

**Order of the
Inter-American Court of Human Rights *
of November 24, 2009
Case of the "Five Pensioners" v. Peru
(Monitoring Compliance with Judgment)**

HAVING SEEN:

1. The Judgment on the merits, reparations and costs delivered by the Inter-American Court of Human Rights (hereinafter, the "Court", the "Inter-American Court" or the "Tribunal") on February 28, 2003¹.
2. The Orders issued by the Inter-American Court on November 17, 2004 and September 12, 2005 in relation to the procedure to monitor compliance with the instant case.
3. The Order issued by the Court on July 4, 2006, by which it was decided:

[that] the Court will continue to monitor compliance with the decisions pending fulfillment in this case. These are:

- a) "To conduct the corresponding investigations and apply the pertinent punishments to those responsible for failing to abide by the judicial decisions delivered by the Peruvian courts during the applications for protective measures filed by the Victims" (*operative paragraph six of the Judgment of February 28, 2003*);
- b) "as indicated in paragraph 180 of [the] Judgment, [to] pay the four victims and Maximiliano Gamarra Ferreyra's widow the amount of US\$3,000.00 (three thousand United States dollars) for non-pecuniary damage" (*operative paragraph seven of the judgment of February 28, 2003*)
- c) "[to] pay the amount of US\$13,000.00 (thirteen thousand United States dollars) for expenses and a total of US\$3,500.00 (three thousand five hundred United States dollars) for costs, as stated in paragraph 182 of [the] judgment" (*operative paragraph eight of the judgment of February 28, 2003*) and
- d) "[T]he possible patrimonial consequences of the violation of the right to property should be established under domestic legislation, by the competent national organs" (*operative paragraph five of the judgment of February 28, 2003*).

* Judge Diego García-Sayán, Peruvian, disqualified himself from participating in the procedure to monitor compliance with the Judgment delivered in the instant case; therefore, he did not participate in the deliberation of this Order. Judge Leonardo Franco informed that, due to reasons of *force majeure*, he could not participate in the deliberation and signature of this Order.

¹ Case of the "Five Pensioners" V. Perú. Merits, Reparations and Costs. Judgment of February 28, 2003. Series C No. 98.

4. The briefs of April 20 and November 6, 2007 by which the State of Peru (hereinafter, the "State") referred to the status of compliance with the Judgment.
5. The briefs of November 13, 2006, January 22, March 29, June 11, September 17 and October 3, 2007, January 17, April 22 and October 21, 2008, by which the representative of the victims (hereinafter, the "representative") referred to the status of compliance with the Judgment.
6. The briefs of July 5 and October 5, 2007 and February 20, 2008, by which the Inter-American Commission on Human Rights (hereinafter, the "Commission" or the "Inter-American Commission") submitted the observations to the status of compliance with the Judgment.
7. The Order issued by the President of the Court (hereinafter, the "President"), on December 3, 2008 by means of which it convened the State, the representatives and the Inter-American Commission to a private hearing in order to received the updated information on the aspects pending compliance with the Judgment.
8. The private hearing held at the Court's seat in San José de Costa Rica on January 19, 2009².
9. The briefs and the appendices presented by the State during the private Bering (*supra* Having Seen clause 8) by means of which it informed on the compliance with the measures ordered in the Judgment.
10. The brief of January 22, 2009, by which the representative presented observations to the report submitted by the State on January 19, 2009 (*supra* Having Seen clause 9).
11. The brief of April 30, 2009, by which the State presented new information on the status of compliance with the Judgment.
12. The brief of May 14, 2009 by which the representative presented observations to the information forwarded by the State (*supra* Having Seen clause 11).
13. The brief of June 16, 2009 by which the Inter-American Commission presented observations to the information forwarded by the State (*supra* Having Seen clauses 9 and 11).

CONSIDERING:

1. That it is an inherent power of the judicial functions of the Court to monitor compliance with its decisions.

² Pursuant to Article 62 of the Rules of Procedures, the Court held the hearing together with the following commission of Judges: Judge Cecilia Medina Quiroga, Judge Leonardo A. Franco and Judge Rhadys Abreu Blondet. To this hearing, there appeared: a) on behalf of the Inter-American Commission: Deputy Executive Secretary Elizabeth Abi-Mershed; Advisers Lily Ching Soto and Silvia Serrano; b) on behalf of the victims and their representatives: Javier Mujica Petit, Carlos Torres Benvenuto and Guillermo Álvarez Hernández, and c) on behalf of the State of Peru: Supranational Specialized Prosecutor, Delia Muñoz Muñoz; Deputy Superintendent, Sergio Espinosa Chiroque; Adviser, Carlos Cueva Morales; Technical Secretary of the Council of State of Peru and Ambassador of Peru in Costa Rica, Alberto Gutiérrez La Madrid.

2. That Peru has been a State Party to the American Convention (hereinafter, the "American Convention" or the "Convention") since July 28, 1978, and that it accepted the binding jurisdiction of the Court on January 21, 1981.

3. That, pursuant to article 67 of the American Convention, States Parties must fully comply with the judgments delivered by the Court in time fashion³.

4. That article 68(1) of the American Convention stipulates that "[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, the States must ensure that the rulings set out in the decisions of the Court are implemented at the domestic level⁴.

5. That, in relation to the procedure to monitor compliance with the judgments, article 63(4) of the Rules of Procedure of the Court⁵ establishes that "once the Tribunal has obtained all the relevant information, it shall determine the state of compliance with its decisions and issue the pertinent orders".

