

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

OF FEBRUARY 5, 2013

CASE OF KIMEL v. ARGENTINA

MONITORING COMPLIANCE WITH JUDGMENT

HAVING SEEN:

1. The Judgment on merits, reparations and costs (hereinafter "the Judgment") in this case delivered by the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") on May 2, 2008, in which the Court accepted the acknowledgment of international responsibility made by the Argentine Republic (hereinafter "the State" or "Argentina") and declared that the latter had violated the principle of legality, the right to freedom of thought and expression, and the right to be heard within a reasonable time, to the detriment of Eduardo Kimel. The Inter-American Court considered that the criminal judgment handed down on March 17, 1999, in which Mr. Kimel was sentenced for the crime of libel, did not meet the requirements of legality, necessity and proportionality and, consequently, constituted a restriction incompatible with the American Convention and violated his freedom of expression. In this regard the Court emphasized that the critical opinion expressed by Mr. Kimel in his 1989 book entitled "*La Masacre de San Patricio*" [The St. Patrick's Church Massacre], related to issues of significant public interest, because it referred to the conduct of the judge in charge of the investigation into the 1976 murder of five members of the clergy during the military dictatorship.

2. The Order of the Court of May 18, 2010, concerning monitoring compliance with the Judgment, in which it declared, *inter alia*, that the State had complied fully with the following obligations:

- a) To pay the amounts established in th[e] judgment for pecuniary and non-pecuniary damage, and reimbursement of costs and expenses (*sixth operative paragraph of the Judgment*);
- b) To eliminate the name of Mr. Kimel from the public records in which it appear[ed] with a criminal record in relation to the instant case (*operative paragraph octavo of the Judgment*);
- c) To make the publications indicated in paragraph 125 of the Judgment (*ninth operative paragraph of the Judgment*), and
- d) To adapt its domestic law to the American Convention, in order to correct the ambiguity acknowledged by the State, so as to meet the requirements of legal certainty and, consequently, not to impair the exercise of the right to freedom of expression (*eleventh operative paragraph of the Judgment*).

3. The Order of the Court of November 15, 2010, concerning monitoring compliance with the Judgment, in which it declared that:

1. The State ha[d] complied fully with the obligation to organize a public act of acknowledgment of responsibility (*tenth operative paragraph of the Judgment*); [...]

2. It w[ould] keep the monitoring proceeding open until the pending obligation in this case ha[d] been complied with; namely, to annul the criminal sentence imposed on Mr. Kimel and all the ensuing consequences (*seventh operative paragraph of the Judgment*). [...]

4. The notes of the Secretariat of the Court of June 27, 2011, and April 18, 2012, in which, on the instructions of the President of the Court, the State was requested to provide specific information on its position in relation to the request of the representatives that it assume the costs and expenses arising from the appeal for review they had filed in order to comply with the provisions of the seventh operative paragraph of the Judgment, and the representatives were asked to advise the possible amount of the corresponding expenditure.

5. The briefs of May 2 and September 9, 2011, and February 24 and June 12, 2012, and their annexes, in which the State presented information on compliance with the Judgment, and also referred to the request of the representatives of the victim's family regarding the costs arising from the filing of an appeal for review.

6. The briefs of June 3 and 21, October 12 and December 20, 2011, and April 4 and 27, 2012, and their annexes, in which the representatives presented their observations on the information provided by the State, as well as the information requested on the alleged costs they incurred by filing the appeal for review in order to ensure compliance with the provisions of the seventh operative paragraph of the Judgment.

7. The briefs of June 23 and October 25, 2011, and of April 24, 2012, in which the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") presented its observations on the information forwarded by the State and on the briefs of the representatives.

CONSIDERING THAT:

1. One of the inherent attributes of the jurisdictional functions of the Court is to monitor compliance with its decisions.

2. Under the provisions of Article 67 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"), the State must comply with the judgments of the Court fully and promptly. Furthermore, 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." To this end, the States must ensure the implementation of the decisions of the Court in its rulings.¹ This obligation to comply with the Court's decisions includes the State's obligation to provide information on the measures taken in that regard. The prompt fulfillment of the State's obligation to inform the Court on how it is complying with each element ordered by the Court is essential for assessment of the status of compliance with the Judgment as a whole.²

¹ Cf. *Case of Baena Ricardo et al. v. Panama. Competence. Judgment of November 28, 2003*. Series C No. 104, paras. 60 and 131, and *Case of Salvador Chiriboga v. Ecuador. Monitoring compliance with judgment*. Order of the Inter-American Court of Human Rights of October 24, 2012, second considering paragraph.

² Cf. *Case of the Five Pensioners v. Peru. Monitoring compliance with judgment*. Order of the Court of November 17, 2004, fifth considering paragraph, and *Case of Salvador Chiriboga v. Ecuador. Monitoring compliance with judgment*. Order of the Inter-American Court of Human Rights of October 24, 2012, third considering paragraph.

3. The obligation to comply with the decisions in the Court's judgments corresponds to a basic principle of international law, supported by international case law, according to which, States must comply with their international treaty-based 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.³ The treaty-based obligations of the States Parties are binding for all the powers and organs of the State.⁴

4. The States Parties to the Convention must guarantee compliance with its provisions and their inherent 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 procedural norms, such as those referring to compliance with the decisions of the Court. These obligations must be interpreted and applied so that the protected guarantee is truly practical and effective, bearing in mind the special nature of human rights treaties.⁵

5. According to the provisions of the Order of the Court of November 15, 2010 (*supra* having seen paragraph 3), the only measure of reparation pending compliance by the State is the one relating to annulling the criminal sentence imposed on Mr. Kimel and any ensuing consequences (seventh operative paragraph the Judgment). This Order placed on record that the State had expressed its willingness to comply with the measure of reparation and informed the Court that it had consulted different State bodies in order to find out the appropriate way to achieve this. According to the State, its domestic organs concluded that an appeal for review of the criminal sentence should be filed, but that the State lacked procedural standing to file the appeal; however, it indicated "its firm intention to submit [...] an *amicus curiae* to the corresponding court," "in the event that the petitioners decided to file this appeal for review."⁶ In addition, in this Order, this Court took into account the intention expressed by the representatives to file the appeal for review in order to expedite compliance with the said reparation, but also recalled that the obligation established in the seventh operative paragraph of the Judgment was an obligation of the State, which may not, for domestic reasons, fail to assume the international responsibility that has been established.⁷ In this regard, the Court indicated that it was awaiting information from the representatives and the State concerning the execution and results of the said appeal for review, and asked the latter to provide complete and detailed information "on the measures

³ Cf. *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights)*. Advisory opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 35, and *Case of the Las Dos Erres Massacre v. Guatemala*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of September 4, 2012, fourth considering paragraph.

⁴ Cf. *Case of Castillo Petruzzi et al. v. Peru*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of November 17, 1999. Series C No. 59, third considering paragraph, and *Case of the Las Dos Erres Massacre v. Guatemala*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of September 4, 2012, fourth considering paragraph.

⁵ Cf. *Case of Ivcher Bronstein v. Peru. Competence*. Judgment of September 24, 1999. Series C No. 54, para. 37, and *Case of the Las Dos Erres Massacre v. Guatemala*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of September 4, 2012, fifth considering paragraph.

⁶ *Case of Kimel v. Argentina. Monitoring compliance with judgment*. Order of the Court of November 15, 2010, seventh considering paragraph.

⁷ Cf. *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights)*. Advisory opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 35, and *Case of Lori Berenson Mejía v. Peru. Monitoring compliance with judgment*. Order of the Court of June 20, 2012, fourth considering paragraph.

and actions taken to ensure total and effective compliance with the said measure of reparation.”⁸

6. The State provided a copy of the *amicus curiae* that the National Human Rights Secretariat had submitted to the National Criminal Cassation Chamber,⁹ which heard the appeal for review filed by the representatives of Mr. Kimel’s daughter. Subsequently, it presented a copy of the judgment deciding this appeal for review, which was delivered by the Third Chamber of the National Criminal Cassation Chamber on November 10, 2011, and asked the Court to “consider that the seventh operative paragraph of the Judgment had been complied with [...] and [...] to] order the closure of the case because it [had been] complied with fully.” Regarding the request of the representatives that the State assume the expenses and costs arising from the appeal for review they had filed, Argentina indicated that “it had no objections in this regard and [...] awaited the decision adopted by the Court [...].” When referring to the amount requested by the representatives for expenses arising from the processing of this appeal, Argentina asked the Court to “determine the [said expenses] based on equity and the criteria [...] set out [in its brief].” These criteria referred to the way in which the representatives calculated the costs and expenses, the laws regulating the way in which this calculation should have been made, the amount requested by the representatives during the processing of the case before the Court, and that the amount awarded by this Court in the Judgment for costs and expenses included “the *future* expenses that Mr. Kimel might incur at the domestic level or during monitoring compliance with [the] Judgment.”

7. The representatives affirmed that, “in view of the obstacles described by the Argentine State” to compliance with this pending obligation, “the conditions should have been established to make [the said] compliance possible, since a further appeal had to be filed.” They provided a copy of the appeal for review filed on November 15, 2010, “against the judgment handed down in the case of ‘Kimel, Eduardo Gabriel ref./libel’” before the National Criminal Cassation Chamber and, on June 3, 2011, before the Court, asked that Argentina pay the expenses and costs arising from this proceeding. After the State had indicated that it had no objections with regard to the representatives’ request (*supra* considering paragraph 6), they asked the Court to “consider that the Argentine State had indicated its decision” and to “establish an amount” in equity. When the Third Chamber of the National Criminal Cassation Chamber had delivered judgment deciding the appeal for review, the representatives reiterated the said request to the Court and also expressed their “concern” because the Chamber had “refuted that the appeal for review was admissible based on the existence of the judgment of the [Inter-American] Court,” and annulled the sentence convicting Mr. Kimel based on “a more favorable criminal law which determined that the conduct was not criminalized.” Regarding the amount of the costs incurred by the representatives in processing the appeal for review (*supra* having seen paragraph 4), they mentioned that “the Chamber [...] did not [...] establish costs” and explained the reasons why, in their opinion, these amounted to US\$4,000 (four thousand United States dollars).¹⁰

⁸ Cf. *Case of Kimel v. Argentina. Monitoring compliance with judgment*. Order of the Court of November 15, 2010, eleventh and thirteenth considering paragraphs and second operative paragraph.

⁹ Cf. *Case of Kimel v. Argentina. Monitoring compliance with judgment*. Order of the Court of November 15, 2010, seventh considering paragraph.

¹⁰ The representatives stated that “[t]he figure that should be used as a basis for making the calculation, is the amount of the initial proceedings against [Mr.] Kimel. The civil and criminal action included a financial claim and, at the time, was filed for the sum of 20,000 pesos/dollars.” They indicated that “the appeal for review that was filed, [...] is not understood as an appeal, but rather as a new proceeding.” They also stated that “[a]ccording to the law on honoraria, based on the civil compensation requested, the costs amount to between US\$2,200 (minimum) and US\$4,000 (maximum).” In addition, they stated that “[s]ince this was a short trial in a single instance, without evidence and without adversarial proceedings, the minimum might have been considered, but it

8. The Commission indicated that the State should “pay the expenses incurred by [the representatives] in the judicial processing of the appeal for review.” It indicated that “the State failed to take measures *ex officio* to comply with this aspect of the Judgment and that the mechanism used to try and eliminate the effects of the conviction [placed] an unwarranted burden on the representatives.” In addition, it took note of “the State’s willingness to cover the costs incurred by the representatives as a result of processing the appeal for review before the National Criminal Cassation Chamber” (*supra* considering paragraph 4). After it had been informed of the said judgment handed down by the Third Chamber of the National Criminal Cassation Chamber deciding the appeal for review, the Commission indicated that all the measures of reparation ordered by the Court had been fulfilled and stated that, once the representatives had forwarded the information on the costs they incurred, the State should reimburse them.

9. The Court recalls that, in its Judgment, it ordered the State to annul “every aspect” of the criminal judgment delivered against Mr. Kimel,¹¹ “including its implications for third parties, namely: (1) the accusation of Mr. Kimel as the author of the offense of libel; (2) the imposition of a suspended sentence to one year’s imprisonment, and (3) the sentencing to pay \$20,000.00 (twenty thousand Argentine pesos),” which had to be paid within six months of notification of that judgment.¹²

10. The Court has verified that, because the State considered that domestic law prevented it from taking measures *ex officio* to annul the judgment convicting Mr. Kimel, the representatives had to file an appeal for review before the National Criminal Cassation Chamber on November 15, 2010. In this appeal, they argued as grounds for its admissibility both “the obligation of the Argentine State to comply with the judgment delivered by the Inter-American Court in this case” and also the “principle of the most favorable law” (“paragraph 5 of article 479 of the National Code of Criminal Procedure”), because “a subsequent law [had been enacted] that decriminalized the act based on which the guilty verdict was handed down.” The Court notes that, when filing the said appeal, the representatives asked that “[the court] order that the name of Eduardo Gabriel Kimel be eliminated immediately from any public record in which he appears with a criminal record in relation to this case.” On this point, the Court recalls that, in its Order of May 18, 2010 (*supra* having seen paragraph 2), it declared that the State “had complied fully with the eighth operative paragraph of the Judgment”; in this regard, it took into account both the evidence provided and the fact that the representatives had confirmed that “Mr. Kimel’s name had, indeed, been eliminated from the public records of individuals with criminal records.”

11. Furthermore, it has been proved that, on November 10, 2011, the Third Chamber of the National Criminal Cassation Chamber delivered judgment ruling on the said appeal for review. In this judgment, it decided:

[...]

- 2) To annul the ruling [...] condemning [Mr.] Kimel to a suspended sentence of one year’s imprisonment, with costs of both instances, considering him criminally responsible for the offense of libel [...] and, consequently, to acquit [Mr.] Kimel of the act attributed to him;

should also be taken into account that the action obtained the annulment of the criminal conviction; thus, it is in order to request the maximum.”

¹¹ Judgment handed down on March 17, 1999, by the Fourth Chamber of the National Criminal and Correctional Chamber of the Federal Capital in which Eduardo Gabriel Kimel was convicted of the offense of libel.

¹² *Cf. Case of Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008. Series C No. 177. Para. 123.

- 3) To annul the ruling condemning [Mr.] Kimel to pay the complainant, Guillermo Federico Rivarola, the sum of twenty thousand pesos (\$20.000), as compensation to repair the non-pecuniary damage caused.

12. Taking into account that the said judicial decision of November 10, 2011, decided to annul the judgment against Mr. Kimel, with regard to both the attribution of criminal responsibility and the payment of civil compensation for non-pecuniary damage, and also taking into consideration the observations of the parties and of the Commission, the Court finds that the State has complied with the measure of reparation established in the seventh operative paragraph of the Judgment.

13. Nevertheless, the Court notes that, although this was an obligation that the State should have fulfilled, the latter did not comply *ex officio* with the measures of reparation ordered in the seventh operative paragraph of the Judgment, but rather the representatives had to file an appeal for review at the domestic level in order to obtain the annulment of the criminal judgment against Mr. Kimel.

14. Regarding the costs requested by the representatives because they had to file the said judicial remedy, the Court does not find it appropriate to establish an additional amount for this concept at the actual stage of monitoring compliance with judgment. The additional costs and expenses incurred by the representatives owing to the filing and processing of the said remedy can be claimed in the domestic sphere, in keeping with the pertinent national procedures under domestic law.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

in exercise of its attributes for monitoring compliance with its decisions under Articles 33, 62(1), 62(3), 65, 67 and 68(1) of the American Convention on Human Rights, 24 and 30 of its Statute, and 31 and 69 of its Rules of Procedure,¹³

DECLARES THAT:

1. The State has complied fully with the obligation to annul the criminal conviction imposed on Mr. Kimel and all its consequence (*seventh operative paragraph of the Judgment*), as indicated in the ninth and thirteenth considering paragraphs of this Order.

AND DECIDES:

1. To close the case of Kimel, because the Argentine Republic has complied fully with the provisions of the Judgment delivered by the Inter-American Court of Human Rights on May 2, 2008.
2. To archive the file of this case.

¹³ Rules of Procedure approved by the Court at its eighty-fifth regular session held from November 16 to 28, 2009.

3. To communicate this Order to the General Assembly of the Organization of American States, by means of the 2013 Annual Report of the Inter-American Court of Human Rights.

4. That the Secretariat of the Inter-American Court of Human Rights notify this Order to the Argentine Republic, the representatives of the victim's next of kin, and the Inter-American Commission on Human Rights.

Diego García-Sayán
President

Manuel E. Ventura Robles

Eduardo Vio Grossi

Roberto de Figueiredo Caldas

Humberto Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary