ORDER OF THE

INTER-AMERICAN COURT OF HUMAN RIGHTS

OF NOVEMBER 22, 2011

CASE OF SERVELLÓN GARCÍA *ET AL. v.* HONDURAS

MONITORING COMPLIANCE WITH JUDGMENT

HAVING SEEN:

1. The Judgment on merits, reparations and costs of September 21, 2006 (hereinafter "the Judgment") by the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court").

2. The Order on Monitoring of Compliance with Judgment of the Inter-American Court of August 5, 2008, whereby it decided:

> 1. That in accordance with the terms of Considering clauses 10 to 25 and 30 to 33 of [the] Order, the State has fully complied with the following operative paragraphs of the Judgment:
>
> a) to publish once, in the Official Gazette, the chapter related to the proven facts in the Judgment and the operative paragraphs of the same, pursuant to Considering Clauses 10 to 13 of the Order (*operative paragraph nine of the [J]udgment*[);]
>
> b) to carry out a public act of acknowledgment of international responsibility [...], pursuant to Considering Clauses 14 to 17 of [the] Order (*operative paragraph ten of the Judgment*[);]
>
> c) to place a plaque with the name[s] of the victims in the street that has been named in their memory, pursuant to Considering Clauses 18 to 21 of [the] Order (*operative paragraph eleven of the Judgment*[);]
>
> d) to establish a training program for police and judicial personnel[,] as well as for the Public Prosecutor's Office and [p]enitentiary personnel[, on] the protection of children and [youth,] [...] the principle of equality before the law[,] and the international standards on human rights and judicial guarantees of detainees, pursuant to Considering Clauses 22 to 25 of [the] Order (*operative paragraph twelve of the Judgment*[);] and
>
> e) To create a unified database, which the State named "System of Inter-Institutional Digital File[,"] under the terms established in Considering clauses 30 to 33 (*operative paragraph fourteen of the Judgment).*
>
> 2. That it will [continue proceedings] to monitor compliance with the pending [operative paragraphs] in the [...] case, specifically:
>
> a) to carry out all actions necessary to identify, prosecute and, as the case may be, punish all the perpetrators of the violations committed [to the]

detriment of the victims[,] and to remove all obstacles and mechanisms of fact and of law that have maintained impunity in the instant case, pursuant to Considering clauses 6 to 9 of[...] [the] Order (*operative paragraph eight of the Judgment*[);] and

b) to carry out a campaign to [raise awareness] in Honduran society regarding the importance of the protection of children and [youth], to inform [Honduran society] of the specific protection duties that correspond to the family, society[,] and the State, and to show the population that children and [youth] in risky [social] situations are not associated [with] delinquency, pursuant to Considering Clauses 26 to 29 of [the] Order (*operative paragraph thirteen of the Judgment*).

3. The reports of the Republic of Honduras (hereinafter "the State" or "Honduras") regarding the progress of compliance with the Judgment, submitted on April 21 and October 2, 2009; August 3 and October 1, 2010; and September 9, 2011.

4. The observations of the victims' representatives (hereinafter "the representatives") on the State reports submitted on February 27 and November 2, 2009; September 13 and November 2, 2010; and October 12, 2011.

5. The observations of the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") on the State reports of April 22 and November 30, 2009; December 1, 2010; and November 21, 2011.

CONSIDERING THAT:

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

2. Honduras [has been] a State Party to the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") since September 8, 1977, and recognized the contentious jurisdiction of the Court on September 9, 1981.

3. In conformity with Article 67 of the American Convention, the Court's judgments shall be fully and promptly complied with by the State. In addition, Article 68(1) of the American Convention stipulates that "[t]he States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties." Therefore, States must ensure that the rulings set out in the decisions of the Court are implemented at the domestic level.[1]

4. The obligation to comply with the rulings of the Court corresponds to a basic principle of law on the international responsibility of the State, supported by international jurisprudence, according to which States must comply with their international conventional obligations in good faith *(pacta sunt servanda)* and, as previously held by the Court and pursuant to Article 27 of the Vienna Convention on the Law of Treaties of 1969, States cannot, for reasons of domestic law, neglect the international responsibility which has

[1] *Cf. Case of Baena Ricardo et al. Jurisdiction.* Judgment of November 28, 2003. Series C No. 104, para. 60; *Case of the Yean and Bosico Girls v. The Dominican Republic.* Monitoring Compliance with Judgment. Order of the Court of October 10, 2011, Considering clause four.

already been established.[2] The conventional obligations of the States Parties bind all powers and organs of the State.[3]

5. The States Parties to the Convention must ensure compliance with its provisions and their inherent effects (*effet utile*) within their respective domestic legal systems. This principle applies not only in connection with the substantive norms of human rights treaties (*i.e.* those dealing with provisions on protected rights) but also in connection with procedural rules, such as the ones concerning compliance with the decisions of the Court. These obligations are intended to be interpreted and enforced in a manner that the protected guarantee is truly practical and effective, taking into account the special nature of human rights treaties.[4]

6. The States Parties to the Convention that have recognized the contentious jurisdiction of the Court must comply with the obligations established by the Court. This obligation includes the State's duty to report to the Court the measures adopted to comply with that ordered by the Court in its rulings. Prompt observance of the State's obligation to report to the Court how it is complying with each of the operative paragraphs ordered is essential to assess the state of compliance of the Judgment as a whole.[5]

A) The State's obligation to carry out all actions necessary to identify, prosecute, and if applicable, punish the perpetrators of the violations committed against the victims, and to remove all obstacles and mechanisms of fact and of law that have maintained impunity in the instant case (operative paragraph eight of the Judgment)

7. The State reported that on November 10, 2008, Roxana Sierra Ramírez was sentenced to serve a prison term of one year at *Centro Femenino de Adaptación Social* (CEFAS), as well as "additional punishments of limited disqualification for double the time of the sentence and deprivation of civil rights for the time of the sentence." In addition, it reported that on December 9, 2008, the commutation of her prison sentence was declared. It also indicated that a commitment order was issued against Alberto José Alfaro for the crimes of illegal detention and murder, and that the defendant was released on bail. In addition, the State indicated that it issued an international arrest warrant to INTERPOL against Habram Mendoza, Marco Julio Regalado Hernández, and José Antonio Martínez Arrazola, as it is known that these individuals live abroad. In the communication of September 9, 2011, the State concluded by indicating that the investigations related to the case continue, and that it would subsequently report on their progress.

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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, and *Case of the Yean and Bosico Girls v. The Dominican Republic*, *supra* note 1, Considering clause five.

[3] *Cf. Case of Castillo Petruzzi et al. v. Perú.* Monitoring Compliance with Judgment. Order of the Court of November 17, 1999, Considering clause three, and *Case of the Yean and Bosico Girls v. The Dominican Republic, supra* note 1, Considering clause five.

[4] *Cf. Case of Ivcher Bronstein v. Perú. Jurisdiction.* Judgment of September 24, 1999. Series C No. 54, para. 37, and *Case of the Yean and Bosico Girls v. The Dominican Republic, supra* note 1, Considering clause six.

[5] *Cf. Case of Barrios Altos v. Perú.* Monitoring Compliance with Judgment. Order of the Court of September 22, 2005, Considering clause seven, and *Case of "Las Dos Erres" Massacre v. Guatemala.* Monitoring Compliance with Judgment. Order of the Court of July 6, 2011, Considering clause six.

8. The representatives indicated that "the investigation process is at a standstill, and that the actions that have been reported by the State [...] continue are insufficient to achieve the prosecution and punishment of those responsible for the deaths of [...] [the] victims in the instant case." In addition, they indicated that in February 2008, the First Court of Appeals of Francisco Morazán ordered the continuation of the proceedings against the accused Alberto José Alfaro Martínez, and that to date the corresponding public hearing has not been held, which is an unacceptable situation. In addition, in their observations on the State report of September 9, 2011, the representatives expressed their concern with the lack of advances in relation to this operative paragraph, which is one of the most relevant in terms of its ability to prevent the reoccurrence of this type of incident. Finally, they requested the State to submit detailed information on the steps taken to apprehend the individuals allegedly responsible, the difficulties encountered with regard to their apprehension, as well as the administrative and budgetary information of the investigation (*supra* Having Seen 4).

9. In its observations of December 1, 2010, the Commission indicated that the State's efforts to comply with this operative paragraph have been insufficient. The Commission noted that since the Court's last Order dated August 5, 2008, no advances have been confirmed in relation to the investigations, that the information provided by the State is meager, and that it does not allow for the adequate following up on the steps taken domestically. In addition, the Commission "agrees with the representatives regarding the lack of progress in the proceedings against Alberto José Alfaro, on which the State merely reported that he is out on bail." The Commission expressed its concern over the lack of information, leading it to petition the Court to require the State to remit "complete and detailed information on compliance with this operative paragraph, including corresponding documentation."

10. In keeping with the above, though the State has remitted information on some of the measures taken, both the representatives and the Commission have indicated that the State did not refer to the steps taken to investigate those allegedly responsible in the present case. Based on the foregoing, the Court lacks sufficient information with which to assess the state of compliance with the duty to investigate. Consequently, the Court reiterates to the State its duty to intensify its efforts and to immediately perform all appropriate actions to move forward the investigations; it considers it essential for the State to submit updated, detailed, and complete information on the implementation of the investigation, the steps taken, and their results with regard to compliance with the Judgment.

B) Execution of a campaign to raise awareness in Honduran society of the importance of protecting children and youth, and to inform Honduran society of the specific protection duties that correspond to the family, society, and the State (operative paragraph thirteen of the Judgment).

11. The State indicated that this campaign has been carried out in 14 departments in the country, starting in the Department of Francisco Morazán on July 22, 2010, and ending in the Department of Olancho on June 13 and 14, 2011. This was done with the participation of local authorities, as well as the civil society of the municipalities with the highest rate of violence and social exclusion of children and youth. In addition, the State highlighted that the main goal of the campaign was to promote and disseminate information on the rights of children -especially minors in situations of social risk, as a vulnerable group in relation to the different social sectors- in compliance with that ruled by the Court in the Judgment of September 21, 2006 (*supra* Having Seen 3).

12. Through the communication received on October 12, 2011, the representatives expressed their satisfaction with the execution of this operative paragraph, "consider[ing] that the information provided by the State is in conformity with that with which they agreed in order to comply with the Court's orders [...]" (*supra* Having Seen 4).

13. The Commission acknowledges the information provided by the State, which denotes the culmination of the awareness-raising campaign. Furthermore, the Commission underscored the willingness of the parties to coordinate on the contents of the campaign, as well as the details of its execution. Consequently, the Commission deemed that the State has fully complied with the present operative paragraph.(*supra* Having Seen 5).

14. In conformity with that reported by the State and that indicated by the representatives and the Inter-American Commission, the Court observes that the State has implemented several actions to comply with the campaign. Therefore, it considers that the State has complied with operative paragraph thirteen of the Judgment (*supra* Having Seen 1). The Court appreciates compliance with this operative paragraph, which constitutes an advance by the State in the execution and implementation of the Court's judgments.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

by virtue of its authority to monitor compliance with its own decisions pursuant to Articles 33, 62(1), 67, and 68(1) of the American Convention on Human Rights, Articles 24 and 30 of its Statute and 31(2) and 69 of its Rules of Procedure,

DECLARES:

1. That in conformity with that indicated in Considering clauses 11 to 15 of the instant Order, the State has fully complied with the operative paragraph in the Judgment on carrying out a campaign to raise awareness in Honduran society regarding the importance of the protection of children and youth, informing Honduran society of the specific protection duties that correspond to the family, society, and the State, and showing the population that children and youth in risky social situations are not associated with delinquency (*operative paragraph thirteen of the Judgment*).

2. That it will continue proceedings to monitor compliance with the operative paragraph pending fulfillment in the instant case, specifically, to carry out all actions necessary to identify, prosecute and, if applicable, punish all the perpetrators of the violations committed against the victims, and to remove all obstacles and mechanisms of fact and of law that have maintained impunity in the instant case, in conformity with Considering clause10 of the instant Order (*operative paragraph eight of the Judgment*).

AND DECIDES:

1. To require the State to adopt all measures necessary to promptly and effectively comply with the operative paragraph pending compliance, in conformity with the provisions of Article 68(1) of the American Convention on Human Rights.

2. To request that the State submit to the Inter-American Court of Human Rights, no later than March 5, 2012, a report indicating all measures adopted to comply with that ordered by the Court in operative paragraph eight, which is pending compliance.

3. To request the victims' representatives and the Inter-American Commission on Human Rights to submit their observations on the State report mentioned in the previous operative paragraph, within four and six weeks, respectively, from the date of receipt thereof.

4. To continue monitoring the operative paragraph pending compliance from the Judgment on merits, reparations and costs of September 21, 2006.

5. To request that the Court's Secretariat provide notice of the instant Order to the State, the Inter-American Commission on Human Rights, and the victims' representatives.

Judge García-Sayán and Judge Vio Grossi informed the Court of their concurring opinions, which accompany the present Order.

Diego García-Sayán
President

Leonardo A. Franco

Manuel E. Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Alberto Pérez Pérez

Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE DIEGO GARCÍA-SAYÁN

WITH RESPECT TO THE ORDER TO MONITOR COMPLIANCE WITH THE JUDGMENT

IN THE CASE OF SERVELLÓN GARCÍA *ET AL. v.* HONDURAS

NOVEMBER 22, 2011

1. The Inter-American Court of Human Right's (hereinafter "the Inter-American Court," "the Court," or "the Tribunal") ability to monitor compliance with its own Judgments is one of the attributes most relevant to the protection of human rights. The Tribunal exercises this right even in its earliest decisions, and it is a tool fundamental to ensuring that these rulings are fulfilled. The monitoring of compliance phase has thus emerged as a central aspect for the protection of human rights in the Americas. This is due not only to the fact that it guarantees, in the specific case to which a State is party, "that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party,"[1] but also because its practical effect is also felt among the other States parties, promoting the full validity of human rights.

2. An appreciation for the procedure of monitoring compliance with judgments adopted by the Tribunal, reinforced by the holding of hearings for this purpose, leads me to affirm that this tool has become a vital and successful mechanism.[2] Through this same procedure a new dynamic has been imprinted on this stage, facilitating and promoting significant advances in the implementation of measures to ensure compliance with that ordered by the Tribunal in its rulings, generating participatory spaces of dialogue and cooperation between state authorities and the victims or their representatives. This new dynamic has been very well-received by the different actors involved in a case before the Court. Along these lines, it is worth recalling that indicated by the General Assembly of the Organization of American States, which has, since 2009, repeatedly asserted "the importance and the constructive character of the private hearings for monitoring compliance with the judgments issued by the

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

[2] The continuous practice of the Tribunal since 1989 has been to solicit reports from the State. Generally, this begins with an initial report, which should be submitted to the Tribunal at the end of one year from the time the judgment was handed down. The observations of the victims or their representatives, and the Inter-American Commission on Human Rights, are required subsequently. Having obtained all the relevant and necessary information, the Court emits an Order evaluating the level of progress with regard to compliance with its rulings, and providing guidance in order to lead to the fulfillment of all pending measures. While this procedure was carried out essentially as written, in 2007 an innovative mechanism was implemented by the Court, namely, the conducting of hearings to monitor compliance with judgments. At these hearings, the parties have the opportunity to learn, in a direct way, their positions, to react before each other and the Tribunal, to "suggest some alternative solutions, call attention to noncompliance stemming from a lack of desire, promote the planning – among all involved - of schedules for compliance, and even make available their facilities so that the parties might have conversations which often are difficult to carry out in the pertinent State itself" (*Cfr.* Annual Report of the Inter-American Court of Human Rights of 2010, pg. 10). This practice came to be consolidated into regulation by Article 69(3) of the existing Rules of Procedure, in which the possibility of the Court to hold a hearing when it considers it pertinent is expressly established (*Cfr.* Rules of Procedure approved by the Inter-American Court in its LXXXV Regular Period of Sessions, held November 16 to 28, 2009).

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Inter-American Court, and their positive results."[3] In the same way, it has incentivized "the holding of hearings for monitoring compliance with judgments, as it is one of the most effective mechanisms for advancing compliance."[4]

3. In order to illustrate the relevance of this function, it is worth recalling the events of the case of *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua.* In this case, as a result of a private hearing and discussion meeting at the Court's headquarters, the State undertook a series of measures aimed at the execution of the only pending operative paragraph of the ruling. This led to full compliance with the Judgment, and the archiving of the case seven months after the hearing, with the demarcation and titling of more than 70,000 hectares in accordance with the Order passed down by the Tribunal on April 3, 2009.[5] Similarly, in the case of *Valle Jaramillo et al. v. Colombia,* the State and the representatives were able to engage in dialogue and cooperation during the private audience, leading to the implementation of reparation measures pertaining the awarding of a scholarship for study or work training. These measures were finalized less than a month later, with the joint presentation of an agreement for an alternative form of compliance; this was later deemed satisfactory by the Tribunal.[6] Likewise, after a private hearing for the case of *Vargas Areco v. Paraguay,* the Court noted, in regard to the obligation to pay default interest charges corresponding to the amount of compensation for material and immaterial damages, as well as reimbursement for costs and expenses, "the will of the parties to achieve progress on this point based on an agreement and is waiting for updated information on efforts and results achieved regarding the compliance with this aspect of the reparation."[7]

4. The Inter-American Court's verification of the occurrence of human rights violations, through the exercise of its contentious jurisdiction, has led the Tribunal to order, pursuant to Article 63 of the American Convention on Human Rights (hereinafter "the American Convention," or "the Convention"), measures of diverse nature, that tend to correspond with the idea of holistic reparations. This includes not only compensation of a pecuniary nature, but also measures of a different sort, with the aim of restitution, rehabilitation, satisfaction, and non-recurrence of the proven violations. The implementation of these measures represents, as has already been stated, a gradual and complex process, which presents many opportunities for the participation of state institutions. The reason for this being that during the implementation of reparation measures, various organs and institutions of the State

[3] General Assembly, Resolution AG/RES. 2500 (XXXIX-O/09) approved in the fourth plenary session, held June 4, 2009, titled "Observations and Recommendations to the Annual Report of the Inter-American Court of Human Rights", pg. 3; Resolution AG/RES. 2587 (XL-O/10) approved in the fourth plenary session, held June 8, 2010, titled "Observations and Recommendation to the Annual Report of the Inter-American Court of Human Rights", pg. 2, and Resolution AG/RES. 2652 (XLI-O/11) approved in the fourth plenary session, held June 7, 2011, titled "Observations and Recommendations to the Annual Report of the Inter-American Court of Human Rights", para. 6.

[4] General Assembly, Resolution AG/RES. 2500 (XXXIX-O/09), *supra* nota 3, operative paragraph five; Resolution AG/RES. 2587 (XL-O/10), *supra* nota 3, operative paragraph five, and Resolution AG/RES. 2652 (XLI-O/11), *supra* nota 3, operative paragraph six.

[5] *Cfr. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua.* Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights, operative paragraphs 1 and 2.

[6] *Cfr. Case of Valle Jaramillo et al. v. Colombia.* Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of February 28, 2011, considering clauses 34 to 37, and *Case of Valle Jaramillo et al. v. Colombia.* Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of May 15, 2011, considering clauses 6 to 11.

[7] *Case of Vargas Areco v. Paraguay*. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 24, 2010, considering clause 39.

– forming part of either the central or federal government, at any of its various levels- can become involved, as well as any of the various powers established in individual State constitutions.

5. As I have already indicated, this process of compliance – due to its complex nature - cannot be analyzed in isolation, nor under a formal abstract logic; mathematically, in a context in which deadlines have become ends in themselves. Rather, it must be analyzed in light of the diverse variables and factors encompassed by full compliance with a judgment of the Intern-American Tribunal. For example, concerning judicial processes of investigation and, eventually, the punishment of grave human rights violations (where the rights of third parties are involved), or those that refer to legal reforms, or the design and implementation of public policy: it must be acknowledged that these are complex issues for which it is essential to reflect and verify the general sense of each.

6. This does not imply, of course, that States may rely on slow internal processes or complex institutional tangles to avoid complying with requirements. The Tribunal's experience has shown that the fulfillment of reparations ordered encompasses a process in which the Court's persistent and careful work to monitor compliance is crucial. Monitoring compliance with the reparation measures ordered in the Judgments issued by the Inter-American Court, as an area of competence inherent in the exercise of its jurisdictional function, is a phase fundamental to the achievement of the effectiveness of its rulings in the internal sphere. In another sense, the desire to find a holistic form of reparation can become diluted without adequate, timely, effective, and rigorous monitoring. For this reason, it has been necessary to adopt specific procedures and mechanisms that enable the Court to exercise, in an ever more rigorous manner, its function - and judicial duty - of supervision, in accordance with the mandate established in the American Convention, its Statute, and Rules of Procedure, while simultaneously guiding and positively contributing to the States and the victims of human rights abuses, toward prompt and full compliance.

7. Now, Article 65 of the American Convention is clear in its order to the Court to submit, before the General Assembly of the Organization of American States, a report of the work done in the preceding year, signaling the cases in which the State had failed to comply with the Court's rulings. This does not require much commentary or analysis, as its content is straightforward The important thing to stress is that, in order to be able to seriously carry out this mandate, and not abdicate the Tribunal's function to guarantee compliance with its decisions, it is precisely the monitoring phase which allows the Inter-American Court to analyze the degree of compliance with reparation orders, and to determine the moment, if it should arise, in which the Tribunal's jurisdiction could be considered exhausted and transferred to the General Assembly. In this vein, monitoring compliance with judgments and the activities in this realm that the Tribunal undertakes is precisely what permits the yearly sharing of this information with the General Assembly, through the Court's Annual Report on labors, the state of compliance with judgments, and the work that regularly takes place.

8. In this sense, the application of Article 65 of the Convention, concerning the identification and singling out of a State before the General Assembly, so that the latter may act as collective guarantor of the Inter-American system, is limited to those exceptional cases in which a particular reluctance or ignorance on the part of the State failing to comply with the Judgment has been demonstrated. This situation has arisen in specific contexts and particular circumstances throughout the history of

the Inter-American Court. Only in light of a clear expression of noncompliance – be it partial or total – from the State, combined with the failure of all possible means of supervision, has the Tribunal turned to the application of Article 65 of the American Convention, and has understood that in such an event, it no longer makes sense to continue requiring the State in question to present information pertaining to compliance with the pertinent judgment.[8] In my view, this case has not yet reached this stage.

Diego García-Sayán
Judge

Pablo Saavedra Alessandri
Secretary

[8] Order of the Inter-American Court of Human Rights of June 29, 2005.Monitoring Compliance with Judgment (Applicability of Article 65 of the American Convention on Human Rights).

CONCURRING OPINION OF JUDGE EDUARDO VIO GROSSI
WITH RESPECT TO THE ORDER OF
THE INTER-AMERICAN COURT OF HUMAN RIGHTS,
OF NOVEMBER 22, 2011,
CASE OF SERVELLÓN GARCÍA *ET AL. v.* HONDURAS,
MONITORING COMPLIANCE WITH JUDGMENT.

Introduction.

The undersigned concurs with the present vote on the Order indicated in the title, hereinafter the Order, on the understanding that, according to the relevant norms and in light of the extensive lapse of time - which has been thus, more than prudent or reasonable - since the pronouncement of the judgment in the present case, without the State concerned having, in essence, complied, the Inter-American Court of Human Rights, hereinafter the Court, must make it known to the General Assembly of the Organization of American States, hereinafter General Assembly of the OAS.

I.- Standards.

In effect, Article 65 of the American Convention on Human Rights, hereinafter the Convention, establishes:

> *"To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."*

For its part, Article 30 of the Statute of the Court, hereinafter the Statute, provides:

> *"Report to the OAS General Assembly.*
> *The Court shall submit a report on its work of the previous year to each regular session of the OAS General Assembly. It shall indicate those cases in which a state has failed to comply with the Court's ruling. It may also submit to the OAS General Assembly proposals or recommendations on ways to improve the Inter-American system of human rights, insofar as they concern the work of the Court."*

As is evident, both provisions categorically enshrine an obligation of the Court, and not a privilege; as such, the Court cannot - and certainly does not - avoid it. This obligation is to submit a yearly report to the OAS General Assembly of the work done by the Court in the previous period. The language employed in the two articles quoted is meaningful in this regard, as it is imperative in nature. That is, it indicates that the Court "*shall submit*" the aforementioned report to the General Assembly of the OAS.

That being said, the standards referred to above further establish that cases in which the state has failed to comply with the rulings of the Court must be identified in the annual report for the corresponding year. Once again, both texts employ an imperative

construction; namely, "*shall indicate*" such cases. It is a matter, therefore, of an obligation of the Court, and not of a right.

It is worth reiterating that the identification of appropriate cases should be done in the annual report of the corresponding year. That is, cases, such as the present one, in which not only the period granted for compliance in the Judgment itself has passed, but in which an extended period of time – which is more than could be considered prudent or reasonable – has transpired, without the State having, in essence, effectively complied with the Judgment.

Obviously, this obligation is not fulfilled by with the inclusion of the list of cases subjected to the monitoring of compliance with judgments in the annual report, or by the attachment of the orders adopted to that end, as the quoted norms are clear in this regard, establishing that the Court should "*indicate*" the cases in which the pertinent orders have not been complied with. This obligation cannot be satisfied with the mere appending of information.

II.- Competence of the General Assembly of the OAS and the Court.

In this matter, it should be remembered that the Inter-American system of human rights leaves the adoption of the measures deemed pertinent for the enforcement of the judgments of the Court in the jurisdiction of the General Assembly of the OAS. It is understood, then, that the lack of compliance with the Court's judgments is more a matter of the competence of the political body and not of the judiciary, given that it is a case of a sovereign state fulfilling the commitments made under the requirements of Article 68(1) of the Convention, which provides:

> *"The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties."*

It is for this reason that the Convention assigns limited jurisdiction to the Court in the cases in question, having once delivered its judgment.

Effectively, Article 67 indicates:

> *"The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment."*

That is, against a ruling of the Court, only a request for legal interpretation may be lodged; such a request would, naturally, be presented before the Court.

For their part, the Rules of Procedure of the Court, hereinafter the Rules, dictated by the Court itself,[1] by virtue of the rights granted by the Statute,[2] provide for specific actions of the Court once the judgment in question has been delivered. In addition to communicating judgments,[3] it can hand down a judgment on reparations and costs, and, if it has not already done so,[4] interpret these rulings,[5] monitor compliance,[6] and amend obvious mistakes, clerical errors, or errors in calculation.[7] That is all that the

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[1] Approved by the Court during its LXXXV Regular Period of Sessions, held from November 16 to 28, 2009.

[2] Art. 25: *"Rules and Regulations of Procedure. …*

3. The Court shall also draw up its own Regulations."

[3] Art. 67: *"Delivery and Communication of the Judgment.*

1.When a case is ready for judgment, the Court shall deliberate in private and approve the judgment, which shall be notified by the Secretariat of the Commission; the victims or alleged victims, or their representatives; the respondent State; and, if applicable, the petitioning State.

….

6. The originals of the judgment shall be deposited in the archives of the Court. The Secretary shall dispatch certified copies to the States Parties; the Commission; the victims or alleged victims, or their representatives; the respondent State; the petitioning State, if applicable; the Permanent Council through its Presidency; the Secretary General of the OAS; and any other interested person who requests them."

[4] Art.66: *"Judgment on reparations and costs.*

1. When no specific ruling on reparations and costs has been made in the judgment o the merits, the Court shall set the date and determine the procedure for the deferred decision thereon. …."

[5] Art. 68: *"Request for Interpretation.*

1. The request for interpretation referred to in Article 67 of the Convention may be made in connection with judgments on preliminary objections, on the merits, or on reparations and costs, and shall be filed with the Secretariat. It shall state with precision questions relating to the meaning or scope of the judgment of which interpretation is requested.

2. The Secretary shall transmit the request for interpretation to all those participating in the case and shall invite them to submit any written comments they deem relevant within the time limit established by the Presidency.

3. When considering a request for interpretation, the Court shall be composed, whenever possible, of the same Judges who delivered the judgment whose interpretation is being sought. However, in the event of death, resignation, impediment, recusal, or disqualification, the judge in question shall be replaced pursuant to Article 17 of these Rules.

4. A request for interpretation shall not suspend the effect of the judgment.

5. The Court shall determine the procedure to be followed and shall render its decision in the form of a judgment."

[6] Art. 69: *"Procedure for Monitoring Compliance with Judgments and Other Decisions of the Court*

1. The procedure for monitoring compliance with the judgments and other decisions of the Court shall be carried out through the submission of reports by the State and observations to those reports by the victims or their legal representatives. The Commission shall present observations to the State's reports and to the observations of the victims or their representatives.

2. The Court may require from other sources of information relevant data regarding the case in order to evaluate compliance therewith. To that end, the Tribunal may also request the expert opinions or reports that it considers appropriate.

3. When it deems it appropriate, the Tribunal may convene the State and the victims' representatives to a hearing in order to monitor compliance with its decisions; the Court shall hear the opinion of the Commission at that hearing.

4. Once the Tribunal has obtained all relevant information, it shall determine the state of compliance with its decisions and issue the relevant orders..

5. These rules also apply to cases that have not been submitted by the Commission."

[7] Art. 76: *"Rectification of errors in judgments and other decisions.*

The Court may, on its own motion or at the request of any of the parties to the case, within one month of the notice of the judgment or order, rectify obvious mistakes, clerical errors, or errors

Court can do regarding a judgment it has delivered, not simply because of the principle that in public law only that which is permitted by standards may be done, but also in recognition of the principle of legal certainty involved in the handing down of the judgment, which is conveyed as definitive as well, for the tribunal from which it has been issued.

Then, logically, it should be understood that monitoring compliance with judgments is provided for in the Rules, for the purposes specified in Articles 65 of the Convention and 30 of the Statute, namely, that the Court include in its annual report to the General Assembly of the OAS states that have not complied with its judgments in the relevant period, and not to evade that obligation.

This regulatory mechanism cannot, therefore, be expected to replace the competence, enshrined in the Convention, of the General Assembly of the OAS on the matter, even if the Assembly should fail to exercise its competency, or fail to do so in proper form. It is not for the Court to judge the actions of that political body, the highest of the organization.

III.- Shortcomings and risks of the mechanisms provided.

Neither can the aforementioned regulatory mechanism be justified by the fact that applicable conventional legal standards do not establish other, more appropriate mechanisms to effectively guarantee compliance with the judgments of the Court. Especially seeing as how the current mechanism pertains to the application and interpretation of the Convention,[8] and not its modification; a function which is the exclusive responsibility of the States Parties to the Convention.[9] So much so, that

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in calculation. The Commission, the victims or their representatives, the respondent State, and, if applicable, the petitioning State shall be notified if an error is rectified."

[8] Art. 62 of the Convention: *"1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.*

2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.

3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

[9] Art. 76 *idem*: *"1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General.*

2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification."

Art. 39 of the Vienna Convention on the Law of Treaties: *"A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide."*

Art. 40 *idem*: *"Amendment of multilateral treaties.*

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

a) the decision as to the action to be taken in regard to such proposal:

b) the negotiation and conclusion of any agreement for the amendment of the treaty.

Article 30 of the Statute, after referring to the annual report and the identification of cases that have not complied with judgments, adds, after a full stop, that the Court "*may also submit to the OAS General Assembly proposals or recommendations on ways to improve the Inter-American system of human rights, insofar as they concern the work of the Court.*" That is, if the Court considered the present system inefficient or inadequate, what would follow would be for it to propose to the General Assembly of the OAS the modifications it deemed necessary; not for it to alter, through legislation, that which is established in the Convention and the Statute.

Similarly, it is not appropriate to transform the regulatory mechanism for monitoring compliance with judgments in the prolongation of the already failed process, or in a new process, or, finally, in a case which ultimately involves, on the one hand, an excuse for failing to report promptly to the General Assembly of the OAS the lack of compliance with rulings of the Court, and, on the other, granting the State an extension, without, moreover, a deadline for compliance. This, for one, because such a situation would place the victims of human rights violations in a disadvantageous position, due to the need to extend litigation – this time against arguments of internal law which the State typically invokes to avoid complying with rulings, and which obviously would not arise in the trial proper.[10] For its part, the Court itself is placed in a position in which, due to the lack of powers necessary for the enforcement of its rulings, it must rely on appeals or, rather, political pressure to ensure that the State in question honor its freely made sovereign commitment to comply with judgments.[11] This mechanism cannot, therefore, strip the final judgment of its intrinsic value as "*final and not subject to appeal,*" nor affect the majesty of the Court's function.[12]

We have even greater difficulty justifying the prolongation of the regulatory mechanism of monitoring compliance with judgments, without promptly informing the General Assembly of the OAS of any failure to comply, as occurs in the present case, when the Court has many of these types of cases open. As such, providing this information in one case would lead to the obligation to provide the same information in many of the rest of the cases; this could result in a serious political problem within the

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3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.
4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State.
5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:
a) be considered as a party to the treaty as amended; and
b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement."

[10] Art. 27 idem*: "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."
[11] Art. 26 idem*: "Pacta sunt servanda".*
"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."
[12] Art. 67 of the Convention.

Inter-American system, as well as the recognition of the inefficiency of the judicial system of human rights.

This circumstance cannot function as a justification in the present issue, as it is primarily a political in nature rather than judicial, though it belongs to the judicial sphere.

IV.- Responsibilities.

Additionally, it is not appropriate to invoke this circumstance, given that it would be assuming that the topic of compliance with judgments is exclusively the responsibility of the Court, and not the States. Namely, that the inefficiency of the judicial system of human rights in this regard is a matter to be resolved by the Court, and not by the States.

However, the provisions of Article 65 of the Convention and 30 of the Statute of the Court have as their object, precisely the opposite: that the General Assembly of the OAS, that is, the States, officially recognize and consequently assume the problem of noncompliance, in some cases, of judgments of the Court, and adopt the appropriate measures, if they so deem it necessary. And it is the sovereign States that have assumed the obligation provided for in Article 68(1) of the Convention. The problem is, then, their responsibility, as well as the task of solving it. That is the system established in the Convention and, as such, the Court should not impede its normal functioning, but rather, allow for it to operate effectively. What follows, therefore, is to permit the institutionality provided for in the Convention to function as planned.

Likewise, it would be unacceptable, in order to justify the failure to inform the General Assembly of the OAS, as in the present case, of the noncompliance with judgments, to cite the fact that the Court has set a precedent, constant and uniform, in this regard. It is, as it has been described on other occasions[13], not just that the Court is unable to modify the provisions of the Convention, but also that its jurisprudence does not create law,[14] is not binding outside of the case being heard,[15] and obviously can be modified by the Court itself, there being no impediment to this, except for the eventual inclination it might adopt in favor of a conservative stance on the matter.

Also, it is not appropriate to invoke respect for human rights or the *pro homine*[16] principle as justification for the indefinite extension, as has occurred in the present

[13] *Dissenting Opinion of Judge Eduardo Vio Grossi regarding the Judgment of the Inter-American Court on Merits, Reparation, and Costs, Case of Barbani Duarte et al. v. Uruguay, of October 13, 2011, III. General Considerations.*

[14] Art. 38(1)(d). of the Statute of the International Court of Justice*: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: …d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."*

[15] Art. 59 *idem: "The decision of the Court has no binding force except between the parties and in respect of that particular case."*

[16] Art. 29 of the Convention: *"Restrictions Regarding Interpretation.*

case, of the regulatory mechanism of monitoring compliance with judgments without informing the General Assembly of the OAS, in accordance with Articles 65 of the Convention and 30 of the Statute. That is because this is not the eventuality provided for in the treaty standards for the application of aforementioned principle. That is, the mechanism for monitoring compliance of judgments is not a right recognized in the Convention, but an instrument set forth in the Rules of Procedure, and not by the Convention, nor by the State. This, in order to enable the Court to best fulfill the obligation laid on it by Article 65 of the Convention and 30 of the Statute, before the General Assembly of the OAS, to which the Court is, therefore, liabe to answer to in this matter.

Finally, it would not be justifiable to argue in support of neglecting to comply with the provisions of Article 65 of the Convention and Article 30 of the Statute, despite the lapsing of a more than reasonable or prudent amount of time since the pronouncement of the judgment without fulfillment, in the essential, on the part of the State. The regulatory mechanism for monitoring compliance with judgments represents for the State the opportunity to promote or guarantee respect for human rights, which would not occur if it reported in the terms set forth in the abovementioned articles.

And that argument would not be justifiable, as it fails to consider, as it was described in another opportunity,[17] that the best guarantee for the respect of human rights is for the Court to adhere strictly to the norms, especially treaty standards, which govern it. The unrestricted adherence to "the rule of law" which is required of the States in matters of human rights is equally, and more justifiably, expected of the Court; especially, when one recalls that its role is to impart Justice in matters of human rights, through the application of Law in that sphere, and not the promotion of such rights. The latter task, being left in the hands of the Inter-American Commission on Human Rights.[18] Nor does the Court engage in the creation of norms that perfect the

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No provision of this Convention shall be interpreted as:

a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;

b) 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;

c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or

d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."

[17] See Note N° 13.

[18] Art. 41 of the Convention*: "The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:*

a) to develop an awareness of human rights among the peoples of America;

b) to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;

c) to prepare such studies or reports as it considers advisable in the performance of its duties;

d) to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;

e) to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;

Inter-American system of promotion and protection of human rights; such a task corresponds, as has been previously stated, to the States.[19] The Court is, on the other hand, an autonomous entity in the exercise of its functions, which necessitates an extremely strict adherence to the norms which regulate it, guaranteeing in this way judicial impartiality and security.

Conclusion.

Certainly, with all that has been noted, it is not being asserted that the mechanism for monitoring compliance with judgments enshrined in the Rules of Procedure is not useful, or even, in certain cases, effective. Neither is it being espoused that it is inappropriate or that it contradicts that which is set out in the Convention or the Statute. On the contrary, what is being affirmed is, on the one hand, that its application does not relieve the Court of its duty laid out in Article 65 of the Convention and 30 of the Statute, and on the other hand, that the mechanism has been established precisely to carry out with those duties.

Note that in this regard, monitoring entails "*exercising a superior's inspection in work done by others*,"[20] which for the Court, corresponds simply to that provided for, among others, in the Rules of Procedure:,[21] to become informed, particularly through the request for reports on compliance with judgments and "*once…having all the pertinent information, it shall determine the state of compliance, and it shall emit the resolutions that it deems necessary.*" That, and no other, is and ought to be the object of the regulatory mechanism, and never the evasion or delaying of the fulfillment of that ordered in Article 65 of the Convention and Article 30 of the Statute. The objective of these norms is the enabling of the General Assembly of the OAS to adopt the decisions it deems necessary with regard to noncompliance with the judgments of the Court, and to that it ought to adhere.

One additional remark: Undoubtedly, in light of the objective indicated, one could estimate that the identification before the General Assembly of the OAS by the Court of those cases in which, during the preceding period, compliance with judgments has not been achieved does not preclude the exercise of the right of the Court to continue employing, in appropriate cases, the regulatory mechanism of monitoring compliance with judgments. That is to say, it does not exclude the possibility that the Court continue, in the periods that follow, with the regulatory procedure of respective supervision; an event in which it ought to indicate, in the following year's annual report, whether the previously reported state of noncompliance persists, and, in this way, contribute to the objective mentioned above. Namely, that the General Assembly of the OAS act, if it considers it pertinent, according to its responsibilities in this matter.

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f) to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and

g) to submit an annual report to the General Assembly of the Organization of American States."

[19] See Note Nº 9.

[20] Dictionary of the Spanish Language, Real Academia Española, 2001 edition.

[21] Art. 69.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary