

ORDER OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

OF NOVEMBER 23, 2010

CASE OF ZAMBRANO VÉLEZ AND OTHERS V. ECUADOR

MONITORING COMPLIANCE WITH JUDGMENT

HAVING SEEN:

1. The Judgment on merits, reparations and costs issued by the Inter-American Court of Human Rights (hereinafter "the Court," "the Inter-American Court" or "the Tribunal") on July 4, 2007.

2. The Order of the Inter-American Court of September 21, 2009, through which it declared:

1. [T]hat pursuant to considering clauses 27, 31, 49, 62 and 72 of the [...] Order, the State has complied with the obligation:

a) to carry out, within six months following notification of the present Judgment, a public act of acknowledgement of its responsibility for the extrajudicial execution of the victims and the other violations committed in the instant case (*operative paragraph seven of the Judgment*);

b) to publish, on just one occasion, in the Official Gazette and in another widely circulated national newspaper, paragraphs 9 to 130 of the present Judgment and the operative paragraphs therein, within six months following the notification thereof (*operative paragraph eight of the Judgment*);

c) to adopt all legal, administrative and other measures necessary to bring its domestic legislation on states of emergency and suspension of guarantees, especially the provisions of its *Ley de Seguridad Nacional* [National Security Law], into conformity with the American Convention on Human Rights (*operative paragraph nine of the Judgment*);

d) to implement, within a reasonable time period, permanent educational programs on human rights for members of all levels of the armed forces and the national police force, with particular emphasis on the legitimate use of force and states of

emergency; and, for prosecutors and judges, permanent educational programs on international standards related to judicial protection of human rights (*operative paragraph ten of the Judgment*); and,

e) to pay directly to the *Comisión Ecuménica de Derechos Humanos (CEDHU)* [Ecumenical Human Rights Commission] the amounts set in paragraph 161 of the Judgment as compensation for legal costs and expenses (*operative paragraph twelve of the Judgment*).

2. That the State has complied in part with its obligation to pay directly to the family members of Mr. Wilmer Zambrano-Vélez, Mr. Segundo Olmedo Caicedo Cobeña and Mr. José Miguel Caicedo Cobeña the amounts set as compensation for pecuniary and non-pecuniary damages (*operative paragraph of the Judgment eleven*), as set forth in considering clauses numbers 67 to 70.

3. That, in accordance with the terms of considering paragraphs 12 to 16 and 69 to 70, the procedure to monitor compliance with the outstanding points in the instant case shall remain open, to wit:

a) to immediately carry out the necessary actions, and use all available means, to expedite the investigation and proceedings with ordinary criminal jurisdiction to identify, prosecute and, if applicable, punish those responsible for the extrajudicial execution of Wilmer Zambrano-Vélez, José Miguel Caicedo Cobeña and Segundo Olmedo Caicedo Cobeña, as well as fulfilling the next of kin of the victims right to the truth and ensuring that they have full access and capacity to act in all stages and instances of the said investigations and proceedings, pursuant to the domestic laws and provisions of the American Convention on Human Rights (*operative paragraph six of the Judgment*), and

b) to directly pay the family members of Mr. Wilmer Zambrano-Vélez, Mr. Segundo Olmedo Caicedo Cobeña and Mr. José Miguel Caicedo Cobeña the interest accrued on the overdue payments as compensation for pecuniary and non-pecuniary damages (*operative paragraph eleven of the Judgment*).

3. The briefs of July 20, August 13 and 24, and September 10, 2010, through which the Republic of Ecuador (hereinafter "the State" or "Ecuador") issued information about compliance with the outstanding points in the present case.

4. The briefs of August 20 and October 14, 2010, through which the representatives of the victims (hereinafter "the representatives") presented their observations on the State reports.

5. The communication of October 19, 2010, through which the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") presented its observations on the State's reports.

CONSIDERING THAT:

1. Monitoring compliance with its decisions is an inherent jurisdictional power of the Court.

2. Ecuador has been a State Party to the Convention since December 28, 1977, and recognized the contentious jurisdiction of the Court on July 24, 1984.

3. Article 68(1) of the American Convention sets forth that "[t]he States Parties to the Convention undertake to comply with the Court's judgment in any case to

which they are parties." Therefore, the States must ensure that the orders issued by the Court in its decisions are implemented within their jurisdictions.¹

4. As the Court's Judgments are final and not subject to appeal, pursuant to Article 67 of the American Convention, the States must comply with them promptly and fully.

a) Duty to carry out investigations under the ordinary criminal jurisdiction

5. Regarding the duty to immediately carry out the due procedures and to use all the measures available in order to expedite the investigation and the respective procedures under the ordinary criminal jurisdiction to identify, prosecute and, when necessary, sanction those responsible (sixth operative paragraph of the Judgment), the State stated that it informed the Fiscalía General del Estado [Prosecutor General's Office] about "the error that had been committed by failing to promptly investigate the case facts." According to the Prosecutor General's Office, the report was presented in 1997, but according to the report presented by the Procuraduría General del Estado [Attorney General's Office], the Prosecutor General was informed of the facts in 2007. The State manifested that, once the cases' preliminary investigation is opened, "the prescription decreed by the Ninth Criminal Judge of Guayas would be revoked" and it would receive statements and testimonies. Also, the State informed that it coordinated with the Public Defense Office of the People so that the latter would present an "proceeding on grounds of non-compliance," a jurisdictional guarantee provided for in Article 93 of the Constitution of Ecuador of 2008,² against the Prosecutor General of the State due to the lack of investigation into the case, so that the Constitutional Court declare that the Judgment of the Inter-American Court has not been complied with and order the necessary measures thereto. Accordingly, the Public Defense Office presented the "preparatory information request" to the Prosecutor General as a step towards this proceeding. In August 2010, the opening of the Preliminary Investigation was stipulated, which based on the "preparatory request," initiated the investigation of the case facts. Also, in August 2010, the Ministry of Justice, Human Rights, and Worship requested that the President of the Board of Judiciary re-open the administrative case file of the judge who, at that time, had declared the prescription period.

6. The representatives manifested that the information provided by the State evidenced that the Public Prosecutor's Office, to date, had not begun the investigation to comply with that provided for in the Judgment. They indicated that the judicial employees failed to comply with the constitutional and legal guarantees, which state that the Public Ministry is obliged to begin, on their own accord, investigations into every criminal offence, and, the State has not proceeded to revoke the prescription period issued by the Ninth Criminal Judge of Guayas.

¹ Cf. *Case of Baena and others v. Panama. Competence*. Judgment of November 28, 2003. Series C No. 104, paragraph 60; *Case of Escher and others v. Brazil*. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of May 17, 2010, Considering third, and *Case of Tristán Donoso v. Panama*. Monitoring Compliance with Judgment. Order of the Court of Human Rights of September 1, 2010, Considering Clause three.

² In conformity with Article 54 of the Organic Law of Jurisdictional Guarantees and Constitutional Control, all the persons and the Public Defense of the People have the right to present the aforementioned action.

Consequently, the State has not taken any real action to investigate the facts, carrying out no more than a few official communications and meetings, which had little impact. Also, there is no will to sanction the judge that irresponsibly allowed time to pass, failed to carry out the investigation, lost the case file, and declared the prescription period. Then, the representatives observed that the preliminary investigation initiated by the Public Ministry is an investigation that is carried out before a criminal proceeding has begun, and it cannot remain open for more than one year, barring a few exceptions, and that it is reserved for third parties and the public in general, without affecting the rights of the offended and the accused. Although said inquiry had begun evidently late, the representatives hope that it will lead to real actions being taken to identify those responsible. They requested that the State periodically informs them of the advances made in the investigation, guarantee the next of kin their right to be informed about the progress and decisions therein, and that their right to be heard and to present evidence is recognized. Also, they requested that the State let the decision made by the Judiciary Board be known in an appropriate fashion.

7. The Commission manifested that “it values the State’s willingness to avoid impunity in the present case and the information offered,” stating that it has no additional information about the prior preliminary investigation, the facts being investigated therein and their relation to the case, or about the execution of the pertinent and necessary actions to progress with the investigation.

8. The Court observes that, according to the information provided, the State recently started the investigation with a preliminary investigation, led by the Prosecution Ministry. More than three years after the Judgment were handed down and more than 17 years since the events occurred, the victims serious lack of access to justice in the present case is evident, as shown by the clear lack of investigation on the authorities’ behalf. The establishment of an “action for non-compliance” is noteworthy in this case and, in general, as a jurisdictional guarantee recently provided for in Article 93 of the Constitution of Ecuador³ so that the Public Defense of the People could exercise more direct control over the public functions. In this case, according to the State information, an action of this kind had been initiated against the Prosecutor General of the State due to the lack of investigation into the case, such that the Constitutional Court declared the lack of compliance with the Inter-American Court’s Judgment and prescribed the measures necessary to secure compliance. Also, the State has informed of disciplinary measures, such as the present action against the judge that declared the prescription. Notwithstanding, although disciplinary path and non-compliance actions are noteworthy complementary control measures, the State must adopt those necessary actions so as to effectively comply with its main obligation of investigating the facts of this case within the ordinary justice system.

9. Due to the lack of action taken, the Court reiterates that the State shall intensify its efforts to investigate all the human rights violations with due diligence. When doing so, it should be taken into account that the Judgment established that

³ Article 93 of the Constitution of Ecuador establishes the following:

Action for Non-Compliance Art. 93 –Action for non-compliance will have the purpose of enforcing application of the statutes making up the system of laws and implementation of rulings or reports by international human rights organizations when the statute or decision whose implementation is sought contains a clear, explicit and enforceable obligation to act or refrain from acting.

Messrs. Wilmer Zambrano Vélez, Segundo Olmedo Caicedo Cobeña and José Miguel Caicedo Cobeña were extrajudicially executed on March 6, 1993, by State agents through the illegal use of lethal force as part of a military and police security operation with undefined objectives (“capturing criminals, drug dealers, and terrorists”), and a suspension of legal guarantees without clear limits. The situation provided for in the Judgment still persists, since the State continues to fail to provide a satisfactory and convincing explanation regarding the use of lethal force, hence breaching the obligation to ensure an investigation into what occurred was carried out.⁴

10. Regarding the alleged declaration of the prescriptive period of the criminal prosecution, the Court reminds that the Judgment clearly stated that the State “cannot invoke any domestic law or disposition to relieve itself from the order of the Court to investigate, and when applicable, criminally sanction, those responsible for the execution of Wilmer Zambrano Vélez, José Miguel Caicedo Cobeña and Segundo Olmedo Caicedo Cobeña.”⁵

11. This Tribunal deems it essential that the State continue to submit updated, detailed, and complete information regarding the progress of the judicial investigation, if the aforementioned prescriptive period decision were revoked, as well as the complementary investigations that have been opened. The State shall, in particular, report on the legal mechanisms which enable the next of kin of the victims to have access to and participation in the criminal procedures, since the next of kin’s right to be informed regarding the course of the investigation and the decisions adopted, to be heard, and to submit evidence must be guaranteed.

b) Payment of moratorium interest

12. According to that set forth in the Order of September 21, 2009 (*supra* Having Seen 2), although the State has paid the economic reparations set in the Judgment of July 4, 2007, in full, the payment of moratorium interest from October 2008 was pending.

13. The State reported that on April 1, 2010, a “Mutual agreement concerning the payment of moratorium interest in the case of Zambrano Vélez and others [v.] Ecuador” was signed, through which the victims agreed and accepted the total amount that the State should pay. Likewise, it informed that “in order to calculate the payment, the State’s 31 day delay in paying compensation was taken into account, as well as the current moratorium interest rate of 9.19%, in line with the official Central Bank rates, calculated on the amounts awarded by the State of Ecuador to [the victims]. The amount awarded on September 1, 2008, was a total of \$ 804.000,00. Therefore, “it was concluded that the total value to be paid [was] \$ 6.362,54 (six thousand three hundred and sixty two dollars and fifty four cents of the United States of America).” Therefore, the State informed that, according to paragraph 136 of the Judgment, “50% of the compensation awarded was distributed equally between the victim’s children, and the remaining 50% was distributed equally between whomever was the victim’s partner at the time of his or her death.” Likewise, the State informed that each of the sons and daughters of the victims

⁴ *Case of Zambrano Vélez and others v. Ecuador. Merits, Reparations and Costs.* Judgment of July 4, 2007. Series C No. 166, par. 94, 101 and 110.

⁵ *Case of Zambrano Vélez and others v. Ecuador, supra* note 4, para. 148.

received USD 138.32 (one hundred and thirty eight dollars and thirty two cents of the United States of America) and each partner received USD 1.062,42 (one thousand, sixty two dollars and forty two cents of the United States of America).” Finally, it was stated that, “[t]he money was credited to the account of each victim on May 14, 2010.”

14. The State also manifested that “due to an error that occurred during the transfer, the money owed to Mrs. Mariela Caicedo and her representatives (Marjuri Narcisca Caicedo and Gardenia Marianela Caicedo) could not be credited,” but the transfer would be ready by the end of July 2010, and apologized for the delay. Afterwards, the State informed that it had paid the compensation to Mrs. Caicedo Rodríguez.

15. The representatives thanked the State for the moratorium interest payment made to some of the beneficiaries and indicated that they awaited the payment to the remaining beneficiaries.

16. The Commission expressed that it values the agreement reached between the victims and the State in order to fulfill the payment of the pending moratorium interest.

17. The Court positively values the agreement to pay moratorium interest reached between the State and the beneficiaries of pecuniary compensation. In light of the agreement between representatives and the State, and the understanding that the latter shall fully comply with the agreement regarding one of the persons that had not received the payment, the State shall inform and demonstrate, by means of the relevant documents, full compliance of the payment of moratorium interest owed.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

in exercising its power to monitor compliance with its decisions, pursuant to Articles 67 and 68(1) of the American Convention on Human Rights, Article 30 of the Statute, and Articles 31(2) and 69 of its Rules of Procedure,

DECLARES:

1. That according to that provided for in the considering clause 17 of the present Order, the State has partially complied with the obligation to directly pay the next of kin of Messrs. Wilmer Zambrano Vélez, Segundo Olmedo Caicedo Cobeña and José Miguel Caicedo Cobeña, the accrued moratorium interest, owed as compensation for pecuniary and non-pecuniary damages (*operative paragraph eleven of the Judgment of July 4, 2007*) and to prove the respective interest payments to those still waiting to receive it.

2. That in accordance with that provided for in Considering Clauses 9, 10 and 11 of the present Order, the procedure to monitor compliance with the outstanding

point shall remain open. The aforementioned point concerns "the obligation to carry out the due procedures and to use all measures available in order to expedite the investigation and the respective procedures under ordinary criminal jurisdiction in order to identify, prosecute and, if applicable, sanction those responsible for the extrajudicial execution of Wilmer Zambrano Vélez, José Miguel Caicedo Cobeña and Segundo Olmedo Caicedo Cobeña" as well as the obligation to satisfy the next of kin of the victims' right to know the truth and to ensure that they have full access and capacity to participate in all stages and instances of investigations and proceedings, pursuant to domestic laws and the provisions of the American Convention on Human Rights." (*operative paragraph six of the Judgment of July 4, 2007.*)

AND RESOLVES:

1. To request the State to adopt all the measures necessary to give effective and prompt compliance with operative paragraph six of the Judgment of merits and reparations of July 4, 2007, pursuant to that provided for in Article 68(1) of the American Convention on Human Rights.
2. To request the State to submit to the Inter-American Court, no later than March 30, 2011, a report in which it state all the actions adopted to comply with the reparations awarded by this Court that are pending compliance, pursuant to that set forth in Considering Clauses eleven and twelve, as well as in the first and second Declarative Paragraphs of the present Order.
3. To request the representatives of the victims and their next of kin, and the Inter-American Commission on Human Rights to submit their observations on the State's report mentioned in the foregoing operative paragraph, within four and six weeks, respectively, following the receipt of said report.
4. To continue monitoring the outstanding point from the Judgment on merits, reparations and costs of July 4, 2007.
5. To request to the Secretariat of the Court to notify the State, the Inter-American Commission on Human Rights, and the representatives of the victims and their next of kin of the present Order.

Diego García-Sayán
President

Leonardo A. Franco

Manuel E. Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Alberto Pérez Pérez

Eduardo Vio Grossi

Pablo Saavedra Alesandri
Secretary

So directed,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary