality and non-discrimination, prenatal care and emergency obstetric care must be provided to women in detention in a manner equivalent to that available outside prison, as these women are under the total control of the prison authorities. It is an obligation of the state to prevent irreparable damage to the rights to physical and mental health, personal integrity and life of these women. About the measures imposed to ensure the realization of the right to health:

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<sup>10</sup> “75. This Court has ruled specifically on violence during pregnancy, childbirth and after childbirth in access to health services, and has held that it constitutes a violation of human rights and a form of gender-based violence called obstetric violence, which ‘encompasses all situations of irresponsible, abusive, negligent treatment, or denial of treatment, during pregnancy and the previous stage, and during childbirth or postpartum, in public or private health centers’.

76. On this subject, by virtue of Article 7 of the Convention of Belém do Pará, the Court recalls that States have the duty to prevent, punish and eradicate violence against women, to which end they must refrain from engaging in acts constituting gender violence, including those that occur during access to reproductive health services.

[...] 77. In line with the above, the Court finds that, in light of the Convention of Belém do Pará, women have the right to live a life free of obstetric violence and States are obliged to prevent it, sanction it and refrain from practicing it, as well as to ensure that their agents act accordingly, taking into account the special vulnerability involved in being pregnant and in the postpartum period” [free translation].

*Percebe-se que a Corte IDH reconhece em suas sentenças relacionadas ao direito à saúde o dever dos Estados em realizar prestações positivas e negativas a fim de concretizar tal direito. Evidencia-se que alguns dos pontos elencados pelas decisões possuem uma finalidade positiva prestativa a qual se reverte em um caráter negativo de não repetição*<sup>11</sup> (Maas; Bosa, 2023, p. 474).

However, the protection of States also includes preventing third parties from unduly interfering in the enjoyment of the rights to life and personal integrity, which are particularly violated when a person is undergoing health treatment. The example of the Rodriguez Pacheco case (IACtHR, 2023b, p. 41) shows that States must regulate and supervise all health care provided to people covered by their jurisdiction, regardless of whether the provider is public or private. State action is essential to ensure minimum quality standards through the normative frameworks that regulate the provision of the service, preventing violations, as well as supervising and overseeing its provision.

Regarding the relationship between health and the environment, there is also an immediate demand for the application of Article 26, which requires States to ensure the interrelationship and indivisibility between Civil and Political Rights and Economic, Social, Cultural and Environmental Rights. In other words, the right to life and personal integrity are interrelated with the right to health, and the latter relates to the right to an environment with the conditions necessary for a healthy life, since contamination of the soil, water and air seriously alters the preconditions for human health. The IACtHR has established that the State's duty to respect the right to health implies refraining from polluting the environment and the obligation to protect and ensure people's access to essential health services (IACtHR, 2023a, p. 54).

The responsibility of the State recognized by the decision is such that, once the significant risk to people's health is recognized, and they are exposed to contamination, the State has the duty to prevent environmental contamination so that it is not necessary to demonstrate the direct causality of the illnesses caused by exposure to contaminants, but it is sufficient to infer that the State allowed the existence of levels of contamination that put the population at significant risk (IACtHR, 2023a, p. 80). The decision in the case of La Oroya Population is significant because it highlights the responsibility of States to protect the right to health and to properly manage environmental risks.

Finally, in the four judgments recognizing the violation of the right to health directly by the content of Article 26 of the American Convention, it is important

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<sup>11</sup> “In its decisions on the right to health, the IACtHR recognizes the duty of States to provide positive and negative services in order to make this right a reality. Some of the points listed in the decisions have a positive benefit purpose which is reversed into a negative non-repetition purpose” [free translation].



to note that the decisions were not unanimous. In all the recent cases mentioned in the last three years, judges Patricia Pérez Goldberg and Humberto Antonio Sierra Porto dissented about the Article 26. The latter expresses his disagreement with the justiciability and autonomy of the DESCAs through Article 26, having repeatedly expressed his position since the Lagos del Campo case, as he said in his vote in the Rodríguez Pacheco case (IACtHR, 2023b, p. 69-70). He states that "there are logical and legal inconsistencies" in the majority position taken by the IACtHR, which contradicts the Vienna Convention on the Rights of Treaties, changes the nature of the progressive obligation and ignores the will of the States expressed in the Protocol of San Salvador, undermining the legitimacy of the Court.

The judge Goldberg, by her turn, has also registered her dissent since the Guevara Díaz case, pointing out the lack of competence of the IACtHR to declare the autonomous violation of the DESCAs (IACtHR, 2023b, p. 75-78). The judge believes that it is impossible to artificially expand the Court's jurisdiction, understanding that the lack of direct justiciability of the DESCAs does not imply ignoring their existence, their importance and their interdependent and indivisible nature with Civil and Political Rights, and does not deny the need for their protection. For the judge, it is the national Courts, in accordance with their respective competences, that exercise the interpretation and justiciability of the DESCAs in their legal system, even if they incorporate the provisions of international law, and the IACtHR is only responsible for judging compliance with the obligations of progressive development and non-regression (in other words, without analyzing the DESCAs individually).

## **5. Conclusions.**

Considering all the above, the jurisprudence of the IACtHR underwent a change of position in 2017, reaching the issue of health in 2018. However, this situation did not occur spontaneously that year, but over the course of dissenting votes and a long doctrinal construction that culminated in the recognition of the universality, indivisibility, interdependence and interrelationship of human rights (Civil and Political Rights and Economic, Social, Cultural and Environmental Rights). The understanding of the direct justiciability of the right to health and its immediate enforceability now prevails. However, this understanding is not completely settled, and it is the majority position of the current composition of the IACtHR (five of seven judges). This situation highlights the risk that a change in composition could affect the dominant jurisprudence that has led to the above in the selected cases.

With the construction of the notion of the direct justiciability of the right to health and its immediate enforceability, the judgments provide an interpretation that allows them to go beyond judging compliance with the obligations of progressive development and non-regression, analysing the DESCAs

individually with an inter-American *corpus iuris* for the promotion of advances in this protection. Thus, in establishing standards of protection for the human right to health of all individuals under its jurisdiction, the IACtHR has issued judgments delimiting the scope of this right.

The result of this last point is that the violation of the right to health also includes the right to sexual and reproductive health as a human right, as well as the recognition of obstetric violence as a serious violation of human rights from a gender perspective. Likewise, greater attention has been paid to the duty of protection of States and, consequently, their accountability, in the face of violations against groups in situations of vulnerability, such as in the case of people deprived of their liberty, children, women, pregnant women, among others. Equally, the jurisprudence shows the notion of four elements for fulfilling the right to health: availability, acceptability, quality and accessibility, making possible to require States to provide positive and negative services to make this right a reality. This duty of protection also requires preventive actions against third parties, and it is the responsibility of the States to regulate, supervise and monitor compliance.

The right to health has been shown to be connected to the right to a healthy environment, in such a way that preventing environmental contamination and properly managing environmental risks are crucial to ensuring the conditions necessary for a healthy life. For the purposes of establishing a violation of human rights, the onus on the State to ensure these conditions is so great that it is not necessary to demonstrate the direct causality of the illnesses that resulted from exposure to contaminants, it is sufficient to infer that the State allowed the existence of levels of contamination that put the population at significant risk. All of this shows how the IACtHR has upheld the right to health, building a jurisprudence that moves towards the construction of minimum standards of protection, even for the DESCA, with the progress shown in its judgments.

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