6. That the obligation to comply with the rulings of the Court conforms to a basic principle of the law on the international responsibility of States, under which States are required to fulfill their international treaty obligations in good faith (*pacta sunt servanda*) and, as previously held by the Court and provided for in Article 27 of the Vienna Convention on the Law of Treaties of 1969, States cannot invoke their municipal laws to escape from their pre-established international responsibility. The treaty obligations of States Parties are binding on all State powers and organs.⁶

7. That the States Parties to the Convention must ensure compliance with its provisions and their inherent effects (*effet utile*) within their respective domestic legal systems. This principle applies not only in connection with the substantive provisions of human rights treaties (*i.e.* those dealing with the protected rights) but also in connection with procedural rules, such as the ones concerning compliance with the decisions of the Court. Such obligations are intended to be interpreted and enforced in a manner such that the protected guarantee is truly practical and effective, taking into account the special nature of human rights treaties⁷.

³ Cf. *Case of Baena Ricardo et al. Competence*. Judgment of November 28, 2003. Series C No. 104, para 60; *Case of the Caracazo V. Venezuela*. Monitoring Compliance with the Judgment. Order of the Inter-American Court of Human Rights of September 23, 2009, considering clause four and case of *Cantoral Huamaní and Garcia Santa Cruz V. Peru*. Monitoring Compliance with the Judgment. Order of the Inter-American Court of Human Rights, of September 21, 2009; Considering clause four.

⁴ Cf. *Case of Baena Ricardo et al. Competence*, supra note 1, para. 60; *Case of the Caracazo V. Venezuela*, supra note 3, considering clause three and *Case of Cantoral Huamaní and Garcia Santa Cruz V. Peru*, supra note 3, considering clause three.

⁵ Added by the Court during its LXXXII Ordinary Period of Sessions, in the session held on January 29, 2009.

⁶ See *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (articles 1 and 2 American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994, Series A N° 14, para. 35; *Case of the Caracazo V. Venezuela*, supra note 3, considering clause five and *Case of Cantoral Huamaní and Garcia Santa Cruz V. Peru*, supra note 3, considering clause five.

⁷ Cf. *Case of Ivcher Bronstein V. Peru. Competence*. Judgment of the Inter-American Court of Human rights of September 24, 1999. Series C N° 54, para. 37; *Case of the Caracazo V. Venezuela*, supra note 3, considering clause six and *Case of Cantoral Huamaní and Garcia Santa Cruz V. Peru*, supra note 3, considering clause six.

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8. That, in relation to the State's obligation to "conduct the corresponding investigations and apply the pertinent punishments to those responsible for failing to abide by the judicial decisions delivered by the Peruvian courts during the applications for protective measures filed by the victims" (*operative paragraph six of the Judgment of February 28, 2003*), the State informed *inter alia*, at the private hearing, that:

a) "after the delivery of the Judgment and by virtue of it, Mr. Javier Mujica Ruiz Huidobro filed a complaint⁸ against three superintendents of Banks and Insurance for alleged offenses related to the non-compliance with the protective measures";

b) "the Solicitor General, after the preliminary investigation, ordered⁹ that it was not acceptable to initiate an investigation against the former officers who were denounced, inasmuch as there was a proceeding opened in which the same facts were in dispute [...]. Therefore, the public prosecutor's office decided not to accept the opening of an investigation and set aside the complaint of Mr. Mujica", and

c) The judicial proceeding in process was conducted before "the 30° Criminal Trial Court of Lima, in which it was investigated the officers of the Superintendency in relation to the complaints for the reductions of the victims' pensions. However, this investigation concluded with the ruling of a court to the effect that there was no criminal responsibility on the part of the officers so denounced. This decision of the trial court was upheld by the Superior Court, [in] second instance [...]. [In light of that situation], Mr. Mujica filed a motion to annul against such decision of the Superior Court, which was declared to be inadmissible. According to the Peruvian legislation against such decision, a complaint appeal should be filed due to the inadmissibility of the motion to annul. Remedy that was also denied; therefore, the proceeding concluded".

9. That at the private hearing and in the brief containing the observations to the State's reports (*supra* Having Seen clauses 5, 8, 10 and 11), the victims' representative indicated that "the judgment of the Court orders not only the opening of an investigation but also the application of the pertinent punishments to the responsible of these violations. [Such is] an affirmation [...] clear and precise [...] that has been interpreted [...] by the State as a simply obligations of means and not of results. And these pensioners, as has been said, [l]ike others, filed criminal remedies to try and obtain some guarantees of non-repetition, [...] which were absolutely ineffective and were permanently rejected, ensuring that the responsible for these violations go unpunished". Furthermore, it indicated that "the impunity

⁸ Cf. complaint filed by Mr. Javier Mujica Petit, acting on behalf of Mr. Javier Mujica Ruiz- Huidrobo, before the Solicitor General's Office on April 7, 2003 (record on monitoring compliance with the judgment, volume IV; pages 1046 to 1054) and complaint filed by Mr. Javier Mujica Petit, acting on behalf of Mr. Javier Mujica Ruiz-Huidrobo before the on-duty Provincial Public Prosecutor's Office on Criminal Matters of Lima on February 21, 1999 (record on monitoring compliance with the judgment, volume IV, pages 1113 to 1117).

⁹ Cf. ordered issued by the Solicitor General, Office of the Public Prosecutor of Peru, on April 6, 2004 (record of monitoring compliance with the Judgment, volume IV, pages 1055 to 1057).

surrounding this case reinforces the systematic policy of aggression against the rights of the Peruvian pensioners, which is reflected in the important number of cases that are currently being heard [before the Inter-American system of human rights]”.

10. That, during the private hearing held, the Commission mentioned that “th[ose] investigations are for failing to abide by the judicial decisions that were not complied with. The investigations should not necessarily be focused on criminal matters, but disciplinary or administrative or on other type, and [that it heard,] for the first time [...] the filing or closing of the investigations referred to by the State, since during the procedure to monitor compliance with the judgment, it [had] not have information on that aspect”. Moreover, in its observations of June 16, 2009 it expressed that “it notes with concern that from the information furnished by the State, it spring that the State has not investigated nor punished the responsible for failing to abide by the judicial decisions issued by the Peruvian tribunals. Even more, while the State has informed on the filing of the criminal complaints filed at the request of the interested parties, it has not informed on the measures adopted, on its own initiative, to comply with this order of the Court”. Therefore, the Commission requested the Court to order the State to comply with said operative paragraph and to present updated information in that respect.

11. That, in the Judgment delivered in this case, the Tribunal considered that:

[T]he claim that an impartial and effective investigation should be conducted into the prolonged failure to comply with the judicial rulings is admissible, so that the Court orders the State to conduct the corresponding investigations and apply the pertinent punishments to those responsible for disregarding the judicial rulings¹⁰.

12. That, upon the analysis of the information furnished by the parties, this Tribunal has verified that the complaints filed by the victims of the instant case, prior to the delivery of the Judgment of the Court, gave rise to the criminal proceeding to which the State has referred (*supra* Considering clause 8). Those complaints are, namely:

- a) On July 19, 1995, Mr. Carlos Torres Benvenuto, Guillermo Alvarez Hernandez and Javier Mujica Ruiz Huidrobo, victims in the instant case, filed, among others, a criminal complaint against Mr. Luis Cortavarria Checkley and Claudio Sarmiento Molina for the “crimes of abuse of authority, non-performance of duties, embezzlement, misappropriation of funds, conversion and undue delay in the payment”, arguing as factual grounds: “the undue appropriation of the resources of the Pensions Fund of the Superintendency of Banks and Insurance and the [withholding of said resources] despite they had the legal obligation to transfer them to the Ministry of Economy and Finance as of the end of October 1992”. Moreover, they alleged that there was an unjustified delay in the payment decreed by the competent authority¹¹;
- b) On March 12, 1997, Mr. Guillermo Álvarez Hernández filed a criminal complaint against Mr. Manuel Vásquez Perales and Juan Alberto Aching

¹⁰ Case of *the Five Pensioners V. Peru*, *supra* note 1, para. 179.

¹¹ *Cf.* criminal complaint filed before the on-duty Provincial Prosecutor’s Office on July 19, 1995 (record on monitoring compliance, Volume IV, pages 1059 to 1071).

- Ashuy for the crime of "abuse of authority, violence and for disobeying authority and against freedom of work"¹². By means of the resolution of June 20, 1997, the Solicitor General's Office decided "[Not to accept] the criminal complaint filed"¹³;
- c) On February 21, 1999, Mr. Javier Mujica Ruíz Huidrobo filed a criminal complaint against Mr. Martin Naranjo Landerer for the crimes of "abuse of authority and unjustified delay in the ordinary payment"¹⁴. By means of the resolution of August 26, 1999, the Solicitor General's Office of Peru decided "[Not to accept] the criminal complaint filed against Martin Naranjo Landerer"¹⁵;
- d) On December 27, 2001, the Criminal Trial Court issued a decision in relation to the complaints referred to above (*supra* Considering clause 12.a), and indicated that "the commission of the crime against the Public Administration- Misappropriation of Funds and Embezzlement and the criminal responsibility" of Mr. Luis Cortavarria Checkley and Claudio Sarmiento Molina has not been proven. In addition, it pointed out that "the defense based on statute of limitations for the crime against the Public Administration - violence and disobeying the authority- was uphold *ex officio*"¹⁶;
- e) On June 12, 2003 the *Primera Sala Penal de Procesos con Reos Libres* [First Criminal Court] of the Superior Court of Justice of Lima declared "there are not grounds to bind Luis Cortavarria Checkley and Claudio Sarmiento Molina over to trial for the crime against the Public Administration –Embezzlement and Misappropriation of Funds- to the detriment of, among other people, Javier Mujica Ruis Huidrobo, Carlos Torres Benvenuto, Guillermo Alvarez Hernández and the State". As basis of said decision, the Superior Court of Justice of Lima indicated that "from the analysis of the evidence furnished during the preliminary proceedings, it spring that the charges brought against the accused have disappeared upon the decision that they acted under the terms of Decree-Law [N° 25.792] published in 'El Peruano' official gazette on [October 23, 1992], and it was also ruled out that they had transferred the Pensions Funds to their private sphere or to third parties or that they had appropriated the money to some purpose other than the one it was intended to"¹⁷, and

¹² Cf. criminal complaint filed before the on-duty Solicitor General on March 12, 1997 (record on monitoring compliance, Volume IV, pages 1059 to 1105).

¹³ Cf. criminal complaint filed before the on-duty Solicitor General on June 30, 1997 (record on monitoring compliance, Volume IV, page 1106).

¹⁴ Cf. criminal complaint filed before the on-duty Solicitor General on February 21, 1999 (record on monitoring compliance, Volume IV, pages 1113 to 1117).

¹⁵ Cf. criminal complaint filed before the on-duty Solicitor General on August 26, 1999 (record on monitoring compliance, Volume IV, page 1118 and 1124).

¹⁶ See "final reports" of case file N° 22-90 of December 27, 2001 (record on monitoring compliance, volume IV; pages 1074 and 1093).

¹⁷ Cf. resolution issued by the *Primera Sala Penal de Procesos con Reos Libres* [First Criminal Chamber] of the Superior Court of Justice of Lima on June 12, 2003 (record on monitoring compliance, volume IV; pages 1094 and 1095).

- f) On August 25, 2003, Mr. Javier Mujica Ruiz filed a motion to annul against such decision, which was declared inadmissible by the First Transitory Chamber in Criminal Matters of the Superior Court of Lima¹⁸.

13. That, from the information tendered by the parties, it spring that, once this Tribunal delivered the Judgment, on April 7, 2003, the victims, by means of their representative, filed a new criminal complaint against Mr. Luis Contravarría Chekley and Claudio Sarmiento Molina for the alleged commission of the crimes of "omission, reluctance and delay in the performance of duties, undue delay in the payment, abuse of authority, illegal misappropriation and violence and for disobeying the authority" to their detriment¹⁹. In that respect, on April 6, 2004 the Solicitor General's Office issued a resolution by means of which it decided not to open the investigation into the facts reported, based on that the criminal proceeding for the same facts was still open²⁰. On October 18, 2004 the First Transitory Chamber in criminal matters of the Supreme Court of Justice declared the inadmissibility of the complaint appeal filed by Mr. Javier Mujica Ruiz Huidrobo against said decision²¹.

14. That, considering the above mentioned, it is clear that the victims of the instant case have exhausted the instances and remedies available in the conduct of the criminal investigations initiated by them in this matter, until they reached the last competent judicial instance (*supra* Considering clauses 8, 12 and 13). It has not been proven, however, that the State has adopted, apart from the processing of the complaints filed by the victims, all the measures necessary to guarantee a thorough investigation into the facts of the instant case in order to determine, if applicable, the criminal, administrative or disciplinary responsibilities provided under the Peruvian legislation. From the decisions made by the State in this matter, it neither spring that the domestic courts have taken into account the terms established in the Judgment of this Court, by dismissing the complaints filed. To that purpose, it is worth recalling that, in the instant case, the Tribunal determined the non-compliance with the judicial decisions made at the domestic level that referred to the payment of the pensions and that this constituted a violation of the rights enshrined in articles 21 (Right to Property) and 25 (Right to Judicial Protection) of the American Convention, to the detriment of the five pensioners.

15. That, since its first rulings, the Court has indicated that, "The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the

¹⁸ *Cf.* criminal complaint filed before the First Criminal Chamber of the Superior Court of Lima on August 25, 2003 (record on monitoring compliance, Volume IV, page 1096).

¹⁹ *Cf.* complaint of April 7, 2003 filed by Javier Mujica Petit before the Solicitor General's Office (record on monitoring compliance, volume IV; pages 1040 to 1054).

²⁰ *Cf.* criminal complaint filed before the on-duty Solicitor General on April 6, 2004 (record on monitoring compliance, Volume IV, page 1055 to 1057).

²¹ *Cf.* resolution issued by the First Transitory Chamber in Criminal Matters of the Supreme Court of Lima of October 18, 2004 (record on monitoring compliance, Volume IV, page 1097).

initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government"²².

16. That, it is necessary for the State to report on the adoption of all the measures necessary to comply with the duty to "conduct the corresponding investigations and apply the pertinent punishments to those responsible for failing to abide by the judicial decisions delivered by the Peruvian courts during the applications for protective measures filed by the victims" (*operative paragraph six of the Judgment of February 28, 2003*). Especially, it is necessary for the State to inform in which way the decisions adopted up to the present by the state authorities (*supra* Considering clauses 12 and 13) have responded to the decision made by this Tribunal to that effect. Furthermore, the Court deems it is vital for the State to inform on the steps taken to conduct a thorough investigation different to the one conducted by the criminal courts.

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17. That, regarding the State's obligation to pay Mr. Carlos Benvenuto Torres, Javier Mujica Ruiz Huidrobo, Guillermo Alvarez Hernández, Reymert Bartra Vásquez and the widow of Mr. Maximiliano Gamarra Ferrerya, the amount fixed for non-pecuniary damage and the amount established as costs and expenses in their favor (*supra* Having Seen clauses 3.b and 3.c, respectively), the State indicated that it has complied with the aspects ordered in operative paragraphs seven and eight of the Judgment. In that respect, it indicated that on December 28, 2005, it paid to each one of the victims the amount of US\$ 6,300 (six thousand three hundred dollars of the United State of America) equivalent to \$ 21.552,30 new soles (twenty-one thousand five hundred and fifty-two and 30/100 new soles) for those items²³. In

²² Case of Velásquez Rodríguez V. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, para. 177 and Case of Godínez Cruz V. Honduras. Merits. Judgment of January 20, 1989. Series C N°. 5, para. 188; Case of Caballero Delgado and Santana V. Colombia, Merits. Judgment of December 8, 1995. Series C N° 22, para. . 58; Case of Cantoral Huamani and García Santa Cruz V. Perú. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C N°. 167, para. 131 and Case of Valle Jaramillo *et al.* V. Colombia. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C N° 192, para. 100.

²³ Cf. payment receipt in the name of Carlos Alberto Torres Benvenuto, issued by the Ministry of Justice – Administration General Office, on December 23, 2005 for the amount of 21.552,30 (twenty-one thousand five hundred and fifty two with 30/100 new soles) (record on monitoring compliance, volume III, page 662); cash receipt of December 28, 2005 signed by Mr. Carlos Benvenuto (record on monitoring compliance, Volume III, page 663); payment receipt in the name of Javier Mujica Ruiz Huidrobo, issued by the Ministry of Justice- Administration General Office, on December 23, 2005 for the amount of 21.552,30 (twenty-one thousand five hundred and fifty-two with 30/100 new soles) (record on monitoring compliance, volume III; page 664); cash receipt of December 28, 2005 signed by Patricia Mujica Petit (record on monitoring compliance, volume III, page 665); payment receipt in the name of Guillermo Alvarez Hernández, issued by the Ministry of Justice- Administration General Office on December 23, 2005 for the amount of 21.552,30 (twenty one thousand five hundred and fifty-two with 30/100 new soles) (record on monitoring compliance, volume III, page 666); cash receipt of December 28, 2005 signed by Guillermo Alvarez Hernández (record on monitoring compliance, volume III, page 667); payment receipt in the name of Reymert Bartra Vásquez, issued by the Ministry of Justice- Administration General Office of December 23, 2005 for the amount of 21.552,30 (twenty one thousand five hundred and fifty-two with 30/100 new soles) (record on monitoring compliance, volume III, page 668); cash receipt of December 28, 2005 signed by Reymert Bartra Vásquez (record on monitoring compliance, volume III, page 669); payment receipt in the name of Sara Elena Castro Remy widow of Gamarra, issued by the Ministry of Justice- Administration General Office of December 23, 2005 for the amount of 21.552,30 (twenty one thousand five hundred and fifty-two with 30/100 new soles) (record on monitoring compliance, volume

addition, it mentioned that the “victims voluntarily and expressly, waived their rights to the interest accrued since March 15, 2004”, and to prove that it presented letters signed by each one of them to that purpose²⁴.

