ORDER OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS
OF JULY 1, 2011

CASE OF LOAYZA TAMAYO *v.* PERU

MONITORING OF COMPLIANCE WITH JUDGMENT

HAVING SEEN:

1. The Judgments on the merits, reparations, and costs, and the interpretation of the latter rendered by the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court," or "the Tribunal") on September 17, 1997, November 27, 1998, and June 3, 1999, respectively.

2. The Orders of Monitoring of Compliance with Judgment on reparations and costs (hereinafter "the Judgment") rendered by the Court on November 17, 1999, June 1, 2001, November 27, 2002, November 27, 2003, March 3, 2005, September 22, 2006, December 13, 2007, and February 6, 2008. In the last Order, the Court declared, *inter alia:*

> 1. That it will keep open the proceeding for monitoring compliance with the still-pending items in the instant case, namely:
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> > a) The reinstatement of María Elena Loayza-Tamayo in the teaching sector in public institutions, on the understanding that the amount of her salary and other benefits is to be equal to the remuneration she was receiving for these activities in the public and private sector at the time of her detention (*Operative paragraph 1 of the judgment on reparations, November 27, 1988*);
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> > b) The guaranteeing of her full retirement benefits, including those owed for the period transpired since the time of her detention (*Operative paragraph 2 of the judgment on reparations, November 27, 1998*);
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> > c) The adoption of all domestic legal measures necessary to ensure that no adverse decision delivered in proceedings against Loayza-Tamayo in the civil courts has any effect whatsoever (*Operative paragraph 3 of the judgment on reparations, November 27, 1998*);
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> > d) The adoption of the internal legal measures necessary to adapt Decree-Laws 25,475 (Crime of Terrorism) and 25,659 (Crime of Treason) to conform to the American Convention (*Operative paragraph 5 of the judgment on reparations, November 27, 1998*), and
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> > e) The investigation of the facts of the instant case, identifying and punishing those responsible for those acts, and the adoption of all necessary domestic legal measures to ensure that this obligation is discharged (*Operative paragraph 6 of the judgment on reparations, November 27, 1998*).

3. The briefs of the Republic of Peru (hereinafter "the State," "the State of Peru," or "Peru") of April 30, 2008, June 29, 2009, March 29, May 7, June 22, and July 27, 2010, and

June 10, 2011, wherein information was provided regarding the monitoring of compliance with the Judgment.

4. The communications of Mrs. María Elena Loayza Tamayo (hereinafter "Mrs. Loayza Tamayo" or "the victim") of June 8, and December 21, 2008, August 10, 2009, July 23 and September 22, 2010, and May 25, 2011, wherein observations were provided in regard to the monitoring of compliance with the Judgment.

5. The briefs of the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") of June 20, 2008, September 2, 2009, August 4, and September 24, 2010, and June 9, 2011, wherein observations were provided regarding the monitoring of compliance of the Judgment.

6. The notes of the Secretariat of the Court of March 2, 2010, and May 26, 2011 wherein, following instructions by the President in exercise of this case, information was requested from the parties regarding specific aspects related to compliance of the Judgment.

CONSIDERING THAT:

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

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

3. Pursuant to Article 67 of the American Convention, the Judgments of the Court must be promptly fulfilled by the State in all of its aspects. 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 such effect, the States must ensure implementation, at the domestic level, of the requirements stated by the Court in its Orders.[1]

4. The obligation to comply with the rulings of the Court conforms to a basic principle of the law on the international responsibility of States, as supported by international jurisprudence, under which States are required to comply with their international treaty obligations in good faith *(pacta sunt servanda)* and, as previously held by the Court and provided for in Article 27 of the Vienna Convention on the Law of Treaties of 1969, States cannot invoke their domestic laws to escape their pre-established international

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• Judge Alberto Pérez Pérez, for reasons of *force majeure,* did not assist the 91st Regular Period of Sessions, and consequently, did not participate in the deliberation and signing of this Order. Judge Diego García-Sayán, of Peruvian nationality, excused himself from hearing this case, pursuant to Articles 19(2) of the Statute of the Court and 19 of the Rules of Procedure.

[1] *Cf. Case of Baena Ricardo et al.. Jurisdiction.* Judgment of November 28, 2003. Series C No. 104, para. 60; *Case of the "Las Dos Erres Massacre" V. Guatemala. Monitoring of Compliance with Judgment.* Order of the Inter-American Court of Human Rights of July 6, 2011, Considering clause three, and Case of *Montero Aranguren et al. (Detention Center of Catia) V. Venezuela. Monitoring of Compliance with Judgment.* Order of the Inter-American Court of Human Rights of August 30, 2011, Considering clause three.

responsibility.[2] The State Parties' obligations under the Convention bind all State branches and organs. [3]

5. The States Parties to the American Convention are required to guarantee compliance with the provisions thereof and to secure their effects (*effet utile*) at the domestic law level. This principle applies not only in connection with the substantive provisions of human rights treaties (that is, those dealing with provisions of the protected rights), but also in connection with procedural rules, such as those concerning compliance with the decisions of the Court. Such obligations are to be interpreted and enforced in a manner such that the protected guarantee is actually practical and effective, considering the special nature of human rights treaties. [4]

