

**ORDER OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS***

OF MAY 18, 2010

CASE OF KIMEL V. ARGENTINA

MONITORING COMPLIANCE WITH JUDGMENT

HAVING SEEN:

1. The Judgment on the merits, reparations and costs (hereinafter “the Judgment”) delivered by the Inter-American Court of Human Rights (hereinafter “the Inter-American Court”, “the Court” or “the Tribunal”) on May 2, 2008, in which it decided:

6. To order the State to pay the amounts set in [the] Judgment as compensation for pecuniary and non-pecuniary damage, and reimbursement of legal costs and expenses, within the term of one year as from notice of [the] Judgment [...].

7. To order the State to set aside the criminal sentence imposed on Mr. Kimel and all the effects deriving therefrom within the term of six months as from notice of [the] Judgment [...].

8. To order the State to write forthwith the name of Mr. Kimel off all public records wherein he has been entered as having a criminal record in relation to the instant case [...].

9. To order the State to publish the pertinent parts [t]hereof [...] as ordered in paragraph 125 of [the] Judgment, within the term of six months as from notice [t]hereof.

10. To order the State to hold a public act as acknowledgement of responsibility, within the term of six months as from notice of [the] Judgment [...].

11. To order the State to bring within a reasonable time its domestic legislation into conformity with the provisions of the Inter-American Convention on Human Rights, so that the lack of accuracy acknowledged by the State [...] be amended in order to comply with the requirements of legal certainty so that, consequently, they do not affect the exercise of the right to freedom of thought and expression.

2. The Communications submitted on September 10 and November 19, 2009, February 3, and May 5, 2010 and their annexes, whereby the Argentinean Republic (hereinafter “the State” or “Argentina”) referred to its compliance with the Judgment.

* Judge Leonardo A. Franco, of Argentinean nationality, excused himself from hearing the present case, prior to the Judgment of May 2, 2008. Consequently, he did not participate in the deliberation and signing of the instant Order.

3. The briefs submitted on October 14 and December 17, 2009, and March 4, 2010 and their annexes, whereby the representatives of the victim (hereinafter “the representatives”) presented their observations on the information presented by the State.

4. The communications submitted on October 30, 2009, January 25 and April 9, 2010, whereby the Inter-American Commission on Human Rights (hereinafter “Inter-American Commission” or “the Commission”) presented its observations on the submissions of the State and briefs of the representatives, in relation to the state of compliance with the Judgment.

CONSIDERING THAT:

1. The monitoring of compliance with its decisions is a power inherent to the judicial functions of the Court.

2. Argentina has been a State Party to the American Convention on Human Rights (hereinafter “the American Convention” or “Convention”) since September 5, 1984, and accepted the compulsory jurisdiction of the Court on the same date.

3. Pursuant to Article 68(1) of the American Convention, “[t]he States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.” Therefore, States must ensure that the rulings set out in the decisions of the Court are implemented at the domestic level.¹

4. In view of the final and not-subject-to-appeal character of the judgments of the Court, as established in Article 67 of the American Convention, the State should comply with them fully and promptly.

5. The obligation to comply with the decisions in the Court’s judgments corresponds to a basic principle of the law of international responsibility of the State, supported by international case law, according to which States must comply with their international treaty obligations in good faith (*pacta sunt servanda*) and, as this Court has already indicated and as established in Article 27 of the 1969 Vienna Convention on the Law of Treaties, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.² The treaty obligations of the States Parties are binding for all the powers and organs of the State.³

6. The States Parties to the Convention must guarantee compliance with its provisions and their effects (*effet utile*) within their respective domestic legal systems. This principle is applicable not only with regard to the substantive norms of human rights treaties (that is, those which contain provisions concerning the protected rights), but also with regard to

¹ Cf. *Case of Baena-Ricardo et al. v. Panama. Competence*. Judgment of November 28, 2003. Series C No. 104, para. 131; *Case of the Saramaka People v. Suriname. Monitoring Compliance with Judgment*. Order of the President of the Court of April 20, 2010, considering clause thirteen, and *Case of Heliodoro Portugal v. Panamá. Monitoring Compliance with Judgment*. Order of the President of the Court of April 20, 2010, considering clause three.

² Cf. *International responsibility for execution and application of laws in violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*. Advisory Opinion OC-14/94 December 9, 1994. Series A No. 14, para. 35; *Case of the Saramaka People v. Suriname*, *supra* note 1, considering clause five, and *Case of Heliodoro Portugal v. Panamá*, *supra* note 1, considering clause four.

³ Cf. *Case of Castillo Petruzzi et al. v. Peru. Monitoring Compliance with Judgment*. Order of the Court of November 17, 1999. Series C No. 59, considering clause three; *Case of the Saramaka People v. Suriname*, *supra* note 1, considering clause five, and *Case of Heliodoro Portugal v. Panamá*, *supra* note 1, considering clause four.

procedural norms, such as those referring to compliance with the decisions of the Court. These obligations are to be interpreted and enforced in a manner such that the protected guarantee is truly practical and effective, bearing in mind the special nature of human rights treaties.⁴

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7. The representatives informed the Court in their communication of March 4, 2010 (*supra* Having Seen 3) that on February 10, 2010, Mr. Kimel passed away.

8. The Court, in its March 8, 2010 note, offered its condolences to Mr. Kimel's family members and, deeply regrets that Mr. Kimel's death occurred prior to the Judgment being fully complied with.

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9. With respect to the obligation to pay the amounts set in the Judgment as compensation for pecuniary and non-pecuniary damage, and reimbursement of legal costs and expenses (*sixth operative paragraph*), the State informed that the corresponding payment "for every item indicated in the Judgment [...] was made effective on September 24, 2008." It indicated that, on said date, the General Treasury of the Nation deposited the total sum of US\$40,000.00 (forty thousand dollars of the United States of America) in the bank account indicated by Mr. Kimel.

10. The representatives confirmed that "the compensation had been made effective" and they stated that the State had adopted "the appropriate measures" to comply with the present obligation. Similarly, the Commission observed that "this measure should be deemed satisfied."

11. The Tribunal observes that, according to the information submitted, the State paid Mr. Kimel the total amount ordered in the Judgment, within the timeframe it established. As a consequence, the Tribunal considers that the State has fully complied with operative paragraph six of the Judgment.

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12. In relation to the obligation to set aside the criminal sentence imposed on Mr. Kimel and all the effects deriving therefrom (*seventh operative paragraph*), the State indicated that "the practical consequences derived from the judgment in the criminal case in question have been set aside," and provided information regarding the steps taken to eliminate the victim's criminal record. Nonetheless, the State added that "for the annulment as such of the criminal judgment and its feasibility in the context of [its] juridical system, the corresponding determinations by the permanent legal and technical services of each ministry of the State should be awaited."

13. The representatives informed that fulfillment of this measure is pending because the criminal sentence has not been set aside, given that "the corresponding tribunal has not made any decision on the matter yet." They noted that the State has not submitted any evidence that it has studied or put into place concrete mechanisms in order to obtain a judicial decision or an opinion from the legal and technical services to which it made reference in its report. They indicated that, although in Argentina there is no rule that

⁴ Cf. *Case of Ivcher-Bronstein v. Peru. Competence*. Judgment of September 24, 1999. Series C No. 54, para. 37; *Case of the Saramaka People v. Suriname*, *supra* note 1, considering clause six, and *Case of Heliodoro Portugal v. Panama*, *supra* note 1, considering clause five.

specifically outlines the review process of a criminal judgment when the Inter-American Court orders the annulment of an unlawful sentence, "there are judicial precedents [that] the State [...] should have explored." In addition, they considered that with the adoption of the law that decriminalizes slander and libel, "a speedy ruling via a judicial review, based on the retroactive application of the more benign criminal law" could be obtained. Finally, they indicated that the death of Mr. Kimel does not limit the presentation of a petition for review, given that the Criminal Procedural Code of the Nation provides for the possibility that, in the case of the death of the offender, the descendants or ancestors present it.

14. The Commission observed that the obligation to leave the criminal charge without effect, even though related, has a different content to that of the obligation to eliminate the criminal records. Similarly, the Commission observed that the State has not objected to considering the request made by the representatives, in relation to obtaining a judicial decision that declares that the criminal charge is without effect, due to which it stated that it would await for Argentina "to refer, in detail, to the consulted state agencies, the dates of said consultations, and the timeframes in which it hopes to have an answer regarding the viable alternatives in the Argentine body of law." Likewise, it considered important that the State refer "to the routes mentioned by the representatives."

15. The Tribunal observes that the information presented by the State is not clear as to what are the "practical consequences", of the criminal judgment against Mr. Kimel, that have been left without effect, nor under which mechanism. The Court recalls that paragraph 123 of the Judgment states that "the State [must] annul such judgment in all respects, including its effects as far as third parties are concerned." These effects are not limited to the elimination of Mr. Kimel's criminal records, which constitutes an additional measure of reparation (*infra* Considering Clauses 16 to 19). Therefore, the Tribunal states that compliance with the present obligation is pending and requests the State, within the period prescribed in the operative paragraphs of this Order, to submit complete and detailed information on the measures taken for its effective implementation, including dates, deadlines, results and actions taken as a result of the opinions of the legal and technical services referred to by the State in the information provided to the Court (*supra* Considering Clause 12).

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16. In regard to the obligation to immediately eliminate Mr. Kimel's name from the public records wherein he appears with a criminal history in relation to the present case (*eighth operative paragraph*), the State indicated that "Mr. Kimel's criminal history has been eliminated from all public records." Likewise, the State attached a copy of a communication from the Secretary of National Security of the Ministry of Justice, Security and Human Rights with the notes issued by the National Gendarmerie, Naval Prefecture, Airport Security Police and the Federal Police of Argentina, wherein "[the] said security forces informed on the compliance with said order."

17. The representatives confirmed that "[i]n effect [...] Mr. Kimel's name was removed from the public criminal records."

18. The Commission considered "this obligation [...] should be deem[ed] satisfied."

19. Given the evidence submitted and taking into account the information presented by the Parties, the Court considers that the State has fully complied with the eighth operative paragraph of the Judgment.

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20. With respect to the obligation to publish the Judgment as ordered by the Court (*ninth operative paragraph*), the State informed that the publications were made on September 10 and 25, 2008, in the Official Bulletin (*Boletín Oficial*) and the Clarín newspaper, respectively, and it submitted a copy of them. Moreover, the State indicated that the selection of the newspaper of widespread national circulation “was made in consideration of the request made by the petitioners in this regard.”

21. The representatives confirmed that “the corresponding publications were made in the indicated newspapers.”

22. The Commission observed that “according to the briefs presented by both parties, this order should be declared as complied with.”

23. The Tribunal observes, in accordance with the evidence provided and taking into account the information presented by the parties, that the State has fully complied with the publications ordered in the Judgment.

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24. In relation to the obligation to carry out an act of public acknowledgment of its responsibility (*tenth operative paragraph*), the State indicated that on September 11, 2009, it carried out an act “within the framework of the Extraordinary Session of the Inter-American Commission on Human Rights held in [Argentina],” where the President of the Nation announced that “in compliance with the decision against the State in the Kimel case [...] she ha[d] decided to send the Nation’s Congress a draft bill wherein the crimes of libel and slander are removed from matters related to freedom of expression.” It noted that “the exact words of the [...] President [of the Republic], in a public ceremony transmitted through a national public broadcast, of such importance as the act carried out on September 11, 2009, constituted an unequivocal public acknowledgment of Argentina’s responsibility.” Additionally, it noted that “without prejudice to the fact that the public event mentioned above was carried out, the Foreign Ministry contacted the pastor in charge of the Church of the Palotinos, at the request of Mr. Kimel so that the “the event be carried out in the Church [...] where the events mentioned in his book took place.” Finally, the State affirmed that said act would take place in late 2009.

25. The representatives indicated that “the public act of acknowledgement of responsibility [at the Church of the Palotinos] had still not been carried out.” Likewise, they stated that “the State’s attitude was surprising” inasmuch as it considers the act of September 11, 2009 as the act of acknowledgment of its responsibility in the present case. They affirmed that the victim was not informed of the said act and that he only “became aware [of it], once it was carried out, through the media”. They insisted that, after such ceremony, “the State undertook, in an explicit manner, to perform the act of acknowledgment in accordance with the victim’s wishes.” Therefore, they requested that the State take the necessary measures to carry out the public act of acknowledgment of responsibility “in accordance with the victim’s expectations and ensuring that when [the] act does take place, both the daughter and mother of Mr. Kimel be formally convened.”

26. The Commission observed that the ceremony held on September 11, 2009, mentioned by the State, “did not correspond to the public act of acknowledgment of responsibility referred to in the [J]udgment of the Court.” It stressed that the ceremony held on September 11, 2009, was held without the presence of the victim and without him being aware that his case would be mentioned. Similarly, the Commission gave value to the efforts made by the State to perform the act according to the victim’s wishes and considered it appropriate that the victim’s family and representatives be informed of the details of such act sufficiently in advance, as well as that their expectations be taken into account, in view of the fact that “the purpose of measures of satisfaction is the moral

reparation of victims, and therefore their presence, participation and agreement, with the details of the execution of the act, are particularly relevant.”

27. The Court values greatly the reference, to the present case, made by the President of the Republic within the framework of the Extraordinary Session of the Inter-American Commission. However, the Court notes that the words of the President in said ceremony do not constitute a recognition of responsibility for the violation of, *inter alia*, the freedom of expression of the victim. In fact, the words of the President, according to the information provided by the State, reveal the will of the Executive to initiate the implementation of another measure of reparation ordered in the Judgment, that is, the adaptation of domestic law to the Convention’s terms on freedom of expression, regarding the crimes of libel and slander. The Court also observes that, according to the representatives (*supra* Considering clause 25), the victim was not informed nor was present at the mentioned event, but instead learnt of it and thus, of the reference to his case, because the speech by the President of the Republic was shown through a “national public broadcast”, as was indicated by the State. For all the foregoing reasons, the Tribunal considers that the act carried out on September 11, 2009, is not sufficient to be considered a satisfactory measure of reparation in regard to the violations committed.

28. Additionally, the Court considers it necessary to observe that compliance with this measure of redress is still pending, despite the death of Mr. Kimel. Measures of satisfaction, such as the present one, have effects on the recovery of the memory of the victims, the restoration of their dignity, as a consolation for their next of kin, or as an official message of disapproval for the human rights violations in question and of commitment to the efforts to ensure that they do not happen again.⁵ Public acts of acknowledgment of responsibility by the State, as the one ordered in the Judgment, serve the dual purpose of providing satisfaction to the victim and his family, by restoring his dignity, and serving as a guarantee of non-repetition of the violations committed. This has been the view of this Tribunal in numerous occasions.⁶ Accordingly, the Court considers that in the instant case the State must comply with this measure of reparation both to avoid repetition of similar events, as well as to bring a sense of dignity to the memory of the victim. Likewise, the Court also considers that to ensure that the said recognition of responsibility fulfills its effectiveness (*effet utile*), the State must seek the participation, cooperation and agreement of the family of the victim, in regard to its compliance.

29. On the other hand, although the Court values the steps mentioned by the State so as to hold a public act of acknowledgement of responsibility according to the victim’s wishes (*supra* Considering Clause 24), it notes that the deadline to fulfill this obligation expired on November of 2008, more than a year before the victim’s passing, without it being complied with to date. The Court regrets the lack of timely fulfillment of this obligation by the State, since the contrary would have made it possible for the victim to be present. Finally, the Court requests the State to adopt, without delay, all measures necessary to ensure effective compliance with the tenth operative paragraph of the Judgment.

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30. In relation to the obligation to bring its domestic legislation into conformity with the provisions of the Inter-American Convention on Human Rights, so that the inaccuracies

⁵ Cf. *Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala. Reparations and Costs*. Judgment of May 26, 2001. Series C No. 77, para. 84.

⁶ Cf. *Case of La Cantuta v. Peru. Merits, Reparations, and Costs*. Judgment of November 29, 2006. Series C No. 162, para. 235; *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. 193, and *Case of Zambrano-Vélez et al. v. Ecuador. Merits, Reparations, and Costs*. Judgment of July 4, 2007. Series C No. 166, para. 150.

recognized by the State are amended in order to satisfy the requirements of legal certainty and, consequently, to not affect the exercise of the right to freedom of expression (*eleventh operative paragraph*), the State submitted a copy of a draft bill to reform various provisions contained in the Criminal Code of the Nation, related to libel and slander. It stated that said project aimed to “promote the complete decriminalization of cases in which expressions refer to ‘matters of public interest’ or are ‘not assertive’” and, added that the “draft bill is based on the importance that opinions and critical assessments deserve and the significance that freedom of expression merits in any democratic society, as a stronghold of the rule of law” and to that effect, concluded that it is necessary to “abrogate Article 112 (‘covert’ slander and libel) from the Penal Code of the Nation and to replace several articles of the Penal Code [...] that refer to ‘slander and libel.’” Subsequently, the State reported that the said draft law was approved on November 18, 2009, and the respective law, promulgated on November 26, 2009.

31. The representatives gave value to the fact that the Argentine State had assumed an attitude directed at complying with the provisions of the Judgment. Nevertheless, they considered that the draft bill submitted by the State “is insufficient because it does not meet current standards [...] regarding protection of the right to freedom of thought and expression [...] of the the American Convention.” They stated that the draft bill regarding the reform is limited only to criminal matters, leaving in effect laws that contain civil penalties that could also generate “an inhibitory effect.” They insisted that “the threat of facing exorbitant sums of money in order to compensate for a damage to honor, which could lead to a collapse in the personal economy of any citizen, jeopardizes the use of freedom of expression.” They highlighted the fact that these civil penalties are applied using a law dating back to 1869, which is not based on “the highest international standards of protection of freedom of expression.” They also indicated that apart from the draft bill presented by the Executive, “there are other projects, regarding the modification of existing legislation that restricts freedom of expression, with a parliamentary status.” Finally, they noted that “the human rights violations endured by Mr. Kimel were shaped not only by the application of criminal rules but also by civil rules” and therefore, they considered that in order for the decision of the Inter-American Court to be complied with, both the criminal and civil legislation should be reformed.

32. The Commission acknowledged the submission of said draft bill as a “decisive step for the adaptation of domestic legislation.” Likewise, it also noted that said project “could have the effect of eliminating the use of criminal proceedings in relation to matters of public interest” and was “more precise regarding behaviors that are considered criminal offenses, which, in principle could overcome the shortcomings identified [in the Judgment].”

33. The Court values the actions taken by the State to fulfill its obligation. Likewise, it observes that the Law 26.551 that modifies the articles of the Penal Code of the Nation on the crimes of libel and slander, which was presented by the State, in fact does amend the codification and punishment of the crimes of libel and slander so as to not include “expressions to matters of public interest,” nor “expressions of a non-assertive nature,” and assigns monetary fines as punishment for the commission of said crimes.

34. The Tribunal recalls that the Judgment ordered the State to adapt its domestic law to the American Convention in regard the right of freedom of expression, in such a way that the “lack of accuracy acknowledged by the State [...] be amended in order to comply with the requirements of legal certainty so that, consequently, they do not affect the exercise of [said] right.”⁷ It also observes that the inaccuracies recognized by the State concerned

⁷ *Case Kimel v. Argentina. Merits, Reparations, and Costs.* Judgment of May 3, 2008. Series C No. 177, para. 128 and eleventh operative paragraph.

“criminal legislation punishing [libel and slander].”⁸ Because of this, the Court considers that the obligation to adapt its domestic law, derived from the Judgment, is restricted to the modification of such inaccuracies in criminal matters.

35. In light of the abovementioned, and taking into account the conformity expressed by the representatives at least in regard to the amendments made to the relevant criminal laws, the Court declares that the State has complied with operative paragraph eleven of the Judgment.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

in exercise of its authority to monitor compliance with its decisions and in accordance with Articles 33, 62(1), 62(3), 65, 67 and 68(1) of the American Convention on Human Rights, 25(1) and 30 of its Statute, and 31 and 69 of its Rules of Procedure,⁹

DECLARES THAT:

1. In accordance with Considering Paragraphs 11, 19, 23 and 35 of the instant Order, the State has fully complied with the following obligations:

- a) to pay the amounts set in the Judgment as compensation for pecuniary and non-pecuniary damage, and reimbursement of legal costs and expenses (*sixth operative paragraph of the Judgment*);
- b) to remove immediately the name of Mr. Kimel off all public records wherein he has been entered as having a criminal record in relation to the present case (*eighth operative paragraph of the Judgment*);
- c) to carry out the publications indicated in paragraph 125 of the Judgment (*ninth operative paragraph of the Judgment*), and
- d) to bring its domestic legislation into conformity with the provisions of the Inter-American Convention on Human Rights, so that the lack of accuracy acknowledged by the State be amended, in order to comply with the requirements of legal certainty so that, consequently, they do not affect the exercise of the right to freedom of thought and expression (*eleventh operative paragraph*).

2. The monitoring proceedings will remain open until full compliance with the measures pending, in accordance with Considering Paragraphs 15 and 29 of the instant Order, is achieved, namely to:

- a) set aside the criminal sentence imposed on Mr. Kimel and all the effects deriving therefrom (*seventh operative paragraph of the Judgment*), and
- b) hold a public act of acknowledgement of its responsibility (*tenth operative paragraph of the Judgment*).

⁸ *Case Kimel v. Argentina*, *supra* note 7 **Error! Bookmark not defined.**, para. 18.

⁹ Rules of Procedure approved by the Court in its LXXXV Regular Period of Sessions, held from November, 16 to 28, 2009.

AND DECIDES:

1. To require the State to adopt, as soon as possible, all the necessary measures to comply promptly and effectively with the orders of the Tribunal in its Judgment on the merits, reparations, and costs of May 2, 2008 that are pending compliance, pursuant to the provisions of Article 68(1) of the American Convention on Human Rights.
2. To request the State to submit to the Inter-American Court of Human Rights, by August 18, 2010 at the latest, a detailed and exhaustive report indicating all the measures adopted to comply with the reparations ordered by the Court that are pending fulfillment, pursuant to the second declaratory paragraph of the present Order.
3. To request the victim's representatives and the Inter-American Commission on Human Rights to submit their observations to the State's report mentioned in the preceding operative paragraph, within four and six weeks, respectively, as of the date the report is received.
4. To continue monitoring the matters pending compliance of the Judgment on the merits, reparations and costs of May 2, 2008.
5. To require the Secretariat of the Court to notify the present Order to the State, the Inter-American Commission on Human Rights and the victim's representatives.

Diego García-Sayán
Presidente

Manuel E. Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Alberto Pérez Pérez

Eduardo Vio Grossi

Pablo Saavedra Alesandri
Secretario

Comuníquese y ejecútese,

Diego García-Sayán
Presidente

Pablo Saavedra Alessandri
Secretario