

**ORDER OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS
OF JUNE 19, 2012**

CASE OF HELIODORO PORTUGAL V. PANAMA

MONITORING OF 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 August 12, 2008.

2. The Order for Monitoring Compliance with Judgment issued by the Inter-American Court on May 28, 2010. In this Order the Court declared that it would keep open the procedure to monitor compliance with the operative paragraphs still pending compliance in the instant case, namely:

a) investigate the facts that gave rise to the violations in the instant case, and identify, prosecute and, if applicable, punish those responsible (*Operative Paragraph 12 of the Judgment*);

b) provide the medical and psychological care required by Graciela De León de Rodríguez, Patria Portugal and Franklin Portugal, immediately and free of charge, through its specialized health care institutions (*Operative Paragraph 15 of the Judgment*) and

c) define the offenses of forced disappearance of persons and torture (*Operative Paragraph 16 of the Judgment*).

3. The briefs of September 8 and November 29, 2010, January 24 and June 20, 2011 and March 8, 2012, in which the Republic of Panama (hereinafter "the State" or "Panama") reported on its compliance with the Judgment.

4. The briefs of October 7 and 8, 2010, January 10, February 4 and July 20, 2011 and March 30, 2012, in which the victims' representatives (hereinafter "the representatives") submitted their observations to the State's reports.

5. The communications of December 16, 2010, February 22 and October 25, 2011 and of May 1, 2012, in which the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted its observations to the reports submitted by the State and to the observations presented by the representatives.

CONSIDERING THAT:

1. It is an inherent power of the judicial functions of the Court to monitor compliance with its decisions.
2. Panama has been a State Party to the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") since June 22, 1978, and accepted the contentious jurisdiction of the Court on May 9, 1990.
3. In accordance with the provisions of Article 67 of the American Convention, the State must comply fully and promptly with the Court's judgments. 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." Therefore, States must ensure that the rulings set forth in the Court's decisions are implemented at the domestic level.¹
4. The obligation to comply with the rulings of the Court corresponds to a basic principle of international law, supported by international jurisprudence, according to which States must comply with their international treaty obligations in good faith (*pacta sunt servanda*) and, as this Court has already indicated and as established in Article 27 of the 1969 Vienna Convention on the Law of Treaties, States cannot, for domestic reasons, neglect their pre-established international responsibility.² The treaty obligations of States Parties are binding for 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

1. Obligation to investigate the facts that gave rise to the violations in the instant case, and to identify, prosecute and, if applicable, punish those responsible (Operative Paragraph 12 of the Judgment)

¹ Cf. *Case of Baena Ricardo et al. Jurisdiction*. Judgment of the Inter-American Court of November 28, 2003. Series C No. 104, para. 60; 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.

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 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 para. 3, and *Case of Caballero Delgado Santana v. Colombia*, *supra* note 2, considering para. 5.

⁴ Cf. *Case of Ivcher Bronstein v. Peru. Jurisdiction*. Judgment of the Inter-American Court of Human Rights of September 24, 1999. Series C No. 54, para. 37, and *Case of Caballero Delgado and Santana v. Colombia*, *supra* note 2, considering para. 6.

6. The State indicated its firm interest in the criminal investigation into the case of Mr. Portugal and expressed the hope that this would lead to the prosecution of those responsible. In this regard, it reported that on March 8, 2010 the Second Superior Court of Justice initiated criminal proceedings against eight accused and dismissed the case against two persons. The Attorney General's Office appealed the decision with regard to one of these persons. Similarly, the State indicated that as part of this proceeding two hearings were convened, on July 7, 2010 and June 29, 2011. Initially, the State indicated that the hearing of July 2010 was postponed due to the appeal filed by the Attorney General's Office. Subsequently, Panama stated that the hearing was postponed due to the fact that some parties were not notified. In addition, it reported on some of the steps taken regarding the extradition process of one of the accused. Finally, it indicated that there are no *de jure* or *de facto* obstacles that impede the investigations, and that the "next of kin [...] have had access to the case file of the proceedings, were heard in person and through the affidavits in the case file [...] and in [these] they made petitions that have been resolved and addressed."

7. The representatives referred to the lack of substantial progress made in the investigation of the facts. Furthermore, among other claims, they pointed out that "the facts of the case are being investigated under the criminal definition of homicide, which excludes the investigation, prosecution and punishment of several conducts associated with the forced disappearance of persons, including the torture suffered by Mr. Portugal." They noted that the State "has not submitted copies of the investigation procedures carried out," as required in the Order, "and it has not referred to the lines of investigation followed in the proceedings carried out at the domestic level." Similarly, they emphasized that "the hearing set for June 29, 2011 did [not] take place" and that there have been setbacks in the extradition process of one of the accused because certain "documents related [to the process] had to be sent back to France due to omissions in the translation, which implies a further delay." They also pointed out that it is unreasonable to delay the hearing for one year due to the fact that the parties were not notified. Finally, they stated that "the victim's next of kin have not had access to the proceedings and have not been informed of the measures carried out."

8. The Commission made similar observations to those of the representatives and, *inter alia*, noted the lack of progress made in the investigation, pointing out that although more than 18 months had elapsed since the Court issued the Order of March 8, 2010, the State continues to report that it has not been able to notify it to all parties involved in the proceedings. The Commission "consider [ed] it necessary that the State [...] explain the reasons why procedural problems of notification or of another type prevent progress in the legal proceedings." It added that "the State abstained from explaining the reasons why the investigation is limited to the crime of homicide, and why other alternatives have not been explored so that any liabilities eventually determined are consistent with the repeated and continued nature of the offenses during the decades of Mr. Portugal's forced disappearance." The Commission concluded that "the State is not fulfilling this part of the Judgment with the diligence necessary to properly investigate the facts and determine the corresponding liabilities."

9. In its Order of May 28, 2010 the Court recalled that pursuant to its obligation to guarantee the rights recognized in Article 1(1) of the Convention, the State has the duty to prevent and fight impunity, which the Court has defined as "the overall failure to investigate, search, arrest, prosecute and convict those responsible for human rights violations protected by the American Convention." In this regard, the Court has

held that the State “has the obligation to fight impunity using all the legal means at its disposal, since impunity fosters chronic recidivism of human rights violations and the total defenselessness of victims and their relatives.” This obligation implies the duty of States Parties to the Convention to organize their governmental apparatus and, in general, all the structures through which public authority is exercised, so that they are legally capable of ensuring the free and full exercise of human rights. Hence, considering its importance, the obligation to investigate must be discharged in a certain way, so that it is consistent with the standards established by international rules and jurisprudence, which require investigations to be prompt, thorough, impartial and independent.⁵

10. In this Order, the Court also deemed it “essential for the State to present organized, detailed, complete and updated information on the investigations in process and the steps taken since the delivery of the Judgment up to the present, forwarding copies of the relevant parts of the respective case files. Moreover, the State must ensure the victims’ participation in all the pertinent procedural stages.”⁶

11. From the information provided by the parties, the Court notes that the Order issued by the Second Superior Court of Justice, on March 8, 2010, requiring the opening of criminal proceedings, has not been notified to all of the accused, which would prevent the continuation of the process. Moreover, the hearing convened in the instant case was postponed at least twice, in July 2010 and June 2011, and the State has not set a new date for this proceeding. In this regard, the Court recalls that the Judgment states that, in compliance with the obligation to investigate and, if applicable, punish those responsible, the State must remove all *de facto* and *de jure* obstacles that impede the proper investigation of the facts, and use all means available to expedite that investigation.⁷ Furthermore, this Court has not received copies of the relevant parts of the case files from the State and, therefore, is unable to ascertain whether or not Panama is indeed ensuring the participation of the victims or their representatives in these proceedings, as it claims.

12. Consequently, the Court considers it necessary that the State submit organized, detailed, complete and updated information on the investigations carried out and the steps taken since the delivery of the Court’s Judgment up to the present, forwarding copies of the relevant parts of the respective case files. Likewise, in its next report Panama must submit information on the observations of the representatives and the Commission in relation to the facts and actions that are under investigation, as well as the legal context thereof (*supra* considering paragraphs 7 and 8). In addition, the Court reiterates that the State must guarantee the victims’ participation and provide them with the relevant information during all the pertinent procedural stages.

2. *Obligation to provide the medical and psychological care required by Graciela De León de Rodríguez, Patria Portugal and Franklin Portugal, immediately and free of charge, through its specialized health care institutions (Operative Paragraph 15 of the Judgment)*

⁵ Cf. *Case of Heliodoro Portugal v. Panama. Monitoring Compliance with Judgment*. Order of the Inter-American Court of Human Rights of May 28, 2011, considering para. 21.

⁶ Cf. *Case of Heliodoro Portugal v. Panama*, *supra* note 5, considering para. 23.

⁷ *Case of Heliodoro Portugal v. Panama. Preliminary Objections, Merits, Reparations and Costs*. Judgment of the Inter-American Court of Human Rights of August 12, 2008. Series C No. 186, para. 246.

13. The State reported that it issued “an ID card to the members of the Portugal family in order to inform the medical staff [...] of the case and of the State’s obligation to provide medical attention free of charge.” It also appointed a medical team and a social worker to provide assistance to the Portugal family and “has coordinated psychological and [physical] treatment” for Patria Portugal, Franklin Portugal and Graciela De León Rodríguez. The State indicated that it is taking steps to carry out the initial evaluation.

14. The representatives pointed out that “the State’s obligation in relation to this measure is not to provide care –even special [care] - for the ordinary ailments suffered by these individuals. Rather, the main goal is to provide reparation for the psychological and physical damage caused to the victims by the forced disappearance of Heliodoro Portugal.” The representatives stated that in order to comply with the Judgment it is necessary “to carry out a comprehensive diagnosis of the beneficiaries, in order to understand their physical and mental health situation and provide the specialized care they require, according to their specific circumstances and needs.” The representatives added that the treatment must be agreed and accepted by the beneficiaries, and must be provided by health care professionals in whom they trust.” They emphasized the situation of Graciela De León, who does not live in Panama City and “is unable to benefit from the arrangements made by the State with the Hospital Santo Tomás.” They also reported Mrs. Portugal had attended meetings “to coordinate the provision of medical and psychological treatment,” and several agreements were reached. Finally, they indicated that the State has not responded to the Court’s request to provide information on the possibility of providing care to persons who have been subjected to violence, under the terms established by the Pan American Health Organization.

15. The Commission indicated that although it considers it important for the Portugal family to be identified so that medical staff are aware of the special treatment to which they are entitled, this measure of itself does not ensure adequate compliance with this reparation measure. It considered that the State must conduct an individual assessment of the victims as soon as possible, in order to begin the appropriate treatment for each one, and eventually counteract the effects that this case has had on their health. Finally, the Commission asked the Court to order the State to submit a full and detailed report on the progress made regarding this measure, updating the information on the victims’ mental health.

16. The Court takes cognizance of the State’s report regarding the issue of an ID card, the assignation of a medical team and a social worker to provide assistance to the victims and the care provided by the public health institutions. Nevertheless, the Court recalls that this measure of reparation must seek to “reduce the physical and mental suffering that the events of this case have caused the victims,” and therefore it is essential to conduct an initial assessment of the victims.⁸ Furthermore, the Court notes that after more than three years since the Judgment was delivered, the initial assessment of each victim has not been carried out, this being an essential step to enable the State to provide them with the most appropriate and effective care.⁹ In addition, the Court reiterates that both medical and psychological care must be

⁸ Cf. *Case of Heliodoro Portugal v. Panama*. *supra* note 7 para. 256.

⁹ Cf. *Case of Heliodoro Portugal v. Panama*. *supra* note 7 para. 256.

provided according to the needs and with the consent of the beneficiaries. The Court recalls its observations in the previous Order, namely that the psychological treatment provided by the State must take into account the particular circumstances and needs of each person, so that they can be provided with collective, family or individual treatment, as agreed with each person and following individual assessment.¹⁰ To that end, the Court reiterates that the State authorities must continue to secure the cooperation and consent of the beneficiaries.¹¹

17. Consequently, the Court deems it necessary that the State submit organized, complete and up-to-date information regarding the measures adopted to comply with this operative paragraph of the Judgment in favor of Graciela De León, Patria Portugal and Franklin Portugal. Furthermore, as mentioned previously, the State should include information regarding the feasibility of following the recommendation of the Pan American Health Organization, so that “the people who have suffered different types of violence [could] be treated within the framework of the mental health system [...] [of Panama].”

3. Obligation to define the offenses of forced disappearance of persons and torture (Operative Paragraph 16 of the Judgment)

18. The State reported that the crimes of forced disappearance of persons and torture were defined in Law No. 1 of January 13, 2011, published in the Official Gazette No. 26702-A, which “modified and added articles to the Criminal Code of the Republic of Panama in relation to the offenses of Forced Disappearance of Persons and Torture.” The State attached a copy of the aforementioned law.

19. The representatives noted that “the text of the approved law does not stipulate that in cases of forced disappearance the criminal proceedings, or the penalty, are not subject to the statute of limitations [, nor] does it recognize the continuous or permanent nature of the offense of forced disappearance.” They stated that the omission of this aspect of the offense could have consequences for the application of the criminal definition to behaviors that started before the legal definition of the offense and continued thereafter. Similarly, with regard to the definition of torture, the representatives indicated that the new text overcomes the limitations of the previous wording, which only defined the behavior of public servants. However, they emphasized the provisions of Article 3 of the Inter-American Convention to Prevent and Punish Torture, considering it important that the norm in question clearly define the persons who may be considered as perpetrators of this offense.

20. The Commission noted that the new text adopted on forced disappearance is, in principle, compatible with four of the five elements considered essential with regard to the State’s international obligations and indicated as such in the Judgment, namely: a) irrelevance of the way in which forced disappearance is perpetrated; b) deprivation of liberty and failure to provide information in that regard; c) refusal to acknowledge the deprivation of liberty; and d) proportionality of the punishment in relation to the gravity of the crime. However, the Commission indicated that this norm does not establish the continuity or permanence of the offense or the fact that it is not subject

¹⁰ Cf. *Case of Heliodoro Portugal v. Panama*, *supra* note 5, considering paragraph 30.

¹¹ Cf. *Case of Heliodoro Portugal v. Panama*, *supra* note 5, considering paragraph 30.

to the statute of limitations. Consequently, since the new criminal definition does not clearly establish the continuous nature of the offense, it would appear that it is only applicable in the future and not to forced disappearances that took place prior to the legal definition, but that have continued over time because the whereabouts or fate of the victims or of their mortal remains has not been determined. Furthermore, with regard to the offense of torture the Commission noted that the text adopted overcomes the limitation regarding the perpetrators (active subjects) of this conduct, which was previously restricted to public servants.

21. In its Judgment, the Court ordered the State to define both offenses “in the terms of and in compliance with the obligations assumed [by Panama] under the [Inter-American] Convention on Forced Disappearance and the [Inter-American] Convention against Torture, as of March 28, 1996 and August 28, 1991, respectively.”¹² In this regard, the Court takes cognizance of Law No. 1 of January 13, 2011, which amended and added articles to the Criminal Code of Panama regarding the offenses of forced disappearance of persons and torture.

22. The State modified the legal definition of the offense of forced disappearance, contemplated in Article 152 of the Criminal Code, as follows:

The act of depriving a person or persons of their freedom, in whatever way, perpetrated by Agents of the State or by individuals or groups acting with the authorization, support, or acquiescence of the State, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees, shall be punished with imprisonment of fifteen to twenty years.

23. The Court notes that the definition used by the law transcribes the definition of forced disappearance established in Article II of the Inter-American Convention on the Forced Disappearance of Persons.¹³ Therefore, the Court confirms that, with the entry into force of Law No. 1 of January 13, 2011, the State of Panama has complied with its obligation to define forced disappearance in accordance with its international obligations.

24. Nevertheless, the Court notes that this regulation does not refer to the continuous or permanent nature of the offense nor does it state that the statute of limitations does not apply to criminal proceedings in cases of forced disappearance. Consequently, the Court considers that the aforementioned definition partially complies with the requirements set forth in the Inter-American Convention on the Forced Disappearance of Persons and those ordered in the Judgment. In view of the foregoing, the State must take the necessary steps to adapt, within a reasonable period, its domestic legislation regarding the continued and permanent nature of the offense of forced disappearance and the non-application of the statute of limitations to criminal proceedings for this offense, and to provide information on this matter.

¹² *Case of Heliodoro Portugal v. Panama*, *supra* note 7, para. 259.

¹³ Article II: For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

25. Regarding the definition of torture, the new Article 156-A of the Panamanian Criminal Code establishes that:

Whoever inflicts physical or mental suffering on a person for the purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty or for any other purpose, shall be punished with imprisonment of ten to fifteen years.

This punishment shall be imposed on the person who applies methods intended to obliterate the personality of the victim or diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

26. In paragraph 215 of the Judgment, the Court indicated that the previous regulation:

merely refers to the conduct of public officials and only when the victims have been detained. Hence, these articles do not contemplate the criminal liability of any other "person who, at the instigation of a public servant, [...] orders, instigates or induces the use of torture, directly commits it, or is an accomplice thereto", according to Article 3(b) of the Convention against Torture. Furthermore, such an imprecise description of this act violates the requirements of the principle of legal and juridical certainty.

27. In this regard, the Court takes cognizance that the definition used in the current legislation transcribes Article 2 of the Inter-American Convention to Prevent and Punish Torture¹⁴ and does not limit the perpetrators to public servants. Accordingly, the Court considers that the amendment to the law complies with its requirements regarding the definition of torture. As to the representatives' observation that the definition does not include different presumptions of instigation or participation, the Court considers that there is no indication that these cannot be contemplated under the general presumptions of liability provided for in criminal law.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

in exercise of its authority to monitor compliance with its decisions 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 Articles 31(2) and 69 of its Rules of Procedure,

DECLARES:

1. That pursuant to the terms of considering paragraphs 25 to 27 of this Order, the State has complied with the following measure of reparation:

define the offense [...] of torture (*Operative Paragraph 16 of the Judgment*).

2. That in accordance with the terms of considering paragraphs 21 to 24 of this

¹⁴ Article 2: For the purposes of this Convention, torture shall be understood as any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty or for any other purpose. Torture shall also be understood as the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. [...]

Order, and without prejudice to the indications below regarding the continuous or permanent nature of the forced disappearance of persons and the non-application of the statute of limitations to this offense, the State has partially complied with the following measure of reparation:

define the offense [...] of forced disappearance of persons [...] (*Operative Paragraph 16 of the Judgment*).

3. That it will keep open the procedure to monitor compliance with the following operative paragraphs pending compliance:

a) investigate the facts that gave rise to the violations in the instant case, and identify, prosecute and, if applicable, punish those responsible (*Operative Paragraph 12 of the Judgment*);

b) provide the medical and psychological care required by Graciela De León de Rodríguez, Patria Portugal and Franklin Portugal, immediately and free of charge, through its specialized health care institutions (*Operative Paragraph 15 of the Judgment*) and

c) define the offense of forced disappearance of persons, so that its legislation includes the continuous or permanent nature of the offense of forced disappearance and the non-application of the statute of limitations to criminal proceedings and the penalty for this offense, in accordance with the terms of considering paragraph 23 of this Order (*Operative Paragraph 16 of the Judgment*).

AND DECIDES:

1. To require the State of Panama to adopt all such measures as are necessary to promptly and effectively comply with the operative paragraphs pending compliance, indicated in Declarative paragraph two, under the terms of Article 68(1) of the American Convention on Human Rights.

2. To request the State of Panama to submit to the Inter-American Court of Human Rights, no later than October 31, 2012, a report specifying the measures it has adopted to comply with the reparations ordered by this Court that are still pending compliance, as indicated in Considering paragraphs 12, 17 and 24, as well as in Declarative paragraph 3 of this Order.

3. To call upon the representatives and the Inter-American Commission on Human Rights to submit their observations to the State's report referred to in the preceding operative paragraph, within a period of four and six weeks, respectively, as from the date of receipt thereof.

4. To require the Secretariat of the Court to notify the instant Order to the State of Panama, the Inter-American Commission 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