A) Regarding the obligation to reinstate Mrs. Loayza Tamayo in the teaching sector in public institutions, on the understanding that the amount of her salary and other benefits shall be equal to the remuneration she was receiving for these activities in the public and private sectors at the time of her detention (Operative paragraph one of the Judgment)

6. The State reported that in regard to the reinstatement in the teaching sector of the Ministry of Education, Mrs. Loayza Tamayo and the representative of the Local Educational Services Unit No. 2 signed an Act of Agreement on April 7, 2008, in order to "carry out the severance payments for the lost income" of the victim, noting that "the first severance payment was made in the national currency." Regarding the reinstatement in the teaching sector at the National School of Dramatic Arts, the State noted that by means of the Reinstatement Act signed by the representative of the Assistant Manager's Office of the National Institute of Culture, the reinstatement of Mrs. Loayza Tamayo is noted at said School as of January 18, 2002, "were she has been assigned a work day of 15 hours of class [...] weekly." Nevertheless, "by way of the Departmental Resolution No. 1417-2006-ED dated [September 20, 2006] the contract for personal services of [Mrs.] Loayza Tamayo came to an end, as of August 01, 2006." In relation to the incorporation of [Mrs. Loayza Tamayo] to the teaching sector of a university, the State reported on the communications addressed to three universities,[5] receiving negative responses from two of them-including

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[2] *Cf. 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).* Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14 para. 35; *Case of the "Las Dos Erres Massacre", supra* note 1, Considering clause four, and Case of *Montero Aranguren et al., supra* note 1, Considering clause four.

[3] *Cf. Case of Castillo Petruzzi et al. V. Perú. Monitoring Compliance of Judgment.* Order of the Court of November 17, 1999, Considering clause three; *Case of the "Las Dos Erres Massacre", supra* note 1, Considering clause four, and Case of *Montero Aranguren et al. (Detention Center of Catia), supra* note 1, Considering clause four.

[4] *Cf. Case of Ivcher Bronstein V. Perú. Jurisdiction.* Judgment of the Inter-American Court of Human Rights of September 24, 1999. Series C No. 54, para. 37; *Case of the "Las Dos Erres Massacre", supra* note 1, Considering clause five, and Case of *Montero Aranguren et al. (Detention Center of Catia), supra* note 1, Considering clause five.

[5] Specifically, the State cited the letter s/n of April 9, 2008, by which the General Secretary of the University of San Martin de Porres said: "The Court's mandate is to target the Peruvian government, not the University of San Martin de Porres and [...] the reinstatement being ordered is for teaching service in public institutions, the university does not hold the status of a public institution, and as such, the university is not able to

the University of San Martín de Porres- and awaiting the response from one. In response, the State reported that, through the representative of the Ministry of Education to the National Human Rights Council, it has requested the reinstatement of the victim in the teaching service of "any" public university; the administration of her social benefits before the University of San Martín de Porres, as well as the administration of payment on the compensation of lost income when the victim served in the National School of Dramatic Arts.

7. On her behalf, Mrs. Loayza Tamayo noted that her reinstatement to the Educational Institute 2057 of the Educational Services Unit No. 2 has been fulfilled. Nevertheless, she noted that despite the compromises undertaken by the State in the meeting on April 7, 2008, "she has not be[en] paid the compensation for lost income, nor has she be[en] informed of the results of the steps taken," on the matter. Regarding her reinstatement to the National School of Dramatic Arts, she stated that she was never hired [for professional services wherein she had to bill for those services], [given that] she was a professor […] under a ministerial budget and payroll with privilege to all social benefits." Therefore, she reiterated that "it corresponds to the State to provide for [her] reinstatement […] pursuant to the laws in force" and to comply "with the payment of the compensation for lost income." In regard to her incorporation to the teaching sector at a university, she expressed her willingness to work in any national university, educational department and social work, educational institute, or institute of higher education given her background, a "Bachelor in Education with a Focus on Historic Social Sciences," a "Bachelor in Social Work," and "a Masters in Higher Education." The victim noted that "she has been denied the payment of [her] social benefits derived from the severance pay for the time she worked at the University of San Martín de Porres." Also, she noted that by way of a letter dated October 15, 2008, said university "informed her […] that the period to request payment of [her] social benefits had expired" and that she specified "not having carried out any request […] given that she anticipated the State to do so."

8. In this regard, the Commission "value[d] the efforts of the State so that various institutions respond to the concerns of the victim." Nevertheless, it noted that "progress has not been verified" and, in this respect, it requested the Court to require the State to present a report that "details [...] the steps taken to comply with [this point]."

9. The Court recalls that Mrs. Loayza Tamayo, at the moment of her detention worked at three educational institutions, namely: The Educational Center 2057 "Jose Gabriel Condorcanqui," the National School of Dramatic Arts, and the University of San Martin de Porres. The Court notes that the victim confirmed the fulfillment by the State of its obligation to reinstate her to the Educational Institute 1057 and that, nevertheless, the payment is still pending of compensation for lost income from the moment of her detention until her reinstatement at said institution. In what regards the National School of Dramatic Arts, there is a controversy between the parties, since according to the victim, she was a professor under a ministerial budget and payroll, while for the State, it has complied with her reinstatement even though on September 20, 2006, Mrs. Loayza Tamayo's contract

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satisfy the obligation of the judgment of the [C]ourt, either because it is not the State or because it does not hold the status of a public institution. In addition, it should be noted that during the time that Mrs. Loayza Tamayo served the university, she did so as a hired teacher. As we know, contracts of this nature are renewable for periods of time if the parties, the teacher and the University agree, a renewal that has not occurred in this case." (case file of Monitoring of Compliance with Judgment, tome VIII, folios 2449 and 2474).

ended for personal services. Lastly, regarding the reinstatement to a public university, the Court notes that the State has reported on the steps taken regarding three universities, without obtaining a favorable response from them.

10. As such, considering the information presented by the parties, the Court considers that the State:

i) has fulfilled its obligation to reinstate Mrs. Loayza Tamayo in the Educational Center 2057 "José Gabriel Condorcanqui";

ii) has yet to clarify the modality under which Mrs. Loayza Tamayo will work at the National School of Dramatic Arts. Thus, it must explain the circumstances under which the Departmental Resolution No. 1417-2006-ED of September 20, 2006, was issued and the possible conformity of said measure with that ordered in the Judgment;

iii) still pending is the realization of the reinstatement of Mrs. Loayza Tamayo to an educational university. The Court recognizes that it no longer is of the State's obligation to reinstate the victim to the teaching sector of the University of San Martin de Porres, because at the request of the State, this institution denied this possibility based on their private motivations. However, while recognizing the various steps taken by the State, the Court recalls that the obligation at hand is result-oriented, and to that extent, the corresponding obligation will not be satisfied until the victim is reinstated at a university, and

iv) still pending is the payment of fees and social benefits foregone by the victim from the time of her detention until her reinstatement at the three aforementioned educational institutions. In response to information provided by the State regarding the partial payment of the severance payments of compensation for lost income for the Education Center 2057, the Court anticipates the documentary evidence attesting to such disbursement.

11. It is therefore imperative that the State submit accurate and detailed information on a) the employment status under which Mrs. Loayza Tamayo was reinstated and the circumstances in which she ceased to work at the National School of Dramatic Arts; b) internal efforts made and the alternatives explored for the reinstatement of the victim in the teaching sector at a university, based on her expressed willingness to perform for a wide range of academic institutions according to her broad professional background, and c) the internal efforts made to finalize the payment of fees and social benefits foregone by the victim.

12. For these reasons, the Court finds that the State has partially complied with this obligation by way of the reinstatement of the victim to two of the educational institutions in which she worked at the time of her arrest. Thus, the obligation remains regarding the reinstatement of the victim to the teaching staff of a university and payment of all the fees and benefits forgone by the victim at the three educational institutions in which she worked. Specifically, despite the failure to reinstate the victim at the University of San Martin de Porres (*supra* Considering clause 6 and 10), the State shall push forward the procedures for obtaining the social benefits of the victim for the time she worked at that institution.

B) Regarding the obligation to guarantee the victim her full retirement benefits, including those owed for the period transpired since the time of her detention (Operative paragraph two of the Judgment)

13. The State reported that the victim is "unemployed pursuant to Decree Law No. 20530" and that as such she is offered "unemployment pension for the 21 years, 1 month, and 8 days of service lent to the State, under the charge of Sub-Director, Level F-2." The State specified that "Mrs. Loayza Tamayo could receive pension as a teacher, if the corresponding change is made to the Private Pensions System, given that, […] pursuant to the Decree [Law] 19990, it is not permitted for any Peruvian citizen to receive an additional pension, as a teacher at a public institution, if to date one is under the unemployment pension of the Decree L[aw] No. 20530, as is the case at hand." As such, given that this regards an issue that is in the hands of the victim, the State considers that it has fulfilled this obligation of the Judgment. Nevertheless, it also added that the Office of Production of the Office of Pension Standardization "reported that Mrs. Loayza Tamayo is not to be found in the pension records that [said] Office administers," which is in charge of the administration of pensions that correspond to Decree Law No. 19990. In addition, it attached "the Individual Account of [Mrs. Loayza Tamayo] containing the contributions made to the National Pension System from 2002 to date."

14. In regard to this point, the victim stated that "despite the fact that the […] the Office of Pension Standardization [thinks that] it is not possible for her to receive two pensions" one protected by Law No. 20530 (for services lent to the Ministry of Health) and the other by Decree Law No. 19990 (for teaching services), "the time has not been added for the period she spent under illegal and arbitrary detention" up until her reinstatement at the mentioned public institutions, that is, 4 years, 7 months, and 11 days for pension purposes and the years she remained in another country as a political refugee. She specified that "at the time of her arbitrary detention, although she was unemployed under the scope of Decree Law 20530 for having worked for the Ministry of Health, she continued [working] for public and private institutions under the scope of [Decree] Law 19990, offering educational services as a teacher." The victim highlighted that "she has been contributing to the National Pension System [for] her work at the National Institute of Culture since April 1, 1972." She added that "upon not being entitled to a pension under the pension regime of [the Decree] Law 19990, the State would be retaining her compensation in an irregular manner."

15. In regard to the foregoing, the Commission assessed as "a breakthrough" that "the State and the victim agreed that domestic Peruvian law allows for Mrs. Loayza Tamayo to receive the two pensions to which she claims she is entitled." However, it stressed that "[t]he reports of the State […] merely reiterate Mrs. Loayza Tamayo's pensioner status under one of the regimes." In this regard, the Commission "consider[ed] it relevant that the State refer […] to the comments of the victim about the possibility of having two pensions, thereby assuring that in the retirement regarding her educational services it include the years she worked […] as well as those where she was deprived of liberty."

16. The Court notes that expressed by the Office of Pension Standardization in "that there is no inconsistency in simultaneously and legally receiving two pensions obtained under Decree Law No. 20530 and Decree Law No. 19990, when and if the contributions of Mrs. Loayza Tamayo that establish her right to the latter do not correspond to work periods

in the [Central Government, the Regional Governments, the Local Governments, the Offices of State, the Decentralized Autonomous Organizations, and the Decentralized Public Institutions, according to that provided in Legislative Decree No. 817],"[6] or "correspond to contributions carried out for employers belonging to the private sector." Thus, the Court notes that, according to that stated by the Office of Pension Standardization, the Decree Law No. 20530 established that it is possible to "simultaneously receive two pensions from the State, when one of them stems from teaching services lent to public teaching," but that "this exception has not been established for those pensioners of the National Pension System, regulated by Decree Law No. 19990, to which the provisions established by Decree Law No. 817 apply."

17. As such, the Court considers that of the information provided by the State, it has not even been proven whether the victim is subject to the regime of Decree Law No. 20530. Thus, even though at first glance it appeared as though the State and Mrs. Loayza Tamayo coincided regarding the inclusion of the victim in the regime of Decree Law No. 20530, it is clear from the case file of Memorandum No. 686-2010-DSO.SP/ONP of April 15, 2010, wherein the Sub-director of Provision Payments of the Office of Pension Standardization reported that the victim "is NOT in [its] records as a pensioner of Decree Laws Nos. 19990, 18846, and 20530, nor in the Special Regimes that [said] office administers." Therefore, there is a discrepancy between the information contained in the Memorandum and that noted by the State upon recognizing that Mrs. Loayza Tamayo is unemployed pursuant to Decree Law No. 20530 (*supra* Considering clause 13) and that her contributions to the National Pension System are proven since 2002.

18. The Court recalls that compliance with the present measure is conditioned on it being established that the victim is subject to the pension regimes that correspond to Decree Laws Nos. 20530 and 19990. Said condition assumes that the victim would receive a retirement pension for her work in the health sector (Decree Law No. 20530) and another for her activities in the education sector (Decree Law No. 19990). Given that the State has indicated that Mrs. Loayza Tamayo must comply with a series of requisites in order to be accepted into the pensioner regime of Decree Law No. 19990, the Court considers that it is necessary for the victim to understand said requirements and that, as such, the State must answer the comments made by her regarding the fact that the enjoyment of two pensions must include the years worked, as well as those where she was deprived of liberty" and was a political refugee. (*supra* Considering clause 14).

19. Based on the foregoing, the Court considers it essential that, pursuant to the specific circumstances of this case and the situation of Mrs. Loayza Tamayo, the State confirm whether the victim is subject to the regime of Decree Law No. 20530 and provide complete and detailed information regarding the requirements to ensure the full enjoyment of her right to retirement under Decree Law No. 19990. The latter should include information on legal regulations, formalities, and procedures in place at the internal level in order for her to obtain the social benefits. All this, notwithstanding that the State immediately make the necessary arrangements and provide the means in the respective process to comply with this obligation.

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[6] Official Letter No. 489-2007-GO/ONP of July 19, 2007 (case file of Monitoring of Compliance with Judgment, tome VI, folio 2171.29)and Official Letter No. 162-2008-GO/ONP of April 17, 2008 (case file of Monitoring of Compliance with Judgment, tome VIII, folio 2498), which correspond to the Office of Pension Standardization, Office of Operations.

C) Regarding the obligation to adopt all domestic legal measures necessary to ensure that no adverse decision delivered in proceedings against Mrs. Loayza Tamayo in the civil courts has any legal effect whatsoever (Operative paragraph three of the Judgment)

20. The State indicated that "to date, the [victim] has no records." For this, the State forwarded a copy of the resolution issued on May 28, 1999, by the Special National Criminal Corporate Chamber for Cases of Terrorism (Exp. 634-93), which declared as unenforceable the judgment ordered by the Special Chamber of the Superior Court of Justice of Lima on October 10, 1994, which charged the victim to 20 years imprisonment for the crime of terrorism, as well as a copy of official letters requesting the annulment of criminal, judicial, and police records" of Mrs. Loayza Tamayo.[7]

21. Mrs. Loayza Tamayo did not present observations on this point.

22. The Inter-American Commission "value[d] that the State had adopted measures [it had reported on]. Nevertheless, […] it awaits the observations of the victim regarding compliance with this measure of reparation."

23. In this regard, the Court finds that the Superior National Criminal Corporate Chamber for cases of Terrorism ordered the annulment of police, judicial, and criminal records that derived from Mrs. Loayza Tamayo's case and, moreover, that within certain state agencies surveyed by the State, there is no indication of her judicial, criminal, nor police record. [8] Therefore, taking into account that the victim has not expressed an opinion contrary to that reported by the State regarding compliance with this point of the Judgment, the Court finds that the State has fully complied with this measure of reparation.

D) Regarding the obligation to adopt the domestic legal measures necessary for Decree Laws No. 25.475 (Crime of Terrorism) and No. 25.659 (Crime of Treason) to conform to the American Convention on Human Rights.

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[7] Official letter addressed to the Chief of the Office of Revenue and Expenditure of Lima and Callao asking for "the annulment of the judicial record" of Mrs. Loayza Tamayo (case file of Monitoring of Compliance with Judgment, tome VIII, folio 2507); official letter addressed to the Director of the Central Register of Convictions for available "the annulment of criminal records" of the victim (case file of Monitoring of Compliance with Judgment tome VIII, folio 2509), and official letter addressed to the Chief of Police of the Identification Division to provide for the "annulment of the criminal records" of Mrs. Loayza Tamayo. (case file of Monitoring of Compliance with Judgment, tome VIII, folio 2511). Moreover, there is also the resolution issued by the Criminal Chamber (See No. 69-98) which annulled the order issued by the Second Criminal Chamber of the Supreme Court of June 14, 1999, which declared the judgment of the Inter-American Court unenforceable in this case. (case file of Monitoring of Compliance with Judgment, tome VIII, folios 2513 to 2516).

[8] Official Letter No. 591-07-DIRCRI-DIVIDCRI-DEPANANT of the Department of Annulment of Police Records of the Criminal Investigations Division of the National Police of Peru on July 6, 2007 (case file of Monitoring of Compliance with Judgment, tome VI, folio 2171.31); Official Letter No. 1767-2007/INPE/16-07-D of the Office of Prison Records –Regional Office of Lima of the National Prison Institute on July 10, 2007 (case file of Monitoring of Compliance with Judgment, tome VI, folio 2171.32), and Official letter No. 1270-2007-RNC-GSJR-GG/PJ of the National Conventions Register of the Judiciary Branch on July 5, 2007. (case file of Monitoring of Compliance with Judgment, tome VI, folio 2171.33).

24. The State noted that "the Peruvian legislative reform does not allow a trial that violates the principle *n[e] bis in idem*, for the crimes of terrorism and treason, as defined in the Decree Laws [25475 and 25659]." It added that "in accordance with the domestic judicial bodies (the Judiciary Branch and Constitutional Court), [the] domestic legislation is in conformance with [the] Convention."

25. Similarly, Mrs. Loayza Tamayo accepted that which was noted by the State regarding the adaption of domestic law to the principle of *n[e] bis in idem*.

26. The Commission "acknowledge[d] that measures were adopted aimed at satisfying compliance with [this obligation]." However, "considering that today [...] it has a number of petitions and cases pending which allege violations of the American Convention as a result of the application of [said] Decrees [...] even with the modifications to which the State alludes, it [said] it will continue with the analysis and monitoring of this obligation in the performance of its powers under the Convention."

27. In this regard, the Court notes that the only information submitted by the State on the adaption of the domestic legislation to the American Convention refers to the inability to violate the principle *ne bis in idem*, with particular emphasis on that noted by the Constitutional Court of Peru in a judgment issued on January 3, 2003. However, in the exercise of its contentious jurisdiction and in terms of monitoring compliance in relation to other Peruvian cases involving the obligation to adapt the same legislation, the Court is aware of legislation that has been issued after the Constitutional Court of Peru of January 3, 2003, as well as this judgment of August 9, 2006, wherein it declared unfounded the claim of unconstitutionality of the new legislation. These elements allow the Court a general assessment of some of the measures taken by the State to comply with the provisions of the Judgment.

28. The Court emphasizes four key issues concerning the adaption of domestic law regarding the violations found in this case: i) the codification of the crimes of treason and terrorism, ii) the right to a competent tribunal, iii) the right to defense, and iv) the detention conditions.

29. Regarding the issues of criminal codification, in the Judgment on the merits of this case, the Court ruled on the broadness of the elements of the crime under which the victim was prosecuted and the ambiguity in the wording of them, especially in regard to treason. As such, the Court observes that the judgment rendered by the Constitutional Court of Peru in 2003 declared the unconstitutionality of Articles 1 and 2 of Decree Law No. 25659, in relation to Articles 3, 4, 5, 6,[9] and 7 thereof, relating to the offense of treason. Indeed, the Constitutional Court noted that "all the factual circumstances described in the elements of [this] crime [...] are similar to the pre-existing codifications of terrorism[, generating]

[9] In relation to Article 6.º of Decree Law N.º 25659, related to habeas corpus actions, the TC declared unconstitutional the phrase, "or treason," and as such, that provision shall read as follows: "The action of habeas corpus is appropriate in the circumstances envisaged in Article 12 of Law No. 23506, to the benefit of the detainees involved or accused of crimes of terrorism, and the following rules of procedure must be observed: (case file of Monitoring of Compliance with Judgment, tome V, folio 1865).

duplicity of the content," "thus enabling the same fact or element to be subsumed under any of the criminal codifications" and "thereby affect[ing] the principle of legality."

30. Likewise, the Court also notes that in the judgment of the Constitutional Court of 2003, the subsistence was declared of Article 2 of Decree Law No. 25475 on the crime of terrorism, with the same text, if it is interpreted that the action must be carried out "intentionally," as there is a reasonable uncertainty and the analogical interpretation clauses do not violate the principle of *lex certa* when the legislature establishes the examples that can serve as parameters for interpretation. [10]

31. Furthermore, regarding the guarantee to a competent tribunal, in the Judgment on the merits of the case, the Court noted that Decree Law No. 25.659 and No. 25.475 divided the jurisdiction between the military and ordinary [civil] courts, even to try civilians, attributing jurisdiction for crimes of treason to the former and of terrorism to the latter.[11] Regarding the crime of treason, prosecution was to be done by "faceless" judges, in a summary procedure and with diminished guarantees. In this regard, the Constitutional Court of Peru considered Article 4 of Decree Law No. 25659 on treason, unconstitutional, and it stressed the creation of "Law No. 26.671 [which] repeal[ed], implicitly, both Article 15 [of Decree Law No. 25475] as well as all those provisions, which prevented the defendant from having the opportunity to learn the identity of those involved in the proceeding."

32. On the other hand, regarding the right to defense, in the Judgment on the merits, the Court questioned aspects related to the inability to file any protective remedy to safeguard personal liberty or to question the legality or arbitrary detention of victims (Article 6 of Decree Law No. 25659). In this regard, the Court notes that Article 6 of Decree Law No. 25659 "was modified by Decree-Law No. 26.248, adopted on November 12, 1993, and in force since the 26th of that same month and year, [...] allowing, in principle, the filing of protective remedies in favor of those charged with crimes of terrorism or treason."

33. Moreover, in the Judgment on the merits in this case, the conditions of detention in the execution of the punishment for the crime were questioned, under Article 20 of Decree Law No. 25475, which assured the victim remained in a very small cell, without ventilation or natural light, for a half hour of sun a day, in continuous solitary confinement, and with severely restricted visitation. [12] In this regard, the judgment of the Constitutional Court of Peru established that this Article served as an unreasonable and disproportionate measure, thereby constituting cruel and inhumane treatment, which violated the Peruvian Constitution and the American Convention. Thus, the Constitutional Court considered the unconstitutionality of the phrase "continuous solitary confinement during the first year of detention and subsequently" as well as the phrase "[i]n no case, and under the

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[10] Thus, in accordance with the Constitutional Court "the interpretation of the clause 'against the security of (...) methods or means of communication or transport of any kind' must limit its scope to the conduct constituting the offense against public safety affecting methods or means of transportation or communication. For the same reasons, the clause 'against the security of (...) any other good or service' should be interpreted as referring only to goods or services that have specific criminal protection in different forms of crimes against public safety, under Title XII of Second Tome of the Criminal Code." Judgment of the Constitutional Court of January 3, 2003, paras. 72 and 73 (case file of Monitoring of Compliance with Judgment, tome V, folio 1806 to 1825).

[11] *Case of Loayza Tamayo. Merits*, Judgment of September 17, 1997. Series C No. 133, para. 61.

[12] *Case of Loayza Tamayo. supra* note 11, para. 46, literal k).

responsibility of the director of the Establishment, those sentenced can share single cells, a disciplinary regime that will apply until release."

34. Given the foregoing, the Court believes that through the Executive and Legislative Branches and the Constitutional Court, measures have been taken to revoke the regulations that are contrary to the Convention, by way of their annulment, reform, or new interpretation. In this sense, some norms of a legal nature have been issued on the subject, whose content is geared towards fulfilling certain standards of the international law of human rights. In this regard, the Court considers that, in the absence of a specific and current controversy between the parties relating to the scope of the reforms ordered by the Court, in the specific context of that which was declared to be a violation of the Convention in the present case, it deems that this measure of reparation has been fulfilled, without this implying a trial on the norms or practices which it analyzes in the context of other contentious cases.

35. Notwithstanding the foregoing, this Court notes that not only the suppression or issuance of norms in domestic legislation guarantee the rights enshrined in the American Convention, pursuant to the obligation established in Article 2 of that instrument. It also requires the development of State practices that are conducive to the effective observance of the rights and freedoms enshrined in it. Consequently, the existence of a norm does not by itself guarantee that its application is appropriate. It is necessary that the application of the norms or their interpretation, in both judicial practices and manifestations of State public order, be adapted to the same purpose of Article 2 of the Convention. In other words, the Court notes that judges and other bodies linked to the administration of justice must exercise "control for conformity with the Convention" *ex officio* between the domestic norms and the American Convention, in the framework of their powers and the corresponding procedural regulations. In this task, they should take into account not only the international treaty in question, but also the interpretation thereof made by the Court, the ultimate interpreter of the American Convention.[13] This should ensure the strictest diligence in safeguarding the principles of legality, the right to defense, the restrictions on the use of the military jurisdiction and the duty to guarantee the rights of persons deprived of liberty, in the framework of the jurisprudence of the Court and the applicable international law.

E) Regarding the obligation to investigate the facts in the instant case, identify and punish those responsible for those acts, and adopt all necessary domestic legal measures to ensure that this obligation is discharged (Operative paragraph six of the Judgment)

36. The State reported on the termination of criminal actions due to the statute of limitations in the criminal prosecution stage taken against five members of the Police, for the crime against life, body, and health, serious injury, and against two members of the Police for the crime of forced-rape, both to the detriment of Mrs. Loayza Tamayo, enacted by the Third Criminal Procedures Chamber for Inmate Liberty of the Superior Court of

[13] *Case of Radilla Pacheco V. México. Preliminary Objections, Merits, Reparations and Costs.* Judgment of 23 de Noviembre de 2009. Series C No. 2009, paras. 338 and 339.

Justice of Lima, by order of July 27, 2007. [14] Thus, the State said that "it is unable [to act] as it [has] lost its power to punish." It added that "considering that the injured party claims that the facts [...] took place during the days of her arrest [,]that is from February 06 to 26 1993, [this led to] a combination of crimes," applying the third paragraph of Article 80 of the Penal Code which states that "[t]he actions [run the course of the statute of limitations] after a period equal to the maximum for the most serious offense runs its course," which in this case is that of severe bodily harm, at 12 years. Therefore, from February 1993 to 2007, 15 years and 5 months had passed, "running past the statute of limitations."

37. Mrs. Loayza Tamayo said the State "has failed to comply" with this measure because on July 27, 2007, on the legal proceedings concerning the case, "the criminal action was declared extinguished due to the statute of limitations." She noted that "[t]he information that has been brought to the attention of the Court [...] by the State" on this point, refers to events that pre-date the hearing on monitoring of compliance of the case and to allegations made by it on that occasion. She added that "the delay itself of the [S]tate in the investigation, identification, and prosecution of those responsible, serves as justification for not punishing those officers, who remain in their position, those of which have also even been promoted."

38. The Commission considered that "the State […] must complete a real and effective investigation in order to identify and punish those persons responsible for the violations determined by this Court in [the J]udgment." Moreover, it requested that the State "refer to the irregularities mentioned by the [victim], according to which over time would be attributable to authorities of the Public Prosecutor's Office and the judicial authorities that heard the case, among other aspects of the process."

39. The Court notes that it has been more than twelve years since it issued its Judgment in this case without the State clarifying all the relevant facts and determining the responsibility for the violations declared, a situation which remains in impunity and which has generated the corresponding invocation and application of the exception of the statute of limitations of two specific criminal actions.

40. In this regard, this Court recalls that although the statute of limitations should be duly observed by the judge for all accused of a crime, [15] the invocation and application of it is unacceptable when it has been clearly proven that the passage of time has been determined by procedural actions or omissions, in bad faith or negligence, to encourage or allow impunity. Thus, the Court reiterates what it has noted on other occasions, in that "[t]he right to effective judicial protection requires [...] the judges to direct the process so as to prevent undue delays and obstruction which will lead to impunity, thereby agitating the judicial protection of human rights."[16] The Court also noted that "when a State has

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[14] Judgment of the Third Criminal Chamber for Inmate Freedom of the Superior Court of Justice of Lima (Case file No 547-06) of July 27, 2007. (case file of Monitoring of Compliance with Judgment, tome VIII, folio 2621 to 2626).

[15] *Cf. Case of Barrios Altos V. Perú. Merits.* Judgment of March 14, 2001. Series C No. 75, para. 41; *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. 171, and Case of *Gelman V. Uruguay. Merits and Reparations.* Judgment of February 24, 2011 Series C No. 221, para. 225

[16] *Cf. Case of Bulacio V. Argentina. Merits, Reparations and Costs.* Judgment of September 18, 2003. Series C No. 100, paras. 115; *Case of Bayarri V. Argentina*. *Preliminary Objection, Merits, Reparations and Costs*.

ratified an international treaty such as the American Convention, its judges, as part of the State apparatus, are also bound to it, obligating them to ensure that the effects of the provisions of the Convention are not diminished."[17] That is, that the statute of limitations yields to the rights of victims when there is an obstruction of the obligation to identify, prosecute, and punish the perpetrators of a crime.

41. In its previous jurisprudence the Court has stated, referring to the principle of *ne bis in idem*, that it is not applicable when: i) the actions of the court that heard the case and decided to dismiss or acquit the person responsible for a violation of human rights or international law were intended to shield the accused from criminal responsibility; ii) the proceeding was not conducted independently or impartially in accordance with due process, or iii) there was no real intention of placing the perpetrator in the hands of justice. A judgment declared which involves any of the foregoing circumstances produces an "apparent" or "fraudulent" res judicata."[18] Thus, the authority of res judicata of a decision that affects the rights of individuals protected by the Convention and shows that there are grounds for questioning that which is res judicata may possibly be discussed before this Court.[19]

42. The information provided by the parties in this case only allows the Court to note that in the two aforementioned proceedings, the statute of limitations was declared to have run its course. The Court does not have elements to know if the proceedings ran the statute of limitations due to the reasons described in the preceding paragraphs. In view of the foregoing, it is imperative that the State submit organized, detailed, complete, and updated information on the causes that led to the opposition and application of the statute of limitation in the two criminal cases mentioned, referring to, if applicable, the copies of the relevant parts of case files.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

In the exercise of its powers of supervision of compliance with its decisions and in conformity with Articles 33, 62(1), 62(3), 65, 67, and 68(1) of the American Convention on

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Judgment of October 30, 2008. Series C No. 187, para. 116; *Case of Carpio Nicolle et al. V. Guatemala. Monitoring of Compliance with Judgment.* Order of the Inter-American Court of Human Rights of July 01, 2009, Considering clause fourteen, and Case of *Ivcher Bronstein V. Perú. Monitoring of Compliance with Judgment.* Order of the Inter-American Court of Human Rights of November 24, 2009, Considering clause seventeen.

[17] *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. 124; *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 15, para. 176, and Case of *Gelman V. Uruguay, supra* note 15, para. 193.

[18] *Cf. Case of Carpio Nicolle et al., supra* note 16, para. 131*; Case of Almonacid Arellano et al. V. Chile, supra* note 17, para. 154, and Case of *Ivcher Bronstein V. Perú. Monitoring of Compliance with Judgment.* Order of the Inter-American Court of Human Rights of August 27, 2010, Considering clause fourteen.

[19] *Cf. Case of Genie Lacayo V. Nicaragua. Request for Review of the Judgment on the Merits, Reparations and Costs.* Order of the Court of September 13, 1997. Series C No. 45, paras. 10 to 12; *Case of Almonacid Arellano et al. V. Chile, supra* note 17, para. 154.

Human Rights, Articles 25(1) and 30 of the Statute, and Articles 31(2) and 69 of its Rules of Procedure,

DECLARES THAT:

1. Pursuant to that noted in the pertinent Considering clauses of the present Order, the State has fully complied with the following operative paragraphs of the Judgment:

a) reinstate Mrs. Loayza Tamayo in the teaching service in educational institution 2057 "José Gabriel Condorcanqui" (*Operative paragraph one of the Judgment and Considering clause 12)*;

b) adopt all the domestic legal measures necessary to ensure that no adverse decision delivered in proceedings against Mrs. Loayza Tamayo in the civil courts has any legal effect whatsoever. (*Operative paragraph three of the Judgment and Considering clause 23),* and

c) adopt the domestic legal measures necessary for Decree Laws 25.475 (crime of terrorism) and 25.659 (crime of treason) to conform to the American Convention on Human Rights (*Operative paragraph five of the Judgment and Considering clause 34).*

2. Pursuant to that noted in the pertinent Considering clauses of this Order, the following operative paragraphs have not yet been fully complied with:

a) reinstate Mrs. Loayza Tamayo in the teaching sector of a public university; provide information on the work conditions under which Mrs. Loazya Tamayo was reinstated at the National School of Dramatic Arts and the circumstances under which she stopped working there, and to pay the amount for her salaries and other services lent to the public and private sectors due to lost income since her detention until her reinstatement at the three mentioned educational facilities (*Operative paragraph one of the Judgment and Considering clause 12);*

b) guarantee the full enjoyment of her retirement benefits, to include the time spent in detention (*Operative paragraph two of the Judgment and Considering clause 19*);

c) investigate the facts of the case, identify, and punish those responsible for those acts, and adopt all necessary domestic legal measures to ensure that this obligation is discharged (*Operative paragraph six of the Judgment and Considering clause 40, 41, and 42)*

AND DECIDES TO:

1. Require the State of Peru to adopt all the measures necessary to effectively and promptly comply with the pending operative paragraphs in accordance with that established in Article 68(1) of the American Convention on Human Rights.

2. Request the State to present to the Inter-American Court of Human Rights, on December 5, 2011, a detailed and current report wherein it indicates all the measures

adopted in attempts to comply with the reparations ordered by this Court that are pending compliance, pursuant to that established in the Considering clause 12, 19, 40, 41, and 42, and operative paragraph 2 of this Order.

3. Request Mrs. Loayza Tamayo and the Inter-American Commission on Human Rights to present observations they deem pertinent to the mentioned report of the State in the prior operative paragraph, in a period of four to six weeks respectively, as of the date the report is received.

4. Continue monitoring the operative paragraphs pending compliance in the Judgment on reparations of November 27, 1998.

5. Order the Secretariat of the Court to provide legal notice of this Order to the State, the Inter-American Commission on Human Rights, and Mrs. María Elena Loayza Tamayo.

Diego García-Sayán
President

Manuel E. Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Alberto Pérez Pérez

Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretariat

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretariat