ORDER OF THE

INTER-AMERICAN COURT OF HUMAN RIGHTS[*]

MARCH 20, 2013

CASE OF GELMAN *v.* URUGUAY

MONITORING COMPLIANCE WITH JUDGMENT

HAVING SEEN:

1. The Judgment on merits and reparations delivered by the Inter-American Court of Human Rights (hereinafter, "the Inter-American Court" or "the Court") on February 24, 2011. The facts of this case took place during the military dictatorship that governed Uruguay between 1973 and 1985, when the security and intelligence forces resorted to the systematic practice of serious human rights violations in collaboration with Argentine authorities as part of the national security doctrine and the so-called "Operation Condor." In that context, María Claudia García Iruretagoyena Casinelli and her husband Marcelo Ariel Gelman Schubaroff, son of Mr. Juan Gelman, both of Argentine nationality, were detained on August 24, 1976, in Buenos Aires, Argentina, by Uruguayan and Argentine military, after which they were separated. At the time of her arrest, María Claudia was nineteen years old and in an advanced stage of pregnancy (approximately seven months). In October 1976, María Claudia García was secretly flown to Montevideo, Uruguay, by Uruguayan authorities and held at a facility of the Uruguayan Defense Intelligence Service (hereinafter, "the SID" for its Spanish acronym). She subsequently gave birth to a daughter who was taken away from her as a newborn and given to a Uruguayan policeman and his wife, who registered her as their own daughter and named her María Macarena. Since then, María Claudia García Iruretagoyena has been missing. Mr. Juan Gelman and his wife made inquiries on their own account, and in 2000, made contact with their granddaughter María Macarena. Subsequently, they initiated legal action and, as a result, in 2005 she took the name of María Macarena Gelman García Iruretagoyena. In its response to the petition, the State of Uruguay partially acknowledged its international responsibility for the violation of the human rights of María Claudia García Iruretagoyena de Gelman, María Macarena de Gelman García and Juan

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[*] Judge Alberto Pérez, an Uruguayan national, did not participate in this case or in the deliberation and signing of this Order, in compliance with Articles 19(2) of the Statute and 19(1) of the Rules of Procedure approved in the Court's 85th Ordinary Period of Sessions, held from November 16 to 28, 2009. Pursuant to this article, "[i]n the cases referred to in Article 44 of the Convention, a Judge who is a national of the respondent State shall not be able to participate in the hearing and deliberation of the case."

Gelman.[1] The Inter-American Court unanimously ruled that the State of Uruguay is internationally responsible for: a) the forced disappearance and violation of the rights recognized in Articles 3, 4(1), 5(1), 5(2) and 7(1), in relation to Article 1(1) of the Convention and with Articles I and XI of the Inter-American Convention on the Enforced Disappearance of Persons, to the detriment of María Claudia García; b) Articles 3, 4(1), 5(1), 7(1), 17, 18, 19 and 20(3), in relation to Article 1(1) of the Convention and Articles I and XI of the Inter-American Convention on the Enforced Disappearance of Persons to the detriment of María Macarena Gelman; c) Articles 5(1) and 17, in relation to Article 1(1) of the Convention, to the detriment of Mr. Juan Gelman and d) Articles 8(1) and 25(1), in relation to Articles 1(1) and 2 of the Convention and Articles I(b) and IV of the Inter-American Convention on the Enforced Disappearance of Persons, for the failure to investigate effectively the facts of this case, to the detriment of Mr. Juan Gelman and María Macarena Gelman. Furthermore, the Court ruled that the State had not fulfilled its obligation to adapt its domestic legislation to the American Convention, contained in its Article 2, in relation to Articles 8(1), 25 and 1(1) of the same document and Articles I(b), III, IV and V the Inter-American Convention on the Forced Disappearance of Persons, as a consequence of the interpretation and implementation of the Law on the Expiry of the Punitive Claims of the State. Moreover, the Court ruled:

> unanimously, that:
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> 8. This Judgment constitutes *per se* a form of reparation.
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> 9. The State must, within a reasonable period of time, conduct and carry out effectively the criminal investigation of the facts of this case, in order to ascertain them, determine the corresponding criminal, civil, and administrative responsibilities and apply the consequential sanctions provided by law, in accordance with paragraphs 252 to 256 and 274 and 275 of the Judgment.
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> 10. The State should continue and accelerate the search and immediate location of Maria Claudia Garcia Iruretagoyena, or of her bodily remains and, where appropriate, deliver them to her next of kin, after genetic parentage testing, all in accordance with paragraphs 259 and 260 of the Judgment.
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> 11. The State must guarantee that the Expiry Law, lacking effects due to its incompatibility with the American Convention and the Inter-American Convention on the Enforced Disappearance of Persons, insofar as it can hinder the investigation and possible sanction of those responsible for serious human rights violations, will never again be an impediment to the investigation of facts and to the identification, and where applicable, punishment of those responsible, in conformity with paragraphs 253 and 254 of the Judgment.
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> 12. The State must, within a period of one year, carry out a public act of acknowledgment of international responsibility for the facts of this case, in conformity with paragraph 266 of this Judgment.
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> 13. The State must locate, within the building of the Defense Intelligence Service (SID), accessible to the public, within a period of one year, a memorial plaque with the inscription of the names of the victims and all persons who were illegally in said place, pursuant to paragraph 267 of the Judgment.
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> 14. The State must carry out, within a period of six months, the publications provided for in paragraph 271 of this Judgment.
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> 15. The State must implement, within a reasonable period and with the respective budgetary

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[1] The State of Uruguay acknowledged its international responsibility in the following terms: "in consideration of the principle of institutional continuity, [the State] acknowledges the violation of the human rights of [Messrs.] María Claudia García Iruretagoyena de Gelman, María Macarena de Gelman García and Juan Gelman during the de [f]acto [g]overnment that governed Uruguay from June 1973 until February 1985."

provisions, a permanent human rights program, directed at the agents of the Public Prosecutor's Office and the judges of the Judicial Branch of Uruguay, in conformity with paragraph 278 of this Judgment.

16. The State must adopt, within a period of two years, the appropriate measures to guarantee the technical and systematical access to the information regarding serious violations of human rights that occurred during the dictatorship that are held in State archives, in conformity with paragraphs 274, 275 and 282 of the Judgment.

17. The State must pay, within a period of one year, the amounts established in paragraphs 291, 293, 296, and 304 of this Judgment, for compensation of pecuniary and non-pecuniary damage and the reimbursement of costs and expenses that correspond, in conformity with paragraphs 305 to 311 of this Judgment.

18. Pursuant to the provisions of the American Convention, the Court will monitor full compliance with this Judgment and will conclude the case once the State has entirely satisfied said provisions. Within a period of one year as of the legal notification of this Judgment, the State must provide the Court with a report on the measures adopted to satisfy compliance.

2. The briefs of the Eastern Republic of Uruguay (hereinafter, "the State" or "Uruguay") of January 17 and March 14, 2012, in which it referred to its compliance with the Judgment.

3. The briefs of the victims' representatives (hereinafter, "the representatives") of July 22, 2011, and February 17 and April 4, 2012, containing their observations regarding the status of compliance with the Judgment.

4. The brief of the Inter-American Commission on Human Rights (hereinafter, "the Inter-American Commission" or "the Commission") of April 12, 2012, in which it submitted observations regarding the status of compliance with the Judgment.

5. The note of the Secretariat of December 19, 2012, in which it stated that in compliance with Article 68(1) of the Convention and Articles 15(1) and 69(3) of the Rules of the Court, the President of the Court, in consultation with the remaining Judges of the Court, decided to summon the State, the representatives and the Commission to a private hearing for monitoring compliance with the Judgment.

6. The private hearing on monitoring compliance with Judgment took place on February 13, 2013.[2]

7. The brief of February 27, 2013, in which the victims' representatives submitted a copy of the ruling issued by the Supreme Court of Justice of Uruguay regarding compliance with the Judgment.

8. The note of the Secretariat of March 5, 2013, in which, following the instructions of the President, it requested that the Inter-American Commission and the State submit, no later than March 11, 2013, their observations on the information provided, particularly regarding the effects that the ruling of the Supreme Court of Uruguay could have in relation to the decisions in the Judgment.

[2] In accordance with Article 6(2) of its Rules of Procedure, the Court held the private hearing with a commission of judges composed of: Diego García Sayán (President), Eduardo Vio Grossi and Eduardo Ferrer Mac-Gregor Poisot. The State was represented by Messrs. Carlos Mata, Agent; Federico Perraza, Director of Human Rights of the Ministry of Foreign Relations and Fernando Marr, Ambassador of Uruguay in Costa Rica. María Macarena Gelman García Iruretagoyena also appeared at the hearing along with Lilliana Tojo as representative. Silvia Serrano and Jorge Meza, advisors, testified for the Inter-American Commission on Human Rights.

9. The briefs of March 11, 2013, in which the representatives and the State submitted their observations on the effects of said decision.

10. The note of March 11, 2013, wherein the Commission requested an extension until March 13 to submit its observations, which was granted following instructions of the President, through a note from the Secretariat the following day.

11. The brief of March 15, 2013, in which the Commission submitted its observations extemporaneously.

CONSIDERING THAT:

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

2. Uruguay has been a State Party to the American Convention on Human Rights (hereinafter, "the American Convention" or "the Convention") since April 19, 1985, and recognized the contentious jurisdiction of the Court on that same date.

3. In compliance with Article 67 of the American Convention, the State must comply fully and expeditiously with the Court's judgments. Likewise, 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 implementation at the domestic level of the Court's rulings in its judgments.[3]

4. In the following section the Court will assess the actions taken by the State in compliance with the reparation measures ordered and will determine the points already fulfilled by the State (*infra* paras. 5 to 13); subsequently it will analyze those points on which the State has complied in part or which are still pending.

I. MEASURES OF REPARATION IMPLEMENTED BY THE STATE

A. Obligation to conduct a public act acknowledging international responsibility for the facts of this case and to install a plaque in the SID building

5. The **State** indicated that a public act was held at the Legislative Palace on March 21, 2012, with the participation of the three branches of Government, led by the President of the Republic, attended by María Macarena Gelman García Iruretagoyena and Juan Gelman and with the presence of the Vice-President of the Republic and the President of the Supreme Court of Justice. Furthermore, the **State** reported that on March 21, 2012, in the former building of the Defense Intelligence Service (SID), it had installed a plaque in memory of María Claudia García Iruretagoyena, María Macarena Gelman García and all the victims of State terrorism who were deprived of their freedom there. It also made reference to the Judgment of the Court.

[3] *Cf. Case of Baena Ricardo et al., Jurisdiction.* Judgment of November 28, 2003. Series C No. 104, para. 60 and *Case of Vera Vera et al. v. Ecuador. Monitoring Compliance with Judgment.* Order of the Inter-American Court of Human Rights of October 23, 2012, Considering paragraph 2.

6. The **representatives** recognized this public act of acknowledgment of international responsibility, but during the private hearing they pointed out that the plaque cannot be seen by anyone because the National Institute of Human Rights is not yet functioning. They concluded this point by stating they were confident that the institution would operate and would be an additional element of reparation. The **representatives** and the **Commission** welcomed this information and considered that the State had complied with the measure ordered.

7. The **Court** had specified in the Judgment that the public act of acknowledgment must: a) refer to the violations established in the Judgment; b) be carried out through a public ceremony conducted by high-ranking national authorities with the presence of the victims in this case; c) consult the victims or their representatives regarding the method of compliance; d) broadcast the event through the media; e) conduct the public ceremony within one year of notification of the Judgment, and f) as agreed, and within one year, unveil a plaque engraved with the names of the victims and the period during which they were illegally detained, in an area accessible to the public in the SID building.

8. The Court welcomes the fact that the public act of acknowledgment was led by the President of the Republic himself, Mr. José Mujica, with the participation of the three branches of Government (and in the presence of the Vice-President of the Republic and the President of the Supreme Court of Justice), in the Legislative Palace and in the presence of Macarena and Juan Gelman. Additionally, it reported on the installation of a plaque with the name of María Claudia García and other victims and survivors that were held, interrogated, detained or disappeared in the building where the Defense Intelligence Service operated. This building is currently the headquarters of the National Institute of Human Rights. These proceedings were widely disseminated by the media and were carried out within the period stipulated in the Judgment. Accordingly, the Court considers that the public ceremony fully satisfies the object and purpose of the reparation ordered, in one of the most significant acts carried out by the States in compliance with measures of reparation of this type. It therefore declares that the State has fully implemented operative paragraphs twelve and thirteen of the Judgment.

B. Obligation to issue, within a period of six months, the publications stipulated in paragraph 271 of the Judgment

9. The **State** reported that the publications ordered were issued in the Official Gazette and on the websites of the Presidency of the Republic, the Ministry of Foreign Relations and the Ministry of Culture and Education. Furthermore, it confirmed that on August 21, 2011, an official summary of the judgment was published in newspapers with wide national circulation, *El País* and *La República*. In a subsequent communication, the State clarified that the judgment was published on the website of the Ministry of Culture and Education and remains available on the other websites.

10. The **Commission** pointed out that it does not have copies of the publications made by the State, which would be useful for verifying full compliance with this obligation. As to the online publications, it welcomed the fact that these have been maintained on the official websites, although it considered that access to them is not at all straightforward.

11. The **representatives** pointed out that the State had not attached copies that would allow them to verify compliance, given that it did not indicate the possible date of publication and they do not have copies of the media cited. They therefore asked

the Court to require the State to present supporting documentation of the publications. They added that they were able to confirm the publication of the Judgment on the Ministry of Foreign Relations' website and of the operative part and summary of the judgment on the website of the Presidency. However, it was not possible to find these publications on the website of the Ministry of Culture and Education.

12. Based on what the State has reported, the **Court** considers that it has complied with the obligation to issue the publications in the Official Gazette, in national newspapers with wide circulation and on the websites. Consequently, and while continuing to wait for the State to submit the documentation specifically confirming the issue of these publications, the Court finds that the State has complied with this measure. It therefore declares that the fourteenth operative paragraph of the Judgment has been fulfilled.

C. Obligation to pay, within a period of one year, the amounts ordered in compensation for pecuniary and non-pecuniary damages and for reimbursement of costs and expenses

13. The **Court** confirmed that the **State** had made the payments for the amounts established for pecuniary and non-pecuniary damages. Both the **Commission** and the **representatives** indicated that the amounts corresponding to the compensation had been paid. Consequently, the State has fully complied with operative paragraph seventeen within the stipulated period.

II. MEASURES OF REPARATION IN PROGRESS OR PENDING COMPLIANCE

A. Obligation to adopt, within a period of two years, the appropriate measures to guarantee the technical and systematic access to information held in State archives regarding the serious human rights violations that occurred during the dictatorship

14. The **State** reported that it is updating the historical investigation, which is available on the website of the Presidency of the Republic of Uruguay. It has also formed a team of archivists to "organize, catalogue, classify, computerize and systematize" the entire document collection stored in the Monitoring Secretariat of the Uruguayan Peace Commission since August 2000. Similarly, during the private hearing the State provided further details on how any natural or legal person interested in accessing the public records can do so within the framework of Law 18381 regarding access to public information, aimed at promoting transparency in public administration.

15. The **Commission** considered it important for the State to continue reporting on the progress made by this initiative and for the Court to continue monitoring its implementation for a reasonable time in order to determine the effectiveness of the measures. As to the historical investigation, it considered it appropriate that the State reply to the concerns raised by the representatives on the scope and intention of said investigation, and on the accessibility of the authorities responsible for the investigations and proceedings. Moreover, it considered it necessary to have more information on the impact of the reopening and progress of the investigations on the human rights violations, in order to assess the suitability of these measures.

16. The **representatives** noted that the scope of the initiatives reported by the State remained unclear. In particular, they considered it disturbing that the documents attached by the State only referred to those collected by the Secretariat of the Peace Commission, precisely when the debate raised before the Court and "addressed in its ruling" shows the wide range of places where documents could be found that would clarify the circumstances and responsibilities for the serious human rights violations committed during the last dictatorship. They further noted that, as is evident in the presentation of the work related to the investigation of the disappeared detainees, this is a strictly academic investigation that does not fulfill the State's obligation as established in the Judgment. Moreover, they pointed out that it was unclear whether the records being systematized also include all of the archives that the University researchers have been able to access.[4] Finally, they stressed that in the accompanying documents submitted by the State as attachments contain no specific information on the budget allocation, the institutional design of the team it claims to have formed, the time frame or the assigned budget.

17. Regarding this reparation measure, the **Court** recalls that in the Judgment it welcomed the State's offer to create an Interministerial Commission in charge of promoting investigations to discover the fate of those who disappeared between 1973 and 1985 and that the Court recommended that the State ensure "the participation of a representative of the victims of those events" in that body "who would be able to channel relevant information and would be subject to the confidentiality that such information requires, and [the participation] of a representative of the Public Prosecutor's Office acting as a contact to compile such information." Similarly, the Court appreciated the State's willingness to establish a "Protocol for the collection and information on the bodily remains of the disappeared persons" and ordered the State to indeed adopt it and make this known to the authorities responsible for its immediate implementation.[5]

18. The Court noted that in this case one of the constraints making progress with the investigation was the fact that information concerning serious human rights violations that took place during the dictatorship was kept in different national security files which are dispersed with no adequate control. Given that this information could be useful to the officials who conduct the relevant judicial investigations, it ordered the State to adopt "the appropriate and adequate measures to guarantee the technical and systematic access to this information, measures that must be supported by the appropriate budget allocation."[6]

19. Accordingly, the Court calls on the State to provide more precise and detailed information in its next report regarding compliance with this measure of reparation referred to in operative paragraph sixteen of the Judgment, which it will continue to monitor.

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[4] In this regard, it mentioned, for example, that at the time of the resumption of the Investigation on the Disappeared Detainees, the State reported that although the investigation team accessed five new files comprising 1,500 documents until now unpublished, these were not in fact available for judges and prosecutors because they had not surmounted the formal and real obstacles on accessibility and organization that were alleged and proven in the case.

[5] *Cf. Case of Gelman v. Uruguay. Merits and Reparations*. Judgment of February 24, 2011, Series C No. 221, paras. 274 and 275.

[6] *Case of Gelman v. Uruguay*, para. 282.

B. Obligation to implement, within a reasonable period and with the respective budgetary allocation, a permanent human rights program directed at officials of the Public Prosecutor's Office and judges of the Judicial Branch of Uruguay

20. The **State** pointed out that even though training programs on human rights already exist, the Interministerial Commission is working to include in these programs courses or modules for the proper investigation and prosecution of acts involving the forced disappearance of persons and the abduction of children as well as the interpretation of the Law from a human rights perspective. It added that these programs are being coordinated with the Center of Judicial Studies of the Judiciary and the Ministry of Education and Culture. The State added that, thanks to the joint work of the Ministry of Education and Culture, the Center for Legal Studies of the Judicial Branch (CEJU for its Spanish acronym) and the Public Prosecutor's Office, the first annual lesson of the human rights course for judicial officials took place at the headquarters of CEJU on September 28 and 29, October 26 and 27, and November 23 and 24, 2012.

21. The **Commission** and the **representatives** pointed out that the State did not provide documents with details of the course contents, the officials to whom the courses were imparted, the institutions to which they belong or the duration of the courses.

22. Regarding this reparation measure, the **Court** notes that the State referred to the organization of human rights courses for officials of the Judiciary and the Public Ministry. However, the Court considers that the information provided by the State is insufficient because it does not report on the permanent nature of the program, the syllabus or the content of the courses. Therefore, the Court calls on the State to submit more specific and detailed information regarding compliance with this measure of reparation in its next report, and will continue to monitor compliance with this measure, as established in operative paragraph fifteen of the Judgment.

C. Obligation to continue and accelerate the search and the immediate location of María Claudia García Iruretagoyena

23. The **State** reported that in the case "María Claudia García Iruretagoyena de Gelman and María Macarena Gelman García Iruretagoyena" new excavations were being carried out by a team of anthropologists searching for the bodily remains of the disappeared. It added that in the context of those excavations, on October 21, 2011, it had found the skeletal remains of Master Julio Castro on the grounds of the Army's Fourteenth Battalion of the Paratrooper Infantry Division, which resulted in successive investigative actions. The State also reported on the creation of the Interministerial Commission, within the Presidency of the Republic, through a presidential decree issued on August 31, 2011, made up of the Ministers of Education and Culture, Foreign Relations, National Defense and Interior and the Executive Coordinator of the Secretariat of the Peace Monitoring Commission. The purpose of this Commission is to monitor the State's compliance with the Court's judgment, define policies for the investigation of forced disappearances and murders committed under similar circumstances during the military dictatorship, strengthen the structure and responsibilities of the Secretariat of the Peace Monitoring Commission and create a unified database on disappeared detainees.

24. The **Commission** pointed out that the State had not presented specific information on the steps taken to locate María Claudia García and that more detailed

information was needed on the work plan or schedule being implemented and on any results obtained. As to the Interministerial Commission responsible for advancing the investigations and the adoption of a Protocol for the collection of information on the bodily remains of disappeared persons, the Commission indicated it was important for the State to report on the implementation of its search for the disappeared victim in this case.

25. On this point, the **representatives** stated they were not aware whether the State, through any of its Branches, had prepared a plan of inquiry to locate María Claudia and establish the truth of what happened to her. They also stressed that the Update of the Historical Investigation on Disappeared Detainees, made public in November 2011, reported on the case of María Claudia, that "it has been expressly established that, despite the focus of the investigation and the efforts made by the team members, the extensive review of documents and files authorized by the President of the Republic, it has still not been possible to find complementary and evidentiary documentation in the case of the abduction, illegal transfer from Argentina and the disappearance in Uruguay of the pregnant Argentine citizen María Claudia García Iruretagoyena de Gelman, and on the birth in captivity, kidnapping and change of identity of her daughter, Macarena Gelman [...]." As to the Interministerial Commission, the representatives noted that the State had not submitted documents on how the Commission is organized, its work plan, a timeline or the State's policies for discharging its obligation to clarify the disappearances and executions that occurred during the last military dictatorship. Similarly, they noted that although ordered by the Court in its Judgment, neither the representatives of the Public Prosecutor's Office nor of the victims were included on the Interministerial Commission, but instead were included in the Secretariat of the Peace Monitoring Commission. Finally, they pointed out that the State did not provide information regarding the adoption of the "Protocol for the collection of information on the bodily remains of disappeared persons", as offered by the State and ordered by the Court under the terms of paragraph 275 of the Judgment.

26. The **Court** deems it appropriate to recall that, under the terms of the Judgment and as a measure of reparation in respect of the victims' right to know the truth, "the State must continue with the effective investigation and immediate localization of María Claudia García, or of her bodily remains, either through a criminal investigation or through other appropriate and effective procedures [and that] these procedures must be implemented in accordance with international standards."[7] Likewise, the Judgment required the State to inform the victims' next of kin of these procedures and, as far as possible, secure their presence."[8]

27. The Court appreciates that certain steps have been taken toward surveying and exhuming the victims' remains, and that in the course of these efforts the remains of other disappeared persons have been identified. In this regard, although the Court has confirmed that efforts have been made to ensure that the procedures comply with the terms of its Judgment, the State has not yet submitted a structured plan with appropriate information on the technical, institutional and budgetary resources for compliance with this measure. Thus, the Court reiterates that there is a close link between compliance with this obligation and the effective investigation of the facts. Accordingly, it will continue to monitor compliance with this measure and

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7 *Case of Gelman v. Uruguay*, para. 259.

8 *Cf. Case of Gelman v. Uruguay,* para. 260.

will require the State to refer to the measures adopted in its next report, and to specify other suitable measures that could be implemented for the purpose of continuing and accelerating the search for María Claudia Iruretagoyena, under the terms of operative paragraph ten of the Judgment.

D. Obligation to investigate the facts of this case and determine the corresponding responsibilities and obligation to ensure that the Law on the Expiry of Punitive Claims of the State (Law 15848), upon lacking effects, does not again represent an obstacle for those purposes

D.1. Information and observations

28. The **State** reported on the enactment on October 27, 2011, of Law 18831 entitled "Punitive Claims of the State: Reparation for Crimes Committed in the Application of State Terrorism until March 1, 1985." The State also reported that on June 30, 2011, the Executive Branch approved Resolution 323/2011 in which it repealed, "for reasons of legitimacy, the administrative acts and [m]essages issued by the Executive Branch, in application of Article 3 of Law 15848 [Expiry Law], considering that the facts denounced were covered by the provisions of Article 1 of the aforementioned law and instead declared that those facts did not fall within said standard." It added that, with the enactment of Law 18831 and Decree 323/2011, it sought to remove the obstacle represented by law 15848.

29. At the same time, the **State** reported that on October 27, 2011, a criminal Judge opened a proceeding for the murder of María Claudia García de Gelman and that so far five individuals were being prosecuted in this case, currently in the pre-trial phase. It specified that the proceeding is for murder in the first degree, which carries a punishment of 15 to 30 years imprisonment. It also indicated that it had requested the extradition from Brazil and Argentina of retired military officer Manuel Cordero, who is serving a sentence in an Argentine prison. The State also reported that the five soldiers have already been arrested for other criminal cases against them.

30. The **Commission** considered it necessary to obtain further information and documentation on the impact of reopening the process and the progress made in the investigations of human rights violations, in order to assess the appropriateness of these measures and to ensure that the Expiry Law does not continue to be an obstacle in criminal justice matters related to serious human rights violations. Furthermore, the Commission noted that the investigation into the facts of this case is being carried out under the definition of a homicide and not forced disappearance. It also noted that the State merely reported on the investigations in terms of what happened to the victim, but it did not refer to any other procedure aimed at investigating other violations declared in the Judgment, many of which could imply sanctions of a different nature. Thus, the Commission considers that the Court should continue to monitor this obligation.

31. In relation to the criminal proceeding initiated regarding the disappearance of María Claudia García, the **representatives** stated that the judge had approved a request to prosecute two additional soldiers, a decision that was confirmed by the Appeals Court on May 30, 2012. Likewise, they pointed out that as a consequence of

the limits imposed by Uruguay's current code of criminal procedure on the participation of victims - an issue that was argued and debated during the processing of this case- they have encountered major difficulties in accessing the case file.[9] Furthermore, they welcomed the adoption of Law 18831 and Decree 323, but argued that this measure adopted by the State does not remove the obstacle that the Expiry Law represents to investigating crimes against humanity committed in Uruguay between 1973 and 1985 in terms of impunity given that, according to the recent interpretation confirmed by a ruling of the Supreme Court, acts of forced disappearance of persons committed during the last military dictatorship would be covered by the statute of limitations in November 2011. Moreover, they argued that the Expiry Law had not been repealed or annulled; that Law 18831 had been challenged through several actions of unconstitutionality, which were ruled admissible by the Supreme Court of Justice and that, on February 22, 2013, it had issued a judgment declaring Law 18831 as unconstitutional. The **representatives** added that it was still not possible to measure the true effect that these decisions have had regarding the reopening of archived investigations, or on the progress of those that might be affected by one of the exemptions of liability.

32. Regarding the Supreme Court's decision of February 22, 2013, the **State** explained that in the Uruguayan legal system, constitutionality control is concentrated in the Supreme Court of Justice and consequently it is the only body authorized to declare a law unconstitutional. The effect of a ruling of unconstitutionality, which is made in a specific instance, applies to the particular case in which it arises. Consequently, the law or the articles that are challenged as unconstitutional and that the Supreme Court of Justice declares non-applicable cannot, therefore, be applied in the matter for which they have been invoked. Moreover, it argued that this ruling does not affect the validity of the law. It pointed out that even if the aforementioned matter submitted to the Supreme Court of Justice does not specifically refer to the *Gelman case* or affect that case, it does refer "to another trial, but one in which the events that occurred during the same dictatorship period are being investigated" and "it is worth noting that at present there are cases before the Supreme Court of Justice that also concern complaints of events that occurred during the dictatorship, and are awaiting judgment on the same questions regarding the constitutionality of Law 18831." The State added that Article 1 of Law 18831 was not ruled unconstitutional by the Supreme Court of Justice, "a circumstance that should be correctly construed as clear progress in removing obstacles to the investigation of human rights violations that occurred in the past."

33. The **State** further argued that it "still considered [itself] responsible for fully complying with the judgment issued by the [Court] in the *Case of Gelman v. Uruguay*, in accordance with its obligations, as it has done since becoming part of the community of States that have approved and accepted the jurisdiction of the Court and of the Commission, as well as the principles of the American Convention and other international instruments that it has freely ratified." Finally, it stressed that,

[9] They asked the Court to require the State to present copies of the file in order to assess and evaluate the State's actions in light of the Court's order. They also indicated that the adoption of a new Code of Criminal Procedure that includes the possibility of victims participating in the process is still pending. They further added that in the documentation presented, the State attached a list of existing cases in the criminal courts concerning persons disappeared and/or murdered by State terrorism, but did not provide information on the status of these cases and/or actions taken by the Public Prosecutor's Office to move forward with the proceedings. Finally, the representatives asked the Court to require the State to submit detailed information on the efforts made by the Public Prosecutor's Office to tackle impunity in respect of crimes against humanity committed during the last military dictatorship.

"the conduct of the State of Uruguay is unequivocal as regards its respect and support for the decisions of the Inter-American Court."

34. In this regard, the **representatives** stated that even if the ruling of unconstitutionality only applies to the case for which it was issued, the tenor of its pronouncements in light of the Supreme Court's assessments regarding the binding nature of the Inter-American Court's Judgments, clearly does not comply with the Court's ruling in the Judgment on the *Gelman Case* since it represents an obstacle to the progress of the investigations.

D.2. Considerations of the Court

35. In the Judgment that convicted the State of Uruguay in the *Gelman Case*, the **Court** ruled that the State had an obligation to investigate the facts and to identify, prosecute, and where appropriate, punish those responsible for the forced disappearance of María Claudia García and María Macarena Gelman, in the latter case due to her abduction, suppression and substitution of her identity, as well as related facts (operative paragraph 9 and para. 252).

36. In relation to the foregoing, in its Judgment this Court ruled that the State must "guarantee" that the Expiry Law "never again becomes an impediment to the investigation of the facts at hand, and to the identification and, if applicable, punishment of those responsible for the facts and similar serious violations of human rights that took place in Uruguay."[10] The Court emphasized that "[g]iven its express incompatibility with the American Convention, the provisions of the Expiry Law […] cannot […] have the same or similar impact with regard to other cases of serious violations of human rights enshrined in the American Convention that could have occurred in Uruguay."[11]

37. In this particular regard, the Inter-American Court ruled in its Judgment that "the Expiry Law lacks legal effects because of its incompatibility with the American Convention and the Inter-American Convention on Forced Disappearance of Persons, inasmuch as it can impede the investigation and possible sanction of those responsible for serious human rights violations."[12] Accordingly, at the time of issuing its judgment, the Court considered that Judgment No. 365 of October 19, 2009, delivered by Uruguay's Supreme Court of Justice in the *Case of Nibia Sabalsagaray Curutchet*, where it declared the unconstitutionality of Articles 1, 3 and 4 of the Expiry Law unconstitutional and ruled that these provisions were not applicable in this case, Uruguay's Supreme Court of Justice had exercised "appropriate conventionality

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10 *Case of Gelman v. Uruguay*, para. 253.

11 *Case of Gelman v. Uruguay*, para. 232.

12 Thus, based on the interpretation and application of the Expiry Law, it ruled that the State had not complied with its obligation to adapt its domestic law to the Convention, as established in Article 2 thereof, in relation to Articles 8(1), 25 and 1(1) of the same treaty and I(b), III, IV and V of the Inter-American Convention on the Forced Disappearance of Persons (para. 246). The Court further stated that "by applying the provisions of the Expiry Law (which, to all intents and purposes constitutes an amnesty law) and thereby impeding the investigation of the facts and the identification, prosecution and possible sanction of the likely perpetrators of continued and permanent violations such as enforced disappearances, the State is failing to comply with its obligation to adapt its domestic laws, as established in Article 2 of the American Convention" (para. 240).

control with respect to the Expiry Law,"[13] a decision that was subsequently reiterated at least twice.[14]

38. Accordingly, in its Judgment the Court considered that the violation of the right to a fair trial and the right to judicial protection (Articles 8(1) and 25(1) of the American Convention), in relation to Articles 1(1) and 2 thereof and Articles I(b) and IV of the Inter-American Convention on Forced Disappearance of Persons, was based on:

> i) the Expiry Law adopted in Uruguay in 1986,[15] which is manifestly incompatible with the American Convention and thus lacking legal effects,[16] the interpretation and application of which had constituted the main obstacle to the investigation of the facts of this case and of other cases of serious human rights violations established in the American Convention that could have occurred in Uruguay;[17]
>
> ii) the length of the investigations in this case, which had exceeded any standard of reasonableness;[18]
>
> iii) non-compliance with the State's international obligations, established in inalienable norms, for the failure to investigate serious human rights violations committed in this case, in the context of systematic patterns,[19] and
>
> iv) that the proceedings related to the disappearance of María Claudia García Iruretagoyena had been initiated and continued under the definition of homicide, thereby excluding other crimes such as torture and forced disappearance, and the suppression of the identity of María Macarena Gelman García, which made it possible for the domestic courts to apply the statute of limitations to this case.[20]

39. Consequently, to ensure that these violations are not repeated, as reparation and in compliance with the aforementioned obligations, the Court ordered State to:

> i) ensure that no other norm analogous to the Expiry Law, such as a statute of limitations, non-retroactivity of the criminal law, *res judicata*, *ne bis in idem* or any other similar law which exonerates responsibility, be applied and that the authorities refrain from carrying out acts that would imply the obstruction of the investigative process;[21]

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13 *Case of Gelman v. Uruguay*, para. 239.

14 In the Judgment, the Court noted that on October 29, 2010, the Supreme Court issued another ruling in the case of the "Human Rights Organization," in which, using the mechanism of an "early ruling," it repeated the case law established in the case of Sabalsagaray, regarding the objection to the unconstitutionality of the Expiry Law, confirming the arguments put forward in the aforementioned judgment. It is also public knowledge that the Supreme Court repeated the criteria used in that decision in its rulings in other cases, namely the case of the "*Soca Shootings*" of February 10, 2011, the case of "García Hernández, Amaral et al.", File 173-318/2006.

15 *Cf. Case of Gelman v. Uruguay*, para. 241.

16 *Cf. Case of Gelman v. Uruguay*, para. 232.

17 *Cf. Case of Gelman v. Uruguay*, paras. 230 to 241.

18 *Cf. Case of Gelman v. Uruguay*, para. 242.

19 *Cf. Case of Gelman v. Uruguay*, para. 231.

20 *Cf. Case of Gelman v. Uruguay*, para. 235.

21 *Cf. Case of Gelman v. Uruguay*, para. 254.

ii) conduct the investigation in an effective manner, within a reasonable period of time, of the case filed or by opening a new one, ensuring that the competent authorities conduct the corresponding *ex officio* investigations;[22]

iii) guarantee the victims' family members full access and the capacity to act in all stages of the investigation and prosecution of those responsible,[23] and

iv) publish the results of the corresponding proceedings.[24]

40. For the purposes of monitoring compliance with the operative paragraphs of the Judgment, this Court will first analyze the State's actions in the investigation of the facts. Secondly, it will assess the State's obligation to ensure that the Expiry Law and its effects will never again represent an obstacle to the investigation of the facts and the serious human rights violations that occurred in Uruguay.

41. As to the first point, the Court notes that in the investigation of the facts in the *Gelman case*, the State has taken steps aimed at prosecuting five persons presumed responsible for the facts of the case, though this process is still in the initial stages, and the victims have had restricted access to the contents of the proceedings. This prosecution refers only to acts committed against María Claudia García Iruretagoyena, but does not include the other conduct which formed the basis of the serious human rights violations, nor will it investigate the facts of the disappearance, through the suppression of identity, of María Macarena Gelman.

42. Regarding the second obligation of the State, the Court notes and appreciates the fact that initially, subsequent to the notification thereof, the Uruguayan State had taken clear steps to comply with its provisions.

43. In the first place, the Court notes that, upon issuing Decree 323/2011, Uruguay's Executive Branch revoked "for reasons of legitimacy, all administrative acts and communications issued by the Executive Branch in application of Article 3 of the [Expiry Law], considering that the facts denounced were included in the provisions of Article 1 of the abovementioned law and instead declared that those acts were not included in said legal standard." In taking this decision, the Council of Ministers headed by the President of the Republic took into account, *inter alia*, that "the State of Uruguay has been convicted for its international responsibility in a Judgment of the Inter-American Court […] and therefore is under an obligation to comply with the provisions of the Judgment," and particularly with the provisions of operative paragraph 11 and several paragraphs thereof, and that the State has ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[25]

44. The Court considers that, having regard to the situation created by the Expiry Law, which delegated to the Executive Branch the authority to determine whether or not the judges hearing the complaint could continue the investigations,[26] that Decree

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22 *Cf. Case of Gelman v. Uruguay*, para. 255.

23 *Cf. Case of Gelman v. Uruguay*, para. 256.

24 *Cf. Case of Gelman v. Uruguay*, para. 256.

25 *Cf.* Supreme Court of Justice of Uruguay. Case of "Sabalsagaray Curutchet Blanca Stela – Complaint based on an Objection of Unconstitutionality," Judgment No. 365, of October 19, 2009.

26 The Expiry Law establishes that:

represents a clear and explicit willingness to comply with the Judgment, annulling the previous actions which, in relation to said Law, represented an additional obstacle to the investigation of this case and other cases of serious human rights violations.

45. Secondly, the Court notes that Article 1 of Law 18831 provides that "the State's full right to punitive action is re-established in respect of crimes committed in the context of State terrorism up to March 1, 1985, and covered by Article 1 of Law 15848 of December 22, 1986;" that Article 2 establishes that "[n]o period of limitation or expiry shall apply between December 22, 1986 and the entry into force of [this] Law, in respect of offences covered by Article 1 of [this] Law;" and that Article 3 declares that "the offences referred to in the previous articles are crimes against humanity according to international treaties to which Uruguay is party."

46. Thus, as indicated above (*supra*), the Court finds that Law 18831 "Re-establishment of the Punitive Claims of the State for Crimes Committed in the Context of State Terrorism up to March 1, 1985" revokes the Expiry Law (Law 15848) and at the same time paves the way for such investigations by suspending the alleged applicability of the statute of limitations in cases involving gross human rights violations. Article 1 of this Law reiterates the obligation of all competent judges of the State of Uruguay to investigate such cases which, given their nature, are obviously not covered by the statute of limitations. Furthermore, in this case there is no doubt that enforced disappearances took place, that they are crimes of a continuous or permanent character and, therefore, as long as they continue taking place the statute of limitations is not applicable. Accordingly, Law 18831 constitutes a specific action of compliance with the Judgment, both in respect of operative paragraph eleven and of the State's obligation to investigate the facts.

47. Nevertheless, during the hearing on monitoring compliance, the Court was advised by the representatives and by the State that Uruguay's Supreme Court of Justice had admitted motions of unconstitutionality against Law 18831 filed by soldiers accused in pre-trial investigations. However, just a few days after the monitoring compliance hearing, in another case also involving enforced disappearances, and through Judgment No. 20 of February 22, 2013, the Supreme Court of Justice declared the objection of unconstitutionality partially admissible[27] and, "on the basis of merit, declar[ed] unconstitutional, and therefore, inapplicable Articles 2 and 3 of Law No. 18831."

48. Therefore, it would be possible to consider that the content of Executive Decree 323 together with the provisions of Article 1 of Law No. 18831 of the

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> Article 3. For the purposes contemplated in the above articles, the court in pending cases will request the Executive Branch to submit, within a period of thirty days of receiving such request, an opinion as to whether or not it considers that the case falls within the scope of Article 1 of the current law. If the Executive Branch considers this law to be applicable, the court will dismiss the case. If, on the other hand, the Executive does not consider that the case falls within this law, the court will order the judicial proceedings to continue. From the time this law is promulgated until the date the court receives a response from the Executive Branch, all pre-trial proceedings in cases mentioned in the first paragraph of this article will be suspended.
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> Article 4. Notwithstanding the foregoing, the court will submit to the Executive Branch all testimony offered until the date that this law is approved, regarding persons allegedly detained in military or police operations who later disappeared, including minors allegedly kidnapped in similar circumstances. The Executive Branch will immediately order the investigation of such incidents. Within a 120-day period from the date of receipt of the judicial notification of the complaint, the Executive Branch will inform the plaintiffs of the results of these investigations and place at their disposal all the information gathered.

[27] *Cf.* Processes entitled: "M.L., J.F.F., O. –Complaint- Objection of Unconstitutionality, Articles 1, 2 and 3 of Law 18831, IUE 2-109971/2011."

Legislative Branch, were intended to ensure that the Expiry Law would no longer constitute an additional obstacle to the investigation of serious human rights violations. However, based on the information presented, the issuance of Decree 323 and the suspension of the effects of the Expiry Law under the terms of Article 1 of Law 18831, would appear not to be sufficient to eliminate all obstacles to the investigations given that, according to the ruling issued by the Uruguayan Supreme Court of Justice on February 22, 2013, the effects of the Expiry Law would not have affected the statute of limitations in cases constituting gross human rights violations committed during the dictatorship. In close relation to the foregoing, and according to the Supreme Court, no other compelling legal grounds would be applicable to such events, such as enforced disappearance or crimes against humanity, despite being contemplated in its legislation,[28] considering that these were defined subsequent to the events and therefore such definition would imply their application retroactively, infringing on the principle of legality.[29] Indeed, the latter was considered in this way in the recent decision of the Supreme Court of Justice.

49. This would imply, for example, that cases such as the forced disappearance of María Claudia García would only be investigated as a crime of "especially aggravated murder," thereby allowing the application of the statute of limitations (*supra* paragraphs 38 and 41). Indeed, in its Judgment, the Inter-American Court noted that "the proceedings initiated by Juan Gelman and reopened in 2008 through the efforts of María Macarena Gelman, were conducted for the crime of homicide, thereby excluding such crimes as torture, enforced disappearance and suppression of identity, which allow[ed] the domestic courts to declare that the case had prescribed."[30]

50. In this regard, it is important to recall that the Judgment in this case was issued in respect of the gross human rights violations committed by organized power structures or forces acting under a system of "state-sponsored terrorism,"[31] which served as an instrument for perpetuating such acts and as a guarantee of impunity. It is significant that these acts did not take place within the framework of an international armed conflict, unlike others that did occur in this type of context.[32]

51. Articles 2 and 3 of Law 18831 specifically seek to eliminate the statute of limitations as a procedural guarantee for alleged perpetrators of acts such as those committed in the *Gelman case*, as well as other serious human rights violations "committed in the context of State terrorism up to March 1, 1985," stipulating that no period of limitation or expiry applies to such offences, which constitute crimes against humanity (*supra* Paragraph 46).

52. However, although the Supreme Court decision of February 22, 2013 did not declare Article 1 of Law 18831 unconstitutional, it did rule that Articles 2 and 3 were

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[28] The crime of forced disappearance was defined in Uruguay by Article 21 of Law 18026 of September 25, 2006.

[29] *Cf.* for example, Supreme Court of Justice, Cassation Judgment No. 1501 of May 6, 2011, in rulings on "Gavazzo Pereira, José Nino and Arab Fernández, Jose Ricardo." This judgment confirmed the conviction of first and second instance of those accused of 28 crimes of "especially aggravated homicide"; the cassation appeal was rejected by the defense on the grounds that the Expiry Law did not grant amnesty to police or military officers during the de facto government. It stated that it could not proceed with the statute of limitations during the de facto government and rejected the request of the Public Prosecutor's Office to classify the facts as crimes of enforced disappearance and crimes against humanity.

[30] *Case of Gelman v. Uruguay*, para. 235.

[31] *Case of Gelman v. Uruguay*, paras. 44 to 63.

[32] *Cf., e.g., Case of Massacres of El Mozote and Surrounding Areas v. El Salvador. Merits, Reparations and Costs.* Judgment of October 25, 2012. Series C No. 252.

unconstitutional. According Uruguay´s law on constitutional procedure and the State's affirmations (*supra* paragraph 32), this type of decision on unconstitutionality only has the effect of inapplicability for the party requesting it (the "objector"), but in practice such decisions can be subsequently reiterated without major deliberation in similar cases by using the mechanism of an "early ruling"[33] or by issuing similar new rulings.[34] The Supreme Court of Justice stated the following, *inter alia*, in its ruling:

> As has been pointed out, and particularly bearing in mind the manner in which it was expressed in [Supreme] Court Judgment No. 365/2009 "... *the international conventions on human rights are incorporated into the Constitution through Article 72, since they concern rights inherent to human dignity that the international community recognizes in these treaties*...," it is appropriate to stress that our constitutional and legal order does not establish an obligation of the judicial authorities of the Oriental Republic of Uruguay to consider the rulings of the inter-American bodies as binding precedents.
>
> Therefore, the provisions of the above-mentioned international judgment [in the *Case of Gelman v. Uruguay*] does not alter the legal parameters on which the issue of unconstitutionality must be decided in the instant case (Arts. 256 to 259 of the Constitution).
>
> It is worth adding that for crimes committed during the dictatorship and protected by the Expiry Law, no special statute of limitations was established; instead, the same expiry terms as for any other crime simply apply. Therefore, in such a case, the conviction imposed by the Inter-American Court of Human Rights would not be applicable as regards the elimination of the statute of limitations established especially for these cases, given that no laws of this nature were issued.
>
> As can be appreciated, the case under consideration does not concern the application of the judgment of the Inter-American Court or its non-recognition; rather, it concerns the monitoring of constitutionality required of the Supreme Court of Justice, according to the rules established in the Constitution, an inalienable matter according to our Constitution. In short, while it is beyond any discussion that the Inter-American Court of Human Rights is the final interpreter of the American Convention on Human Rights – naturally within the sphere of its jurisdiction – it cannot be denied that the final interpreter of the Constitution of the Oriental Republic of Uruguay is the Supreme Court of Justice. […]

53. The Court recalls that the Judgment in the *Case of Gelman* concerned gross human rights violations, upon establishing that enforced disappearance "constitutes, owing to the nature of the infringed rights, a violation of a *jus cogens* principle, especially serious because it occurred in the context of a systematic practice of 'State-sponsored terrorism' at an inter-state level."[35] Thus, in the same Judgment the Court recalled that "the failure to investigate the serious human rights violations committed in the present case, which occurred in the context of systematic patterns, evince the State's non-compliance with international obligations, established by non-derogable norms."[36] Similarly, the Judgment attributes to these serious violations the judicial consequences of the non-applicability of the statute of limitations, non-retroactivity of the criminal law and other similar exemptions of responsibility. In this regard, the Court established that:

> 234. […] given the involvement, not only of a systematic pattern in which multiple authorities may have been involved, but also of a cross-border/interstate operation, the State should have used and applied the appropriate legal instruments for the analysis of the case, the criminal codifications that are in-line with the facts, and the design of an appropriate investigation able to collect and

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[33] *Case of Gelman v. Uruguay*, paras. 142 and 150.

[34] It is public information that in at least three other cases, said ruling was reiterated by the Supreme Court of Justice, specifically: through Judgment No. 152 of March 8, 2013, in processes entitled "Z. Q., J. R. Accomplice to the crime of especially aggravated homicide – exception of unconstitutionality Articles 1, 2 and 3 of Law No. 18831", IUE 87-289/1985, as well as through Judgments No. 186 and 187 of March 13, 2013.

[35] *Case of Gelman v. Uruguay*, para. 99.

[36] *Case of Gelman v. Uruguay*, para. 231.

> systematize the vast and diverse information that has been reserved or made not easily accessible and includes the necessary inter-state cooperation […]
>
> 236. It is necessary to reiterate that this is a case of gross human rights violations, in particular enforced disappearance; hence this is the codified crime that should have priority in the investigations that must be opened at the domestic level. As already established by this Court, given that this crime is of a permanent nature, in other words, it continues over time when the codification of enforced disappearance enters into force, the new law is applicable without this representing retroactive application.[37] […]

54. Thus, as regards the obligation to investigate the facts, the issuance of the aforementioned Decree and Law appears to have little practical utility if, owing to subsequent court rulings, such crimes are declared expired, which would open up the possibility that enforced disappearances and other gross human rights violations committed in this case, and during the dictatorship in Uruguay, would go unpunished. Thus, beyond declaring the "re-establishment of the State's punitive claims" through said Law, certain considerations included in the Supreme Court ruling of February 22, 2013, and the manner in which they are expressed, could imply a serious obstacle to the investigation of gross human rights violations committed, in light of the Court's order.

55. In this regard, in its observations on the effects of this ruling by the Supreme Court, the State itself pointed out that, under Uruguay's constitutional system, the "technical independence of judges does not require them to apply the concepts put forward in the pronouncement by the Supreme Court of Justice, and they are competent to continue with the cases in which they must take action, [since t]hese concepts will be examined by the competent judge in application of the substantive criminal norms that should be applied by law." The State indicated that, "…it is up to the interpreter and not the Constitutional Court to decide whether the facts under investigation are covered by Article 3 [of Law 18831], as crimes against humanity, because they are included in the treaties signed by Uruguay … In this way judges, in exercise of their technical independence, will be able to continue investigating the cases and eventually punish those responsible for crimes whose investigation comes under their jurisdiction." Nevertheless, the State added that, "even though it is clear that Judgment No. 20 of the Supreme Court of Justice issued on February 22 was not approved by a unanimous vote, this does not prevent future rulings in the same vein." It added that even if the decision adopted by the highest organ of the Judiciary has limited effect in this particular case and "the suspension of Law 18831 does not affect its enforcement," it also "recognizes that the recent ruling of the highest organ of the Judiciary could create difficulties in judicial rulings relating to cases of human rights violations that occurred in the past."

56. Consequently, despite the fact that this Court ruled that the Expiry Law lacks effects due to its incompatibility with the American Convention, and despite the provisions of Article 1 of Law 18831, and taking into account the recent decision of the Supreme Court of Justice, it is not clear whether, in complying with the Judgment issued in the *Gelman case*, the State has adopted all measures and actions necessary to ensure that the effects produced by the Expiry Law for more than two decades cease to represent an obstacle to the investigation of evidence of gross human rights violations.

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[37] *Case of Tiu Tojín v. Guatemala. Merits, Reparations and Costs.* Judgment of November 26, 2008. Series C No. 190, para. 87; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, Reparations and Costs.* Judgment of September 1, 2010. Series C No. 217, para. 201, and *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 24, 2010. Series C No. 219, para. 179.

57. In this regard, although the Supreme Court ruling of February 22, 2013 includes a number of comments concerning compliance with the Judgment of the Inter-American Court in this case, the manner in which these are presented, and in particular the interpretation of the State's obligation to exercise control of conventionality, these considerations could have the effect of impairing or making compliance with the Judgment illusory.

58. Consequently, the Court considers it pertinent to recall: a) the binding nature of the Judgment issued in this case and the extent of the obligation of States to exercise control of conventionality and b) certain standards applicable to the question of whether, with respect to crimes committed during the dictatorship that were covered by the Expiry Law, the ordinary terms of prescription are applicable, and the manner in which the principle of retroactivity of the criminal law should be understood in relation to the stipulations of the Judgment, International Law, the nature of the acts committed and the nature of the crime of enforced disappearance.

a) Binding nature of the judgment issued by the Court and control of conventionality

a.1 Binding nature of the judgment

59. The obligation to comply with the decisions in the Court's judgments is based on the legal principle of basic principle of international law, supported by international case law, according to which States must comply with their international treaty obligations in good faith (*pacta sunt servanda*) and, as this Court has already indicated, and as established in Article 27 of the 1969 Vienna Convention on the Law of Treaties, they may not invoke the provisions of their domestic law as justification for their failure to abide by their pre-established international responsibilities.[38] The treaty obligations of the States Parties are binding for all the powers and organs of the State[39] (Executive, Legislative, Judicial branches and any other government bodies) and other public or state authorities, at any level, including the highest courts of justice, which have a duty to comply with international law in good faith.

60. This interpretation is directly based on the principle contained in Article 27 of the Vienna Convention on the Law of Treaties.[40] In addition, the States have the general obligation established in Article 2 of the American Convention to adapt domestic law to the provisions of this instrument and to guarantee the Rights enshrined therein[41] which, depending on the circumstances of each particular

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[38] *Cf. International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Articles 1 and 2 of the American Convention on Human Rights).* Advisory Opinion OC- 14/94 of December 9, 1994. Series A No. 14, para. 35 and *Case of Barrios Altos v. Peru. Monitoring of Compliance of the Judgment*. Order of the Inter-American Court of Human Rights of September 7, 2012, para. 4. The above has been included in "Order approved by the General Assembly [based on the report by the Sixth Commission (A/56/589 and Corr.1)] 56/83, Responsibility of States for internationally wrongful acts, 85th Plenary Session, December 12, 2001, Official Documents of the General Assembly, 56th Session, Supplement No. 10 and corrections (A/56/10 and Corr.1 and 2).

[39] *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, para. 4 and *Case of Barrios Altos v. Peru. Monitoring Compliance with Judgment.* Order of the Inter-American Court of Human Rights of September 7, 2012, para. 4.

[40] *Cf. Case of Apitz Barbera et al., Monitoring Compliance with Judgment*. Ruling of the Court of November 23, 2012, para. 22.

[41] *Cf. Case of "Juvenile Reeducation Institute" v. Paraguay*. *Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 2, 2004. Series C No. 112, para. 205; *Case of Bulacio v. Argentina. Merits, Reparations and Costs.* Judgment of September 18, 2003. Series C No. 100, para. 142

situation, implies adopting two types of measures, namely: i) the elimination of norms and practices of any nature that result in violations of the guarantees provided for in the Convention or that disregard the rights recognized therein or hinder their exercise and ii) the enactment of laws and the implementation of practices conducive to the effective observance of said guarantees.[42]

61. The Court reiterates that, once it has ruled on the merits and reparations of a case submitted to it, the State must abide by the provisions of the Convention regarding compliance with its judgments.[43] In accordance with Article 67 of the American Convention, "[t]he judgment of the Court shall be final and not subject to appeal," which produces the effects and authority of *res judicata*. Likewise, Article 68(1) of the American Convention stipulates that "[t]he State Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties."

62. Thus, given that the operative part of the Court's judgment must be complied with when it expressly and directly refers to the considerations contained therein, (as in the Judgment of the *Gelman Case*), the Court's reasoning is clearly an integral part of the Judgment, with which the State concerned is also obliged to fully comply. In this particular case, the ninth operative paragraph of the Judgment refers directly to paragraphs 252 to 256, 274 and 275, while the eleventh operative paragraph refers to paragraphs 253 and 254. Otherwise, it would be incongruous for the operative part of the judgment to be binding without taking into account the grounds and context in which it was ordered, especially recalling that, pursuant to Articles 66 to 69 of the Convention, the ruling constitutes a whole or a unit. Thus, the obligation of the States Parties to comply promptly with the decisions of the Court is an intrinsic part of the obligation to comply with the American Convention in good faith, and is binding for all the powers and organs of the State.

63. The State Parties to the Convention must ensure compliance with the provisions of the Convention and their effects (*effet utile*) within their respective domestic legal systems. This principle is applicable not only with regard to the substantive norms of human rights treaties (that is, those which contain provisions concerning the protected rights), but also with regard to procedural norms, such as those referring to compliance with the decisions of the Court.[44]

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and *Case of Five Pensioners v. Peru. Merits, Reparations and Costs.* Judgment of February 28, 2003. Series C No. 98, para. 164.

[42] *Cf. Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 26, 2006. Series C No. 154, para. 118; *Case of Ximenes Lopes v. Brazil. Merits, Reparations and Costs.* Judgment of July 4, 2006. Series C No. 149, para. 83 and *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.).* Judgment of February 5, 2001. Series C No. 73, para. 85. In relation to this the Court has affirmed that, [i]n people's rights, a standard of common law prescribes that when a State has signed an international convention, it must introduce the necessary modifications in its domestic law for ensuring the implementation of the obligations assumed. This standard is universally valid and has been classified in jurisprudence as an evident principle *("principe allant de soi"; Echange des populations grecques et turques, avis consultatif, 1925, C.P.J.I., series B, no. 10, p. 20). Cf. Case of Almonacid Arellano et al. v. Chile,* para. 117; *Case of "Juvenile Reeducation Institute" v. Paraguay. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 2, 2004. Series C No. 112, para. 205 and *Case of Bulacio v. Argentina. Merits, Reparations and Costs.* Judgment of September 18, 2003. Series C No. 100, para. 140.

[43] *Cf. Case of Baena Ricardo et al. v. Panama. Jurisdiction.* Judgment of November 28, 2003. Series C No. 104, para. 60.

[44] *Cf. Case of Ivcher Bronstein v. Peru. Jurisdiction.* Judgment of September 24, 1999. Series C No. 54, para. 37 and *Case of Barrios Altos v. Peru. Monitoring Compliance with Judgment.* Order of the Inter-American Court of Human Rights of September 7, 2012, para. 5.

64. The States Parties to the Convention may not invoke the provisions of constitutional law or other aspects of domestic law as justification for their failure to abide by their obligations under said treaty.[45]

a.2 Control of Conventionality

65. The concept of control of conformity with the Convention, or "control of conventionality" has emerged in inter-American jurisprudence and is envisaged as a mechanism for the application of International Law, in this case International Human Rights Law, and specifically the American Convention and its sources, including this Court's jurisprudence.

66. Thus, in several judgments the Court has indicated its awareness of the fact that domestic authorities are subject to the rule of law, and are therefore obligated to apply the provisions in force in the legal system.[46] But when a state is Party to an international treaty such as the American Convention, all its organs, including judges and other bodies responsible for the administration of justice at all levels, are bound by the treaty, which requires them to ensure that effects of the provisions of the Convention are not impaired by the application of standards contrary to their object and purpose, so that their judicial or administrative decisions do not render total or partial compliance with international obligations illusory. In other words, all state authorities have the obligation to exercise *ex officio* a "control of conventionality" between domestic standards and the American Convention, within the framework of their respective spheres of competence and of the corresponding procedural rules. Both the treaty and its interpretation the Inter-American Court, the final arbiter of the American Convention, must be taken into account in this task.[47]

67. Accordingly, it is possible to identify two distinct manifestations of the State's obligation to exercise control of conventionality, depending on whether the judgment has been delivered in a case in which the State was a party. This is because the binding effect of the provision of the Convention that is interpreted and applied differs depending on whether or not the State was a material party to the international proceedings.

68. With regard to the first manifestation, when an international *res judicata* judgment exists regarding a State which has been a party in a case submitted to the jurisdiction of the Inter-American Court, all its authorities, including judges and the organs responsible for the administration of justice, are also bound by the treaty and

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[45] *Cf. International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Articles 1 and 2 of the American Convention on Human Rights).* Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 35; *Case of La Cantata v. Peru. Monitoring Compliance with the Judgment.* Order of the Inter-American Court of Human Rights of November 20, 2009, fifth considering paragraph, and *Case of Cantoral Benavides v. Peru. Monitoring Compliance with the Judgment*. Order of the Inter-American Court of Human Rights of November 20, 2009, Considering paragraph 5. See also: General Comment No. 31, adopted by the Human Rights Committee, The Nature of the General Obligation Imposed on States Parties to the Covenant, 80th Period of Sessions, U.N. Doc. HRI/GEN/1/Rev.7 at 225 (2004).

[46] *Cf. Case of Almonacid Arellano et al. v. Chile*, para. 124; *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil,* para. 176 and *Case of Furlan and Family v. Argentina. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 31, 2012. Series C No. 246, para. 302.

[47] *Cf. Case of Almonacid Arellano et al. v. Chile*, para. 124; *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil,* para. 176 and *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 26, 2010. Series C No. 220, para. 225. See also *Case of Gelman v. Uruguay*, para. 193 and *Case of Furlan and Family v. Argentina*, para. 303.

the judgments of this Court. This requires them to ensure that the effects of the provisions of the Convention, and therefore the decisions of the Inter-American Court, are not impaired by the application of standards contrary to their object and purpose or by judicial or administrative decisions that make full or partial compliance with the judgment illusory. In other words, this arises in the context of international *res judicata,* which requires the State to fulfill and apply the judgment. The State of Uruguay finds itself in this situation with respect to the Judgment issued in the *Gelman Case*. Thus, precisely because control of conventionality is an institution that serves as an instrument for applying International Law, in this case having the authority of *res judicata,* it is merely a matter of applying it to comply fully and in good faith with the Court's judgment and therefore it would be inappropriate to use this instrument as justification for failing to comply with it, as noted previously (*supra* paragraphs 60 to 65).

69. As to the second expression of the exercise of control of conformity with the Convention, in situations and cases in which the State concerned has not been a party to the international proceedings in which certain case law was established, the mere fact of being a Party to the American Convention means that all public authorities and all the organs of State, including the democratic bodies,[48] judges and other organs involved in the administration of justice at all levels, are bound by the treaty. This obliges them to exercise control of conformity with the Convention *ex officio*, taking into account the treaty itself and its interpretation by the Inter-American Court, within the framework of their respective spheres of competence and of the corresponding procedural rules, either by the enactment and enforcement of laws, as regards their validity and compatibility with the Convention, or through the identification, prosecution and deciding of particular situations and specific cases, bearing in mind the treaty and, as appropriate, the jurisprudential precedents and guidelines of the Inter-American Court.[49]

70. The Court considers it pertinent to emphasize that the concept of control of conventionality is closely linked to the "principle of complementarity," according to which the State's responsibility under the Convention can only be required at the international level after the State itself has had the opportunity to declare the violation and repair the damage caused by its own means. This is based on the

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[48] In this regard, the Court indicated that in the Gelman Case: "democratic legitimacy of specific facts or acts in a society is limited by the international norms and obligations for the protection of human rights recognized in international treaties, such as the American Convention, so that that the existence of a truly democratic regime is determined by both its formal and substantial characteristics; therefore, particularly in cases of gross violations of norms of international human rights law, the protection of human rights constitutes an impassable boundary to the rule of the majority; in other words, to the sphere of what 'can to be decided' by the majorities in democratic bodies, in which priority should be given to "control of conformity with the Convention," which is a function and task of any public authority and not only the Judiciary. In this regard, in the *Case of Nibia Sabalsagaray Curutchet*, the Supreme Court of Justice exercised an appropriate control of conformity with the Convention as regards the Expiry Law, by establishing, *inter alia*, that 'the decision of the majority is essentially limited by two factors: protection of the fundamental rights (the most important are the rights to life and to personal liberty, and they cannot be sacrificed based on any majority decision, or general interest, or common good), and the fact that public authorities are subject to the law].' Other domestic courts have also referred to the limits of democracy in relation to the protection of fundamental rights." Judgment in the *Case of Gelman v. Uruguay*, para. 239.

[49] The binding effectiveness of the interpretation of the international treaty is also observed by national authorities and courts in the European System of Human Rights. See Parliamentary Assembly of the Council of Europe, ruling 1226 of September 28, 2000, "*Implementation of Judgments of the European Court of Human Rights*": "[…] 3. *The principle of solidarity implies that the case law of the Court forms part of the Convention, thus extending the legally binding force of the Convention erga omnes (to all the other parties). This means that the states parties not only have to execute the judgments of the Court pronounced in cases to which they are party, but also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice.*" http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=16834&Language=EN

principle of complementarity (also known as "subsidiarity") that permeates the Inter-American human rights system which, as stated in the Preamble to the American Convention, "reinforce[s] or complement[s] the protection provided by the domestic law of the American States." Thus, the State "is the main guarantor of the human rights of the individual, so that, if an act that violates the said rights occurs, it is the State itself that has the obligation to decide the matter at the domestic level and, [as appropriate,] to make reparation, before having to respond before international instances, such as the inter-American system, which derives from the subsidiary nature of the international proceedings in relation to the national systems that guarantee human rights."[50]

71. This means that, as a consequence of the binding effectiveness of the American Convention in all its States Parties, a joint dynamic and complementary control of the treaty-based obligations of the States to respect and ensure human rights has been generated between the domestic authorities and the international bodies (in a complementary manner), in order to develop and harmonize decision-making criteria.[51] Thus the jurisprudence of this Court refers to domestic case law in order to found and conceptualize the violation of the American Convention in a specific case.[52] In other cases it has recognized that, in line with international obligations, domestic bodies, institutions or courts have adopted adequate measures to remedy the situation that gave rise to the case;[53] the alleged violation has already been resolved;[54] reasonable

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[50] *Case of the Santo Domingo Massacre v. Colombia. Preliminary Objections, Merits and Reparations.* Judgment of November 30. 2012. Series C No.259, para. 142. See also, *Case of Acevedo Jaramillo et al. v. Peru. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 24, 2006. Series C No.157, para. 66.

[51] *Cf. Case of the Santo Domingo Massacre v. Colombia*, para. 143.

[52] In the *Case of the Mapiripán Massacre v. Colombia*, in addressing the right to not be subjected to forced displacement, under Articles 4, 5 and 22 of the Convention, the Court drew extensively on the judgment of the Constitutional Court of Colombia T/025-04. *Cf. Case of the Mapiripán Massacre v. Colombia. Merits, Reparations and Costs.* Judgment of September 15, 2005. Series C No.134, para. 174 and following. See likewise the *Case of* the *Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations*. Judgment of June 27, 2012. Series C No. 245, paras. 159, 164, 182, 186, 202 and 208*, Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil,* paras. 163 to 169*,* or *Case of Gelman v. Uruguay,* paras. 215 to 224*.*

[53] In the *Case of La Cantuta v. Peru* there was discussion as to whether the amnesty laws, ruled incompatible with the Convention in a previous case (*Barrios Altos*), continued to produce effects at the domestic level. After finding that the actions of several state bodies and the decisions of the Peruvian Constitutional Court were in compliance with previous provisions, the Court ruled that the State was not in breach of Article 2 of the Convention. *Cf. Case of La Cantuta v. Peru. Merits, Reparations and Costs*. Judgment of November 29, 2006. Series C No. 162, paras. 165 to 189.

[54] In the *Case of Cepeda Vargas v. Colombia*, the Commission asked the Court to rule that the State was responsible for the violation of the right to the protection of the honor and dignity of family members, regarding statements made by high-level State officials against them which constituted "acts of stigmatization" that affected them "and the memory of the Senator." The alleged violation of Article 11 is also based on a specific act to the detriment of the son of a Senator: an advertising message issued as part of the electoral publicity for the reelection campaign of the then-candidate for the Presidency of the Republic. The Court noted that the Constitutional Court of Colombia itself had handed down a judgment recognizing that the dissemination of certain messages in the mass media damaged the good name and the honor of Mr. Iván Cepeda Castro, as the son of one of the victims of political violence in the country, and that the aforementioned rights of his family had also been violated. The Court ruled that "having analyzed the above judgment of the Constitutional Court, to the effect that it stated the [previously mentioned] violation […] of the aforesaid advertising message, that also required appropriate reparations at the domestic level," *Case of Manuel Cepeda Vargas v. Colombia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of May 26, 2010. Series C No. 213, paras. 203 to 210.

reparations have been made,[55] or an adequate control of conventionality has been implemented. As stated previously (*supra* paragraph 37), specifically in the *Case of Gelman v. Uruguay*, the Court considered that before issuing the ruling of February 22, 2013, Uruguay's Supreme Court of Justice had already implemented an appropriate control of conventionality with respect to the Expiry Law by declaring it unconstitutional in October 2009 in the *Case of Sabalsagaray*.

72. Therefore, control of conventionality is an obligation of every institution, organ or authority of the State Party to the Convention, and must ensure that the human rights of the persons under their jurisdiction are respected and guaranteed, within the framework of their respective jurisdictions and relevant procedural rules. This gives meaning to the conventional mechanism, which requires all judges and judicial bodies to prevent potential violations of human rights, which must be resolved at the domestic level taking into account the interpretations of the Inter-American Court; otherwise these may be considered by the Court, in which case it will exercise a complementary control of conventionality.[56]

73. Without prejudice to the foregoing, and in accordance with the observations regarding the first manifestation of control of conventionality when an international *res judicata* exists, (*supra* Paragraph 69), such control also plays an important role in ensuring compliance with or the implementation of a particular judgment of the Inter-American Court, especially when that compliance is the responsibility of the domestic courts. In these circumstances, the judicial body has the duty to uphold the American Convention and the rulings of this Court, over and above domestic regulations, interpretations and practices that impede compliance with its decision in a specific case.[57]

74. From the above it is clear that the States have a commitment to comply with their international obligations, and not only with reiterated judicial practices at the domestic level, which of course are important. Thus, the highest courts of several States of the region have referred to the binding nature of the judgments of the Inter-America Court and the manner in which they have applied control of conventionality, taking into account the Court's interpretations.

75. In this regard, the Supreme Court of Justice of Argentina has stated that the decisions of the Inter-American Court "are binding and of obligatory compliance for the State of Argentina (Article 68(1)," and has established that "in principle, it must subordinate the contents of its decisions to that international court."[58] Similarly Argentina's Supreme Court stated that "the interpretation of the American Convention on Human Rights must be guided by the jurisdiction of the Inter-American Court of Human Rights," since "it provides ineludible interpretive guidelines for the Argentine branches of government in its sphere of competence and therefore also for the

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[55] In the same *Case of Cepeda Vargas v. Colombia*, regarding the reparations and actions of the domestic contentious-administrative level. *Case of Cepeda Vargas v. Colombia,* paras. 211 and following. See also *Case of the Santo Domingo Massacre v. Colombia*, para. 336.

[56] *Cf. Case of the Santo Domingo Massacre v. Colombia*, para. 144.

[57] *Cf. Case of Apitz Barbera et al. v. Venezuela. Monitoring Compliance with Judgment.* Order of the Inter-American Court of Human Rights of November 23, 2012, para 26.

[58] Judgment of December 23, 2004, by the Supreme Court of Justice of the Argentine Republic (File 224. XXXIX), "Espósito, Miguel Angel following incident of prescription of the criminal action promoted by the defense," paragraph 6.

Supreme Court of Justice, for the purposes of protecting the obligations assumed by the Argentine State within the Inter-American human rights system."[59]

76. For its part, the Constitutional Court of Bolivia has stated that:

> [I]n fact, the Pact of San Jose, Costa Rica, as a component of the `constitutional block', i[s] comprised of three essential parts, which are closely interconnected: the first, made up of the Preamble, the second known as the dogmatic part and the third referring to the substantive part. Specifically, Chapter VIII of this instrument regulates the Inter-American C[ourt] of Human Rights, consequently, following a "systemic" criteria of constitutional interpretation, and it should be established that this body, and therefore its decisions, also form a part of this block of constitutional legislation.
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> This is so for two specific legal reasons, namely: 1) the purpose of the jurisdiction of the Inter-American Court of Human Rights; and 2) the application of the doctrine of effectiveness of judgments concerning Human Rights.[60]

77. In addition, in judgment C-442 of May 25, 2011, the Constitutional Court of Colombia pointed out that "the case law of the Inter-American Court of Human Rights contains the authentic interpretation of the rights enshrined in the [American Convention], an international instrument which includes the parameter of control of conventionality."[61] Likewise, in judgment C-370 of May 18, 2006, following an analysis of various provisions of Law No. 975 of 2005 concerning the rights of victims of gross human rights violations, the Constitutional Court of Colombia indicated, with respect to the case law of the Inter-American Court, that its decisions "express the authentic interpretation of the rights protected by the American Convention on Human Rights […]." The Constitutional Court of Colombia has also indicated that, since the Constitution of Colombia states that constitutional rights and responsibilities must be interpreted "in accordance with international human rights treaties that have been ratified by Colombia," it follows "that the jurisprudence of the international bodies responsible for interpreting such treaties constitutes an important interpretative criterion for determining the meaning of the constitutional rules on fundamental rights."[62]

78. The Constitutional Chamber of the Supreme Court of Costa Rica has indicated that:

> It should be noted that if the Inter-American Court of Human Rights is the natural body for interpreting the American Convention on Human Rights […], the strength of its decisions interpreting the Convention and prosecuting national laws in light of this standard, be it a contentious case or a simple consultation, will have –in principle- the same value as the standard interpreted.[63]

79. In the *Case of Fermín Ramírez v. Guatemala,* the Inter-American Court ordered the State to conduct a new trial for the petitioner. The Court noted and assessed positively the terms of Agreement No. 96-2006 made by the Supreme Court of Justice of Guatemala, which constituted a precedent of particular importance within

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[59] Judgment of the Supreme Court of Justice of the Argentine Nation, Mazzeo, Julio Lilo et al., appeal of cassation and unconstitutionality. M. 2333. XLII. *et al.*, of July 13, 2007, para. 20

[60] Judgment issued on May 10, 2010, by the Constitutional Court of Bolivia (File No. 2006-13381-27-RAC), paragraph III (3) on "The Inter-American System of Human Rights. Arguments and Effects of the Judgments Adopted by the Inter-American Court of Human Rights."

[61] On this point, the Constitutional Court of Colombia cites Judgments C-360 of 2005 and C-936 of 2010 (see note No. 53 of the ruling analyzed).

[62] Judgment C-010/00 issued on January 19, 2000, by the Constitutional Court of Colombia, para. 6, reiterated in Judgments T-1391 of 2001 and C-097 of 2003.

[63] Judgment of May 9, 1995, issued by the Constitutional Chamber of the Supreme Court of Justice of Costa Rica. Unconstitutional Action. Vote 2313-95 (File 0421-S-90), seventh considering clause.

the Inter-American System concerning the implementation of this Court's judgment, upon designating a court to conduct a new trial as required by the Inter-American Court.[64]

80. Furthermore, the Criminal Chamber of the Supreme Court of Justice of Guatemala issued several rulings declaring the "domestic enforceability" of judgments issued by the Inter-American Court of Human Rights in the *Cases of the "White Van" (Paniagua Morales et al.)*,[65] *the "Street Children" (Villagrán Morales et al.)*,[66] *Bámaca Velásquez*,[67] and *Carpio Nicolle et al.*,[68] all against the State of Guatemala. In these rulings, the Inter-American Court found that the criminal proceeding referred to in each of the cases had violated the American Convention on Human Rights, and consequently it ordered the State of Guatemala to effectively investigate the events which produced these violations and to identify, prosecute and sanction those responsible. In compliance with the ruling of the Inter-American Court, the Criminal Chamber decided to annul the corresponding domestic judgments, as well as all subsequent proceedings, and consequently ordered a new proceeding, respectful of the rules of due process and in compliance with the purposes of the criminal process for establishing the facts and punishing those responsible. Finally, the Criminal Chamber of the Supreme Court of Justice declared that since the Republic of Guatemala could not oppose with its domestic law, or allege the absence of procedures or standards, for compliance with the international judgment, the implementation of which had the effect of an extraordinary action of common procedure.

81. For its part, the Supreme Court of Justice of Mexico has indicated that, "the convictions handed down by the Inter-American Court of Human Rights are obligatory for the Judicial Branch of the Federation under its terms. Therefore, [in those cases in which Mexico has been a party], the Judiciary is not only bound by the specific operative paragraphs of the judgment, but also by the criteria in their entirety contained in the judgment in that case."[69]

82. Similarly, on May 12, 2010, through Agreement No. 240, the Plenary of the Supreme Court of Justice of Panama stated that "the Republic of Panama, as a member of the international community, recognizes, respects and abides by the decisions of the Inter-American Court of Human Rights," and decided to remit the ruling of the Inter-American Court regarding the *Case of Tristán Donoso* to the Criminal Chamber of the Supreme Court of Justice."[70] Subsequently the Second Criminal Chamber of the Supreme Court of Justice issued a decision indicating that,

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[64] *Case of Fermín Ramírez v. Guatemala. Monitoring Compliance with Judgment*. Order of the Inter-American Court of Human Rights of May 9, 2008, Considering paragraph 8.

[65] *Cf.* Ruling of the Criminal Chamber of the Supreme Court of Justice of Guatemala No. MP001/2005/46063 of December 11, 2009.

[66] *Cf.* Ruling of the Criminal Chamber of the Supreme Court of Justice of Guatemala No. MP001/2008/63814 of December 11, 2009.

[67] *Cf.* Ruling of the Criminal Chamber of the Supreme Court of Justice of Guatemala No. MP001/2009/10170 of December 11, 2009.

[68] *Cf.* Ruling of the Criminal Chamber of the Supreme Court of Justice of Guatemala No. MP001/2008/2506 of December 11, 2009.

[69] Plenary of the Supreme Court of Justice of Mexico, Miscellaneous File 912/2010, ruling of July 14, 2011, paragraph 19.

[70] *Cf.* Supreme Court of Justice of Panama, Agreement No. 240 of May 12, 2010, in compliance with the Judgment of January 27, 2009, of the Inter-American Court of Human Rights in the *Case of Santander Tristán Donoso v. Panama.*

having regard to the provisions of the judgment of January 27, 2009, handed down by the Inter-American Court of Human Rights, it consider[ed] necessary the acquittal of Mr. Santander Tristán Donoso on charges of committing the offence of slander [...] and consequently annulled his conviction."[71]

83. Furthermore, the Constitutional Court of Peru has affirmed that:

> [T]he binding nature of the judgments of the Inter-American C[ourt] does not end with the operative part (which, certainly, only affects the State that is a party to the proceedings), but extends to its rationale or *ratio decidendi*, and in addition, through the application of the [Fourth Final and Transitory Provision (CDFT) of the Constitution and of Article V of the Preliminary Title of the [Code of Constitutional Procedure], in this area the judgment becomes binding for all national public institutions, including in those cases in which the Peruvian State has not been a party in the proceedings. Indeed, the capacity of the Inter-American Court for interpretation and implementation of the Convention, recognized in Article 62(3) thereof, combined with the Constitution's CDFT, means that its interpretation of the provisions of the Convention made in every proceeding is binding for all domestic branches of government, including, of course, this Court.[72]

84. The Constitutional Court also established that:

> There is clearly a direct relationship between the Inter-American Court of Human Rights and this Constitutional Court; a relationship that has a twofold purpose: on one hand, *restorative*, because by interpreting the fundamental rights violated in light of the decisions of the Court, the possibilities of producing an adequate and successful protection are enhanced; and, on the other, *preventive*, since through its observance the adverse institutional consequences for the legal security of the Peruvian State, stemming from judgments of conviction by the Inter-American Court of Human Rights, are avoided.[73]

85. For its part, the Supreme Court of Justice of the Dominican Republic has established:

> Consequently, not only the provisions of the American Convention, but also the interpretations thereof issued by the jurisdictional bodies, are of a binding nature for the Dominican State, and therefore for the Judiciary, created as means of protection, in accordance with Article 33 [of the Convention], which grants them competence with respect to matters relating to the fulfillment of the commitments made by the State Parties.[74]

86. From foregoing it is clear that the highest domestic courts of several countries have understood that international jurisprudence is a source of law, albeit with different scopes, and have used the *obiter dicta* and/or the *ratio decidendi* of this jurisprudence as the basis or guide for its decisions and interpretations.

87. Accordingly, the Court reiterates, on the one hand, that its judgments produce the effect of *res judicata* and are of a binding nature, owing to the ratification of the Convention and the recognition of the Court's jurisdiction by the States Parties, in a sovereign act conducted according to their constitutional procedures, and on the other, that control of conventionality is an obligation of state authorities, and that its implementation - subsidiary or complementary manner - is the responsibility of the Inter-American Court when a case is submitted to its jurisdiction.

88. Consequently, the claim that the duty of the domestic courts to carry out control of constitutionality is at odds with the control of conventionality carried out by

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[71] Supreme Court of Justice of Panama, Criminal Chamber, Judgment of May 12, 2010.

[72] Judgment issued on July 21, 2006, by the Constitutional Court of Peru (File No. 2730-2006-PA/TC), argument 12.

[73] Judgment 00007-2007-PI/TC issued on June 19, 2007, by the Plenary of the Constitutional Court of Peru (*Bar Association of Callao v. Congress of the Republic*), point 26.

[74] Ruling No. 1920-2003 issued on November 13, 2003, by the Supreme Court of Justice of the Dominican Republic.

the Court is in reality a false dilemma, since once the State has ratified an international treaty and recognized the competence of its oversight bodies, precisely through its constitutional mechanisms, these become part of its legal system. Therefore, control of constitutionality necessarily implies control of conventionality, exercised in a complementary manner.

89. In this case, the general effects of the incompatibility of the Expiry Law, the non-applicability of the statute of limitations and other effects relative to the obligation to investigate the facts, were provided for in the Judgment in the *Case of Gelman*, where the State had every opportunity to articulate its views. Consequently, this Judgment has the authority of international *res judicata*, and therefore it follows that all domestic authorities, including all levels of the Judiciary, must comply with the decision with respect to its international obligations.

90. According to the principle of International Law on the identity or continuity of the State, this responsibility exists for all its authorities and bodies, regardless of changes of government over time and, specifically, from the time the unlawful act that produces responsibility is committed, and the time when it is declared.[75] Thus, according to International Law which the State has accepted in a democratic and sovereign manner, it is unacceptable that once the Inter-American Court has issued a judgment with the authority of *res judicata*, the domestic law or its authorities should seek to leave it without effects.[76] In this case, despite the efforts made by the Uruguayan State, through specific acts by its Executive and Legislative Branches in compliance of the Judgment, the recent decision of February 22, 2013, by the highest judicial organ of the State – acting to control constitutionality – although it contains a series of reflections aimed at complying with the Judgment, the manner in which these are explained constitutes an obstacle to full compliance with the Judgment and could lead to a violation of access to justice for victims of gross human rights violations who are protected by a Judgment of the Inter-American Court.

b) The inapplicability of the statute of limitations to gross human rights violations, the principle of non-retroactivity of criminal law and the nature of the crime of enforced disappearance

91. In this case, the Court first notes that the State of Uruguay, through the Supreme Court of Justice, stated that crimes committed by agents of the dictatorship before March 1, 1985, were not considered by domestic legislation as crimes subject to the statute of limitations, and that therefore Law 18831 interpreting the Expiry Law is unconstitutional.[77]

92. In cases where it has been established that enforced disappearances and other serious violations have occurred, is it crucial that States effectively investigate the facts, given that the imperative need to prevent the repetition of such acts largely

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[75] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No.4, para. 184 and *Case of Godínez Cruz v. Honduras. Merits.* Judgment of January 20, 1989. Series C No. 5, para. 194. See also, *Case of Yvon Neptune v. Haiti. Merits, Reparations and Costs.* Judgment of May 6, 2008. Series C No. 180, paras. 40 to 42.

[76] *Cf. Case of Apitz Barbera et al. v. Venezuela*. Order of the Court of November 23, 2012, para. 39.

[77] In this regard, in its judgment of February 20, 2013, the Supreme Court indicated that "for crimes committed during the dictatorship and protected by the Expiry Law, there was no special prescription, but only the same discontinuance terms as for any other crime, and consequently, there will be no application of the conviction imposed by the Inter-American Court of Human Rights in terms of eliminating the statute of limitations established especially for those cases, given that no laws of this nature were passed."

depends on avoiding impunity and satisfying the expectations of victims, and of society as a whole, to access information and know the truth of what occurred.[78] The elimination of impunity, through all legal means possible, is an essential element for the eradication of enforced disappearances and other gross human rights violations.[79]

93. Regarding this point it is worth reiterating that, in the first place, the Court's constant case law, according to which "the provisions of the statute of limitations [...] which are intended to prevent the investigation and prosecution of those responsible for gross human rights violations such as torture; summary, extrajudicial and arbitrary executions; and enforced disappearances are inadmissible [...]. All these are prohibited because they violate the inalienable rights recognized by International Human Rights Law."[80] The Court also made this point in the *Case of Gelman v. Uruguay.*[81] Similarly the UN Committee on Human Rights has maintained that "[t]he serious violations of civil and political rights committed during the military government [in Argentina] must be prosecutable for as long as is required and with the necessary retroactivity for accomplishing the prosecution of its perpetrators."[82]

94. Based on the foregoing, it is incompatible with the international obligations of a State Party to the Convention to cease investigating, prosecuting, and, where appropriate, punishing those responsible for gross human rights violations which, by their very nature are not subject to the statute of limitations, and which impair the victims' right to have access to justice and maintain a situation of impunity which the State's own authorities and organs have fostered through the creation of *de jure* or *de facto* obstacles that have prevented efforts to carry out investigations or move forward with proceedings during a certain period. The non- applicability of statutory limitations for this type of criminal conduct is one of the few mechanisms that international society has found for ensuring that the most heinous crimes committed in the past do not remain in impunity. These crimes affect the conscience of all humanity and are passed on for generations.

b.1 The principle of legality and of non-retroactivity

95. Regarding the principle of legality and non-retroactivity, the Court notes that the international instruments containing said principle do not limit its application to domestic law. Thus, Article 9 of the American Convention specifies that "[n]o one shall be convicted for any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed." In this regard, the preparatory work of the American Convention explains that the expression "applicable

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[78] *Cf. Case of Vargas Areco v. Paraguay,* para. 81, and *Case of Escué Zapata v. Colombia. Merits, Reparations and Costs*. Judgment of July 4, 2007. Series C No. 165, para. 75.

[79] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits.* Judgment of March 8, 1998. Series C No. 37, para. 173 and *Case of Vargas Areco v. Paraguay. Monitoring Compliance with Judgment.* Order of the Inter-American Court of Human Rights of November 24, 2010, Considering para. 9.

[80] *Case of Barrios Altos v. Peru. Merits*. Judgment of March 14, 2001. Series C No. 75, para. 41; *Case of the Massacre of Dos Erres v. Guatemala. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 24, 2009. Series C No. 211, para. 129 and *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, para. 171.

[81] *Cf. Case of Gelman v. Uruguay*, para. 225.

[82] United Nations, Final Observations of the Human Rights Committee: Argentina, November 3, 2000, CCPR/CO/70/ARG, para. 9. See also: Human Rights Committee General Observation N° 31: Nature of the judicial obligation imposed on State Parties in the Pact, March 29, 2004, CCPR/C/21/Rev.1/Add.13, para. 18, and similarly CAT, Conclusions and Recommendations of the Committee Against Torture: Morocco, February 5, 2004, CAT/C/CR/31/2, para. 5(f).

law" refers as much to domestic as to international law.[83] This interpretation is consistent with Article 15 of the International Pact on Civil and Political Rights,[84] as well as with Article 7 of the European Convention on Fundamental Rights and Freedoms[85] and with Article 11 of the Universal Declaration of Human Rights of 1948,[86] which states that no one can be held guilty of any offense on account of any act or omission which did not constitute an offense under national or international law at the time it was committed. This principle has also been applied by domestic[87] and international criminal courts[88] and by universal[89] and European[90] systems for the protection of human rights.

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[83] *Cf.* Proceedings and Documents, Inter-American Specialized Conference on Human Rights, OAS/Ser.K/XVI/1.2, page 206: *"The President told the Delegate from Colombia that it was not necessary to specify "national or international law" since the expression "applicable law" is all encompassing. He asked the Delegate to omit extended considerations in order for the greatest numbers of articles to be approved."*

[84] *Cf.* International Covenant on Civil and Political Rights (ICCPR) of December 16, 1966. Article 15(1). No one shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby. Article 15(2). Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

[85] *Cf.* Article 7. No punishment without law: 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. 2. Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

[86] *Cf.* The 1948 Universal Declaration of Human Rights, Article 11(2): No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

[87] *Cf.* Argentina: *Case of Simón, Julio Héctor et al.* on the illegal deprivation of liberty, Supreme Court, Cause 17.768, paras. 30 and 31, Judgment of June 14, 2005, Colombia: Constitutional Court, Judgment 666/08, Presiding Judge: Mauricio Gonzalez Cuervo, paragraph 2(2), Supreme Court of the Judicial District of Bogotá, Chamber of Justice and Peace, Settlement 110016000253200680281, December 2, 2010, para. 268; Panama: Supreme Court of Justice of Panama, Judgment of March 2, 2004, File 481 – E –; Germany: See, *inter alia*, *Case of Streletz and Kessler*, Federal Constitutional Court, Judgment of October 24, 1996, Estonia: *Case of Kolk*, Tallinn Court of Appeal, Judgment of January 27, 2004, and Judgment of the Supreme Court of April 21, 2004; *Case of Penart*, Supreme Court, Judgment of December 18, 2003, France: *Case of National Federation of Deported and Interned Members of the Resistance and Patriots et al. v. Klaus Barbie*, Chamber of Cassation, Judgment of December 20, 1985; *Case of National Federation of Deported and Interned Members of the Resistance and Patriots et al. v. Touvier*, Chamber of Cassation, Judgment of November 27, 1992; *Case of Papon*, Criminal Court of Gironde, Judgment of April 2, 1998; Italy: *Case of Hass and Priebke*, Supreme Court of Cassation, Judgment of November 16, 1998; and Military Appeals Court, Judgment of March 7, 1998, Latvia: *Case of Kononov*, Supreme Court, Judgment of September 28, 2004; England: *R v. R* [1992] 1 A.C. 599, House of Lords, in which it ruled that a violation carried out by a husband against his wife should be considered a violation contrary to that established by custom (that had been understood since the Cases of Hale's *Pleas of the Crown 1736, R v. Clarence,* 1988, *R v. Roberts,* 1986), pages 611 and 623. See also: Sri Lanka: Supreme Court of Sri Lanka, Judgment of May 28, 1986, *Case of Ekanayake v. Attorney General*.

[88] *Cf.* Criminal Court for the former Yugoslavia ("TPIY"), *Case of Tadic*, Appeals Chamber, October 2, 1995, IT-94-1-AR72, para. 68; *Case of Delalic et al.*, First Instance, IT-96-21, paras. 313, 402 and following, Judgment of November 16, 1998, *Case of Delalic et al.*, First Instance, IT-96-21-T, para. 313, and IT-96-21-A, Appeals Chamber, February 20, 2001, paras. 174 and 175; *Case of Furundzija*, First Instance, IT-95-17/1, Judgment of December 10, 1998, para. 177; Nuremberg Court (IMT), Judgment of the International Military Tribunal for the Trial of Major German War Criminals, September 30 and October 1, 1946, pages 38 and 39, IMT Volume 22, pages 461 to 463 and page 461, Courts in the Occupied Zones of Germany , Karl Brandt et al., (The Doctor's Trial) Indictment, paras. 10 and 15, October 25, 1946; *USA*

96. In this regard, it is worth mentioning that the importance of considering this principle broadly, encompassing domestic and international law, lies in the fact that it specifically seeks to avoid the validation or covering up, through rules or procedures, of serious human rights violations committed by State agents protected by an organized power structure. If it were to be accepted that only domestic laws would determine whether or not criminal non-retroactivity would be applied, this would imply that an agent of an organized power structure could validly commit the most serious crimes when the State that protects him is in the position of guaranteeing his impunity through legal means. Hence the need to consider international law when investigating, prosecuting, and if appropriate, punishing unlawful conduct that constitutes a gross violation of human rights, would serve as a guarantee against the impunity of the perpetrators of this type of crime and would protect the right of victims to the truth and to justice.

97. In this regard, it is important to note that, in relation to norms that refer to the domestic or international criminalization of a specific conduct, this Court has established that such a norm must be appropriately accessible and predictable.[91] In other words, the perpetrator must be conscious of the unlawful nature of his conduct and must understand that he will have to answer for it.[92]

98. However, in cases of gross human rights violations, it is unreasonable to argue that the State agents responsible for such actions committed them without realizing the extreme and unlawful nature of their acts,[93] even more so in cases such as this, which involves enforced disappearances committed by organized power structures within the State itself. Thus, in cases where the State apparatus has served as an instrument for the commission of these serious crimes and where the State agents who committed them have been assured the tolerance, support and guarantees of impunity by the State itself, there can be no strict interpretation of these procedural guarantees of statutory limitations and non-retroactivity of the criminal law, without

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v. Pohl et al., Indictment, paras. 23 and 25, January 13, 1947; *USA v. Erhard Milch*, Indictment, paras. 7, 9 and 12, pages 360 and following, November 19, 1946; *USA v. Ohlendorf et al*. (The Einsatzgruppen Case), Amended Indictment, pages 20 and following, paras. 10 and 12, July 25, 1947. See also: International Military Tribunal for the Far East, November 4, 1948, pages 48,438 and 48,439 referring to the Judgment of the IMT, *supra*. Also, see: Extraordinary Chambers in the Courts of Cambodia ("ECCC"), *Case of Kaing Guek Eav*, Judgment of February 3, 2012, 001/18-07-2007/ECCC/SC, para. 30.

89 *Cf.* United Nations Committee on Human Rights, Final observations on Argentina 2000, para. 9.

90 European Court of Human Rights, *Case of Kononov v. Latvia*, Grand Chamber, Judgment of May 17, 2010, 36376/04, paras. 185 to 187, 208 and 236, *Case of Papon v. France*, Judgment of November 15, 2001, 54210/00, para. 5, *Case of Touvier v. France*, Judgment of January 13, 1997, 29420/95, para. 148, *Case of Kolk v. Estonia*, Judgment of January 17, 2006, 23052/04; 24018/04, para. 7, *Case of Penart v. Estonia,* Judgment of January 24, 2006, 14685/04, para. 7, *Case of Streletz et al. v. Germany*, Judgment of March 22, 2001, 34044/96; 35532/97; 44801/98, paras. 49 and 50; *S.W. v. United Kingdom*, Judgment of November 22, 1995, 20166/92, Series A No. 335-B, paras. 34 to 36.

91 *Cf. Case of López Mendoza v. Venezuela. Merits, Reparations and Costs.* Judgment of September 1, 2011. Series C No. 233, para. 199.

92 *Cf.* CEDH, *Case of Kononov v. Latvia*, Grand Chamber, Judgment of May 17, 2010, 36376/04, para. 236, *Case of C.R. v. UK*, October 27, 1995, 20190/92, para. 33*, Case of K.- H.W. v. Germany*, 37201/97, paras. 88 to 91. See also: Extraordinary Chambers in the Courts of Cambodia ("ECCC"), *Case of Kaing Guek Eav*, Judgment of February 3, 2012, 001/18-07-2007/ECCC/SC, paras. 28 and 31, TPIY, *Case of Delalic et al*., IT-96-21-A, Appeals Chamber. February 20, 2001, para. 817 and Supreme Court of Canada, *Case of R. v. Finta*, [1994] 1 S.C.R. 701, Judgment of March 24, 1994.

93 *Cf.* CEDH, *Case of Kononov v. Latvia*, Grand Chamber, Judgment of May 17, 2010, 36376/04, para. 236; Extraordinary Chambers in the Courts of Cambodia ("ECCC"), *Case of Kaing Guek Eav*, Judgment of February 3, 2012, 001/18-07-2007/ECCC/SC and TPIY, *Case of Delalic et al*., IT-96-21-A, Appeals Chamber, February 20, 2001, para. 817.

this implying a distortion of their very meaning and failing to meet the victims' legitimate expectations of their right of access to justice.

b.2 Enforced disappearance as a permanent crime and its effect on the principle of non-retroactivity

99. With respect to the legal codification of enforced disappearance, the Court reiterates, as it has in other cases, that it is inadmissible to consider this unlawful conduct as a crime of a temporary or instantaneous nature.[94] Thus, in its constant case law since 1988,[95] the Court has established the permanent nature of the crime of enforced disappearance of persons, which has been repeatedly recognized by the International Law of Human Rights.[96] Similarly, the jurisprudence of this Court has been a precursor to the consolidation of a comprehensive perspective of the numerous rights violated and the permanent nature of the crime of enforced disappearance of persons,[97] in which the act of disappearance begins with the deprivation of a person's liberty and the subsequent lack of information on his fate, a situation that continues for as long as the whereabouts of the disappeared person are unknown or until their bodily remains are positively identified. Indeed, this Court characterized the crime of enforced disappearance prior to its definition in the Inter-American Convention on Forced Disappearance of Persons.[98] Furthermore, this definition is consistent with the one contained in different international instruments,[99] in the case law of the European System of Human Rights,[100] the decisions of the Human Rights Committee of the

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94 *Cf. Case of González Medina and Family v. Dominican Republic. Preliminary Objections, Merits, Reparations and Costs.* Judgment of February 27, 2012, Series C No. 240, para. 50.

95 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, para. 155 and Case of Contreras et al. v. El Salvador. Merits, Reparations and Costs.* Judgment of August 31, 2011. Series C No. 232, para. 82.

96 In International Human Rights Law, an operative definition of this phenomenon was developed in the 1980s by the UN Working Group on Enforced and Involuntary Disappearances. The conceptual elements established by this Working Group were subsequently reviewed in the definitions of different international instruments. *Cf. Case of Chitay Nech et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs.* Judgment of May 25, 2010. Series C No. 212, para. 82 and *Case of Torres Millacura et al. v. Argentina. Merits, Reparations and Costs.* Judgment of August 26, 2011. Series C No. 229, para. 92. See also: Report of the Working Group on the Enforced and Involuntary Disappearances, Commission on Human Rights, 37th Period of Sessions, U.N. Doc. E/CN.4/1435 of January 22, 1981, para. 4; Report of the Working Group on the Enforced and Involuntary Disappearances, Commission on Human Rights, 39th Period of Sessions, U.N. Doc. E/CN.4/1983/14 of January 21, 1983, paras. 130 to 132, and Report of the Working Group on the Enforced and Involuntary Disappearances, Commission of Human Rights, Report on the visit to Sri Lanka by three members of the Working Group, October 7 to 18, 1991, E/CN.4/1992/18/Add. January 1 to 5 of para. 19 p. 92.

97 *Cf. Case of González Medina and Family v. Dominican Republic,* para. 50; *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, para. 103. The European Court of Human Rights has also considered the permanent nature of enforced disappearance in the following case: *Cyprus v. Turkey* [GC], No. 25781/94, paras. 136, 150 and 158, 2001-IV.

98 Article 2 of this Convention established that "enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."

99 *Cf.* Article 2 of the International Convention for the Protection of all Persons from Enforced Disappearance, U.N. Doc. A/RES/61/177 of December 20, 2006; Article 7, paragraph 2, subsection i of the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 of July 17, 1998, and Preamble to the International Convention for the Protection of all Persons from Enforced Disappearance, U.N. Doc. A/RES/47/133 of February 12, 1993.

100 In this regard, the following cases on forced disappearances may be consulted: CEDH, *Cyprus v. Turkey* [GC], No. 25781/94, paras. 132 to 134 and 147 to 148, 2001-IV, and CEDH, *Varnava et al. v.*

International Covenant on Civil and Political Rights,[101] the Working Group on Enforced Disappearances,[102] and in rulings of the national high courts.[103]

100. As to the principle of non-retroactivity applied to cases of enforced disappearance, the Court has already established in other cases that, given that this is a crime of a permanent nature, which continues over time, when the codification of the crime of enforced disappearance enters into force, the new law is applicable, without this implying its retroactive application.[104] Similar rulings have been issued by the highest courts of the States of the American continent, including the Supreme Court of Justice of Peru, the Constitutional Court of Peru, the Supreme Court of Justice of Mexico, the Supreme Court of Justice of Venezuela, the Constitutional Court of Guatemala, the Constitutional Court of Colombia and the Supreme Court of Argentina.[105] Along with Uruguay, these States have ratified the Inter-American Convention on Forced Disappearance.[106]

101. Thus, it is inadmissible to consider the statute of limitations with respect to the prosecution of crimes which may continue to be committed over time, such as the crime of enforced disappearance. Being a crime of a permanent nature, the admissibility of the principle of non-retroactivity of criminal law or of statutory limits is not in dispute. This has been the judicial response of the international community for preventing, eradicating and, where necessary, prosecuting and punishing the most serious crimes that have been committed and ensuring that they do not continue in impunity.

Turkey, Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, paras. 111 to 113, 117 and 118, 133, 138 and 145, January 10, 2008.

[101] In this regard, see: *Messaouda Grioua and Mohamed Grioua v. Algeria*, CCPR/C/90/D/1327/2004 (2007), Communication No. 1327/2004, August 16, 2007; *Yasoda Sharma and Surya Prasad Sharma v. Nepal*, CCPR/C/97/D/1469/2006 (2008), Communication No. 1469/2006, November 6, 2008; *Zohra Madoui and Menouar Madoui v. Algeria*, CCPR/C/94/D/1495/2006 (2008), Communication No. 1495/2006, December 1, 2008, and *Nydia Erika Bautista de Arellana v. Colombia*, CCPR/C/55/D/563/1993, Communication No. 563/1993, November 13, 1995.

[102] *Cf. inter alia*: Compilation of General Comments on the Declaration of Protection of all Persons from Forced Disappearance, General Comment on Article 17 of the Declaration, paras. 28 to 30.

[103] *Cf. Case of Marco Antonio Monasterios Pérez*, Supreme Court of Justice of the Bolivarian Republic of Venezuela, Judgment of August 10, 2007; Supreme Court of Justice of Mexico, Thesis: P./J. 87/2004; *Case of Abuses of Pinochet*, Plenary of the Supreme Court of Chile, Judgment of August 8, 2000; *Case of Sandoval*, Appeals Court of Santiago de Chile, Judgment of January 5, 2004; *Case of Videla et al.,* National Appeals Chamber of the Federal Criminal and Correctional of the Capital of Argentina, Judgment of September 9, 1999; *Case of José Carlos Trujillo*, Constitutional Court of Bolivia, Judgment of November 12, 2001 and *Case of Castillo Páez*, Constitutional Court of Peru, Judgment of March 18, 2004.

[104] *Cf. Case of Trujillo Oroza v. Bolivia. Monitoring Compliance with Judgment.* Order of the Inter-American Court of Human Rights of November 16, 2009, Clause 38. This was previously indicated by the Court in the Judgment of the *Case of Tiu Tojín v. Guatemala,* para. 87.

[105] *Cf.* Supreme Court of Justice of Peru, Judgment of March 20, 2006, File No. 111-04, D.D Cayo Rivera Schreiber. Constitutional Court of Peru, Judgment of March 18, 2004, File No. 2488-2002-HC/TC, para. 26 (At: http://www.tc.gob.pe/jurisprudencia/2004/02488-2002-HC.html) and Judgment of December 9, 2004, File No. 2798-04-HC/TC, para. 22 (At: http://www.tc.gob.pe/jurisprudencia/2005/02798-2004-HC.html). Supreme Court of Justice of Mexico, Thesis: P./J. 49/2004, Judicial Weekly of the Federation and its Gazette, Ninth Edition, Plenary. Constitutional Chamber of the Supreme Court of Justice of the Bolivarian Republic of Venezuela, Judgment of August 10, 2007. Constitutional Court of Colombia, Judgment C-580/02 of July 31, 2002. Constitutionality Court Judgment of August, 2009, Case of Felipe Cusanero Coj. SCJ Argentina Case of Simón.

[106] *Cf. Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, Reparations and Costs.* Judgment of September 1, 2010. Series C No. 217, para. 201.

c) Conclusions

102. Once this Court has issued a Judgment in this case, which produces the effects of the authority of *res judicata*, according to the general principles of International Law and the provisions of Articles 67 and 68 of the American Convention, this means that the State and all its organs have the obligation of ensuring full compliance with it. The binding effect of the Judgment is not limited to the operative paragraphs, but rather includes all its grounds, reasoning, implications and effects; in other words, the Judgment as a whole is binding for the State, including its *ratio decidendi*. Accordingly, given that the operative paragraphs of the Judgment expressly and directly refer to the considerations, these are clearly an integral part of the Judgment and the State is also required to ensure full compliance. The obligation of the State to comply promptly with the decisions of the Court is an intrinsic part of the obligation to comply with the American Convention in good faith, and is binding for all its powers and bodies, including judges and other organs involved in the administration of justice. Consequently, the State cannot invoke provisions of constitutional law or other aspects of domestic law to justify a failure to comply with the Judgment. In the presence of an international *res judicata,* and specifically because control of conventionality is a mechanism which serves as an instrument for applying International Law, it would be contradictory to use this tool as a justification for not complying with the Judgment in its entirety.

103. The Court notes that the State of Uruguay had taken specific and clear steps toward compliance with the Judgment issued in the *Gelman case*, particularly through the issuance of Decree 323 of June 30, 2011 and of Law 18831 of October 27, 2011. However, the ruling of the Supreme Court of Justice, of February 22, 2013, is not consistent with the evolution of International and Universal Human Rights Law, or with the State's international responsibility, which it has acknowledged and which is declared in the Judgment. While this decision of the highest jurisdictional authority of the State includes a series of reflections regarding compliance with the Judgment, the manner in which these are explained constitutes an obstacle to full compliance with the Judgment. This could lead to an interruption of access to justice for the victims of gross human rights violations covered by a Judgment of the Inter-American Court and could represent a mechanism to perpetuate the impunity and neglect of these acts.

104. Thus, regardless of any rules or interpretations issued at the domestic level, the Judgment delivered by the Inter-American Court has the authority of international *res judicata* and is binding in its entirety (both in its considering paragraphs and in its operative paragraphs) for the State of Uruguay. Therefore, in compliance with said Judgment, all State bodies and institutions, including judges and the Judiciary, must continue to adopt all the measures necessary to investigate, prosecute and, if appropriate, punish those responsible for serious human rights violations committed in this and in similar cases in Uruguay which, because of their nature, are not subject to the statute of limitations. Likewise, they must ensure that the effects of the Expiry Law or similar norms, such as prescription, statute of limitations, non-retroactivity of the criminal law or other measures designed to eliminate responsibility, or any other related administrative or judicial interpretation, do not constitute an impediment or obstacle for continuing the investigations. It is incompatible with the State's international obligations to fail to comply with these obligations, to the detriment of the victims' right to have access to justice, shielding itself in a position of impunity that its own powers and bodies have generated by creating *de jure* or *de facto* obstacles that would prevent them from conducting investigations or carrying forward the proceedings during a certain period of time.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

in exercise of its authority to monitor compliance with its judgments under Articles 33, 62(1), 62(3) and 68(1) of the American Convention on Human Rights, 24 and 30 of its Statute and 31(2) and 69 of its Rules of Procedure,

DECLARES THAT:

1. In compliance with the provisions of the relevant considering paragraphs of this Order, the State has fully complied with its obligations to:

   a) conduct a public act of acknowledgement of international responsibility for the facts of this case, in compliance with the twelfth operative paragraph of this Judgment;

   b) place a memorial plaque in the Defense Information Service building, in compliance with the thirteenth operative paragraph of the Judgment;

   c) issue the publications provided for in paragraph 271 of the Judgment, in compliance with the fourteenth operative paragraph of the Judgment; and

   d) pay the amounts established in compensation for pecuniary and non-pecuniary damage and for the reimbursement of costs and expenses, in compliance with the seventeenth operative paragraph of the Judgment.

2. Despite the specific actions taken toward compliance with operative paragraphs 9 and 11 of the Judgment in this case, particularly the issuance of Decree 323 of June 30, 2011, and Law 18831 of October 27, 2011, the ruling of the Supreme Court of Justice of February 22, 2013, constitutes an obstacle to full compliance with the Judgment, under the terms of considering paragraphs 225 to 246, 253 and 254 thereof and considering paragraphs 43 to 90, 101 and 102 of this Order.

3. The Judgment delivered by the Inter-American Court is binding for the State; therefore, in compliance with said Judgment, all its bodies and institutions, including all levels of the Judiciary, must continue to adopt all the measures necessary to investigate, prosecute and, if appropriate, punish those responsible for the serious human rights violations which, due to their nature, are not subject to the statute of limitations, under the terms of considering paragraphs 183 to 194, 230 to 246, 252 to 256, 274 and 275 of the Judgment, and considering paragraphs 43 to 103 of this Order.

4. The procedure for monitoring compliance with operative paragraphs 9, 10, 11, 15 and 16 of the Judgment will remain open regarding the obligations of the State to:

   a) effectively carry out and complete the investigation of the facts of this case in order to clarify them, determine the corresponding criminal and administrative responsibilities and apply the appropriate sanctions as provided by law;

b) continue and expedite the immediate search for and localization of María Claudia García Iruretagoyena, or of her bodily remains and, if appropriate, deliver them to her next of kin, subsequent to genetic testing;

c) guarantee that the Expiry Law on the Punitive Claims of the State does not continue to represent an obstacle to the investigation of the facts or to the identification and, where applicable, the punishment of those responsible for this crime or for other similar acts that occurred in Uruguay;

d) implement, with the respective budgetary provisions, a permanent human rights program, directed at agents of the Public Prosecutor's Office and the judges of the Judicial Branch of Uruguay;

e) adopt the appropriate measures to guarantee the technical and systematic access to the information regarding serious violations of human rights committed during the dictatorship that are held in State archives.

AND DECIDES:

5. To require the State to continue adopting all measures necessary for the effective and expeditious implementation of the points pending compliance, indicated in the fourth operative point *supra,* as stipulated in Article 68(1) of the American Convention on Human Rights.

6. To require the Republic of Uruguay to submit a report to the Inter-American Court of Human Rights, no later than July 20, 2013, describing all the measures adopted in compliance with the reparations ordered by this Court that are still pending, as indicated in considering paragraphs 14 to 104, and in the fourth operative paragraph of this Order. Subsequently, the State must continue reporting to the Court every three months.

7. To request the Gelman family and their representatives and the Inter-American Commission on Human Rights to submit any observations they consider pertinent to the reports submitted by the State, mentioned in the preceding operative paragraph, within a period of four and six weeks, respectively, from the notification of these reports.

8. To require the Secretariat of the Court to notify this Order to the State of Uruguay, the Inter-American Commission on Human Rights and the representatives of the Gelman family.

Judge Eduardo Ferrer Mac-Gregor Poisot informed the Court of his Concurring Opinion, which accompanies this Order.

Diego García-Sayán

President

Manuel E. Ventura Robles

Eduardo Vio Grossi

Roberto de Figueiredo Caldas

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

SEPARATE OPINION OF JUDGE EDUARDO FERRER MAC-GREGOR POISOT

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

OF MARCH 20, 2013

MONITORING COMPLIANCE WITH JUDGMENT

IN THE *CASE OF GELMAN v. URUGUAY*

I. INTRODUCTION: IMPORTANCE OF THIS ORDER ON MONITORING COMPLIANCE WITH JUDGMENT

1. One of the most important competences currently exercised by the Inter-American Court of Human Rights (hereinafter "the ICourtHR" or "the Inter-American Court") is the monitoring of compliance with its decisions, especially the judgments on merits and reparations. This faculty is derived from its jurisdictional attributes, and is directly related to the effectiveness of the human rights of the inhabitants of our region.

2. Bearing in mind the importance of this matter, for the last five years, the Inter-American Court has been holding hearings – public and private – on monitoring compliance with its judgments, particularly when numerous reparations are involved requiring actions that are both complex and problematic for the States.[1] During the hearings to monitor judgments, the Court examines the position of the State, and of the victims and their representatives, and hears the opinion of the Inter-American Commission. This constitutes an important practice, because it has allowed the ICourtHR to comply with its jurisdictional function under the American Convention, which is not concluded until each and every aspect ordered in the respective judgment has been complied with fully and integrally. The hearings have helped ensure the effectiveness of the Court's decisions. They do not represent an intervention in the judgment; rather they are a dynamic activity that provides the Court's judges with recent information so that they may make an adequate assessment of compliance with the judgment by the State concerned, while affording a mechanism for constructive dialogue to promote agreement between the parties and to achieve satisfactory compliance with the decisions made in the judgment, particularly as regards the different forms of reparation for the victims.

3. In the instant case, a private hearing was convened on monitoring compliance with the judgment delivered by the ICourtHR in the Case of *Gelman v. Uruguay* (hereinafter "the Judgment"),[2] and this was held on February 13, 2013, during the Inter-American Court's ninety-eighth regular session, which took place at its seat.

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[1] From 2007 to date, 77 hearings have been held on monitoring compliance with judgment. The practice of holding this type of hearing was included in Article 69(3) of the most recent Rules of Procedure of the Inter-American Court of Human Rights, in force since January 1, 2010.

[2] *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221.

4. The hearing was of particular importance in order to verify that the Judgment had been partially complied with in relation to the provisions of its operative paragraphs 12,[3] 13,[4] 14[5] and 17.[6] Thus, with the information provided by the parties, in the order on monitoring compliance that concerns us, the Inter-American Court considered that the judgment had been partially complied with owing to certain actions taken by the State consisting of: (i) organization of a public act to acknowledge international responsibility for the facts of the case, headed by the President of the Republic and held in the Legislative Palace in the presence of the victims, Juan Gelman and his granddaughter, María Macarena Gelman García Iruretagoyena; (ii) placement of a plaque in the building of the Defense Information Service, which operated as a clandestine prison (current headquarters of the National Human Rights Institution), "in memory of María Claudia García de Gelman and of all the persons victims of State terrorism who were deprived of their liberty in this building"; (iii) publication of the Judgment and of the respective summary in the official gazette, in national newspapers with widespread circulation, and on different official websites, and (iv) payment of the amounts established as compensation – for pecuniary and non-pecuniary damage – and to reimburse costs and expenses.

