

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

OF JUNE 19, 2012

CASE OF ESCHER *ET AL* v. BRAZIL

MONITORING COMPLIANCE WITH JUDGMENT

HAVING SEEN:

1. The Judgment on Preliminary Objections, Merits, Reparations and Costs (hereinafter, the "Judgment") delivered by the Inter-American Court of Human Rights (hereinafter, "the Inter-American Court" or "the Court") on July 6, 2009, in which it ordered that:

[...]

7. The State must pay Arlei José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral and Celso Aghinoni, the amount established in paragraph 235 of the [...] Judgment for non-pecuniary damages, within one year of notification thereof and as stipulated in paragraphs 260 to 264 of the [...] Judgment.

8. The State must publish once in the Official Gazette, in another national newspaper with widespread circulation, and in a newspaper with widespread circulation in the State of Paraná, the cover page, Chapters I, VI to XI, without the corresponding footnotes, and the operative paragraphs of the [...] Judgment, and must publish the entire text of the [...] Judgment on an official web page of the Federal State and of the state of Paraná. The publications in the newspapers and on the Internet must be made within six and twelve months, respectively, of notification of the [...] Judgment, under the terms of paragraph 239 thereof.

9. The State must investigate the facts that gave rise to the violations in the instant case, under the terms of paragraph 247 of the [...] Judgment.

10. The State must pay the amount established in paragraph 259 of the [...] Judgment for reimbursement of costs and expenses, within one year of notification thereof and as stipulated in paragraphs 260 to 264 of the Judgment.

[...]

2. The Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs issued by the Court on November 20, 2009.

3. The Order of the Inter-American Court on Monitoring Compliance with Judgment, of May 17, 2010, in which it was decided, *inter alia*:

1. To clarify the inexistence of an error with regard to the measure of reparation established in paragraph 239 and in the eighth operative paragraph of the Judgment on Preliminary Objections, Merits, Reparations and Costs of July 6, 2009.

2. To order the State, in accordance with the general conditions established in the Judgment and the additional elements established in Considering paragraph 20 of the [...] Order, to publish the cover page, paragraphs 1 to 5, 86 to 117, 125 to 146, 150 to 164, 169 to 180, 194 to 214, and 221 to 247 of Chapters I, VII, VIII, IX and XI of the Judgment, without the footnotes, and the Operative Paragraphs. Said publication must be made within two months of notification of the [...] Order.

4. The briefs of November 23, 2010 and December 15, 2011, and their respective attachments, in which the State submitted information regarding compliance with the Judgment.

5. The briefs of December 24, 2010 and the attachment of February 27, 2012, in which the victims' representatives (hereinafter "the representatives") forwarded their observations to the information presented by Brazil.

6. The briefs of May 17, 2011 and January 30, 2012, in which the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted its observations to the information submitted by the State and the observations presented by the representatives.

CONSIDERING THAT:

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

2. Brazil has been a State Party to the American Convention on Human Rights (hereinafter, the "American Convention" or the "Convention") since September 25, 1992 and, pursuant to Article 62 thereof, accepted the compulsory jurisdiction of the Court on December 10, 1998.

3. In accordance with Article 67 of the American Convention, States Parties must comply fully and promptly with the judgment of the Court. Furthermore, Article 68 (1) of the American Convention stipulates that "[t]he States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties." To this end, the State must ensure the implementation, at the domestic level, of the provisions set forth in the Court's rulings.¹

4. The obligation to comply with the Court's rulings conforms to a basic principle of International Law, supported by international jurisprudence, according to which States must abide by their international treaty obligations in good faith (*pacta sunt servanda*) and, as this Court has already indicated and as established in Article 27 of the 1969

¹ Cf. *Case of Baena Ricardo et al v. Panama. Jurisdiction*. Judgment of the Inter-American Court of November 28, 2003. Series C No. 104, para 131 and *Case of Kawas Fernández v. Honduras. Monitoring Compliance with Judgment* Order of the Inter-American Court of Human Rights of February 27, 2012, Considering paragraph 2.

Vienna Convention on the Law of Treaties, States cannot, for domestic reasons, neglect their pre-established international responsibility.² The treaty obligations of States Parties are binding on all State powers and organs.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 to the substantive provisions of human rights treaties (i.e. those addressing protected rights), but also to procedural provisions, such as those referring to compliance with the Court's decisions. These obligations should be interpreted and applied in such a manner that the protected guarantee is truly practical and effective, bearing in mind the special nature of human rights treaties.⁴

6. The States Parties to the American Convention that have accepted the contentious jurisdiction of the Court have a duty to comply with the obligations established by the Court. This includes the duty to inform the Court about the measures it has adopted to comply with the Court's rulings in its decisions. The State's prompt observance of its obligation to report to the Court on how it is complying with each of the measures ordered is essential for evaluating the status of compliance with the Judgment as a whole.⁵

a) Obligation to pay the amounts established in the Judgment (Operative paragraphs 7 and 10 of the Judgment)

7. The State reported that on April 20, 2010 it issued Decree N° 7158/10, in which it authorized the Secretariat for Human Rights to pay the amounts set in the Judgment. Furthermore, it reported that on April 28 and May 19, 2010, the payment was made to the victims along with the reimbursement of costs and expenses.

8. The representatives confirmed that State made the payments indicated. The Commission confirmed the payment of the indemnities but did not expressly refer to the reimbursement of costs and expenses.

9. From the information furnished by the parties, the Court concludes that the State has fully complied with the payments corresponding to compensation for non-pecuniary damage and the reimbursement of costs and expenses ordered in Operative Paragraphs 7 and 10 of the Judgment.

b) Obligation to publish the Judgment (Operative Paragraph 8 of the Judgment)

² Cf. *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Articles 1 and 2 American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994, Series A N° 14, para. 35, and *Case of Caballero Delgado and Santana v. Colombia. Monitoring Compliance with Judgment*. Order of the Inter-American Court of Human Rights of February 27, 2012, Considering para. 5.

³ Cf. *Case of Castillo Petruzzi et al v. Peru. Monitoring Compliance with Judgment*. Order of the Inter-American Court of Human Rights of November 17, 1999, Considering paragraph 3, and *Case of Caballero Delgado and Santana*, *supra* note 2, Considering paragraph 5.

⁴ Cf. *Case of Ivcher Bronstein v. Peru. Jurisdiction*. Judgment of September 24, 1999. Series C No. 54, para. 37 and *Case of Caballero Delgado and Santana*, *supra* note 2, Considering paragraph 6.

⁵ Cf. *Case of Barrios Altos. Monitoring compliance with Judgment*. Order of the Inter-American Court of Human Rights of September 22, 2005, Considering paragraph 7 and *Case of Kawas Fernández*, *supra* note 1, Considering paragraph 3.

10. The State reported that it published the relevant parts of the Judgment in the Official Gazette and in the "*O Globo*" and "*Correio Paranaense*" newspapers. Likewise, it published the Judgment on the official websites of the Secretariat for Human Rights of the Presidency, of the *Procuradoria Geral de Justiça* and of the Court of Justice and Government, the latter of the state of Parana.

11. In this regard, both the representatives and the Commission indicated that this measure of reparation has been fully complied with.

12. The Court takes cognizance of the information provided by the parties, which includes the supporting documentation of the publications in the "*O Globo*" newspaper on July 23, 2010, in "*Correio Paranaense*" on August 10, 2010 and in the Official Gazette published on September 27, 2010. In addition, the State furnished evidence of the publication of the Judgment on the official websites mentioned previously. The Court considers that the publications issued by Brazil fulfill the measure of reparation ordered by the Court in Operative Paragraph 8 of the Judgment, and therefore declares that the State has fully complied with this measure of reparation.

c) Duty to investigate the facts that gave rise to the violations of the instant case (Operative Paragraph 9 of the Judgment)

13. The State reported on the proceedings undertaken in the domestic sphere with a view to complying with this obligation. The Secretariat for Human Rights forwarded the Judgment to the *Procuradoria Geral de Justiça* of the State of Parana, the competent body in charge of conducting the investigation. In this regard, the Public Prosecutor's Office pointed out that it was not possible to initiate an investigation into the dissemination of the telephone conversations or the handover and dissemination of the tapes with the recorded conversations to the media, given that these events are considered time-barred according to section 10 of Act N° 9.296/96 and section 109 of the Brazilian Criminal Code. Consequently, any investigation into the facts of the case is hindered by the domestic laws, which do not allow for such a proceeding if the crime is time-barred. Likewise, the Public Prosecutor's Office analyzed the possibility that the facts might be characterized as crimes against humanity or as grave human rights violations but concluded that these would not fall within such a category. In response to the Public Prosecutor's Office, the Secretariat for Human Rights inquired about the possibility of conducting a civil investigation or an "investigative procedure [...] even though, in the end, it is concluded because the matters investigated are time-barred." However, the Public Prosecutor's Office opposed such a procedure and noted that the statute of limitations also applies to the civil sphere and that the criminal investigation would not constitute an end in itself. Furthermore, the State argued that the Court's criteria regarding the non-applicability of statutory limitations to a criminal action concerning grave human rights violations could not be applied. Brazil emphasized that "the instant case concerns the violation of the right to privacy, resulting from the 'breach of telephone secrecy' [*quebra del secreto telefónico*], an action that is not classified as a grave human right violation." Moreover, there was no evidence to suggest that the State's conduct was aimed at promoting the impunity of the transgressors.

14. The representatives noted that more than ten years have elapsed since the case was brought before the Inter-American System and yet the State has only recently mentioned the statute of limitations in its report on compliance, for which reason this argument could not be accepted. Furthermore, they stated that aside from the violations of the victims' right to intimacy, privacy and freedom of association, it

was in fact the delay in the investigations into the facts by the State which led to the case being brought before the Inter-American System, which is why the State cannot uphold the argument that it is unable to investigate such facts. The representatives also recalled that the State must enforce the provisions of the Convention and abide by its international obligations. The Judiciary is part of the State and, therefore, must comply with the decisions of the Inter-American Court. The representatives pointed out that, faced with the supposed statute of limitations, the State did not seek alternatives to circumvent this alleged impediment, as Argentina or Peru did in certain cases. Moreover, although the State is required to comply with the criminal investigation, it could show its good faith by proposing alternative forms of investigating and identifying those responsible for the injury; although these actions would not literally comply with the Court's decision, they would demonstrate the State's willingness to find another way to fulfill the provisions of the Judgment.

15. The Commission noted that the statute of limitations had already expired prior to the Judgment and that even so the Court expressly ordered the State to investigate the facts. It considered that "the State's argument that it is unable to comply with its conventional obligation based on the amount of time elapsed without an action having been filed at the domestic level is not valid". It also pointed out that the case was brought before the Court because of a lack of justice at the domestic level and that, as a general legal principle, no party can argue in its favor something that was caused by its own action or negligence. The Commission noted that the State did not present information showing progress in complying with this point of the Judgment.

16. The Inter-American Court, in the first place, recalls that during the Merits procedure, the parties did not inform the Court of the possible expiry of the criminal action; they only referred to the five-year statute of limitations in the administrative sphere.⁶ Similarly, the Court determined that the State should investigate the facts surrounding the dissemination of the tapes with the recorded conversations:

In this case, the Court found that a violation of Articles 8 and 25 has been proved as regards the criminal investigation into the dissemination of telephone conversations conducted against the former Secretary of Security (*supra* para. 204). Moreover, the Court also found it proved that the State did not investigate the handing over and dissemination of the tapes with the recorded conversations to one of the media, and did not establish the criminal responsibility for this act (*supra* para. 205). Regarding the handing over and dissemination of the tapes with the recorded conversations, in accordance with the criteria established in the Court's case-law, the State must investigate the facts and take the necessary measures. Also, regarding the other violations found, the Court considers that this Judgment, its publication and the compensation for the pecuniary damage are sufficient measures of reparation.⁷

17. In its report, the State justified the absence of the investigation ordered in Operative Paragraph 9 of the Judgment based on the expiry of the criminal action, since the applicable definition contained in Article 10 of Act No. 9.296/96 stipulates a penalty of two to four years, and Article 109, IV of the Criminal Code of Brazil, establishes a statute of limitations of eight years for crimes that carry a maximum penalty of four years.⁸ Therefore, the criminal action with regard to the facts of the

⁶ Cf. *Case of Escher et al v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 6, 2009. Series C N°. 200, para. 245 and 246.

⁷ Cf. *Case of Escher et al.*, *supra* note 6, para. 247.

⁸ Law No. 9.296/96, of July 24, 1996:

Art. 10 - Constitui crime realizar interceptação de comunicações telefônicas, de informática ou

instant case expired on June 7, 2007, that is, before the case was brought before the Court.⁹

18. In this regard, this Court has indicated that, in criminal cases, the statute of limitations determines the expiry of the right to bring a criminal action due to the time elapsed, and generally limits the punitive power of the State to prosecute unlawful conduct and punish those responsible.¹⁰ Nevertheless, in its case-law, the Court has specified that the statute of limitations is inapplicable in certain cases that involve serious human rights violations, for which the State's punitive power is maintained against conduct whose repression is imperative. In this sense, in the case of *Albán Cornejo V. Ecuador*, the Court made clear that "the statute of limitations is inadmissible in connection with and inapplicable to a criminal action where gross human rights violations under International Law are involved. This criterion has been upheld in the Court's constant and consistent decisions."¹¹ More recently, in its Judgment in the case of *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, the Court reiterated this view when it stated that "in certain circumstances, International Law considers statutes of limitations to be inadmissible and inapplicable, as well as amnesty laws and the establishment of exemptions of liability, in order to maintain the State's punitive power for conducts that, because of their seriousness and to avoid repetition, need to be repressed."¹²

19. Likewise, in the Judgment delivered in the case of *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, the Court reiterated its case-law with regard to "[...] the statute of limitation provisions [...] that are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, summary, extrajudicial, or arbitrary executions and forced disappearances are not admissible, all these being prohibited for contravening irrevocable rights recognized by International Human Rights Law."¹³ This jurisprudence was also upheld in recent cases

telemática, ou quebrar segredo da Justiça, sem autorização judicial ou com objetivos não autorizados em lei.

Pena: reclusão, de dois a quatro anos, e multa.

Brazilian Criminal Code, Decree-Law No. 2.848, of December 7, 1940:

Prescrição antes de transitar em julgado a sentença

Art. 109 - A prescrição, antes de transitar em julgado a sentença final, salvo o disposto nos §§ 1º e 2º do Art. 110 deste Código, regula-se pelo máximo da pena privativa de liberdade cominada ao crime, verificando-se:

[...]

IV - em oito anos, se o máximo da pena é superior a dois anos e não excede a quatro.

⁹ The case was submitted to the Court on December 20, 2007.

¹⁰ Cf. *Case of Albán Cornejo et al v. Ecuador. Merits, Reparations and Costs*. Judgment of the Inter-American Court of November 22, 2007. Series C N° 171, para. 111, and *Case of Vera et al v. Ecuador. Preliminary Objection, Merits, Reparations and Legal Costs*. Judgment of the Inter-American Court of May 19, 2011. Series C No. 224, para. 117.

¹¹ Cf. *Case of Albán Cornejo et al.*, *supra* note 10, para. 111, and *Case of Vera et al*, *supra* note 10, para. 117.

¹² Cf. *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, Reparations and Costs*. Judgment of the Inter-American Court of September 1, 2010. Series C No. 217, para. 207.

¹³ Cf. *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of the Inter-American Court of November 24, 2010. Series C No. 219, para. 171.

in which serious human rights violations were alleged.¹⁴ From the foregoing, it is clear that, in the Court's case-law, the inadmissibility of statutes of limitations has usually been declared based on the specificities of cases that involve serious human rights violations, such as forced disappearance of persons, extrajudicial executions and torture. In some of those cases, the human rights violations occurred in a context of massive and systematic violations.

20. As has been indicated by this Court, any human rights violation, by its very nature, implies a certain level of gravity, because it implies a breach of certain obligations by the State to respect and guarantee people's rights and freedoms. However, this should not be confused with what the Court, throughout its case-law, has deemed to be "serious human rights violations," which, as is evident from the aforementioned precedents, have their own connotation and consequences. To accept that this case involves a level of gravity for which the statute of limitations is inapplicable, would imply that in any case brought before the Court, involving human rights violations which of themselves imply gravity, such a procedure would be inappropriate.¹⁵

21. This Court recalls that in its Judgment in the instant case it did not declare the non-admissibility of the statute of limitations, but ordered the State to conduct a criminal investigation into specific conducts and establish the corresponding legal consequences, which did not rule out the possibility of a criminal action related to the facts under investigation being considered as prescribed. In view of the foregoing, and bearing in mind the Court's constant case-law, in the instant case the Court deems it appropriate to close the procedure for monitoring compliance with the Judgment regarding the obligation to investigate the facts, as established in Operative Paragraph 9 of the Judgment.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

In exercise of its powers to monitor compliance with its decisions and pursuant to Articles 33, 62.1, 62.3, 65, 67 and 68.1 of the American Convention on Human Rights, Articles 25.1 and 30 of its Statute and 31.2 and 69 of its Rules of Procedure,

DECLARES THAT:

¹⁴ Cf. *Case of Gelman v. Uruguay. Merits, Reparations and Costs*. Judgment of the Inter-American Court of February 24, 2011. Series C No. 221, para. 225; *Case of Contreras et al. v. El Salvador. Merits, Reparations and Costs*. Judgment of the Inter-American Court of August 31, 2011. Series C No. 232, para. 185 (d), and *Case of González Medina and relatives v. Dominican Republic. Preliminary Objections, Merits, Reparations and Costs*. Judgment of the Inter-American Court of February 27, 2012. Series C No. 240, para. 185 (e).

¹⁵ Cf. *Vera Vera et al. supra* note 10, para. 118.

1. In accordance with the provisions stipulated in Considering Paragraphs 9 and 12 of this Order, the State has fully complied with the operative paragraphs of the Judgment delivered in the instant case which ordered the State:

- a) to pay Arlei José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral and Celso Aghinoni, the amount established in paragraph 235 of the [...] Judgment for non-pecuniary damage, within one year of notification thereof and as stipulated in paragraphs 260 to 264 of the Judgment (*Operative Paragraph 7 of the Judgment of July 9, 2009*);
- b) to publish once in the Official Gazette, in another national newspaper with widespread circulation, and in a newspaper with widespread circulation in the state de Paraná, the cover page, Chapters I, VI to XI, without the corresponding footnotes, and the operative paragraphs of the [...] Judgment, and to publish the entire text of the [...] Judgment on an official web page of the Federal State and of the state of Paraná. The publications in the newspapers and on the Internet must be made within six and twelve months, respectively, of notification of the Judgment, under the terms of paragraph 239 thereof (*Operative Paragraph 8 of the Judgment of July 9, 2009*), and
- c) to pay the amount established in paragraph 259 of the [...] Judgment for reimbursement of costs and expenses, within one year of notification thereof and as stipulated in paragraphs 260 to 264 of the Judgment (*Operative Paragraph 10 of the Judgment of July 9, 2009*).

2. Likewise, according to the provisions of Considering paragraphs 16 to 21 of this Order, it proceeds to close the procedure to monitor compliance with the following operative paragraph of the Judgment, which ordered the State:

- a) To investigate the facts that gave rise to the violations in the instant case, as stipulated in paragraph 247 of the Judgment (*Operative Paragraph 9 of the Judgment of July 9, 2009*).

AND DECIDES:

1. To consider closed the case of *Escher et al*, given that the State of Brazil has complied with the measures ordered in Operative Paragraphs 7, 8 and 10 of the Judgment delivered by the Inter-American Court of Human Rights on July 9, 2009, and also of the procedure to monitor compliance with Operative Paragraph 9 of said Judgment.

2. To archive the case file in the instant case.

3. To communicate this Order to the General Assembly of the Organization of American States during its next period of regular sessions by means of the Annual Report of the Inter-American Court of Human Rights for the year 2012.

4. To require the Secretariat of the Court to notify this Order to the Federal Republic of Brazil, the Inter-American Commission on Human Rights and the representatives of the victims.

Diego García-Sayán
President

Manuel Ventura Robles

Leonardo A. Franco

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