18. That the representative indicated during the private hearing that “the [...] aspects of the Judgment [...] related to the payment of [the] compensation for moral damage and costs and expenses of the proceeding, as to the latter, it was normally complied with”.

19. That the Commission pointed out that “it notes that the amount paid by the Peruvian State coincides with the total amount established in the Judgment, though such amount was not distributed in the manner established in paragraph 182 of the Judgment” on merits, reparations and costs of February 28, 2003.

20. That, from the information furnished, it is possible to verify that the State paid to the victims the amounts ordered in the Judgment (*supra* Considering clause 17). This Tribunal has also verified the existence of documents signed by them, in which they expressed their waiver to the right to collect the interest on the amount owed. In this respect, the Court, even though it has ordered, in the method of compliance, that interest may accrue for the delay in the payment of the amounts established for non-pecuniary damage and costs and expenses, it deems that the payment of the interest is a right which may be voluntarily and expressly waived²⁵.

21. That, from the foregoing, it springs that the State has fully complied with operative paragraphs seven and eight of the Judgment delivered in the instant case.

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22. That in relation to the obligation to decide “that the possible patrimonial consequences of the violation of the right to property should be established under domestic legislation, by the competent national organs” (*operative paragraph five of the Judgment of February 28, 2003*), the State, the representatives and the

III, page 670) and cash receipt of December 28, 2005 signed by Sara Elena Castro Remy widow of Gamarra (record on monitoring compliance, volume III, page 671).

²⁴ Cf. Letter addressed to José Burneo Labrín, Executive Secretary of the Human Rights National Council, by Mr. Javier Mujica Ruiz Huidrobo and signed by Patricia Mujica, representative of Javier Mujica Ruiz, of December 28, 2005, in which it is stated “[its] express waiver of the interest accrued since March 15, 2004 [...] up to the present”; letter addressed to José Burneo Labrín, Executive Secretary of the Human Rights National Council, by Mr. Guillermo Álvarez Hernández of December 28, 2005 in which it is stated “[its] express waiver of the interest accrued since March 15, 2004 [...] up to the present”; letter addressed to José Burneo Labrín, Executive Secretary of the Human Rights National Council, by Mrs. Sara Elena Castro Remy, widow of Gamarra of December 28, 2005, in which it is stated “[its] express waiver of the interest accrued since March 15, 2004 [...] up to the present”; letter addressed to José Burneo Labrín, Executive Secretary of the Human Rights National Council, by Mr. Reymert Bartra Vásquez of December 28, 2005, in which it is stated “[its] express waiver of the interest accrued since March 15, 2004 [...] up to the present”; letter addressed to José Burneo Labrín, Executive Secretary of the Human Rights National Council, by Mr. Carlos Torres Benvenuto of December 28, 2005, in which it is stated “[its] express waiver of the interest accrued since March 15, 2004 [...] up to the present” (record on monitoring compliance, volume III, pages 673 to 677).

²⁵ Cf. *Case of Ricardo Canese V. Paraguay. Monitoring Compliance with Judgment*. Order of the Inter-American Court of Human Rights of August 6, 2008, Considering Clause eleven.

Commission forwarded information related to the annulment remedies filed by the Superintendency of Banks, Insurance and Investment Supervisor of Peru (hereinafter, the "SBS" or the "Superintendency") against the administrative decisions that had regulated the equalization of the pensions in favor of the five pensioners (*infra* Considering clause 25).

23. That at the private hearing, the State indicated that "after analyzing the judgment, it was determined that the domestic courts should decide which was the equalization system that had to be applied to the pensions of the pensioners of the Superintendency of Banks and Insurance. Therefore, the main issue [...] was to determine, for the effects of the equalization, whether the pensions should refer to the salary of a worker of the private sector labor regime or whether such it should refer [as understood by the State] to a worker of the public sector labor regime [...]. Therefore, [...] [the State] instituted administrative proceedings by which it requested the Judiciary to determine this equalization system of pensions. [...] The request made by the State has been, precisely, for the purposes of, as stipulated in the Judgment, ordering the domestic courts to determine whether such pensions should be equalized [...] with reference to the salary of a worker of the private sector or the salary of a worker of the public sector labor regime".

24. That, to that effect, the State pointed out that the SBS instituted legal proceedings aimed at declaring the annulment of the administrative decisions that had regulated the equalization of the pensions in favor of the five pensioners. According to the State, the "main purpose of the complaints, in each case, is to declare the annulment of the legal acts contained in the Decisions [of SBS] issued in favor of the five pensioners in the year 1995, by which it was ordered to equalize the retirement pensions of the pension regime of Decree-Law N° 20530 received by the former officials, on the basis of the remunerations that are paid to the employees of the Superintendency, who are subject to the private sector labor regime since January 1, 1982 and, the annulment of the legal acts contained in the [r]esolutions [of SBS] issued on March 12, 2002, whose article 1° orders to comply with the Decisions issued in the year 1995". It further asserted that, as an additional claim, it was requested "the restitution by the [five pensioners] of the sums that the [SBS] paid them in excess as pensions, resulting from the undue increase ordered under the decisions so objected [...]. In addition, it informed that the SBS requested to the Specialized Administrative Chamber of the Superior Court of Lima the adoption of precautionary measures to "ensure an effective final decision". Said precautionary measures were granted; therefore, the SBS continues paying to the five pensioners an amount equal to the sums they received before the adjustment so objected and, as ordered by said Specialized Chamber, the increase for pension equalization is monthly deposited in Banco de la Nación.

25. That, by means of a report presented on January 19, 2009 (*supra* Having Seen clause 9), the State described, in detail, the situation in which the proceedings instituted against each one of the victims are, and indicated that:

- a) Regarding the complaint against Mr. Reymert Bartra Vásquez, the First Transitory Specialized Chamber in Administrative Matters of the Superior Court of Justice of Lima delivered a judgment in first instance on April 27, 2007, by which it declared the annulment of decisions N° 391-95 and 254-2002 of the Superintendency, "ordering a new determination of the pension amount, considering the salary of a public sector employees' regime. In respect to such judgment, the State informed that no appeal was filed against

- it; therefore, it has become final. However, it indicated that the SBS filed an appeal against the aspect related to the restitution of the excess already paid, which was dismissed by the Permanent Civil Chamber of the Supreme Court of Justice by means of judgment of August 14, 2008²⁶, therefore, such proceeding is closed.;
- b) Regarding the complaint against Mrs. Sara Castro Remy, widow of Gamarra, the First Specialized Chamber in Administrative Matters of the Superior Court of Justice of Lima delivered a judgment, in first instance, on April 9, 2008²⁷, by which it declared the annulment of SBS's decisions No. 391-95 y 254-2002, "ordering a new determination of the pension amount, considering the salary of a public sector employees' regime". In respect to such judgment, the State informed that no appeal was filed against it by the defendant. However, it indicated that the SBS filed a motion of appeal regarding the restitution aspect, which is pending decision before the Supreme Court of Justice of the Republic;
 - c) Regarding the complaint against Mr. Guillermo Álvarez Hernández, the First Specialized Chamber in Administrative Matters of the Superior Court of Justice of Lima rendered a judgment in first instance on December 18, 2007²⁸, by which it declared the annulment of the SBS's decisions N°391-95 y 254-2002, "ordering a new determination of the pension amount, considering the salary of a public sector employees' regime". The State informed that the judgment dismisses the request for "repayment of the sums allegedly paid in excess". Furthermore, it indicated that the decision was appealed by both parties and it is now pending decision before the Supreme Court of Justice of the Republic;
 - d) In relation to the proceedings against Mr. Javier Ruiz Huidrobo, the Fourth Specialized Chamber in Administrative Matters of the Superior Court of Justice of Lima rendered a judgment in first instance on June 25, 2007²⁹, by which it declared the annulment of the SBS's decisions N°391-95 y 254-2002, "ordering a new determination of the pension amount, considering the salary of a public sector employees' regime". Moreover, it indicated that the decision was appealed by both parties and it is now pending decision before the Supreme Court of Justice of the Republic;
 - e) In relation to the complaint filed against Mr. Carlos Torres Benvenuto, the State mentioned that the judgment is pending decision before a first instance court. The State mentioned, in addition, that on August 3, 2007, the Transitory Civil Chamber of the Supreme Court of Justice of the Republic³⁰ revoked the precautionary measure ordered in said proceeding, by indicating

²⁶ Cf. judgment of the Permanent Civil Chamber of the Supreme Court of Justice of August 14, 2008 (record on monitoring compliance, volume IV; pages 997 to 1003).

²⁷ Cf. judgment delivered by the Superior Court of Justice of Lima, First Specialized Chamber in Administrative Matters, April 9, 2008 (record on monitoring compliance, volume IV, pages 1005 to 1016).

²⁸ Cf. judgment delivered by the Superior Court of Justice of Lima, First Specialized Chamber in Administrative Matters, December 18, 2007 (record on monitoring compliance, volume IV, pages 1017 to 1027).

²⁹ Cf. judgment delivered by the Superior Court of Justice of Lima, Fourth Specialized Chamber in Administrative Matters, June 25, 2007 (record on monitoring compliance, volume IV, pages 1017 to 1027).

³⁰ Cf. decision issued by the Transitory Civil Chamber of the Supreme Court of Justice of the Republic (record on monitoring compliance, volume IV, pages 1038 to 1040).

that "in the [...] judgment of the Inter-American Court [...] it was precisely valued, in the ground [89.f] the 'administrative decision [No. 289-2002], in which *inter alia* it was decided "[t]o comply with SBS's Decision No. 283-95 [of April 7, 1995],' which means that the administrative decisions, subject-matter of this precautionary measure, are not, actually, null and void, as the SBS alleges to satisfy the requirement of credibility, and should this be the case, the request for precautionary measure has no legal ground, and it would not be necessary to review the compliance with the requirement of danger in the delay, given that since both requirements must be fulfilled in order to grant said measure, the non-fulfillment of one of them is sufficient to dismiss the request for precautionary measure". Hence, the Supreme Court of Justice revoked the precautionary measure adopted against Carlos Alberto Torres Benvenuto.

26. That the State informed that, by means of Decision N° 1407 of February 26, 2009, the SBS decided to authorize "the dismissal of the requests made as additional claim [regarding the restitution of the pension sums paid in excess] in the [...] judicial proceedings [instituted against the victims in the instant case] and, if applicable, to dismiss the appeals filed" (*supra* Having Seen 11 and Considering clauses 23, 24 and 25).

27. That the representative pointed out, at the private hearing, that the pensions of the victims were reduced between "ten and twenty times from its value [...] and the sums that they are now collecting are less than the half of what they used to receive before the commencement of all the judicial proceedings that were instituted over the last 17 years, [when] the Superintendency recognized them the right to a pension of 2.500 soles, which was afterwards reduced to 500 and gave rise to the complaints they filed". They mentioned that, as a result of the proceedings instituted against them, "they are living today a worst situation than 17 years ago". Furthermore, the representative stated that "in order to file [the] complaints [against the five pensioners], the State has made a *sui generis* interpretation of the judgment of the Court, [which] did not decide that the domestic courts, and according to the domestic legislation, should determine whether or not they had a right to an adjustable pension, which was decided in the judgment. It ordered, instead, that the domestic courts should determine the possible patrimonial consequences of the violation of the right to property, the damages, the consequential damage, the loss of earning, among other aspects". According to the representative, "not only has the State flagrantly failed to comply with a judgment that it was its duty to honor and comply, in good faith, but also there is an aggravating circumstance in this act of the State and it is the fact that the State has invoked the judgment of the Court to cause [a] damage [...] to the five victims of this case". To this end, it pointed out that the decision made by this Court in its Judgment of February 28, 2003 does not "authorize the State to interpret this mandate as an authorization to disregard, once again, the decisions with authority of final judgments that the most important courts of Peru had entered" in favor of the five pensioners.

28. That the representative informed that the dismissal authorized by decision N° 1407 of February 26, 2009 (*supra* Considering clause 26) only comprises the additional claims to the complaints already filed, but not the main claim thereof. Said dismissal "is ordered, based on two reasons: the first one is that said claim was systematically dismissed by the Judiciary in all the complaints filed by the SBS, and the second one is that this legal opinion is uniform in all the instances of the

Peruvian courts". According to the representatives, said dismissal "lacks practical effect" and "keeps in force the main claim of the complaints filed against the victims".

29. That the Inter-American Commission noted that there is no controversy between the victims' representatives and the State as to the fact that the State filed complaints against the victims and that, as a result of the precautionary measures ordered by the domestic court, the victims stopped receiving the "increase" in their pensions based on equalization. The Commission mentioned that "what was put forward before the Court did not require or does not require a determination over the [pension] regime in general, but the compliance with a judgment that has not yet become final [...]. [I]t seems that the State is taking a decided case with a final judgment within a legal context and it is reusing it to a certain extent, in relation to a legal framework previously adopted. Furthermore, it mentioned that "it positively values the decision of the administrative courts to dismiss the additional claims to the complaints for annulment filed by the SBS".

30. That the State violated the right to property to the detriment of the victims of the instant case, under the terms of the following paragraphs of the Judgment delivered by this Tribunal:

114. The SBS paid only the amounts owed up until October 1992 and, to this end, it based the calculations on the salary received by its active officials. However, this was the only equalized pension payment that the pensioners received after the judicial rulings had been delivered until, in March 2002, the situation changed; this will be examined below [...]. Consequently, for several years, the State failed to fully implement the said judgments.

115. The Court observes that, although the State authorities could have established the equalized pension in accordance with the salary received by an official subject to the public sector regime of a similar level or category to that of the alleged victims when the SBS employees changed to the private sector regime (1981), they did not do so. Moreover, it was the State itself that, as of the time the alleged victims opted for the pension regime of Decree Law No. 20530, recognized, by administrative decisions, that they had a right to a pension amount equalized with the salary of an active SBS official. In addition, but even more important, when ruling on the applications for protective measures filed by the five pensioners, the domestic courts ordered that the monthly pensions should continue to be paid as they had been paid; in other words, equalizing them with the salary received by active SBS officials, who belonged to the private sector regime. This constitutes a right, to the benefit of the pensioners, emanating from the judgments on protective measures, which, when it was disregarded by the State, affected their patrimony, violating Article 21 of the Convention³¹.

31. That, based on the foregoing, the Court, in its Judgment, considered proven that "the alleged victims and their next of kin suffered pecuniary and non-pecuniary damage, owing to the reduction in their pensions and the failure to comply with the judgments in their favor; the quality of life of the alleged victims was diminished"³². As a result, the Court ordered the State to pay the victims a certain amount for non-pecuniary damage and, regarding the patrimonial consequences, if applicable, it ordered to establish the corresponding amount by means of the State's institutions³³.

³¹ Cf. *Case of the Five Pensioners V. Peru*, supra note 1, para. 114 and 115.

³² Cf. *Case of the Five Pensioners V. Peru*, supra note 1, para. 88.p).

³³ As for the reparation of the pecuniary damage, in the brief on requests, arguments and evidence, they requested the Court that, in order to establish the exact amount of the compensation for damages, "it should take into account the accounting expertise that is available to the Court, at the appropriate time". Subsequently, in their brief with final arguments, they clarified that the purpose of the expert

32. That the scope and meaning of the obligation contained in operative paragraph five of the Judgment does not admit an interpretation different to what was strictly stipulated therein, that is, that the competent national organs must establish the possible patrimonial consequences of the violation of the right to property of the pensioners according to domestic legislation. In this obligation, the Tribunal has not ordered, as the State alleges, the new determination of the pension regime that corresponds to the victims (*supra* Considering clause 23).

33. That, from the information received so far by the Tribunal, it is clear that, after more than six years of the delivery of the Judgment in the instant case, the State has not adopted any measure to establish, through the competent national organs, the patrimonial consequences of the violation of the right to property declared to the detriment of the five pensioners; therefore, this obligation is still pending compliance. It falls upon the State to adopt such measures as soon as possible and inform this Court on that respect.

34. That, moreover, this Tribunal notes that even though the facts regarding the annulment remedies filed by the SBS do not refer to the compliance with the reparations ordered by this Court in the operative paragraphs of the Judgment delivered in this case, such facts could have effects on the subject-matter of the proceeding subjected to the Inter-American system³⁴. In that respect, the Court repeats that, according to article 67 of the Convention, "the judgment of the Court shall be final and not subject to appeal".

35. That it is pertinent to emphasize the terms established in the case of *Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*³⁵ to the effect that

When a State has ratified an international treaty such as the American Convention, the judges are also subject to it; this obliges them to ensure that the *effet util* of the Convention is not reduced or annulled by the application of laws contrary to its provisions, object and purpose. In other words, the organs of the Judiciary should exercise not only a control of constitutionality, but also of "conventionality" *ex officio* between domestic norms and the American Convention; evidently in the context of their respective spheres of competence and the corresponding procedural regulations. This function should not be limited exclusively to the statements or actions of the plaintiffs in each specific case, although neither does it imply that this control must always be exercised, without considering other procedural and substantive criteria regarding the admissibility and legitimacy of these types of action.

report presented in the public hearing was "to explain the magnitude of the patrimonial damage that had been caused," and that they did not intend the Court to order the State to reimburse the amounts indicated in this report, but that it should take them as a reference in order to establish compensation for pecuniary damage. *Cf.* case of the *Five Pensioners V. Peru*, *supra* note 1. para. 170.d).

³⁴ The Court has deemed that the binding nature of the judgments is not limited to the operative section, but also is extended to its foundation or *ratio decidendi*. *Cf.* furthermore, Judgment C-180/06 of the Constitutional Court of Colombia from March 8, 2006, which indicated that "such effects on constitutional matters support not only the same decision contained in the operative paragraphs of the judgment, but also the juridical reasons contained in the considerations that are related directly and wholly (*ratio decidendi*)". Quoted in: Case of *García Asto and Ramírez Rojas v. Perú*, Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of July 12, 2007, Considering Clause 17.

³⁵ *Cf.* Case of the Dismissed Congressional Employees (Aguado - Alfaro *et al.*) *v.* Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C N° 158 para. 128.

36. That, the foregoing, coincides with the case-law of the Constitutional Tribunal of Peru, which has indicated that:

It is not adequate, then, to adopt a duality thesis of primacy of International Law over the Domestic Law and vice-versa; it is required, then, a comprehensive solution, based on case-law, in matters of relationship of the Inter-American system of human Rights and the domestic constitutional Law³⁶.

37. That, by means of the actions adopted before the delivery of the Judgment in the instant case³⁷, the Peruvian State acknowledged as true certain facts or claims put forward by the representative and the Inter-American Commission and that these, consequently, generated a legal effect on which the Inter-American Court based its decision (*supra* Considering clauses 30 and 31).

38. That some of the legal decisions related to this matter are pending resolution (*supra* Considering clauses 25.c; 25.d and 25.e). Until they are not solved, the Court does not count with all the necessary elements for their analysis. However, the Court positively values the dismissal of the additional claims requested by the State, which refer to: "a) the restitution, by the defendants, of the sums of money that the Superintendency paid them in excess, as a result of the increase ordered by the administrative decisions questioned, up to before the filing of the complaints (January 2005) and b) the payment of the accrued interest derived from the payment in excess already mentioned" (*supra* Considering clause 26). This Tribunal deems that said dismissal is consistent with the Judgment on the merits, reparations and costs delivered on February 28, 2003 and in particular, with the terms of paragraphs 102, 103, 116 and 117 thereof.

39. That, in order to fully analyze the compliance with the Judgment in the instant case, the Court shall assess all the information in order to determine the adequate compliance therewith.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

By virtue of its authority to monitor compliance with its own decisions, pursuant to 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 30(2) and 63 of its Rules of Procedure³⁸,

DECLARES:

1. That, in accordance with the terms of Considering clauses 20 and 21 of this Order, the State has fully complied with the following aspects ordered in the

³⁶ Cf. Judgment delivered on March 2, 2007 by the Constitutional Tribunal of Peru, case file N. ° 679-2005-PA/TC, Lima, Santiago Enrique Martin Rivas, para. 36. (<http://www.tc.gob.pe/jurisprudencia/2007/00679-2005-AA.html>) last visit December 2009.

³⁷ Cf. *Case of the Five Pensioners V. Peru*, *supra* note 1, para. 88. n) and 88.o).

³⁸ Rules of Procedure of the Court partially amended during its LXXXII Period of Ordinary Sessions, held from January 19 to 31, 2009.

Judgment on the merits, reparations and costs of February 28, 2003 in the instant case, namely:

- a) "as indicated in paragraph 180 of [the] Judgment, [to] pay the four victims and Maximiliano Gamarra Ferreyra's widow the amount of US\$3,000.00 (three thousand United States dollars) for non-pecuniary damage" (*operative paragraph seven of the judgment of February 28, 2003*), and
 - b) "[to] pay the amount of US\$13,000.00 (thirteen thousand United States dollars) for expenses and a total of US\$3,500.00 (three thousand five hundred United States dollars) for costs, as stated in paragraph 182 of [the] Judgment" (*operative paragraph eight of the judgment of February 28, 2003*).
2. That, in accordance with the terms of Considering clauses 16 and 33 of this Order, the Tribunal shall keep open the procedure to monitor compliance with the aspects pending compliance in the instant case, namely:
- a) "conduct the corresponding investigations and apply the pertinent punishments to those responsible for failing to abide by the judicial decisions delivered by the Peruvian courts during the applications for protective measures filed by the victims" (*operative paragraph six of the Judgment of February 28, 2003*) and
 - b) decide "that the possible patrimonial consequences of the violation of the right to property should be established under domestic legislation, by the competent national organs" (*operative paragraph five of the judgment of February 28, 2003*).

AND DECIDES:

1. To require the State to take the necessary measures to fully and immediately comply with the aspects pending fulfillment that were ordered by the Tribunal in the Judgment on the merits, reparations and costs delivered on February 28, 2003 according to the provisions of Article 68(1) of the American Convention on Human Rights.
2. To order the State to submit to the Inter-American Court of Human Rights, not later than March 12, 2010, a report describing all the measures adopted to comply with the aspects pending compliance, mentioned in declarative paragraph 2 *supra*, pursuant to Considering Clauses 16, 33 to 39 of this Order.
3. To call upon the representative of the victims and the Inter-American Commission on Human Rights to submit their observations to the State's report referred to in the preceding operative paragraph, within a period of four and six weeks, respectively, as from the date of receipt of the report.
4. To continue monitoring the aspects of the Judgment on merits, reparations and costs of February 28, 2003 that are still pending compliance.

5. To require the Secretariat of the Court to notify this Order to the State, the Inter-American Commission on Human Rights and the representative of the victims.

Cecilia Medina Quiroga
President

Sergio García Ramírez

Manuel Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Pablo Saavedra Alessandri
Secretary

So ordered,

Cecilia Medina Quiroga
President

Pablo Saavedra Alessandri
Secretary