5. The said actions undertaken by the Uruguayan State clearly reveal its commitment to comply with the Judgment, and merit being emphasized. In particular, in this Order on monitoring compliance, the Inter-American Court stressed that the public act to acknowledge international responsibility with the participation of the head of that country, which was widely disseminated by the media, and the placement of the plaque, "fully meets the object and purpose of the reparation ordered, in one of the most significant acts carried out by the States in compliance with measures of reparation of this type."[7]

6. In addition, during the private hearing, the ICourtHR was informed of other significant actions taken by the Uruguayan State in order to comply with the judgment, especially: (a) promulgation of Law 18,831 of October 27, 2011, entitled "Punitive Claims of the State: Re-establishment for offenses committed in application of State terrorism up until March 1, 1985";[8] and (b) Decree 323/2011 of June 30 that year, revoking the administrative actions and messages of the Executive Branch, "in application of article 3 of the Law on the Expiry [of the

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[3] "12. The State must, within one year, carry out a public act of acknowledgment of international responsibility for the facts of the present case, in conformity with paragraph 266 of this Judgment".

[4] "13. The State must place in the building of the Defense Information System (SID), within one year, a plaque accessible to the public inscribed with the names of the victims and all the persons who were illegally detained in this place, in accordance with paragraph 267 of the Judgment."

[5] "14. The State must make, within six months, the publications established in paragraph 271 of the Judgment".

[6] "17. The State must pay, within one year, the amounts established in paragraphs 291, 293, 296, and 304 of the Judgment, as compensation for pecuniary and non-pecuniary damage and reimbursement of costs and expense, as appropriate, in accordance with paragraphs 305 to 311 of the Judgment."

[7] The eighth considering paragraph of the Order on monitoring compliance with judgment in the *Case of Gelman* v. *Uruguay,* to which this separate opinion refers.

[8] The four articles of this Law 18,831 (law interpreting the Expiry Law) establish:

"Article 1. The full exercise of the punitive claims of the State is re-established for the crimes committed in application of State terrorism up until March 1, 1985, included in article 1 of Law No. 15,484 of December 1986.

Article 2. No time frame of any type, whether procedural, for the statute of limitations, or for the date of expiration, shall be calculated from December 22, 1986, to the date that this law comes into force, for the crimes referred to in article 1 of this law.

Article 3. It is declared that the crimes referred to in the preceding articles are crimes against humanity pursuant to the international treaties to which the Republic is a party.

Article 4. This law will enter into force as of its promulgation by the Executive Branch."

Punitive Claims of the State], which consider that the allegations made fell within the provisions of article 1 of the said Law and, instead, it is declared that the said facts were not included in the said Law."

7. These actions of the Legislature (Law 18,831) and the Executive (Decree 323/2011) were assessed positively by the Inter-American Court, because they were designed to comply with the judgment in the *Gelman case*, considering that their apparent purpose was to remove the main obstacle represented by Law 15,848 (the Expiry Law),[9] which was declared "null and void" in the Judgment of the ICourtHR because it was incompatible with the obligations established in the American Convention and the Inter-American Convention on Forced Disappearance of Persons. Thus, this law was declared incompatible with these international instruments.[10] The Expiry Law prevented the investigation, prosecution and eventual punishment of those responsible for the facts in the *Gelman case,* as well as in other cases of gross human rights violations that occurred in Uruguay at that time.

8. However, nine days after the above-mentioned private hearing had been held, a "new fact" occurred to which the ICourtHR paid special attention when taking a decision on monitoring compliance with judgment. Thus, the Inter-American Court was advised of the ruling of the Supreme Court of Justice of the Oriental Republic of Uruguay of February 22, 2013,[11] in which, by a majority vote, it declared the objection of unconstitutionality partially admissible and that the exceptions established in articles 2 and 3 of Law 18,831 were inapplicable.

9. Consequently, in the said Order on monitoring compliance with judgment, the ICourtHR analyzed the implications and consequences of this domestic ruling for compliance with the Judgment of the Inter-American Court and concluded that the decision of the Supreme Court of Justice of Uruguay of February 22, 2013, affected due compliance with the judgment in the *Gelman case.* The Inter-American Court therefore ruled on several aspects of vital importance for the future of the inter-American human rights system. It is these circumstances that have resulted in the need to express this separate concurring opinion, in the understanding that, although the undersigned was not a member of the said collegiate body when the Judgment on merits and reparations was handed down in February 2011, now, as a new member of the Inter-American Court, like my peers, I am not only empowered, but also obliged, to ensure due compliance with it.

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[9] Articles 1 and 3 of Law No. 15,848 of December 22, 1986 (published in the official gazette on December 28, 1986 – No. 22295): "Military and police personnel. It is hereby acknowledged that the punitive claims of the State have expired with regard to crimes committed up until March 1, 1985," establish the following:

"Article 1. It is hereby acknowledged that, as a logical result of the measures derived from the agreement signed by political parties and the Armed Forces in August 1984 and in order to conclude the transition towards the full exercise of the constitutional order, the punitive claims of the State have expired with regard to crimes committed up until March 1, 1985, by military and police personnel, directly or indirectly for political motives or in the discharge of their duties and when carrying out actions ordered by the leaders who were in power during the period *de facto*."

"Article 3. For the effects established in the preceding articles, the judge intervening in the corresponding complaints shall require the Executive Branch to advise, within thirty days of receiving the communication, whether or not it considers that the act investigated is covered by article 1 of this law. If the Executive confirms this, the judge shall order the closure and archiving of the case file. If, to the contrary, the Executive does not reply or advises that it is not covered by article 1, he shall order the continuation of the preliminary investigation. From the date of promulgation of this law until the judge receives the communication of the Executive all preliminary investigation procedures shall be suspended in the proceedings mentioned in the first paragraph of this article."

[10] *Case of Gelman v. Uruguay. Merits and reparations.* Judgment of February 24, 2011. Series C No. 221, paragraph 312, sixth operative paragraph, in relation to the contents of paragraphs 237 to 241 and 246.

[11] Judgment No. 20. IUE-2-109971/2011. Justice rapporteur: Jorge O. Chediak González. Dissenting, Justice Ricardo C. Pérez Manrique.

10. Hence, although I share fully the reasoning and the position of this Order on monitoring compliance with judgment – which was adopted unanimously – given the importance of its considerations, I consider it desirable to add this separate concurring opinion in order to analyze and emphasize three key issues that have a bearing on the understanding of the jurisdictional function of the Inter-American Court as the organ that applies and interprets the American Convention on Human Rights. And this is because its decisions have repercussions on the functionality of the inter-American system, particularly on the effectiveness of, and due compliance with, its judgments. Thus, I will now refer to these three issues: (i) the impact of the judgment of the Supreme Court of Justice of Uruguay of February 22, 2013, on full and due compliance with the judgment of the ICourtHR in the *Gelman case* (paras. 11-21); (ii) the effectiveness of the inter-American judgment and the authority of international *res judicata*: its direct effects on the parties (*res judicata*) and indirect effects on the States Parties to the American Convention (*res interpretata*) (paras. 22-79); and (iii) the authority of "international *res judicata*" in relation to "control of conformity with the Convention" [also, "control of conventionality" or "conventionality control"] (paras. 80-100).

II. IMPACT OF THE JUDGMENT OF THE SUPREME COURT OF JUSTICE OF URUGUAY OF FEBRUARY 22, 2013, ON FULL AND DUE COMPLIANCE WITH THE JUDGMENT OF THE INTER-AMERICAN COURT IN THE *GELMAN CASE*

11. The Judgment of the Supreme Court of Justice of Uruguay has a direct impact on full and due compliance with the judgment of the ICourtHR in the *Case of Gelman v. Uruguay,* because it counters the right of the victims to integral reparation under an international judgment that has resulted in the authority of *res judicata*.

12. Indeed, the declaration that articles 2 and 3 of Law 18,831 were not applicable in a case similar to the *Gelman case* – in other words, a case concerning the forced disappearance of persons, the facts of which also occurred during the military dictatorship – results in the prescription of crimes that the ICourtHR expressly declared in the Judgment are 'not subject to the statute of limitations" because, by their very nature, they constitute a violation of *jus cogens* norms.[12] This is especially important because (according to information provided by the parties) several individuals are currently being prosecuted for the "homicide" of María Claudia García de Gelman, without the proceedings including to date other conducts that constitute gross human rights violations, and without an investigation of the facts of the enforced disappearance owing to suppression of identity. Thus, the interpretive criterion of the highest court of Uruguay has a potential impact on the investigation of the facts in the *Gelman case,* because this domestic ruling established that the effects of the Expiry Law would not have an impact on the time limits for the prescription of crimes concerning acts that constitute gross human rights violations.[13] The 2011 judgment of the ICourtHR in the *Case of Gelman v. Uruguay* stated that "the proceedings initiated by Juan Gelman and re-opened in 2008 through the efforts of María Macarena Gelman, <u>were conducted for the crime of homicide, thereby excluding such crimes as torture, forced disappearance and suppression of identity, allowing the domestic courts to declare that the case had prescribed</u>"[14] (underlining added).

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[12] *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, paras. 99, 183, 225 and 254.

[13] Considering paragraphs 32 and 48 of the Order of March 20, 2013, on monitoring compliance with judgment in the *Case of Gelman v. Uruguay*, to which this opinion refers.

[14] *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, para. 235.

13. Even though, pursuant to Uruguayan constitutional procedural law, the judgment of the Supreme Court signifies the non-application of the norms declared unconstitutional in the specific case – without affecting the validity of the norm and other court cases[15] – in reality, the interpretive effect of the norm is expanded, by creating a jurisprudential criterion of the highest significance in the domestic sphere (because it is issued by the highest domestic jurisdictional organ), whose considerations differ from those developed by the ICourtHR in the judgment in the *Gelman case.* Evidently, this means that, in practice, the domestic judges who are examining gross human rights violations have the specious dilemma of applying directly the interpretation derived from the judgment of the ICourtHR (which is what is required by the obligation arising from Article 68(1) of the American Convention) or the case law of their country's Supreme Court.

14. In the *Gelman case*, the ICourtHR's judgment categorized the facts as "forced disappearance of persons," which constitutes one of the most evident and heinous human rights violations (especially when it is carried out under a systematic pattern by State structures, classified as "State terrorism"),[16] and the eleventh operative paragraph of this Judgment states that the State must "guarantee" that the Expiry Law will never again represent an "impediment" to the investigation, identification and, as appropriate, punishment of those responsible. Thus, as a result of this new interpretive criterion of the Supreme Court of Justice — which, if it is followed by the judges would lead to the non-application of articles 2 and 3 of Law 18,831 — in practice, there is a real and potential impairment of the obligation to investigate the facts of this case and to determine the corresponding responsibilities, as well as of the State's obligation to ensure that the Expiry Law (Law 15,848), being null and void, never again represents an obstacle in this regard.

15. Thus, I consider that the impact that the ruling of the Supreme Court of Justice of Uruguay has on due and effective compliance with the judgment in the *Gelman case* is evident, because it allows forced disappearance, torture or suppression of identity and other acts, such as gross human rights violations committed in the said context, to be subject to the statute of limitations.[17] Consequently, it represents a real and potential impediment to the effective investigation, identification and, eventual, punishment of those responsible for the forced disappearance of María Claudia García Iruretagoyena de Gelman and María Macarena Gelman García Iruretagoyena, the latter as a result of the removal, suppression and substitution of her identity as established in the Judgment. In the Judgment, the ICourtHR indicated: "It is necessary to reiterate that this is a case of gross human rights violations, in particular forced disappearance; hence, this is the codified crime that should have priority in the investigations that must be opened at the domestic level. As already established, given that this is a crime of a permanent nature, in other words, it continues over time, when the

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[15] Article 259 of the Constitution of the Oriental Republic of Uruguay establishes: "The ruling of the Supreme Court of Justice shall refer exclusively to the specific case and shall only take effect in the proceedings in which it has been issued."

[16] *Cf. Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, para. 99.

[17] The said judgment of the Supreme Court of Justice of Uruguay stipulates (pp. 18 and 19): "*It should be added that, in the case of the crimes committed during the dictatorship and protected by the Expiry Law, no special statute of limitations was created, but rather, the same time frames for prescription were simply applied as for any other crime, so that, in the instant case, the sentence imposed by the American Court of Human Rights would not be applicable as regards the removal of the laws on prescription established especially for such cases because such laws were not enacted."*

codification of forced disappearance enters into force, the new law is applicable, without this implying its retroactive application"[18] (underlining added).

16. In this regard, it should be stressed that the interpretive precedent that permits the prescription of the said gross human rights violations was established by the highest court of Uruguay, which means that it can simply be reiterated without further considerations using the mechanism of an "early ruling"[19] or by similar new provisions.[20] In addition, since it is case law of the country's highest court – even though it does not constitute a binding precedent – in practice, in may become a relevant guide to interpretation for the lower court judges, leading them to follow the interpretation made by the highest Uruguayan court when they examine gross human rights violations, such as the forced disappearance of persons. This would signify the non-application of articles 2 and 3 of Law 18,831 and, consequently, would result in the prescription of crimes of that nature. This is clearly contrary to the provisions of the international judgment in the *Case of Gelman v. Uruguay,* which, since it its final, has acquired the authority of international *res judicata.*

17. Furthermore, in the hypothesis that the judges who are hearing or who hear cases on gross human rights violations apply the judgment in the *Gelman case* (including, evidently, the interpretive considerations on which the decision is founded) – which is what is appropriate since it is directly binding and effective for all the authorities of the Uruguayan State at all levels pursuant to Article 68(1) of the American Convention – and if the cases reach the Supreme Court through the corresponding appeals, an interpretive criterion currently exists that would allow the Expiry Law to continue to apply in practice, by permitting the prescription of crimes that cannot be subject to the statute of limitations according to the Judgment of the Inter-American Court. Consequently, today, domestic case law constitutes a real and potential obstacle to the investigation of the facts, and the prosecution and eventual punishment of those responsible, a state of affairs that results in a legal situation contrary to the provisions of the judgment in the *Gelman case* which established that "the authorities must refrain from actions that would hinder the investigative process."[21] Moreover, in this regard, the State itself "recognizes that the recent ruling of the highest organ of the Judiciary could create difficulties for judicial rulings relating to cases of human rights violations that occurred in the past"[22] (underlining added).

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[18] *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, para. 236.

[19] Article 519 of the General Code of Procedure establishes:

Early ruling. At any stage of the proceedings and irrespective of the situation of the respective procedure, the Supreme Court of Justice may decide the matter, substantiating one of the following situations:

1. That the petition was prepared by one of the parties with the evident purpose of postponing or delaying unnecessarily the main proceedings on the merits of the matter;

2. That case law exists in the case in question and that the judicial organ declares that it retains its previous opinion.

[20] In at least three subsequent cases, the same interpretive criterion and meaning have been used. *Cf.* Considering paragraph 52 and footnote 23 of the Order on monitoring compliance with judgment in the *Case of Gelman v. Uruguay*, to which this separate concurring opinion refers.

[21] *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, para. 254.

[22] Report CDH-12,607/176 signed by the Agent of the Oriental Republic of Uruguay, in relation to the brief submitted by CEJIL concerning the presentation of the copy of the judgment of the Supreme Court of Justice of the Nation of Uruguay of February 22, 2013. This report indicates that: "The case filed before the Supreme Court of Justice that gave rise to the ruling mentioned, does not refer specifically to the Gelman case, but rather to another proceeding, but in which events that occurred during the same dictatorship are investigated. Even though, as indicated, it would not affect the Gelman case, because the Supreme Court's decision only has an impact on the

18. In addition, the impact of the judgment of the Uruguayan Supreme Court of Justice can also be noted on the right of the victims of similar gross human rights violations that occurred in Uruguay, other than the specific victims in the *Gelman case*. Indeed, it should not be forgotten that, in the judgment in the *Gelman case*, the Court declared that the Expiry Law was "null and void." Consequently, the fact that the general law has no legal effects has an impact on other cases where it is applied or in which it could have effects. The judgment in the *Gelman case* made this finding when it indicated: "Consequently, the State should ensure that no other analogous norm [to the Expiry Law], such as a statute of limitations, non-retroactivity of the criminal law, *res judicata*, *ne bis in idem* or any other similar mechanisms exonerating responsibility, be applied and that the authorities refrain from actions that would hinder the investigative process"[23] (underlining added).

19. The latter consideration entails not only the investigation and eventual punishment of those responsible for the gross human rights violations committed against the victims in the *Gelman case;* rather, the ICourtHR established in the Judgment that "the State must ensure that [the Expiry Law] never again represents an impediment to the investigation of the facts that are the subject of this case, and to the identification and, as appropriate, punishment of those responsible for these facts and for similar gross human rights violations that took place in Uruguay."[24] The last phrase is clear and means that this is not limited exclusively to the victims in the specific case, but rather it is understood, in general, to relate to any victim resulting from the application of the Expiry Law, since this Law has been declared "null and void," precisely so that it never again represents an impediment to the investigation, prosecution and, as appropriate, punishment of those responsible for gross human rights violations, such as forced disappearance of personas, that are not subject to a statute of limitations. This is corroborated in paragraphs 231 and 232 of the Judgment:

> 231. The failure to investigate the gross human rights violations committed in the present case, which occurred in the context of systematic patterns, evince the State's non-compliance with its international obligations, established by non-derogable norms[25] (underlining added).
>
> 232. Given their evident incompatibility with the American Convention, the provisions of the Expiry Law that prevent the investigation and punishment of gross human rights violations have no legal effects and, therefore, cannot continue to obstruct the investigation of the facts of this case and the identification and punishment of those responsible, nor can they have the same or a similar impact on other cases of gross violations of human rights established in the American Convention that may have occurred in Uruguay[26] (underlining added).

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specific case, it should be pointed out that, at the present time, numerous other cases have been submitted to the Supreme Court of Justice that also relate to complaints concerning events that occurred during the dictatorship, and await the ruling of the Supreme Court of Justice on similar questions regarding the constitutionality of Law 18.831" (underlining added).

[23] *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, para. 254.

[24] *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, para. 253.

[25] "*Cf. Case of Goiburú et al. v. Paraguay,* Merits, reparations and costs. Judgment of September 22, 2006. Series C No. 153, paras. 93 and 128; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia.* Merits, reparations and costs. Judgment of September 1, 2010 Series C No. 217, paras. 61 and 197; and *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Preliminary objections, merits, reparations and costs, para. 137."

[26] "*Cf. Case of Barrios Altos. Merits*, *supra* footnote 288, para. 44; *Case of La Cantuta v. Peru. Merits, reparations and costs.* Judgment of November 29, 2006. Series C No. 162, para. 175, and *Case of Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* footnote 16, para. 174."

20. This criterion established clearly and precisely in the Judgment is not an innovation in inter-American case law. Starting with the 2001 *Case of Barrios Altos*, the ICourtHR established with regard to the merits of the matter that, in the case of Peru, the amnesty laws "*lack legal effects and may not continue to obstruct the investigation of the facts on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated.*"[27] The general implications of this declaration were clarified in the decision on interpretation of this case in which the Inter-American Court indicated that *"given the nature of the violation constituted by Amnesty Laws No. 26479 and No. 26492, the decisions in the judgment on merits in the Barrios Altos case h[ad] general effects"*[28] (underlining added).

21. In sum, in our opinion, even though the ruling of the Supreme Court of Justice of Uruguay of February 22, 2013, is based on the acceptance and binding nature of the Judgment of the ICourtHR,[29] owing to its specific interpretation, considerations and effects, it has a direct and potential impact on due compliance with the judgment in the *Gelman case*, because it embodies an interpretation that is contrary not only to the international judgment that has acquired the authority of *res judicata*, but, in general, to international law and, in particular, to international human rights law. Moreover, this could lead to an interruption of access to justice for the victims of gross human rights violations, and could represent a mechanism to perpetuate the impunity and neglect of these facts by allowing these crimes to prescribe;[30] whereas gross human rights violations, such as the forced disappearance of persons, represent, "owing to the nature of the rights harmed, a violation of a *jus cogens* norm, that is particularly serious because it occurred as part of a systematic practice of 'State terrorism' at the inter-State level,"[31] and reveals the State's failure to comply with its international obligations established by non-derogable norms.

III. EFFECTIVENESS OF THE INTER-AMERICAN JUDGMENT AND THE AUTHORITY OF INTERNATIONAL *RES JUDICATA*: ITS DIRECT IMPACT ON THE PARTIES (*RES JUDICATA*) AND INDIRECT IMPACT ON THE STATES PARTIES TO THE AMERICAN CONVENTION (*RES INTERPRETATA*)

A) Binding effectiveness of the international judgment

22. Pursuant to Articles 67 and 68(1) of the American Convention on Human Rights, the judgment of the ICourtHR "shall be final and not subject to appeal" and the States Parties to

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[27] *Case of Barrios Altos v. Peru*. *Merits*. Judgment of March 14, 2001. Series C No. 75, para. 44.

[28] *Case of Barrios Altos v. Peru.* Interpretation of the judgment on merits. Judgment of September 3, 2001. Series C No. 83, para. 18.

[29] In one passage the Judgment states *"Based on the foregoing, there can be no doubt that the judgments delivered by the Inter-American Court of Human Rights are jurisdictional decisions issued by the said international organ, whose jurisdiction and competence have been expressly accepted by Uruguay, when depositing the instrument ratifying the American Convention on Human Rights. Consequently – in observance of its international obligation – our country, as the State found guilty, must proceed in good faith and comply with the decisions of the said Court"* (Judgment No. 20 of the Supreme Court of Justice of Uruguay of February 22, 2013, p. 13, second paragraph).

[30] *Cf.* Considering paragraph 103 of the Order on compliance with judgment in the *Case of Gelman v. Uruguay,* to which this separate opinion refers.

[31] *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, para. 99.

the Convention undertake to "to comply with the judgment of the Court in any case to which they are parties." Under the Pact of San José, these provisions are the cornerstone that grants the judgments of the Inter-American Court their "final" and "binding" nature, so that no type of appeal is admissible[32] and, consequently, they cannot be revised by any authority at the domestic level.[33]

23. The "binding effectiveness" of the judgments is also corroborated by Article 68(2) of the Pact of San Jose, which indicates that compensatory damages "may be executed in the country concerned in accordance with domestic procedures governing the execution of judgments against the State" and also by Article 65, *in fine,* of this Convention,[34] which indicates that the ICourtHR may submit to the consideration of the General Assembly of the Organization of American States, in its annual report, any pertinent recommendations when "a State has not complied with its judgments." In other words, the State must always comply with the international judgment directly, promptly, fully and effectively, and the American Convention itself establishes guarantees to ensure compliance. First, it establishes the possibility for the ICourtHR to monitor this compliance derived from its jurisdictional powers and, eventually, the possibility for the Inter-American Court to submit any non-compliance to a political body,[35] without this signifying that the ICourtHR must cease to monitor the respective compliance. Hence, "it can continue requiring the State to present information on compliance with the respective judgment when it considers this pertinent."[36]

24. As emphasized in the Order on monitoring compliance with judgment to which this separate opinion refers, the obligation to abide by the judgment of the ICourtHR in accordance with the preceding provisions of the Convention, derives from the basic principle of the State's international responsibility, extensively supported by international jurisprudence, and this entails compliance in good faith with international instruments (*pacta sunt servanda*), without the possibility of invoking provisions of internal law – including a constitutional norm or a judicial decision – to fail to assume international responsibility in the terms of Articles 26 and 27 of the Vienna Convention on the Law of Treaties. The ICourtHR has adopted this position for some time, by establishing that:

> Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify non-fulfillment. These rules may be deemed to

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[32] Article 67 of the American Convention on Human Rights establishes a mechanism for interpretation of the judgment, which the parties may present within ninety days of notification of the judgment. However, this mechanism is not strictly speaking a remedy, because its purpose is merely to clarify the meaning or scope of the judgment, and it is unable to amend or change its substance in any way. The ICourtHR has understood it thus on repeated occasions. See, for example, the Order of May 15, 2011, *Interpretation of the judgment on preliminary objection, merits, reparations and costs, Case of Fernández Ortega et al. v. Mexico*, paragraph 11: "a request for interpretation of judgment should not be used as a means of contesting the judgment whose interpretation is required. The exclusive purpose of this request is to determine the meaning of a judgment when one of the parties affirms that the text of its operative paragraphs or of its considerations is unclear or imprecise, provided that these considerations have an impact on the said operative paragraphs. Consequently, it is not possible to request the amendment or annulment of the respective judgment by means of a request for interpretation."

[33] Article 31(3) of the Rules of Procedure of the Inter-American Court of Human Rights.

[34] This possibility is also established in Article 30 of the Statute of the Inter-American Court.

[35] In the last Annual Report of the President of the Inter-American Court, the OAS General Assembly is advised that: "On November 23, 2012, the Inter-American Court issued an order establishing the refusal of Venezuela to comply with the judgment of August 5, 2008, in the case of *Apitz Barbera et al. v. Venezuela*. Pursuant to Article 65 of the American Convention, the Court informs the General Assembly of the OAS that Venezuela has not complied with the said judgment and, therefore, requests that this State be urged to comply with the Court's judgment."

[36] Monitoring compliance with judgment. *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*. Order of November 23, 2012, considering paragraph 48.

> be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions [Greco-Bulgarian "Communities", Advisory Opinion, 1930, P.C.I.J., Series B, No. 17, p.32; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44, p. 24; Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46, p. 167; and I.C.J. Pleadings, Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Case of the PLO Mission) (1988) p. 12, at 31-2, para. 47]. These rules have also been codified in Articles 26 and 27 of the 1969 Vienna Convention on the Law of Treaties.[37]

25. Once the inter-American judgment has been notified to the parties in keeping with Article 69 of the Pact, it produces the "effectiveness of the judgment" and, consequently, gives rise to the international obligation of the State party to the international proceedings – in which it was given the procedural opportunity to defend itself adequately – to "comply with the judgment of the Court" promptly, fully and effectively within the time frames indicated in that judgment. The international obligation to comply with "the judgment" encompasses the State as a whole; that is, all the domestic powers, organs and authorities.[38]

B) Authority of international *res judicata* of the judgments of the Inter-American Court of Human Rights (formal and substantial)

26. "*Res judicata*" is a procedural mechanism that consists in "the authority and effectiveness acquired by the judicial decision when no appeal or other means of contestation is admissible, and its attributes are its enforceability, immutability and irreversibility in a subsequent proceeding."[39]

27. In the sphere of international public law, starting with the initial case law of the Permanent Court of International Justice, and the International Court of Justice, it has been established that the decisions of organs of a jurisdictional nature acquire the status of *res judicata* and entail the obligation that they must be complied with.[40] Furthermore, it has also been established that it would be impossible to attribute to a domestic court the power to invalidate a decision of an international court and to deny the existence of a violation of international law that has been declared at the international level in a specific case.[41]

28. In the inter-American sphere, the judgment of the ICourtHR produces "authority of international *res judicata*." This means that when the inter-American judgment has been

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[37] Advisory Opinion OC-14/94 of December 9, 1994. *International responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights).* Series A No. 14, para. 35. These considerations have also been repeatedly indicated by the Inter-American Court in contentious cases.

[38] *Cf. Case of Albán Cornejo et al. v. Ecuador. Monitoring compliance with judgment*. Order of February 5, 2013, para. 5; *Case of Castillo Petruzzi et al. v. Peru. Monitoring compliance with judgment.* Order of November 17, 1999, third considering paragraph; and *Case of Barrios Altos v. Peru, Monitoring compliance with judgment.* Order of the Court of September 7, 2012, fourth considering paragraph.

[39] Couture, Eduardo J., Voz "*res judicata,*" in *Vocabulario Jurídico, Español y latín, con traducción de vocablos al francés, italiano, portugués, inglés y alemán,* 4th. ed., revised, updated and expanded by Ángel Landoni Sosa, Julio César Faira-Editor, Montevideo, 2010, pp. 211 and 212.

[40] *Cf.* International Court of Justice, *Corfu Channel case (*preliminary objection), 1948, p. 28; International Court of Justice, *Corfu Channel case* (compensation), 1949, p. 248; and *Nottebohm* case (preliminary objection), 1953, p. 123

[41] *Cf.* Permanent Court of International Justice, *The Factory at Chorzow* (Claim for Indemnity) (The Merits), p. 84.

notified to the parties, it produces a binding and direct effectiveness for them. When a judgment is decided against the State in favor of the plaintiff, all the powers, organs and authorities of the said State are obliged to comply with the judgment, without requiring any domestic or internal procedure or interpretation.

29. Thus, the ICourtHR's judgments acquire the "authority of international *res judicata*" owing to the "non-appealable" nature of the judgment established in Article 67 of the Pact of San José. In other words, since these judgments are not subject to a possible review, because no means of contesting them is established, they acquire "finality" as a jurisdictional act that terminates the international proceedings – but not the procedure of monitoring the judgment until it has been complied with fully, which is derived from the Inter-American Court's jurisdictional activities.

30. Thus, the establishment of the "authority of international *res judicata*" (as a result of the non-appealable nature of the judgment) leads to the "immutability" of the judgment delivered by the ICourtHR, as a procedural action and with regard to its content or substance and, in particular, its effects. Hence, international *res judicata* (formal and substantial) means that no other domestic or international court – even the Inter-American Court itself – in another subsequent trial can rule again on the object of the proceedings. This mechanism is based on the general principles of the law on legal certainty and social peace, by providing the parties – and society as a whole – with certainty, by avoiding an indefinite prolongation of the dispute, elements included in Articles 67 and 68 of the Pact of San José to contribute to the establishment of an inter-American public order.

C) Effectiveness of the inter-American judgment as "*res judicata*" with effects *inter partes* and as an "interpretation of a provision of the Convention" (*res interpretata*) with effects *erga omnes*

31. The inter-American judgment, inasmuch as it acquires the authority of international *res judicata,* applies the contents and effects of the judgment in two dimensions: (a) subjectively and directly for the parties to the international dispute, and (b) objectively and indirectly for the States Parties to the American Convention.

32. Regarding the first dimension, it produces an effectiveness *inter partes*, which consists in the States obligation to comply with everything established in the inter-American judgment promptly, fully and effectively. There is a total and absolute relationship between the contents and effects of the judgment that results in an obligation under Articles 67 and 68(1) of the American Convention.

33. With regard to the second dimension, an effectiveness *erga omnes* is produced for all the States Parties to the Convention, because all the domestic authorities are bound by the treaty-based effectiveness and, consequently, also by the interpretive criterion established by the ICourtHR, as a minimum standard of effectiveness of the provision of the Convention, derived from the State obligations of respect, guarantee and adaptation (of norms and interpretation) established in Articles 1 and 2 of the American Convention. This explains why the judgment must be notified not only "to the parties to the case," but also, according to Article 69 of the Pact of San José, "transmitted to the States Parties to the Convention."

C.1) <u>Subjective effectiveness of the inter-American judgment as "international</u> res <u>judicata"</u>: the direct binding effect "*inter partes*" entails the obligation of the State to comply with the whole judgment and not only the operative paragraphs

34. The binding effectiveness of the judgment establishing the international responsibility of a State that was a party to the litigation, during which it had the opportunity to defend itself adequately, relates not only to the operative paragraphs of the judgment, but encompasses the reasoning, arguments and considerations that provide a basis for and give meaning to the decision. It is only thus that it is possible to understand the willingness of the State to comply with what it accepted previously, based on its sovereign decision; that is, "to comply with the judgment of the Court in any case" to which it is a party (Article 68(1) of the American Convention); because the operative paragraphs cannot be separated from the considerations, since the judgment is a jurisdictional act that generally involves "the ruling" as a decisive jurisdictional act.

35. The American Convention itself establishes the ICourtHR's obligation to "give the reasons" for its judgment (Article 66), and this is where the "grounds for the judgment" are to be found; namely, the "series of factual and, above all, legal motives, reasons or arguments on which the judicial decision is based."[42] They constitute the juridical considerations on the facts and law applicable to the case in order to decide it. Thus, the grounds include the *thema decidendum* that is reflected in the operative paragraphs of the judgment and, therefore, "the judgment" constitutes a complex action of the Court's decision. Hence, the *rationes decidendi* constitute a fundamental and necessary element which the State that was a "party to the proceedings" must consider in order to comply satisfactorily and fully with the operative paragraphs of the Judgment.

36. Moreover, the foregoing has been a cause for reflection by the Inter-American Court since the first cases it heard; in the understanding that the respective scope is based on a general principle of procedural law. Thus, in the judgment on reparations and costs in the *Case of Velásquez Rodríguez v. Honduras*, it stipulated that:

> 35. Although these obligations were not expressly incorporated into the operative paragraphs of the judgment on the merits, it is a principle of procedural law that the grounds for a judicial decision are a part of the same. Consequently, the Court declares that those obligations for Honduras continue until they are complied with fully[43] (underlining added).

37. An example of this by a high domestic court can be observed on the occasion of compliance with the judgment in the *Case of Radilla Pacheco v. Mexico*.[44] The Supreme Court of Justice of the Nation of Mexico, *motu proprio* and although it was not hearing a domestic judicial proceeding, in compliance with the inter-American judgment, considered that it was bound by the terms of the judgment. In this regard, in addition to accepting the "control of conventionality *ex officio* in a model of diffuse control of constitutionality,"[45] it considered that "*the decisions taken by that international organ whose jurisdiction has been accepted by the Mexican State, are obligatory for all the organs thereof in their respective spheres of competence, since it has been a State party in a specific litigation. Therefore, for the Judiciary, not only the specific operative paragraphs of the judgment are binding, but all the criteria*

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[42] Couture, Eduardo J., voz "fundamentos de la Sentencia", in *Vocabulario Jurídico. Español y latín, con traducción de vocablos al francés, italiano, portugués, inglés y alemán,* 4th. ed., corrected, updated and expanded by Ángel Landoni Sosa, Julio César Faira-Editor, Montevideo, 2010, p. 364.

[43] *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 35.

[44] *Case of Radilla Pacheco v. Mexico*. Preliminary objections, merits, reparations and costs. Judgment of November 23, 2009. Series C, No. 209.

[45] In explicit compliance with paragraph 339 of the Judgment of the ICourtHR in the *Case of Radilla Pacheco v. Mexico* concerning the obligation to exercise "control of conventionality *ex officio.*" *Cf.* Case file *Varios* 912/2010, decided by the Plenary of the Supreme Court of Justice of the Nation on July 14, 2011, paras. 22 to 36.

contained in the judgment that decides that litigation."[46] The corresponding interpretive criterion adopted by the Mexican Supreme Court of Justice in Judgment No. LXV/2011 is relevant:[47]

> "ALL THE TERMS OF THE JUDGMENTS DELIVERED BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS ARE BINDING WHEN THE MEXICAN STATE HAS BEEN A PARTY TO THE LITIGATION. The Mexican State has accepted the jurisdiction of the Inter-American Court of Human Rights; consequently, when it has been a party to a dispute or litigation before that jurisdiction, the judgment delivered by that court, together with all its considerations, constitutes *res judicata*, and it corresponds exclusively to that international organ to assess each and every objection filed by the Mexican State, whether they are related to the extent of the competence of that Court or to the reservations and qualifications expressed by the State. Consequently, the Supreme Court of Justice of the Nation, even sitting as a constitutional court, is not competent to analyze, revise, qualify or decide whether a judgment delivered by the Inter-American Court of Human Rights is correct or incorrect, or whether it exceeds the norms that regulate its subject matter and procedures. Therefore, the Supreme Court cannot make any ruling that questions the validity of the decision of the Inter-American Court of Human Rights, because these judgments are *res judicata* for the Mexican State. The only appropriate course of action is to recognize and abide by the entire Judgment as delivered. Thus, the decisions issued by that international organ are compulsory for all the organs of the Mexican State, as they are part of a specific litigation, and the Judiciary is bound not only by the specific operative paragraphs of the Judgment, but also by all the criteria contained in it" (underlining added).

38. Evidently, the scope of the binding effect of the *ratio decidendi* acquires greater certainty when the operative paragraphs of the judgment refer explicitly to the considerations that contain the legal grounds for the "judgment," as is the usual practice of the Inter-American Court, and as occurred in the judgment in the *Gelman case.* Indeed, for the effects that are of particular interest, the contents of the eleventh operative paragraph are relevant:[48]

> "11. The State must guarantee that the Expiry Law, since it has no effects to prevent or obstruct the investigation and eventual punishment of those responsible for gross human right violations due to its incompatibility with the American Convention and the Inter-American Convention on Forced Disappearance of Persons, will never again represent an impediment to the investigation of the facts that are the subject of this case and to the identification, and as appropriate, punishment of those responsible, in accordance with paragraphs 253 and 254 of the Judgment" (underlining added).

39. The "eleventh operative paragraph" includes a precise reference to a crucial part of the reasoning made in the section on "Reparations" identified as paragraphs 253[49] and 254[50] of the

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[46] Case file *Varios* 912/2010, decided by the Plenary of the Supreme Court of Justice of the Nation on July 14, 2011, para. 19.

[47] Judgment of the Plenary of the Supreme Court of Justice of the Nation, adopted on November 28, 2011, and published in the *Semanario Judicial de la Federación y su Gaceta*, *Décima Época, Libro III,* December 2011, volume 1, p. 556.

[48] *Case of Gelman v. Uruguay. Merits and reparations.* Judgment of February 24, 2011. Series C No. 221.

[49] "Therefore, given that the Expiry Law has no effects to prevent the investigation and eventual punishment of those responsible for gross human rights violations, because of its incompatibility with the American Convention and the Inter-American Convention on Forced Disappearance of Persons, the State must guarantee that it never again represents an impediment to the investigation of the facts that are the subject of this case, or to the identification, and as appropriate, punishment of those responsible for these facts and other gross human rights violations that took place in Uruguay." *Case of Gelman v. Uruguay. Merits and reparations.* Judgment of February 24, 2011. Series C No. 221, para. 253.

[50] "Consequently, the State must ensure that no other analogous norm, such as a statute of limitations, non-retroactivity of the criminal law, *res judicata*, *ne bis in idem* or any other similar mechanisms exonerating responsibility, be applied and that the authorities refrain from carrying out acts that entail the obstruction of the

Judgment. This does not mean that these arguments alone should be considered in order to reach an adequate understanding of the legal grounds of the matter decided, but rather, in general, also the *rationes decidendi* on the *thema decidendum* that appear throughout the judgment. In other words, all the reasoning contained in the entire judgment and used by the Inter-American Court to reach a decision on the matter submitted and debated in the international proceedings is included.

40. Thus, the reasoning that includes all the factual and legal reasons and grounds that appear in the inter-American judgment gives rise to the specific certainty for compliance with the decisions made by the Inter-American Court in the judgment and, consequently, for compliance with the American Convention in the terms of Article 68(1).

41. In this specific case, this certainty in relation to the provisions of the "eleventh operative paragraph" of the Judgment, refers to the considerations included throughout the Judgment that entail the State's obligation to "ensure" that the Expiry Law never again represents an impediment to the investigation of the facts, and the identification and, as appropriate, punishment of those responsible for the victims in the *Gelman case* and in other cases of gross human rights violations that took place in Uruguay during the military dictatorship, since this general law is null and void because it is contrary to the Pact of San José and the Inter-American Convention on Forced Disappearance of Persons. Moreover, such conducts can never be subject to a statute of limitations because they are covered by *jus cogens* norms and because the forced disappearance of persons is a continuing or permanent crime.[51] These issues are dealt with in other parts of the judgment, specifically Chapter "*VI.3. Rights to judicial guarantees and judicial protection in relation to the obligation to respect rights, the duty to adopt domestic legal effects, and the obligations relating to investigation established in the American Convention and the Inter-American Convention on Forced Disappearance of Persons*, and included in considering paragraphs 139 to 246 of the Judgment; and also in Chapter *VII. Reparations*, especially considering paragraphs 253 and 254 (explicitly mentioned in the eleventh operative paragraph of the Judgment).

42. It is on this basis that, in this Order on monitoring compliance with the Judgment, the ICourtHR considered that the binding effects of "the judgment" it had delivered – in a specific contentious case with regard to a State Party to the Convention that had explicitly accepted its jurisdiction[52] – was not limited to its operative paragraphs, "but rather includes all its grounds, reasoning, implications and effects";[53] in other words, the Judgment as a whole is binding for the State concerned, including its *ratio decidendi,* because "the obligation of the States Parties to comply promptly with the decisions of the Court is an intrinsic part of the obligation to

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investigative process." *Case of Gelman v. Uruguay. Merits and reparations.* Judgment of February 24, 2011. Series C No. 221, para. 254.

51 Considering paragraph 231 of the Judgment expressly indicates: "The failure to investigate the gross human rights violations committed in the present case, which occurred in the context of systematic patterns, reveal the State's failure to comply with its international obligations, established by non-derogable norms." *Case of Gelman v. Uruguay. Merits and reparations.* Judgment of February 24, 2011. Series C No. 221, para. 231.

52 The Oriental Republic of Uruguay has been a State Party to the Convention since April 19, 1985, and accepted the contentious jurisdiction of the ICourtHR on that date. It has also been a party to the Inter-American Convention to Prevent and Punish Torture since November 10, 1992, the Inter-American Convention on Forced Disappearance of Persons since April 2, 1996, and the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women since April 2, 1996. The ICourtHR has competence and has ruled on all these treaties in accordance with Article 62(3) of the American Convention.

53 Considering paragraph 102 of the Order on monitoring compliance with the judgment in the *Case of Gelman v. Uruguay*, to which this separate opinion refers.

comply with the American Convention in good faith, and is binding for all the powers and organs of the State."[54]

*C.2) Objective effectiveness of the inter-American judgment as an "interpretation of a provision of the Convention": the indirect binding effect "**erga omnes**" for all the States Parties to the American Convention entails the application of the minimum interpretive standard for the effectiveness of the Convention-based provision*

43. The implications of the interpretive effectiveness of the judgment for all the States Parties that have signed and ratified or acceded to the American Convention on Human Rights, and particularly those that have accepted the contentious jurisdiction of the ICourtHR, consist in the obligation for all the domestic authorities to apply not only the provision of the Convention, but also the "interpreted provision of the Convention" (*res interpretata*);[55] in other words, the interpretive criterion that the Inter-American Court applied as a minimum standard to the Pact of San José and, in general, to the inter-American *corpus juris*, which is the substance of its competence, in order to decide the dispute and, thus, ensure the (minimum) effectiveness of the provision of the Convention. And this is because, "the interpretation and application" of the American Convention,"[56] and "of other treaties that grant it competence"[57] is precisely the purpose of the Inter-American Court's mandate and competence.

44. The interpretive effectiveness of the provision of the Convention should be understood as the possibility to achieve a minimum standard of regional effectiveness of the American Convention that can be applied by all the authorities in the domestic sphere. This is derived from Articles 1(1)[58] and 2[59] of the Pact of San José itself, because the States Parties have the obligation "to respect" and "to ensure" the rights and freedoms, as well as the obligation to ensure both normative and interpretive adaptation in order to achieve the effectiveness of the rights and freedoms when this is not guaranteed. This latter obligation of the States Parties is of singular importance in the inter-American human rights system and constitutes one of the fundamental aspects that distinguish it from the European system.[60]

45. Indeed, the ICourtHR has considered Article 2 of the American Convention – which is inspired by Article 2(2) of the 1966 United Nations International Covenant on Civil and Political

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[54] Considering paragraph 62, *in fine*, of the Order on monitoring compliance with the judgment in the *Case of Gelman v. Uruguay,* to which this separate opinion refers.

[55] Considering paragraphs 67, 69 and 72 of the Order on monitoring compliance with the judgment in the *Case of Gelman v. Uruguay*, to which this separate opinion refers.

[56] Articles 62(1) and (3) of the American Convention, and Article 1 of the Statute of the Inter-American Court, approved by the OAS General Assembly in La Paz, Bolivia, in October 1979.

[57] *Cf. Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, Merits, reparations and costs*. Judgment of September 1, 2010. Series C No. 217, para. 199.

[58] "Art. 1. Obligation to Respect Rights. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

[59] "Art. 2. Domestic Legal Effects. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

[60] The European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on November 4, 1950, by the Council of Europe and in force since 1953, does not contain any explicit provision in this regard.

Rights,[61] and is also reflected in Article 2 of the 1988 Additional Protocol in the Area of Economic, Social and Cultural Rights[62] – not as an obligation implicit in the obligations "to respect" and "to ensure" established in Article 1 of the Convention, but rather as a specific obligation that complements them. Starting with Advisory Opinion 7/86, the Inter-American Court has considered that the obligation derived from Article 2 of the Pact of San José "is in addition to the one imposed by Article 1 of the Convention. It is intended to make respect for the rights and freedoms recognized by the Convention more definite and certain. The obligation that results from Article 2 thus complements, but in no way substitutes or replaces, the general unconditional obligation imposed by Article 1."[63]

46. The evolutive nature of inter-American case law has permitted the interpretation of the obligation contained in Article 2 of the American Convention "to adopt" "legislative or other measures as may be necessary to give effect to those rights or freedoms." This has resulted in extensive inter-American case law on different issues;[64] for example, indigenous or tribal peoples,[65] freedom of expression and access to information,[66] the right of the accused to appeal the judgment before a higher criminal court,[67] the death penalty,[68] the military jurisdiction,[69]

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[61] UN General Assembly, resolution 2200 A (XXI) of 16 December 1966, in force as of March 23, 1976: "Art. 2(2). …Each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

[62] Signed in San Salvador, El Salvador, on November 17, 1988: "Art. 2. *Obligation to enact domestic legislation.* If the exercise of the rights set forth in this Protocol is not already guaranteed by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Protocol, such legislative or other measures as may be necessary to make those rights a reality."

[63] Furthermore, the ICourtHR has clarified that "the inclusion of the actual Article 2 in the Draft Convention, was proposed in the observations of the Government of Chile on the Draft Inter-American Convention on Human Rights: 'The argument that inclusion of this clause in the Inter-American Convention might warrant the allegation by a State that it was not obligated to respect one or more rights not contemplated in its domestic legislation, is not supported by the terms of the Preliminary Draft; it is even less likely to find support if the scope of the Convention is expressly established at the Conference *(Actas y Documentos*, supra 4, p. 38)." *Enforceability of the Right to Reply or Correction (Arts. 14.1, 1.1 and 2 American Convention on Human Rights)). Advisory Opinion OC-7/86* of August 29 1986. Series A No. 7.

[64] *Cf.* Ferrer Mac-Gregor, Eduardo and Pelayo Möller, Carlos María, "*El deber de adoptar disposiciones de derecho interno. Análisis del artículo 2 de la Convención Americana sobre Derechos Humanos y su impacto en el orden jurídico nacional*", in von Bogdandy, Armin, Ugartemendia, Juan Ignacio, Saiz Arnaiz, Alejandro, and Morales-Antoniazzi, Mariela (coords.), *La tutela jurisdiccional de los derechos. Del constitucionalismo histórico al constitucionalismo de la integración,* Instituto Vasco de Administración Pública, Oñati, 2012, pp. 299-348.

[65] *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, reparations and costs. Judgment of August 31, 2001. Series C, No. 79; *Case of the Yakye Axa Community v. Paraguay*. Merits, reparations and costs. Judgment of June 17, 2005; *Case of Yatama v. Nicaragua*. Preliminary objections, merits, reparations and costs. Judgment of June 23, 2005. Series C, No. 127; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, reparations and costs. Judgment of March 29, 2006; *Case of the Saramaka People v. Suriname*. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2007; *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, reparations and costs. Judgment of August 24, 2010 Series C, No. 214; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador.* Merits and reparations. Judgment of June 27, 2012. Series C No. 245.

[66] *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*. Merits, reparations and costs. Judgment of February 5, 2001 Series C, No. 73; *Case of Palamara Iribarne v. Chile*. Merits, reparations and costs. Judgment of November 22, 2005. Series C, No. 135; *Case of Kimel v. Argentina*. Merits, reparations and costs. Judgment of May 2, 2008 Series C No. 177; *Case of Usón Ramírez v. Venezuela*. Preliminary objection, merits, reparations and costs. Judgment of November 20, 2009. Series C, No. 207.

[67] *Cf. Case of Barreto Leiva v. Venezuela*. Merits, reparations and costs. Judgment of November 17, 2009. Series C, No. 206, and *Case of Herrera Ulloa v. Costa Rica*. Preliminary objections, merits, reparations and costs. Judgment of July 2, 2004. Series C, No. 107.

[68] *Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*. Merits, reparations and costs. Judgment of June 21, 2002. Series C, No. 94; *Case of Fermín Ramírez v. Guatemala*. Merits, reparations and costs.

labor rights,[70] the tenure of judges,[71] and amnesty laws.[72] Regarding the case law developed with regard to the incompatibility of amnesty laws, as in the judgment in the *Gelman case*,[73] the Court explicitly concluded in operative paragraph 6 that: "The State has failed to comply with the obligation to adapt its domestic laws to the American Convention," and specifically indicated in the reasoning that:[74]

> "In particular, due to the interpretation and application that has been given to the Expiry Law, which lacks legal effect in relation to gross human rights violations in the terms indicated above (*supra* para. 232), the State has not fulfilled its obligation to adapt its domestic legislation to the Convention, contained in Article 2 thereof, in relation to Articles 8(1), 25, and 1(1) of this instrument and Articles I(b), III, IV, and V of the Inter-American Convention on Forced Disappearance of Persons" (underlining added).

47. Thus, the phrase "or other" contained in the obligation under Article 2 of the Convention means any measure, and evidently includes the "interpretations" of the Pact of San José made by the authorities, and especially the judges, in order to "give effect" to the rights and freedoms recognized in the Pact that they are obliged to respect and ensure in keeping with Article 1(1) of the Convention. In the *Case of La Cantuta v. Peru*, the Court established that:

Judgment of June 20, 2005. Series C, No. 126; *Case of Raxcacó Reyes v. Guatemala*. Merits, reparations and costs. Judgment of September 15, 2005. Series C, No. 133; *Case of Boyce et al. v. Barbados*. Preliminary objection, merits, reparations and costs. Judgment of November 20, 2007. Series C, No. 169; *Case of Dacosta Cadogan v. Barbados*. Preliminary objections, merits, reparations and costs. Judgment of September 24, 2009. Series C, No. 204.

69 *Cf. Case of Loayza Tamayo v. Peru. Merits*. Judgment of September 17, 1997. Series C, No. 33; *Case of Castillo Petruzzi et al. v. Peru*. Merits, reparations and costs. Judgment of May 30, 1999. Series C, No. 52; *Case of Las Palmeras v. Colombia*. Merits. Judgment of December 6, 2001. Series C, No. 90; *Case of Radilla Pacheco v. Mexico*. Preliminary objections, merits, reparations and costs. Judgment of November 23, 2009. Series C, No. 209; *Case of Fernández Ortega et al. v. Mexico*. Preliminary objection, merits, reparations and costs. Judgment of August 30, 2010. Series C, No. 215; *Case of Rosendo Cantú et al. v. Mexico*. Preliminary objection, merits, reparations and costs. Judgment of August 31, 2010. Series C, No. 216; *Case of Cabrera García and Montiel Flores v. Mexico*. Preliminary objections, merits, reparations and costs. Judgment of November 26, 2010, Series C, No. 220.

70 *Cf. Case of Baena Ricardo et al. v. Panamá*. Merits, reparations and costs. Judgment of February 2, 2001. Series C, No. 72; *Case of Five Pensioners v. Peru*. Merits, reparations and costs. Judgment of February 28, 2003. Series C, No. 98, para. 167 and 168; *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, No. 158.

71 *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*. Preliminary objection, merits, reparations and costs. Judgment of August 5, 2008. Series C, No. 182; *Case of Reverón Trujillo v. Venezuela*. Preliminary objection, merits, reparations and costs. Judgment of June 30, 2009. Series C, No. 197; *Case of Chocrón Chocrón v. Venezuela*. Preliminary objection, merits, reparations and costs. Judgment of July 1, 2011. Series C, No. 227.

72 *Cf. Case of Barrios Altos v. Peru*. Merits. Judgment of March 14, 2001. Series C, No. 75; *Case of Almonacid Arellano et al. v. Chile*. Preliminary objections, merits, reparations and costs. Judgment of September 26, 2006. Series C, No. 154; *Case of La Cantuta v. Peru.* Merits, reparations and costs. Judgment of November 29, 2006. Series C, No. 162; *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*. Preliminary objections, merits, reparations and costs. Judgment of November 24, 2010, Series C, No. 219; *Case of Gelman v. Uruguay*. Merits and reparations. Judgment of February 24, 2011 Series C, No. 221; *Case of the Massacres of El Mozote and nearby places v. El Salvador.* Merits, reparations and costs. Judgment of October 25, 2012 Series C, No. 252.

73 The ICourtHR expressly considered the Expiry Law as an amnesty law. Para. 240 of the Judgment indicates: "In addition, by applying the Expiry Law (which, owing to its effects, constitutes an amnesty law) and thereby impeding the investigation of the facts and the identification, prosecution, and eventual punishment of the possible perpetrators of continued and permanent violations such as those involved in forced disappearance, the State failed to comply with its obligation to adapt its domestic law enshrined in Article 2 of the Convention." *Case of Gelman v. Uruguay*. Merits and reparations. Judgment of February 24, 2011 Series C, No. 221, para. 240.

74 *Case of Gelman v. Uruguay*. Merits and reparations. Judgment of February 24, 2011 Series C, No. 221, para. 246.

> "It is true that Article 2 of the Convention fails to define which measures are appropriate in order to adapt domestic law to this instrument; obviously, this is because it depends on the nature of the norm that must be adapted and the circumstances of each specific situation. Therefore, the Court has interpreted that this adaptation entails the adoption of two types of measures, namely: (i) the elimination of norms and practices of any nature that result in violations of the guarantees provided for in the Convention or that disregard the rights recognized therein or hinder their exercise, and (ii) the enactment of laws and the implementation of practices leading to the effective observance of the said guarantees. The Court has understood that the former obligation is not complied with while the law or practice that violates the Convention remains part of the legislation and, consequently, it is met by the amendment, repeal or annulment in some way, or the reform of the laws or practices that have that effect, as appropriate"[75] (underlining added).

48. The above is relevant in order to note that, if an interpretation of the Constitution or the law at the domestic level is not adapted to the interpretive standard established by the ICourtHR in order to ensure the minimum level of effectiveness of the American Convention, the State has failed to comply with the obligation to adopt the necessary measures established in Article 2 of the Pact of San José. In other words, domestic laws and practices are not aligned with the Convention and thus the effectiveness of the provisions of the Convention is limited, because the interpretation is less favorable than the one made by the Inter-American Court. Moreover, this is prohibited by Article 29 of that instrument, because it allows a domestic practice to limit the scope of the provision of the Convention to the detriment of the effectiveness of a right or freedom. As the ICourtHR has indicated: "the existence of a law does not in itself guarantee that its application is adequate. The application of the laws or their interpretation, inasmuch as they are jurisdictional practices and an expression of the State's public order, must be adapted to the objective sought by Article 2 of the Convention."[76]

49. The ICourtHR has indicated that the general obligation of the State, established in Article 2 of the Convention, includes the adoption of measures *to eliminate the norms and practices of any nature* that entail a violation of the rights established in this international instrument, as well as the *enactment of norms and the implementation of practices* conducive to the effective observance of those rights.[77] Here the observance of the "effectiveness" acquires relevance in terms of the principle of the practical effects (*effet utile)* "which means that the State must adopt all necessary measures to ensure that the provisions of the Convention are complied with faithfully."[78] Thus, the ICourtHR has found it necessary to reaffirm that the said obligation, owing to its nature, constitutes a *results-based obligation.*[79]

50. In this regard, "the State obligation to adapt its domestic law to the provisions of the Convention is not limited to the Constitution and the laws, but must permeate all legal provisions of a regulatory nature and translate into the effective practical application of the

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[75] *Case of La Cantuta v. Peru*. Merits, reparations and costs. Judgment of November 29, 2006. Series C, No. 162, para. 172.

[76] *Cf. Case of Radilla Pacheco v. Mexico***.** Preliminary objections, merits, reparations and costs. Judgment of November 23, 2009. Series C No. 209, para. 338. Similarly, see *Case of Castillo Petruzzi et al. v. Peru.* Merits, reparations and costs. Judgment of May 30, 1999. Series C, No. 52, para. 207; *Case of Ximenes Lopes v. Brazil. Merits, reparations and costs.* Judgment of July 4, 2006. Series C No. 149, para. 83, and *Case of Almonacid Arellano et al. v. Chile.* Preliminary objections, merits, reparations and costs. Judgment of September 26, 2006. Series C, No. 154*,* para. 118.

[77] *Cf. Case of Durand and Ugarte v. Peru. Merits*. Judgment of August 16, 2000. Series C No. 68, para. 137.

[78] *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, reparations and costs. Judgment of June 17, 2005. Series C, No. 125, para. 101.

[79] *Cf. Case of Caesar v. Trinidad and Tobago*. Merits, reparations and costs. Judgment of March 11, 2005. Series C No. 123, para. 93.

standards for the protection of human rights."[80] Thus, the observance of the provisions of Article 2 of the Pact of San José exceeds the merely legislative sphere, and the domestic administrative authorities, especially judges at all levels, can and must make interpretations that do not limit the interpretive standard established by the ICourtHR precisely in order to achieve the minimum level of effectiveness of the American Convention, a commitment that the States have undertaken to implement.

51. On this basis, the ICourtHR has understood that its competences include the possibility of supervising an "adequate control of conformity with the Convention" in relation to the interpretation made by a high domestic court, as it has in the judgment in the *Gelman case*. Indeed, the Inter-American Court considered that, in the 2009 *Case of Nibia Sabalsagaray Curutchet,*[81] the Supreme Court of Justice of Uruguay had carried out "an adequate control of conventionality" as regards the Expiry Law (criterion repeated in at least two subsequent cases),[82] by establishing, *inter alia*, that:

> "The decision of the majority is essentially limited by two factors: the protection of the fundamental rights (the most important are the rights to life and to personal liberty, and they cannot be sacrificed based on any majority decision, or general interest or common good), and the fact that the public authorities are subject to the law."[83]

52. Nevertheless, the domestic authorities may validly expand the effectiveness of the provision of the Convention by a more favorable interpretation in application of the *pro personae* principle, which also obliges the State owing to the provisions of Article 29(b) of the Pact of San José, insofar as no provision of this Convention can be interpreted as "restricting the enjoyment or exercise of any right or freedom *recognized by virtue of the laws of any State Party or by virtue of another convention* to which one of the said States is a party."

53. The foregoing is important in order to understand that the interpretive effectiveness of a provision of the Convention, by constituting a regional minimum standard of national applicability *constitutes a fundamental and essential minimum hermeneutic standard in the area of human rights;* thus the domestic authorities (administrative, legislative or jurisdictional) at

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[80] *Case of Vélez Loor v. Panamá***.** Preliminary objections, merits, reparations and costs. Judgment of November 23, 2010. Series C No. 218, para. 286.

[81] Judgment No. 365 of October 19, 2009. Case of "Sabalsagaray Curutchet Blanca Stela – Complaint on unconstitutionality."

[82] Using the mechanism of an "early ruling," the criterion was repeated in the case of the "Human Rights Organization" of October 29, 2010, and in the case of the "Soca shootings" of February 10, 2011. *Cf.* Considering paragraph 38 and footnote 14 of the Order on monitoring compliance with judgment in the *Case of Gelman v. Uruguay*, to which this separate concurring opinion refers.

[83] *Case of Gelman v. Uruguay*. Merits and reparations. Judgment of February 24, 2011 Series C, No. 239. Footnote 298 of this judgment indicates the following:

> "Supreme Court of Justice of Uruguay, *Case of Nibia Sabalsagaray Curutchet*, *supra* footnote 163:
>
> […] the ratification by the people, which took place in the referendum against the Law held in 1989, has no significant consequence in relation to the analysis that must be made of its constitutionality. […]
>
> Furthermore, the direct exercise of the people's sovereignty by a referendum that annuls laws enacted by the Legislature only has this eventual possibility of annulling them, whereas rejection of the annulment by the population does not extend their effectiveness to the point of granting constitutionality to a legal norm that was flawed "*ab origine*" because it violated norms or principles embodied or recognized by the Constitution. According to Luigi Ferrajoli, the constitutional norms establishing fundamental principles and rights guarantee the material dimension of "substantial democracy," which refers to matters that cannot be decided or that must be decided by the majority, binding the legislation – on pain of invalidity – to respect for the fundamental rights and the other axiological principles established therein […]. The said author classifies as a meta-juridical fallacy the confusion that exists between the paradigm of the rule of law and that of the political democracy, according to which a norm is legitimate only if it is desired by the majority […]."

any level (municipal, regional, state, federal or national) of the States Parties to the Convention may, eventually, diverge from the Court's interpretive criterion when they make a reasoned and well-founded interpretation that grants greater effectiveness to the provision of the Convention by a more favorable interpretation of the "inter-American case law" concerning the human right in question.

54. The interpretive effectiveness of inter-American case law (*res interpretata*) derives directly from the obligation of the States Parties to the Convention to respect, ensure and adapt (their norms and interpretations) referred to in Articles 1 and 2 of the Pact, bearing in mind that, according to the American Convention, "the jurisdiction of the [Inter-American] Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it"[84] and it "shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated" when it decides that there has been a violation.[85] Thus, the application at the domestic level of the inter-American interpretive standard ensures the minimum level of effectiveness of the provision of the Convention.

55. In other words, the interpretive effectiveness of inter-American case law in all the States Parties to the American Convention results from the legal effectiveness of this international instrument, which takes effect in a State merely because the latter is a Party to it.[86] Consequently, the State's compliance with its obligation under the Convention to respect, ensure and adapt (its norms and interpretations) referred to in Articles 1 and 2 requires a minimum level of effectiveness of the American Convention itself, which can only be achieved through the minimum degree of interpretive adaptation made by the domestic authorities of the provision of the Convention in light of inter-American case law. This is because it is the Pact of San José itself that has established the Inter-American Court as the only organ with competence of a "jurisdictional" nature to examine matters related to compliance with the undertakings made by the States Parties to the American Convention, with jurisdiction to interpret and to apply of the Convention[87] and, if it finds that there has been a violation, to ensure to the victim the enjoyment of the right or freedom that was violated. In other words, the ICourtHR's case law conditions the minimum level of effectiveness of the provision of the Convention that the domestic authorities of the State Party must apply in order to comply with their obligations under Articles 1 and 2 of the Pact of San José, and also related to the *pro personae* principle contained in Article 29 of the American Convention.

56. Thus, the Order on monitoring compliance with judgment in the *Gelman case* to which this separate opinion refers, clarifies that the obligation of the States Parties to the American Convention, as regards the binding effect of the "interpretation of the provision of the Convention" (*res interpretata*), is one of the ways in which the "control of conventionality" can be implemented in situations and cases in which the State concerned has not been a material party to the international proceedings during which specific inter-American case law was established.[88] In this regard, "based on the fact that a State is a party to the American

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[84] Article 62(3) of the American Convention on Human Rights, which is corroborated by Articles 62(1) and 33(b) of the Pact of San José; in addition to Articles 1 and 2(1) of the Statute of the Inter-American Court of Human Rights approved by the OAS General Assembly.

[85] Article 63(1) of the American Convention on Human Rights.

[86] As revealed by considering paragraphs 69, 71 and 72 of the Order on monitoring compliance with the judgment in the *Case of Gelman v. Uruguay,* to which this separate opinion refers.

[87] Without disregarding the important attributes of the Inter-American Commission on Human Rights, as one of the two organs of protection of the inter-American system; even though, according to Article 41 of the Pact of San José, its main function is to promote the respect for and defense of human rights.

[88] *Cf.* Considering paragraphs 67, 69 and 72 of the Order on monitoring compliance with the judgment in the *Case of Gelman v. Uruguay,* to which this separate opinion refers.

Convention, every public authority and all its organs, including the democratic bodies, judges and other organs involved in the administration of justice at all levels, are obliged by the treaty; hence, within their respective spheres of competence and observing the corresponding procedural rules, they must exercise conventionality control in the enactment and enforcement of laws as regards their validity and compatibility with the Convention, and also in the identification, prosecution and deciding of particular situations and specific cases, taking into account the treaty itself and, as appropriate, precedents or guidelines in the case law of the Inter-American Court".[89]

57. In the *Gelman case* we are not faced with this situation, because, the fact that an international judgment exists with the authority of *res judicata* means that the Judgment has a total and absolute binding effect, so that all the authorities of the Uruguayan State — including its judges at all levels – must apply the contents, reasoning and effects of the Judgment "directly" (see *supra* paras. 34 to 42). And, the "control of conventionality" is a useful, effective and necessary instrument to achieve this; hence, the relationship that exists between this mechanism and the authority of "international *res judicata*" (see *infra* paras. 80 to 100).

58. Regarding the effectiveness of inter-American case law, this was the subject of reflections in the separate opinion issued to a judgment delivered in a previous contentious case:[90]

> 51. The domestic judges, therefore, must apply Convention-based jurisprudence, including the case-law established in matters in which the State to which they belong is not a party, since what defines the development of the Inter-American Court's jurisprudence is this Court's interpretation of the inter-American *corpus juris* in order to create a standard in the region on its applicability and effectiveness.[91] We consider this to be of the utmost importance for the correct understanding of "diffuse control of conventionality," since attempting to limit the obligatory nature of Convention-based jurisprudence only to cases in which the State has been a "material party" would be equivalent to nullifying the very essence of the American Convention, whose commitments have been assumed by the national States upon signing and ratifying or acceding to it, and whose non-compliance produces international responsibility.
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> 52. Thus, the "regulatory force" of the American Convention extends to the interpretation made thereof by the Inter-American Court, as the "final interpreter" of the Pact in the inter-American system for the protection of human rights. The Inter-American Court's interpretation of the provisions of the Convention, *acquires the same efficacy as the latter,* since the "Convention-based norms" are, in reality, the result of the "interpretation of the Convention" made by the Inter-American Court as an "autonomous judicial organ whose purpose is the judicial application and interpretation"[92] of the inter-American *corpus juris*. In other words, the result of the interpretation of the American Convention constitutes its jurisprudence; that is to say, "the norms derived from the ACHR, which enjoy the same (direct) effectiveness as that of the said international treaty."

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[89] Considering paragraph 69 of the Order on monitoring compliance with the judgment in the *Case of Gelman v. Uruguay*, to which this separate opinion refers.

[90] Separate opinion issued in the *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of November 26, 2010, paras. 51, 52 and 63.

[91] Thus, for example, the standards set by the European Court of Human Rights, international treaties of the universal system, the resolutions of the United Nations committees, the recommendations of the Inter-American Commission on Human Rights, or even the reports of special rapporteurs of the OAS or the United Nations, among others, may form part of its jurisprudence, provided that the ICourtHR uses and appropriates these when making its interpretation of the inter-American *corpus juris* and to establish the interpreted provision of the Convention as the inter-American standard.

[92] Article 1 of the Statute of the Inter-American Court of Human Rights, approved by resolution No. 448 of the OAS General Assembly in La Paz, Bolivia (October 1979).

> 63. From Article 68(1) it is clear that States Parties to the Pact of San Jose "are committed to compliance with the Court's decisions in all cases to which they are parties." This cannot limit the task of ensuring that the Inter-American Court's case law has "direct effectiveness" in all national States that have expressly recognized its jurisdiction, even if it concerns a matter in which they have not participated formally as a "material party." Given that the Inter-American Court is the international judicial body of the inter-American system for the protection of human rights, whose essential function is to apply and interpret the American Convention, *its interpretations acquire the same degree of effectiveness as the text of the Convention.* In other words, the Convention-based provisions that States must apply are the result of interpretations of the provisions of the Pact of San Jose (and its additional protocols, as well as other international instruments). The interpretations made by the Inter-American Court have two purposes: (i) to ensure the Convention's effectiveness in the particular case with *subjective effects,* and (ii) to establish general effectiveness *with the effects of interpreted norms.* Hence, the logic and necessity that the ruling - aside from being notified to the State party in the specific dispute - also be "transmitted to the States Parties to the Convention,"[93] so that they are fully aware of the Convention's normative content derived from the interpretation of the Inter-American Court, as the "final interpreter" of the inter-American *corpus juris.*

59. In this regard, an issue regarding which the Inter-American Court will assuredly have to reflect in future is to decide whether the "interpreted provision" achieves effectiveness *erga omnes* beyond the "contentious cases" in which the authority of *res judicata* is produced; for example, in "advisory opinions" in which the Court does not perform a "jurisdictional" function *sensu stricto,* but issues an opinion interpreting the provision of the Convention, or of other treaties concerning the protection of human rights in the States of the Americas, or even on the compatibility of domestic laws with such treaties,[94] with extensive participation of all the OAS States (and not only the States Parties to the American Convention), and even with the possibility of holding public hearings, receiving *amici curiae* and applying, by analogy, the provisions of the written proceedings in contentious cases as applicable.[95]

60. In addition, it should not be overlooked that the interpretive effectiveness of treaty-based provisions, known as "*chose interprétée,*" has been underscored for some time by European legal doctrine. In general terms, this refers to the effectiveness *erga omnes* produced by the judgment of the Strasbourg Court for all the States Parties to the European Convention that did not intervene in the international proceedings, insofar as the interpretative criterion, as the European Court of Human Rights has indicated, "serves not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention" (*Case of Ireland v. the United Kingdom,* 18 January 1978).[96]

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93 Article 69 of the American Convention on Human Rights.

94 *Cf.* Articles 64 of the American Convention and 70 to 73 of the Rules of Procedure of the Inter-American Court of Human Rights.

95 *Cf.* Articles 73 and 74 of the Rules of Procedure of the Inter-American Court of Human Rights.

96 This well-known judgment establishes (§ 154): "Nevertheless, the Court considers that the responsibilities assigned to it within the framework of the system under the Convention extend to pronouncing on the non-contested allegations of violation of Article 3 (art. 3). The Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (Article 19)" (underlining added). See also the judgment in the 2009 *Case of Opuz v. Turkey* (§ 163): "… and bearing in mind that the Court provides final authoritative interpretation of the rights and freedoms defined in Section I of the Convention, the Court will consider whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other States." See also the judgment in the case of *Rantsev v. Cyprus and Russia* (para. 197)*: "*Finally the Court reiterates that its judgments serve not only to decide those cases brought before it but, more generally, to

61. This "principle of solidarity" — as it is referred to by the Parliamentary Assembly of the Council of Europe — which has been consolidated in the case law of the Strasbourg Court, was recognized in its important resolution 1226 of September 28, 2000, on the "Implementation of judgments of the European Court of Human Rights":[97]

> 3. The principle of solidarity implies that the case-law of the Court [European Court of Human Rights] forms part of the Convention, thus extending the legally binding force of the Convention *erga omnes* (to all the other parties). This means that the states parties not only have to execute the judgments of the Court pronounced in cases to which they are party, but also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice (underlining added).

62. The "principle of solidarity," together with the consolidated jurisprudential doctrine of the Strasbourg Court on the binding effects of its own precedents (for example, see the *case of Mamatkoulov and Askarov v. Turkey*),[98] has progressively taken root in the States that are subject to the Court's jurisdiction and in their practice when considering that its case law is binding as one of their obligations under the Convention.

63. The Strasbourg Court itself has even referred to the European Convention on Human Rights as *a constitutional instrument of European public order*.[99] Consequently, within the Parliamentary Assembly of the Council of Europe reference is increasingly being made to the interpretive authority of the judgments of the European Court of Human Rights[100] – even as an urgent necessity in the face of the increase in the number of cases since direct access to the Strasbourg Court was granted with the disappearance of the Commission as a result of Protocol 11 to the European Convention.

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elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties."

97 Footnote 38 of the Order on monitoring compliance with the judgment in the *Case of Gelman v. Uruguay,* to which this separate opinion refers. The original text may be found at: http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=16834&Language=EN "*Implementation of judgments of the European Court of Human Rights*": "[…] ("3. *The principle of solidarity implies that the case-law of the Court forms part of the Convention, thus extending the legally binding force of the Convention* erga omnes *(to all the other parties). This means that the states parties not only have to execute the judgments of the Court pronounced in cases to which they are party, but also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice*").

98 Of February 2005, § 121: "While the Court is not formally bound to follow its previous judgments, in the interests of legal certainty and foreseeability it should not depart, without good reason, from its own precedents (see, among other authorities, *mutatis mutandis*, Chapman v. the United Kingdom [GC], no. 27238/95, § 70, ECHR 2001-I, and Christine Goodwin v. the United Kingdom [GC], no. 28957/95, § 74, ECHR 2002-VI). However, it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. It is a living instrument which must be interpreted in the light of present-day conditions (see, among other authorities, Tyrer v. the United Kingdom, judgment of 25 April 1978, Series A no. 26, pp. 15-16, § 31, and Christine Goodwin, cited above, § 75)."

99 *Cf. Case of Loizidou v. Turkey, Grand Chamber,* 23 March 1995, preliminary objections, § 75.

100 For example, *cf. Committee on Legal Affairs and Human Rights. Contribution to the Conference on the Principle of Subsidiarity, Skopje, 1-2 October 2010*: "Strengthening Subsidiarity: Integrating the Strasbourg Court's Case Law into National Law and Judicial Practice." Available at: www.assembly.coe.int/.../2010/20101125_skopje.pdf

64. In this regard, it is worth stressing the recent concurring opinion of Judge Paulo Pinto de Albuquerque of Portugal, in the *Case of Fabris v. France* of February 2013, in which he reflected on the direct and *erga omnes* effect of the Court's judgments:[101]

> The direct and *erga omnes* effect of the Court's judgments. At first sight the Convention provides that the effects of the Court's judgments are restricted to the parties to the case, that is, the applicant or applicants and the respondent State or States. This first reading is misleading, however, and a correct construction of Article 46 requires it to be read jointly with Article 1. In the light of these provisions read together, the Court's judgments have a direct and *erga omnes* effect.

65. One of the footnotes to this opinion includes a citation from the former president of the Strasbourg Court, which indicates that "the binding effect of interpretation by the Court goes beyond *res judicata* in the strict sense."[102] An opinion on "interpretation" that, in 2010, the Strasbourg Court included in the judgment in the *Case of Taxquet v. Belgium* citing the Belgium Court of Cassation.[103]

66. It should not be overlooked that, under the inter-American system, there is an obligation that is not explicitly established in the Rome Convention – clearly identifiable in the Pact of San José — which is the need to adopt domestic legal provisions (legislative or other measures) in order to achieve the effectiveness of the rights and freedoms. This is established in Article 2 of the American Convention in the terms analyzed (see *supra* paras. 44 to 50).

C.3) Difference in the scope and degree of the binding effect as regards the subjective effectiveness of the Judgment "inter partes" *and the objective effectiveness of the Judgment* "erga omnes"

67. The previous sections examined two dimensions of the effectiveness of the Judgment: for the parties that intervened in the international proceedings (*res judicata*); and for all the States Parties to the American Convention (*res interpretata*). In both cases a "binding effectiveness" is produced, although this differs qualitatively.

68. When an inter-American judgment exists that specifically declares the international responsibility of a State, it produces a direct, complete and absolute binding effectiveness so that the domestic authorities must comply with all the terms of the judgment, including the *rationes decidendi* (see *supra* paras. 34 to 42), owing to the provisions of Articles 67 and 68(1) of the American Convention and to the "authority of *res judicata*" (material and substantial) that the Judgment acquires.

69. Meanwhile, the inter-American judgment produces a different binding effectiveness for the other States Parties that did not intervene in the international proceedings, because it is limited to "inter-American case law"; in other words, to the "interpreted provision of the Convention" and not to the whole judgment. This interpretive authority is "relative," inasmuch

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[101] Grand Chamber, *Case of Fabris v. France* (Application no 16574/08), Judgment on merits, 7 February 2013.

[102] *Ibidem*, footnote 6: "... The binding effect of interpretation by the Court goes beyond *res judicata* in the *strict sense*. Such a development would go hand in hand with the possibility for citizens to invoke the Convention directly in domestic law ("direct effect") and the notion of ownership of the Convention by the States." This idea was enshrined in point 4 (c) of the Interlaken Declaration and has been the States Parties' practice (Venice Commission Opinion, cited above, para. 32) (underlining added).

[103] Grand Chamber, *Case of Taxquet c. Belgium* (Application no 926/05), Judgment of 16 November 2010, § 33.

as it is produced provided that no other interpretation exists that grants greater effectiveness to the provision of the Convention in the domestic sphere. This is because the domestic authorities may expand the interpretive standard; they may even not apply the norm of the Convention when another domestic or international norm exists that makes the right or freedom in question more effective in the terms of Article 29 of the American Convention. In addition, in each case, the reservations, interpretive declarations, and denunciations must be considered, although in this regard, the ICourtHR may, eventually, rule on their validity and adequate interpretation,[104] as it has on some occasions.[105]

70. To ensure due compliance with the judgment in the *Gelman case*, the Inter-American Court considered it necessary to clarify the different degrees of effectiveness produced by the inter-American judgments, depending on whether or not the State Party to the Convention had been a material party to the international proceedings.[106] This is fundamental in order to distinguish the "binding effect" that the judgment acquired for the Uruguayan State, which includes the Judgment as a whole — *res judicata* — (see *supra* paras. 34 to 42); from the different indirect "binding effect" derived from the same judgment and intended for all the States Parties to the American Convention — *res interpretata* (see *supra* paras. 43 to 66).

71. In the former there is no possibility of interpreting the provision of the Convention, insofar as all the organs, powers and authorities of the State of Uruguay are bound by the entire judgment in the *Gelman case*, precisely because the Uruguayan State was as a "material party" to the international litigation. As already established, a direct, complete and absolute binding effect of the international judgment exists, including its considerations. Consequently, the State cannot invoke a constitutional provision or interpretation to fail to comply with the international judgment, owing to its treaty-based obligations established in Article 68(1) of the American Convention in relation to Articles 26 and 27 of the Vienna Convention on the Law of Treaties, even when it examines and decides a measure of "control of constitutionality."[107]

72. Meanwhile, the judgment in the *Gelman case* produces a binding effect of the inter-American case law for the other States Parties to the American Convention. An effectiveness only as regards the minimum standard of interpretation of the provision of the Convention in order to ensure its minimum effectiveness; which, as already established (see *supra* para. 69), is a "relative" binding effectiveness, insofar as it may diverge from the case law of the ICourtHR

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[104] The ICourtHR has established that "a reservation that suspends all the fundamental laws whose content is non-derogable must be considered incompatible with the object and purpose of the Convention and, consequently, incompatible with this instrument. The situation might be different if the reservation only restricted certain aspects of the non-derogable domestic law without depriving the law of its basic content" (*Case of Radilla Pacheco v. Mexico***.** Preliminary objections, merits, reparations and costs. Judgment of November 23, 2009. Series C No. 209, para. 310). In order to decide this, the Court must examine whether, even when the reservation only restricts some aspects of a non-derogable law, this prevents the Convention from having full meaning and practical effects. *Cf. Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983***.** Series A No. 3, para. 61; and *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 30.

[105] *Cf.*, for example, *Case of Radilla Pacheco v. Mexico***.** Preliminary objections, merits, reparations and costs. Judgment of November 23, 2009. Series C No. 209, paras. 311 and 312.

[106] *Cf.* Considering paragraph 67 of the Order on monitoring compliance with the judgment in the *Case of Gelman v. Uruguay*, to which this separate opinion refers.

[107] The Supreme Court of Justice of Uruguay considered that: "Thus, the provisions of the above-mentioned international judgment [in the *Case of Gelman v. Uruguay*] does not alter the legal parameters on which the issue of unconstitutionality must be decided in the instant case (Arts. 256 to 259 of the Constitution). And it added that, "Furthermore, it should be repeated that, in the case in hand, the matter to be decided relates — exclusively — to verifying whether or not the legal norm is adapted to the rights and guarantees embodied in the Constitution. And it is only the highest organ of the Judiciary that is competent to make this verification." Judgment No. 20 of February 22, 2013, pp. 18 and 19.

when the norm is made effective by means of a more favorable interpretation in the domestic sphere. Thus, there is a "margin for the interpretation at the domestic level" that the authorities may make in order to enhance the effectiveness of the fundamental right or freedom by means of the domestic interpretation, provided that this is intended to increase the effectiveness of the provision of the Convention; a circumstances that does not apply when the State was a "material party" to the international proceedings, and is bound absolutely by all aspects of the judgment owing to the scope of the authority of international *res judicata*.

73. Under the European system for the protection of human rights, the States Parties are obliged to comply with the judgment. The "binding force and execution of judgments" is explicitly derived from Article 46(1) and (2) of the European Convention on Human Rights.[108] However, this reveals another significant difference with the inter-American system, insofar as it is not the European Court of Human Rights that is responsible for ensuring compliance with its judgments, but rather it is the Committee of Ministers, as a political organ, which has the competence to supervise their execution. In this regard, the Committee of Ministers may request that the Strasbourg Court intervene to provide a ruling when there is an impediment to the execution of the final judgment owing to a problem of interpretation of the judgment.[109]

74. When the ICourtHR monitors compliance with a judgment, as it is now doing in the *Gelman case*, it can also note that there are impediments to compliance owing to an inadequate interpretation in the domestic sphere of the American Convention, of the judgment itself or, in general, of the inter-American *corpus juris*. It would appear that this is the case of the judgment of the Supreme Court of Justice of Uruguay of February 22, 2013, which includes interpretations and implications that differ from those of the Judgment of the ICourtHR. Accordingly, the Order on monitoring compliance to which this separate opinion refers clarifies and emphasizes the interpretive scope of the judgment in the *Gelman case,* and the way in which the ruling of the Supreme Court of Justice of Uruguay constitutes "an impediment to full compliance with the Judgment,"[110] which could lead to "an interruption of access to justice for the victims of gross human rights violations who are covered by a judgment of the Inter-American Court and could represent a mechanism to perpetuate the impunity and neglect of these facts."[111]

D) Objective effectiveness of the judgment as part of the system of "collective enforcement"

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[108] "Article 46. Binding force and execution of judgments 1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. 3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee. 4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1. 5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

[109] *Cf.* Art. 46(3) of the European Convention on Human Rights.

[110] *Cf.* Operative paragraph 2 of the Order on monitoring compliance with judgment in the *Case of Gelman v. Uruguay,* to which this separate opinion refers.

[111] Considering paragraph 102, *in fine*, of the Order on monitoring compliance with judgment in the *Case of Gelman v. Uruguay,* to which this separate opinion refers.

75. There is also a direct relationship between the effectiveness of the judgment (consequence of the international *res judicata*) and the system of "collective enforcement" derived from the American Convention. All the States Parties, to the Pact, as a whole, are bound to ensure compliance with and the effectiveness of the rulings issued by the Inter-American Court, because the States Parties to the Convention and, in general, all the States that constitute the Organization of American States are interested in contributing to the establishment of an inter-American public order that guarantees the democratic development of their peoples. The American Convention establishes the possibility of ensuring compliance with the Inter-American Court's judgments pursuant to Article 65 of the Pact of San José.

76. In this regard, the well-chosen words of the former president of the Inter-American Court of Human Rights, Antônio Augusto Cançado Trindade, spoken more than a decade ago before the OAS Permanent Council, are especially relevant:[112]

> The exercise of the collective enforcement by the States Parties to the Convention should not be merely reactive, when there has been non-compliance with a judgment of the Court, but also proactive, in the sense that all the States Parties should previously adopt *positive measures* of protection in accordance with the provisions of the American Convention. It is evident that a judgment of the Court is *'res judicata,'* binding for the defendant State in question, but it is also '*chose interpretée*,' valid *erga omnes partes*, in the sense that it has implications for all the States Parties to the Convention, as regards their duty of prevention. It is only by a clear understanding of these fundamental elements that we will construct an inter-American *public order* based on the faithful observance of human rights (underlining added).

77. Indeed, the Inter-American Court has indicated that it is the States of the Americas themselves that have established a "system of guarantee" which signifies that the States Parties to the Pact of San José must make every effort to contribute to compliance with the ICourtHR's judgments. Thus, the Court has indicated that:[113]

> 46. The important role of the notion of collective enforcement for the implementation of the international decisions of human rights bodies has been emphasized in other cases by this Court,[114] the Human Rights Committee,[115] and the European Court of Human Rights.[116] The

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[112] April 17 2002, repeated two days later in the session of the Committee on Juridical and Political Affairs held on April 19, 2002, on the occasion of the presentation that, as President of the Inter-American Court of Human Rights, he made in the joint meeting of the ICourtHR and the Inter-American Commission on Human Rights. Presentation entitled "Towards the consolidation of the international legal standing of the petitioners in the inter-American system for the protection of human rights."

[113] Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of November 23, 2012. *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, Considering paragraphs 46 and 47.

[114] In this regard, in contentious cases such as *Goiburú et al. v. Paraguay*, *La Cantuta v. Peru*, and the *Mapiripán Massacre v. Colombia*, the Court has applied this concept to establish that the States Parties to the Convention must collaborate with each other to eliminate the impunity of the violations committed in these cases, by the prosecution and punishment, as appropriate, of those responsible. Thus, the Court has declared that the mechanism of collective enforcement established under the American Convention, together with the regional, international and universal obligations in this regard, obliged the States of the region to collaborate in good faith in this regard, either by the extradition or the prosecution on their territory of those responsible for the facts of these cases.

[115] "[E]very State party has a legal interest in the performance by every other State party of its obligations. This follows from the fact that the "rules concerning the basic rights of the human person" are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms." General comments adopted by the Human Rights Committee, General Comment No. 31, The nature of the General Legal Obligation Imposed on States Parties to the Covenant, eightieth session, U.N. Doc. HRI/GEN/1/Rev.7 at 225 (2004), para. 2.

[116] "Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings,

notion of collective enforcement has also been used by the Committee of Ministers of the Council of Europe when assessing non-compliance with some judgments[117] and constitutes one of the reasons for the 2009 amendment of Article 46 of the European Convention on Human Rights made to strengthen the mechanisms for the implementation and supervision of the judgments by assigning new powers to the Committee of Ministers and the European Court.[118]

47. In this regard, this Court has indicated that the American Convention, as well as the other human rights treaties, are applied in keeping with the notion of collective enforcement and have a special character that differentiates them from other treaties that regulate reciprocal interests between States Parties.[119] This concept of collective enforcement is closely related to the practical effects of the judgments of the Inter-American Court, because the American Convention embodies a system that constitutes a real regional public order, the maintenance of which is in the interest of each and every State Party. The interest of the signatory States is the preservation of the system for the protection of human rights that they themselves have created, and if a State violates its obligation to comply with the decisions of the only jurisdictional organ in this matter, it is violating the undertaking to comply with the Court's judgments made towards the other States. Therefore, the task of the General Assembly of the Organization of American States, in the case of manifest non-compliance with a judgment delivered by the Inter-American Court by one of the States, is precisely that of protecting the practical effects of the American Convention and preventing inter-American justice from becoming illusory by being at the discretion of the internal decisions of a State (underlining added).

78. Evidently, we are not faced with this situation in the Order on monitoring compliance with judgment that gives rise to this separate opinion. To the contrary, the ICourtHR has appreciated the efforts and actions undertaken by the Uruguayan State in order to comply with the judgment in the *Gelman case;*[120] and has considered that significant aspects of the judgment have been complied with satisfactorily (see *supra* paras. 4 and 5).[121] Furthermore, it has considered relevant "certain actions aimed at compliance with operative paragraphs 9 and

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objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement.'" ECHR, *Case of Ireland v. United Kingdom* (*No. 5310/71*), Judgment of 18 January 1978, para. 239. Similarly, ECHR, *Case of Mamatkulov and Askarov v. Turkey* (No. 46827/99 and 46951/99), Judgment of 4 February 2005, para. 100. Also, in the Case of *Soering v. United Kingdom*, the European Court declared that the European Convention should be interpreted with regard "to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. […] Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective." ECHR, *Case of Soering v. the United Kingdom* (*No. 14038/88*), Judgment of 7 July 1989, para. 87. Similarly, ECHR, *Case of İlhan v. Turkey* (No. 22277/93), Judgment of 27 June 2000, para. 51; *Case of Glasenapp v. Germany* (No. 9228/80), Judgment of 28 August 1986, para. 48, and *Case of Shamayev and Others v. Georgia and Russia* (No. 36378/02), Judgment of 12 April 2005. Final, 12 October 2005, para. 302.

117 "ECHR, *Case of Loizidou v. Turkey*, (No. 15317/89), Judgment of 23 March 1995, and Council of Europe, Committee of Ministers, Resolution (Res DH (2001) 80) with regard to the Judgment of the European Court of Human Rights of 28 July 1998 in the case of *Loizidou v. Turkey*, adopted by the Committee of Ministers on 26 June 2001."

118 "The Parties to the Convention have a collective duty to preserve the Court's authority – and thus the Convention system's credibility and effectiveness – whenever the Committee of Ministers considers that one of the High Contracting Parties refuses, expressly or through its conduct, to comply with the Court's final judgment in a case to which it is party." Council of Europe, Committee of Ministers, Explanatory report on Protocol 14 to the European Convention. Available at: http://conventions.coe.int/Treaty/EN/Reports/Html/ 194.htm

119 *Cf. Case of Baena Ricardo et al. v. Panama*. *Jurisdiction,* para. 96.

120 Considering paragraphs 8, 12, 13, 27, 42, 43, 44, 45, 46, 103 and declarative paragraph 2 of the Order on monitoring compliance with the judgment in the *Case of Gelman v. Uruguay,* to which this separate opinion refers.

121 Operative paragraph 1 of the Order on monitoring compliance with the judgment in the *Case of Gelman v. Uruguay,* to which this separate opinion refers.

11 of the Judgment" (see *supra* paras. 6 and 7);[122] also noting the "impediment" to full compliance with the Judgment represented by the ruling of the Supreme Court of Justice of Uruguay of February 22, 2013 (see *supra* paras. 8 and 9).[123]

79. In this regard, the willingness of the State of Uruguay to comply with its international obligations should be emphasized, and this can also be observed by its partial acknowledgement of international responsibility during the international proceedings,[124] which has "considerable symbolic value to ensure that similar acts are not repeated."[125]

IV. THE AUTHORITY OF "INTERNATIONAL *RES JUDICATA*" AND "CONTROL OF CONFORMITY WITH THE CONVENTION"

80. When the authority of international *res judicata* is produced owing to the non-appealable nature of the Judgment of the ICourtHR — which signifies its "immutable" nature – the judgment in its entirety is directly and subjectively binding (*res judicata*) on the parties (see *supra* paras. 34 to 42); and an objective and indirect binding effect of the interpretation of the provision of the Convention (*res interpretata)* is produced for all the States Parties to the American Convention (see *supra* paras. 43 to 66).

81. In this Order on monitoring compliance with judgment, the Inter-American Court makes a distinction, for the effects of the adequate exercise of "control of conventionality" at the domestic level (which is of the greatest importance for the inter-American system), "depending on whether the judgment has been delivered in a case in which the State was a party. This is because the binding effect of the provision of the Convention that is interpreted and applied differs depending on whether or not the State was a material party to the international proceedings."[126]

82. This entails two distinct manifestations of the exercise of "control of conventionality" in the domestic sphere that involve the parties that intervened in the international proceedings directly (*res judicata),* and all the authorities of the States Parties to the American Convention indirectly (*res interpretata).*

A) *Res judicata* and "control of conformity with the Convention"

83. When the international responsibility of a State has been established in a judgment of the ICourtHR, the authority of *res judicata*, necessarily has an absolute binding effect on the way in which the domestic authorities of the State that has been found guilty must interpret the provision of the Convention and, in general, the inter-American *corpus juris* applied in the judgment deciding the case. This means that all the organs, powers and authorities of the State concerned – legislative, administrative and jurisdictional at all levels – are obliged by the terms

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[122] *Cf.* Operative paragraph 2 of the Order on monitoring compliance with judgment in the *Case of Gelman v. Uruguay,* to which this separate opinion refers.

[123] *Cf. Idem.*

[124] *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, paras. 19-31.

[125] *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, para. 30.

[126] Para. 67 of the Order on monitoring compliance with judgment in the *Case of Gelman v. Uruguay,* to which this separate opinion refers.

of the international judgment, including its grounds, considerations, operative paragraphs and the effects it produces.

84. In this situation, the "control of conventionality" constitutes a useful, adequate and necessary instrument to achieve compliance with, and due implementation of, the international judgment, insofar as this mechanism permits the application not only of international law, and particularly international human rights law, but also makes it possible to comply with the international obligation derived from the inter-American judgment pursuant to Article 68(1) of the American Convention. This is particularly relevant when compliance with the international judgment entails "annulling" a general law, since all the authorities and especially those who perform jurisdictional functions – at all levels – "have the task of ensuring that the American Convention and the judgments of this Court prevail over domestic law, interpretations and practices that impede compliance with the decisions taken in a specific case."[127]

85. This reveals the importance of an adequate understanding and exercise of "control of conventionality" in order to ensure due compliance with an inter-American judgment. Since the ICourtHR declared that the Law on the Expiry of the Punitive Claims of the State (Law 15,848) was null and void in the judgment in the *Gelman case*,[128] all the Uruguayan authorities — including its judges at all levels – must "guarantee" that the said law never again represents an impediment to the investigation of the facts, and the prosecution and, if appropriate, punishment of those responsible for the victims in the *Gelman case,* as well as in other cases of gross human rights violations that took place in Uruguay during the military dictatorship (1973-1985), because:

> 231. The failure to investigate the gross human rights violations committed in this case, which occurred in the context of systematic patterns, reveals the State's non-compliance with its international obligations established by non-derogable norms.[129]
>
> 232. Given their evident incompatibility with the American Convention, the provisions of the Expiry Law that prevent the investigation and punishment of gross human rights violations have no legal effects and, consequently, cannot continue to represent an impediment to the investigation of the facts of this case and the identification and punishment of those responsible, nor can they have the same or a similar impact on other cases of gross violations of human rights established in the American Convention that may have occurred in Uruguay[130] (underlining added).

86. The Uruguayan authorities, and especially the judges who are investigating the serious human rights violations committed during the military dictatorship (1973-1985), have the obligation, in order to comply with the inter-American judgment, *to apply directly the considerations on which it is founded.* Thus, the *rationes decidendi* that are the basis for the

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[127] Para. 73 of the Order on monitoring compliance with judgment in the *Case of Gelman v. Uruguay,* to which this separate opinion refers.

[128] Because it was contrary to the American Convention and to the Inter-American Convention on Forced Disappearance of Persons. Operative paragraph 6 of the Judgment declared that the State had failed to comply with the obligation to adapt its domestic law to the American Convention (contained in Article 2 in relation to Articles 8(1), 25 and 1(1) of this instrument and Articles I.b, III, IV and V of the Inter-American Convention on Forced Disappearance of Persons), as a result of the *interpretation and application* of the Law on the Expiry of the Punitive Claims of the State in relation to gross human rights violations.

[129] "*Cf. Case of Goiburú et al.*, *supra* footnote 23, paras. 93 and 128; *Case of Ibsen Cárdenas and Ibsen Peña, supra* footnote 9, para. 61 and 197, and *Case of Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* footnote 16, para. 137."

[130] "*Cf. Case of Barrios Altos. Merits*, *supra* footnote 288, para. 44; *Case of La Cantuta v. Peru. Merits, reparations and costs.* Judgment of November 29, 2006. Series C No. 162, para. 175, and *Case of Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* footnote 16, para. 174."

operative paragraphs of the judgment in the *Gelman case* are essential in order to understand this judgment adequately and to achieve due, effective and full compliance with it.

87. This means that, to ensure an adequate exercise of conventionality control *ex officio*, the Uruguayan authorities, and especially the judges at all levels, must take into consideration the terms of the international Judgment in the case in which the Oriental Republic of Uruguay was a material party and is, therefore, bound by its provisions:

(i) that the Expiry Law was declared "without legal effects" owing to its incompatibility with the American Convention and the Inter-American Convention on Forced Disappearance of Persons, because it may prevent the investigation and eventual punishment of those responsible for gross human rights violations in the *Gelman case* and in other cases of gross human rights violations that took place in Uruguay over the same period;[131]

(ii) that the effects of the Expiry Law or of analogous norms, such as the statute of limitations, extinction, non-retroactivity of the criminal law or other similar mechanisms exonerating responsibility, or any administrative or judicial interpretation in this regard, do not represent an impediment or obstacle to the continuation of the investigations;[132]

(iii) that the judgment of the Supreme Court of Justice of Uruguay of February 22, 2013, "constitutes an impediment to full compliance with the judgment" in the *Gelman case*;[133]

(iv) that gross human rights violations — such as forced disappearance of persons – are "not subject to a statute of limitations" because, owing to their very nature, they constitute a violation of *jus cogens* norms, based on non-derogable provisions of international law*;*[134]

(v) that the forced disappearance of persons constitutes a permanent or continuing crime;[135]

(vi) that the *Gelman case* "is a case of gross human rights violations, in particular forced disappearances; hence, it is this crime that should prevail in the investigations that must be opened or continued in the domestic sphere. As has already been established, since this is a crime of permanent execution – in other words, it continues to be committed over time – when the law codifying the crime of forced disappearance of persons enters into force, the new law is applicable without this representing its retroactive application";[136]

(vii) that the enforced disappearance of María Macarena Gelman García Iruretagoyena is the result of the removal, suppression and substitution of her identity,[137] and

(viii) that the obligation "to guarantee" that the Expiry Law never again represents an impediment to the investigation of the facts, and the prosecution, and eventual punishment of gross violations of human rights, refers not only to those responsible for the victims in the

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131 *Cf. Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, paras. 246, 253 and operative paragraph 11.

132 *Cf. Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, para. 254 and Considering paragraph 104 of the Order of the Inter-American Court of March 20, 2013, on monitoring compliance with judgment in the *Case of Gelman v. Uruguay,* to which this separate opinion refers

133 Declarative paragraph 2 and Considering paragraphs 54, 55, 56, 57, 90 and 103 of the Order on the Inter-American Court of March 20, 2013, on monitoring compliance with judgment in the *Case of Gelman v. Uruguay,* to which this separate opinion refers.

134 *Cf. Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, paras. 99, 183, 225 and 254.

135 *Cf. Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, paras. 71, 72, 73, 78, 233, 236 and 240.

136 *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, para. 236.

137 *Cf. Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, paras. 60, 120, 13, 163, 230, 235 and 252.

Gelman case, but also to those responsible for other similar gross human rights violations that took place in Uruguay over the same period.[138]

88. The adequate exercise of control of conventionality by the Uruguayan authorities is essential for the due and integral compliance with the judgment in the *Gelman case* and cannot be made contingent on the constitutional interpretation made by a domestic organ, not even invoking a constitutional norm or the proper exercise of its competence to exercise "control of constitutionality." This is because of the binding nature of the judgments of the ICourtHR pursuant to Article 68(1) and the rules established in Articles 26[139] and 27[140] of the Vienna Convention on the Law of Treaties.

89. The international public law principles of *good faith* and *practical effects*, which also involve the principle of *pacta sunt servanda,* are international tenets to ensure that the international treaties are complied with by the national States and have been repeated constantly in the case law of the Inter-American Court. The compliance obligation under treaty-based law is binding for all the domestic authorities and organs because the State as a whole responds and acquires international responsibility when it fails to comply with the international instruments to which it has acceded.

90. This means that, as a result of the *Gelman case*, all the Uruguayan authorities (including the organs for the administration of justice and judges at all levels) are bound directly by the international judgment, which has acquired the authority of *res judicata* in the terms analyzed (see *supra* paras. 26 to 30). Consequently, all the Uruguayan authorities must, within their respective spheres of competence, comply with and apply "directly" what is expressly established in declarative paragraphs 2 and 3 of the Order of March 20, on monitoring compliance with judgment to which this separate opinion refers; and also operative paragraphs 9, 10, 11, 15 and 16 of the judgment in the *Case of Gelman v. Uruguay* of February 24, 2011, in relation to the aspects pending compliance, taking into account, also, the considerations on which the said operative paragraphs are based. Thus, the obligation to exercise "control of conventionality" adequately in this case where international *res judicata* exists is essential for due compliance with the inter-American judgment.

B) *Res interpretata* and "control of conformity with the Convention"

91. Meanwhile, the second expression of the exercise of "control of conventionality" in the domestic sphere results from the application of the inter-American case law arising from this case – including that of its execution – by the other States Parties to the Pact of San José. It is thus that the provision of the Convention acquires interpretive effectiveness for the other States Parties to the American Convention (*res interpretata*). The binding effect of the "interpretation of the provision of the Convention" – as explicitly noted in considering paragraphs 67, 69 and 72 of the present Order on compliance to which this separate opinion refers – constitutes a treaty-based obligation derived from Articles 1 and 2 of the American Convention in the terms previously analyzed (see *supra* paras. 43 to 66).

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[138] *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, paras. 232 and 253.

[139] "Art. 26: *Pacta sunt servanda*. Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[140] "Art. 27. Internal law and observance of treaties. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

92. In the Order on monitoring compliance to which this separate opinion refers, the ICourtHR considered that "conventionality control" constitutes "an obligation" for every authority of the States Parties to the Convention in order to guarantee and to ensure respect for human rights, within the framework of the corresponding procedural rules and spheres of competence.[141] Thus, this obligation is derived from the legal effectiveness of the Convention itself; and, fundamentally, from the treaty-based obligations "to respect," "to ensure" and "adaptation" (normative/interpretive) established in Articles 1 and 2 of the Pact of San José, in relation to Article 29 of the Pact, in order the achieve the greatest possible effectiveness of the human right concerned.

93. Hence, the second expression of the exercise of "control of conformity with the Convention" in situations and cases in which the State concerned has not been a party to the international proceedings in which certain case law was established. Owing to the mere fact of being a Party to the American Convention, every public authority and all the organs of the State, including the democratic bodies,[142] judges and other bodies involved in the administration of justice at all levels are bound by the treaty, which obliges them to exercise control of conventionality *ex officio*, taking into account the treaty itself and its interpretation by the Inter-American Court, within the framework of their respective spheres of competence and of the corresponding procedural rules, either by "the enactment and enforcement of laws, as regards their validity and compatibility with the Convention, or by the identification, prosecution, and deciding of particular situations and specific cases."[143]

94. The interpretive effectiveness of the provision of the Inter-American Convention is relative, insofar as the domestic authorities may always implement the treaty-based provision by a more favorable interpretation in keeping with the *pro personae* principle established in Article 29 of the Pact of San José (see *supra* paras. 52 to 55).

95. It should not be forgotten that the ICourtHR has ruled previously on the incompatibility with the American Convention of amnesty or self-amnesty laws, and this has resulted in the international responsibility of other specific States.[144] Evidently, in these particular situations we

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[141] Considering paragraph 72 of the Order on monitoring compliance with judgment in the *Case of Gelman v. Uruguay,* to which this separate opinion refers.

[142] "The democratic legitimacy of specific facts or acts in a society is limited by the international norms and obligations for the protection of human rights recognized in international treaties, such as the American Convention, so that that the existence of a truly democratic regime is determined by both its formal and substantial characteristics; therefore, particularly in cases of gross violations of norms of international human rights law, the protection of human rights constitutes an impassable boundary to the rule of the majority; in other words, to the sphere of what 'can to be decided' by the majorities in democratic bodies, in which priority should be given to "control of conventionality," which is a function and task of any public authority and not only the Judiciary. In this regard, in the *Case of Nibia Sabalsagaray Curutchet*, the Supreme Court of Justice exercised an appropriate control of conformity with the Convention as regards the Expiry Law, by establishing, *inter alia*, that 'the decision of the majority is essentially limited by two factors: protection of the fundamental rights (the most important are the rights to life and to personal liberty, and they cannot be sacrificed based on any majority decision, or general interest, or common good), and the fact that public authorities are subject to the law].' Other domestic courts have also referred to the limits of democracy in relation to the protection of fundamental rights" (judgment in the Case of *Gelman v. Uruguay*, para. 239).

[143] Considering paragraph 69 of the Order on monitoring compliance with judgment in the *Case of Gelman v. Uruguay,* to which this separate opinion refers.

[144] *Case of Barrios Altos v. Peru*. Merits. Judgment of March 14, 2001. Series C, No. 75; *Case of Almonacid Arellano et al. v. Chile*. Preliminary objections, merits, reparations and costs. Judgment of September 26, 2006. Series C, No. 154; *Case of La Cantuta v. Peru.* Merits, reparations and costs. Judgment of November 29, 2006. Series C, No. 162; *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*. Preliminary objections, merits, reparations and costs. Judgment of November 24, 2010, Series C, No. 219; *Case of Gelman v. Uruguay*. Merits and reparations. Judgment of February 24, 2011 Series C, No. 221; and *Case of the Massacres of El Mozote and nearby places v. El Salvador.* Merits, reparations and costs. Judgment of October 25, 2012 Series C, No. 252.

are faced with the first expression of "control of conformity with the Convention" due to the fact that the inter-American judgment binds the parties that intervened in the international proceedings directly, because the judgment has the authority of *res judicata*.

96. Moreover, in more than twenty contentious cases, the Inter-American Court has ruled on different aspects of "control of conventionality" in judgments that involve the international responsibility of thirteen different States: Argentina,[145] Barbados,[146] Bolivia,[147] Brazil,[148] Chile,[149] Colombia,[150] Guatemala,[151] Mexico,[152] Panama,[153] Paraguay,[154] Peru,[155] Uruguay[156] and Venezuela;[157] which means more than half the States Parties to the Convention that have accepted the ICourtHR's contentious jurisdiction. Since the 2010 *Case of Cabrera García and Montiel Flores v. Mexico*,[158] the ICourtHR has been providing examples of the way in which the highest courts of several States of the region refer to the binding nature of the judgments of the

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[145] *Case of Fontevecchia and D'Amico v. Argentina. Merits, reparations and costs.* Judgment of November 29, 2011. Series C No. 238, paras. 93, 94 and 113; and *Case of Furlan and family members v. Argentina.* Preliminary objections, merits, reparations and costs. Judgment of August 31, 2012 Series C No. 246, paras. 303 a 305.

[146] *Case of Boyce et al. v. Barbados*. *Preliminary objection, merits, reparations and costs.* Judgment of November 20, 2007. Series C No. 169, para. 79.

[147] *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs*. Judgment of September 1, 2010. Series C No. 217, para. 202.

[148] *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2010. Series C No. 219, paras. 49 and 106.

[149] *Case of Almonacid Arellano* et al. *v. Chile*. *Preliminary objections, merits, reparations and costs*. Judgment of September 26, 2006. Series C No. 154, para. 124; and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, paras. 282 a 284.

[150] *Case of Manuel Cepeda Vargas v. Colombia. Preliminary objections, merits and reparations*. Judgment of May 26, 2010. Series C No. 213, para. 208, footnote 307; and Case of the Santo Domingo Massacre v. Colombia. Preliminary objections, merits and reparations. Judgment of November 30, 2012 Series C No. 259, paras. 142 to 144.

[151] *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of September 4, 2012 Series C No. 250, para. 262; and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala. Merits, reparations and costs.* Judgment of November 20, 2012 Series C No. 253, para. 330.

[152] *Case of Rosendo Radilla Pacheco v. United Mexican States. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2009. Series C No. 209, para. 339 and footnote 321; *Case of Fernández Ortega et al. v. Mexico*. *Preliminary objection, merits, reparations and costs*. Judgment of August 30, 2010. Series C No. 215, paras. 236 and 237; *Case of Rosendo Cantú et al. v. Mexico*. *Preliminary objection, merits, reparations and costs*. Judgment of August 31, 2010. Series C No. 216, paras. 219 and 220, and *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of November 26, 2010. Series C No. 220, paras. 21 and 225 to 233.

[153] *Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of August 12, 2008. Series C No. 186, para. 180; and *Case of Vélez Loor v. Panamá. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2010. Series C No. 218, para. 287.

[154] *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010. Series C No. 214, para. 311.

[155] *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 No. 158, para. 128; *Case of La Cantuta v. Peru*. *Merits, reparations and costs.* Judgment of November 29, 2006. Series C No. 162, para. 173.

[156] *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, paras. 193 and 239.

[157] *Case of Chocrón Chocrón v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of July 1, 2011. Series C No. 227, paras. 164, 165 and 172; and *Case of López Mendoza v. Venezuela.* Merit, reparations and costs. Judgment of September 1, 2011. Series C No. 233, paras. 226 to 228.

[158] *Cf. Case of Cabrera García and Montiel Flores v. Mexico***.** Preliminary objection, merits, reparations and costs. Judgment of November 26, 2010. Series C No. 220, paras. 226 to 232.

Inter-American Court and the way in which they have received or applied the control of conventionality taking into consideration inter-American case law. It has also done so in this Order on monitoring compliance with judgment to which this separate opinion refers, citing the cases of Argentina, Bolivia, Colombia, Costa Rica, Guatemala, Mexico, Panama, Peru and Dominican Republic.[159] Moreover, the Inter-American Court refers to domestic case law in order to found and conceptualize the violation of the American Convention in its decisions.[160]

97. The judgment of February 24, 2011, in the *Case of Gelman v. Uruguay* constitutes an extremely important precedent for the inter-American system and for the evolutive character of inter-American case law on the legal doctrine of "control of conformity with the Convention," because it explains clearly that this type of control must be carried out *ex officio* by all the domestic authorities – including the democratic bodies – "in which 'control of conventionality' must also prevail, since this is a function and task of any public authority and not only of the Judiciary."[161] Similarly, in the judgment of November 2012 in the *Case of the Santo Domingo Massacre v. Colombia*, it was established that all the organs and authorities of a State Party to the Convention have the obligation to exercise "control of conformity with the Convention."[162]

98. Thus, a joint "dynamic and complementary control" of the treaty-based obligations of the States to respect and ensure human rights has been generated between the domestic authorities (who have the primary and essential obligation to guarantee rights and to exercise "control of conventionality") and the international bodies – in a subsidiary and complementary manner[163] - in order to develop and harmonize decision-making criteria,[164] by the exercise of a "primary" control of conformity with the Convention by the domestic authorities and, eventually, by the "complementary" control of conventionality in the international sphere. Nevertheless, it should not be forgotten that the State "is the principal guarantor of the rights of the individual" and has the obligation to respect and ensure them.

99. The foregoing is leading to a new understanding of the inter-American system for the protection of human rights, which is now considered to be an "integrated system," because it involves no only the two organs of protection referred to in the American Convention — the

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159 Considering paragraphs 74 to 86 of the Order on monitoring compliance with judgment in the *Case of Gelman v. Uruguay,* to which this separate opinion refers.

160 Considering paragraph 71 of the Order on monitoring compliance with judgment in the *Case of Gelman v. Uruguay,* to which this separate opinion refers.

161 *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, paras. 193 and 239.

162 *Case of the Santo Domingo Massacre v. Colombia***.** Preliminary objections, merits and reparations. Judgment of November 30, 2012 Series C No. 259, para. 142.

163 *Cf. Case of the Santo Domingo Massacre v. Colombia***.** Preliminary objections, merits and reparations. Judgment of November 30, 2012 Series C No. 259. Paragraph 142 indicates: *The State's responsibility under the Convention can only be required at the international level after the State itself has had the opportunity to declare the violation and to repair the harm caused by its own means. This is based on the principle of complementarity (subsidiarity) that crosscuts the inter-American human rights system, which – as stated in the Preamble to the American Convention – "reinforce[s] or complement[s] the protection provided by the domestic law of the American States." Thus, the State "is the main guarantor of the human rights of the individual, so that, if an act that violates the said rights occurs, it is the State itself that has the obligation to decide the matter at the domestic level and, [as appropriate,] to make reparation, before having to respond before international instances, such as the inter-American system, which derives from the subsidiary nature of the international proceedings in relation to the national systems that guarantee human rights." These ideas have also been incorporated in recent case law based on the opinion that all the authorities and organs of a State Party to the Convention have the obligation to ensure "control of conformity with the Convention"* (underlining added).

164 Considering paragraph 71 of the Order on monitoring compliance with judgment in the *Case of Gelman v. Uruguay,* to which this separate opinion refers.

Inter-American Commission and Court – but also includes, especially and concomitantly, all the domestic authorities of the States Parties to the Pact of San José, that must play an active role in the effective guarantee of human rights, in either their national or international dimension as an "integrated system" for the protection of rights.

100. In sum, we are evolving towards an "integrated inter-American system" – with a dynamic and complementary "control of conventionality" — which is progressively establishing an authentic *ius constitutionale commune Americanum* as a substantial and indissoluble nucleus to preserve and guarantee the human dignity of the inhabitants of the region.

Eduardo Ferrer Mac-Gregor Poisot
Judge

Pablo Saavedra Alessandri
Secretary