

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

2008

Inter-American System

Claudia Martin

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev



Part of the [Courts Commons](#), [Human Rights Law Commons](#), [International Humanitarian Law Commons](#), and the [International Law Commons](#)

II INTER-AMERICAN SYSTEM

CLAUDIA MARTIN^{*}

During the period covered by this report, the Inter-American Court on Human Rights (hereinafter the 'Court') issued the following judgements on the merits: case of *Kimel vs Argentina*, case of *Salvador-Chiriboga vs Ecuador* and case of *Yvon Neptune vs Haiti*. Additionally, the Court adopted several decisions interpreting certain aspects of previous judgements, pursuant to Article 67 of the American Convention on Human Rights (hereinafter the 'American Convention' or 'Convention').

The present report will first briefly describe the Court's current procedure in monitoring State compliance with its judgements. Second, it will analyse the Court's judgement in the *Kimel* Case, on the issue of whether criminal defamation laws are compatible with the American Convention. Third, the report will succinctly review the facts and conclusions on the *Neptune* Case, the first judgement issued by the Court against Haiti.

The full text of the decisions mentioned in this report can be found on the website of the Court at www.corteidh.or.cr.

1. MONITORING COMPLIANCE WITH THE COURT'S JUDGEMENTS

Compliance with the Court's judgements is mandated under Articles 67 and 68 of the American Convention. Article 67 provides that judgements of the Court are final and not subject to appeal. Article 68 obligates States parties to comply with the Court's judgements when the Convention is breached. Additionally, the Court holds that judgement compliance is based on the *pacta sunt servanda* principle; whereby, States must undertake its international obligations in good faith.¹ The Court further

^{*} Claudia Martin would like to thank the editing support and comments provided by Luiza Di Giovanni, a legal researcher at the Academy and WCL student.

¹ Inter-American Court of Human Rights, *Bulacio vs Argentina*, Monitoring Compliance with Judgment, Order of the Inter-American Court of Human Rights of 17 November 2004, 'considering' para. 5; Inter-American Court of Human Rights, *Barrios Altos vs Peru*, Monitoring Compliance with Judgment, Order of the Inter-American Court of Human Rights of 22 September 2005, 'considering' para. 5; and Inter-American Court of Human Rights, *Caesar vs Trinidad and Tobago*,

declared that the States' obligation to ensure effective domestic implementation of the substantive and procedural provisions of the Convention includes compliance with the Court's judgements.² Moreover, States that accept the Court's contentious jurisdiction are obligated to respect its orders, including those requesting information on the status of compliance with the Court's judgements.³

The Court has no authority, under the American Convention or the Court's Statute and Rules, to supervise compliance or set a monitoring procedure. However, since the initial judgements on reparations in 1989, the tribunal established a practice of requesting information from States and adopting resolutions assessing the State's compliance.⁴

In *Baena Ricardo et al. vs Panama*, the Court articulated the legal bases in support of its practice of monitoring compliance.⁵ In *Baena Ricardo*, the Panamanian Government challenged the Court's authority to require information from States and adopt resolutions on the status of compliance with its judgements. Panama argued that the Court exceeded the scope of its jurisdiction, because the OAS General Assembly, pursuant to Article 65 of the American Convention, is the only organ authorised to monitor States. The Court first reasserted its authority to determine the scope of its own jurisdiction.⁶ Second, the Court reasoned that the surveillance of judicial compliance is an inherent part of its jurisdiction.⁷ The Court's decisions are not declaratory in nature, but aim to protect victim's rights and provide redress for their violation; thus, decisions are effective only when fully executed.⁸ Last, the Court concluded that the power to supervise compliance with its judgements is based on an interpretation of several provisions of the American Convention (Articles 33, 62(1) and 20 and 65), its Statute (Article 30), and supported by a consistent monitoring practice never challenged by States before.⁹

Monitoring Compliance with Judgment, Order of the Inter-American Court of Human Rights of 21 November 2007, 'considering' para. 6.

² Inter-American Court of Human Rights, *Moiwana Community vs Suriname*, Monitoring Compliance with Judgment, Order of the Inter-American Court of Human Rights of 21 November 2007, 'considering' para. 6; and Inter-American Court of Human Rights, *Ximenes-Lopes vs Brazil*, Monitoring Compliance with Judgment, Order of the Inter-American Court of Human Rights of 2 May 2008, 'considering' para. 6.

³ Inter-American Court of Human Rights, *Barrios Altos vs Peru*, Monitoring Compliance with Judgment, Order of the Inter-American Court of Human Rights of 22 September 2005, 'considering' para. 7; and Inter-American Court of Human Rights, *Baldeón-García vs Peru*, Monitoring Compliance with Judgment, Order of the Inter-American Court of Human Rights of 7 February 2008, 'considering' para. 5.

⁴ Inter-American Court of Human Rights, *Baena, Ricardo et al. vs Panama*, Competence, Judgement of 28 November 2003, Series C, No. 104, para. 107.

⁵ *Idem*.

⁶ *Ibidem*, at para. 68.

⁷ *Ibidem*, at para. 72.

⁸ *Idem*.

⁹ *Ibidem*, at paras 84–104.

In practice, the Court sends written communications to States requesting information on the measures adopted to implement the judgement. States submit reports that are referred to petitioners and the Inter-American Commission of Human Rights (hereinafter the 'Commission') for their observations. As a result of this process, the Court issues resolutions on compliance, which are published and available at the Court's website. The supervision process is essentially in written form, although in recent times the Court convened the parties and the Commission to private hearings for compliance assessment.¹⁰ Moreover, pursuant to Article 65 of the American Convention, the Court may submit to the General Assembly information on States that demonstrate reluctance in complying with the Court's judgements.¹¹ However, to date, the General Assembly has limited itself to adopting resolutions urging States to comply, in general, without taking any other steps to ensure full compliance.¹²

For a complete set of resolutions monitoring compliance with the Court's judgements, please visit the Court's website at: www.corteidh.or.cr/supervision.cfm.

2. THE *KIMEL* CASE AND ITS IMPLICATIONS FOR THE APPLICATION OF CRIMINAL DEFAMATION LAWS

In *Kimel vs Argentina*, the Court revisited the issue of using criminal defamation laws to sanction adverse public criticism against public officials. In two former cases, *Herrera Ulloa vs Costa Rica* and *Canese vs Paraguay*,¹³ the Court held that freedom of speech merits a higher degree of protection when public officials, rather than private individuals, are targets of alleged defamatory statements. The rationale for the heightened protection is to foster public debate on accountability and transparency of governmental actors in a democratic society. In the aforementioned cases, the Court concluded that, within the context of the facts, the application of criminal and other sanctions to the alleged defamers were disproportionate and resulted in

¹⁰ Inter-American Court of Human Rights, *Raxcacó-Reyes vs Guatemala*, Monitoring Compliance with Judgment, Order of the Inter-American Court of Human Rights of 9 May 2008, 'having seen' para. 7.

¹¹ See, e.g., Inter-American Court of Human Rights, *Annual Report of the Inter-American Court on Human Rights 2003*, OEA/Ser.L/V/III.61, doc. 1, 9 February 2004, pp. 45–46, available at: www1.umn.edu/humanrts/iachr/Annuals/annual-03.pdf (reporting on the partial compliance of Ecuador in the *Benavides Ceballos* Case and the failure of Trinidad and Tobago to inform the Court on the status of compliance in the *Hilaire, Constatine, Benjamin et al.* Case. In both cases, the Court requests the General Assembly of the Organization of American States to urge those States to fulfill their obligations under the American Convention).

¹² See, e.g., AG/Res. 2408 (XXXVIII-O/08), *Observations and Recommendations on the Annual Report of the Inter-American Court of Human Rights*, 4th Plenary Sess., 3 June 2008, at para. 3, available at: www.oas.org/DIL/AGRES_2408.doc.

¹³ Inter-American Court of Human Rights, *Herrera Ulloa vs Costa Rica*, Judgement of 2 July 2004, Series C, No. 107; and Inter-American Court of Human Rights, *Canese vs Paraguay*, Judgement of 31 August 2004, Series C, No. 111.

violations of the right to freedom of expression protected under Article 13 of the American Convention. In *Kimel*, the Court further scrutinised the criminalisation of defamation and its compatibility with the Convention. This issue is particularly relevant in Argentina. According to petitioners, although the State had derogated its contempt laws (*desacato*), public officials continued to sue journalists under criminal defamation laws. Arguably, the possibility of a criminal conviction lingering upon journalists serves to deter public criticism of public officials.

Eduardo Gabriel Kimel (hereinafter 'Kimel') is a well-known journalist, writer, and researcher, who published various books pertaining to Argentina's political history. Among those publications, *The San Patricio Massacre* exposed the assassinations of five priests in 1976, during the Argentine military dictatorship. The book provided adverse remarks against State authorities, including an Argentine judge, who were involved with the homicidal investigation. Kimel asserted that the investigating judge completed all the formalities of the criminal investigation, but never intended to establish the truth. Moreover, Kimel depicted the Argentine judiciary as condescending, and in some occasions, even as accomplices to the military repression. On 28 October 1991, the investigating judge filed a criminal lawsuit against Kimel for defamation (*calumnias*).¹⁴ The Appellate Court found Kimel guilty and he received a one-year suspended sentence and a USD 20,000 fine. The Argentine Supreme Court rejected Kimel's appeal, thus, the case was presented to Commission.

In their submissions before the Court, the Commission and petitioner complained that the State did not abide by its international obligations and violated Articles 13 (Freedom of Thought and Expression), 8 (Judicial Guarantees), and 25 (Judicial Protection) of the American Convention. The violations were committed in relation to the general obligations to respect and ensure, as well as to adopt domestic measures protected by Articles 1(1) and 2 of the Convention. On 9 October 2007, the State and Kimel's representatives announced a friendly settlement agreement. Argentina accepted international responsibility for the violations of the rights of freedom of thought and expression, the right to be tried within a reasonable time and the general obligations to respect and ensure, and to adopt domestic measures. It also requested the Court to determine the appropriate reparations. Petitioners withdrew their claim regarding the alleged violations of the rights to be tried by an impartial tribunal, to appeal and to judicial protection. Notwithstanding the State acceptance of responsibility, the Court decided that certain legal issues needed clarification; thus, the Court proceeded to rule on the specific Convention violations.

The Court, at the onset of the proceedings, reiterated its former case-law contending that the right to freedom of expression under the American Convention has an individual and a social dimension. These dual dimensions require States to respect the freedom to communicate ideas and ensure the collective right to receive information

¹⁴ *Calumnias* involves the untrue accusation of having committed a crime.

and views from others. Subsequently, the Court declared that the right to freedom of expression is not an absolute right. Article 13 of the American Convention authorises permissible restrictions to this right in order to balance other equally relevant rights, such as the right to reputation protected under Article 11 of that treaty. The Court in *Kimel* concluded that the determination of the permissibility of restrictions in this case involves a four-prong test: 1) whether the interference – criminal liability – was established by law; 2) whether the protection of a judge's reputation is a legitimate aim; 3) whether the application of criminal law was necessary in the context of this case; and 4) whether the measures adopted against Kimel were proportional to the end the State sought to achieve.

First, the Court reasoned that the application of criminal law in restricting the right to freedom of expression requires that the legislation respect the principle of legality. The relevant law must define the breath of the prohibited conduct in express, precise, and exhaustive terms. Furthermore, it must be adopted prior to its application to a particular case. In *Kimel*, the State accepted that Argentine criminal defamation laws were overbroad and lacked precision, thereby permitting inappropriate interferences with the right to freedom of expression. The Court concluded that Argentine domestic legislation on defamation violated Article 9 (freedom from *ex post facto* laws) and 13 of the American Convention, in relation to Articles 1(1) and 2.

Second, the Court held that protection of a judge's reputation is a legitimate aim under Article 13 of the Convention. Paragraph two of that provision specifically authorizes States to impose restrictions on the right to freedom of expression in order to protect the 'reputation of others'. Moreover, under Article 11 of the Convention, everyone, including judges, has the right to honour and reputation. The use of criminal law to protect the reputation of others is not *per se* unacceptable under the Convention; however, the necessity and proportionality of its application must be assessed in each case.

Third, the Court assessed whether the criminal sanctions imposed upon Kimel were necessary to protect the right of the judge's honour and reputation. The Commission and the petitioners argued that the criminalisation of public criticism against State officials is in all cases unnecessary, even if the comment is offensive and damaging. The optimal mechanisms to ensure honour and reputation are the usage of civil sanctions coupled with appropriate procedures that permits the exertion of the right to rectification or reply. The Court disagreed and concluded that the use of criminal sanctions to protect the reputation of others, even public officials, is not in itself incompatible with the protection of freedom of speech. However, criminal measures can be applied only in exceptional cases. The Court further suggested that for a criminal measure to be justified, the following elements must be weighed: the extreme gravity of the speaker's comments; the speaker's intention to defame; and the type of damage caused to the plaintiff. Moreover, plaintiffs bear the burden of proof in establishing whether exceptional circumstances are met in their case. The Court further declared that journalists have a duty to verify in a reasonable, not necessarily exhaustive, manner the

facts on which they based their opinions. It is appropriate to require from journalists equity and diligence in the process of verifying the information provided by sources, particularly by comparing the information to other available relevant facts. The Court concluded that the facts clearly showed that the application of criminal sanctions to Kimel was unnecessary. Moreover, the State accepted the existence of shortcomings in its domestic legislation when acknowledging international responsibility.

Last, the Court weighed the proportionality of the criminal measures imposed on Kimel against the protection of the judge's reputation. It concluded that this test required the Court to assess: 1) the degree of interference with the rights at stake and whether that interference was severe, intermediate, or moderate; 2) the relevance of protecting the opposing right; and 3) whether the protection of one right justifies imposing restrictions on the other affected right. Depending on the facts of each case, freedom of expression will prevail in some cases and honour and reputation will prevail in others. In regards to freedom of expression, the interference with Kimel's right to express his views was severe since he was criminally convicted and received a stiff fine. In regards to honour and reputation, freedom of speech enjoys a higher level of protection to foster debates and accountability where public officials' (or prospective public officials') qualifications or actions in pursuance of the State position are at the centre of the discussion. In democratic societies, intense overt scrutiny is part of the sphere of public debate. Therefore, public officials are, in essence, choosing to expose themselves to public criticism when they decide to leave the private sphere. Moreover, in the sphere of public debate even offensive, shocking and irritating comments are afforded a broader protection than merely private speech.

In *Kimel*, the public criticism referred to a matter of public notoriety, namely the investigation carried out by a judge on a massacre perpetrated by state officials during the military dictatorship in Argentina. Additionally, Kimel did not use abusive language and referred only to the judge's role in investigating the case – not to the judge's personal life. Moreover, Kimel thoroughly researched the judicial investigation of the massacre and offered a value judgement on the judicial power's role during the dictatorship. The Court reasoned that Kimel's opinions, since it cannot be considered truthful or false, did not necessitate proof, because only facts merit proof. Proving the truth of value judgements is impossible, therefore, according to the Court subjecting individuals to criminal sanctions for expressing these judgements is not proportionate to the aim of protecting the reputation of others. In sum, Argentina violated Article 13 of the American Convention. Noteworthy, is that in the *Kimel* Case the Court, for the first time, followed the 'value judgements' approach more extensively developed by other international tribunals, notably the European Court of Human Rights.

Upon acceptance of the State's responsibility, the Court also found that the extensive domestic proceedings in Kimel's case failed to ensure the petitioner the right to a hearing within a reasonable time, as protected under Article 8(1) of the Convention.

The Court required that Argentina grants Kimel USD 30,000 for total damages. The Court also ordered that the domestic decision convicting Kimel for defamation be left without effect and his name removed from the criminal records. Moreover, to restore Kimel's reputation the State must publish sections of the Court's judgement in the official gazette and in a newspaper of national circulation and hold a public act acknowledging international responsibility for the violation of his rights. Last, the Court orders the State to adjust its domestic legislation on defamation in light of the protections afforded by the American Convention.

As a final comment, it is worth noting that the Court's conclusion on the application of criminal sanctions is not in agreement with the *Declaration of Principles on Freedom of Expression*, adopted by the Commission and its Rapporteur on Freedom of Expression in 2000.¹⁵ Principle 10 of the Declaration declares that

[t]he protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.

Notwithstanding this different approach, the Court, as stated above, made clear that criminal sanctions are permitted only under a very limited set of circumstances. Moreover, the two separate opinions, appended to the decision, appear to suggest that the Court's decision was a result of a compromise that will require further elaboration and clarification in the future.

3. THE *NEPTUNE* CASE: THE COURT'S FIRST CASE AGAINST HAITI

Haiti ratified the American Convention on 27 September 1977 and accepted the Court's contentious jurisdiction on 20 March 1998. The *Neptune* Case is the first case litigated against Haiti before the Court. The Commission alleged that this was an emblematic case to redress the victim's human rights violations and to draw general attention to the suffering of many other Haitian detainees.

The facts in this case transpired during a period of political polarisation, public insecurity, and inadequate institutionalisation, heightened among other factors, by the crisis regarding the local and legislative elections of 21 May 2000. Yvon Neptune (hereinafter 'Neptune'), during these elections, was elected as Senator of Haiti. The political crisis escalated due to the lack of consensus regarding the irregular polls, which were denounced by the opposing party and the international community. In March 2002, Neptune renounced his position as Senator and was appointed as

¹⁵ For the full text of the Declaration, see www.cidh.org/Basicos/English/Basic21.Principles%20Freedom%20of%20Expression.htm.

Haiti's Prime Minister. In the following months, there were numerous acts of political violence, protests, and repressions throughout the country. Protestors demanded the resignation of the former President Jean-Bertrand Aristide and sectors of the Haitian National Police. In February of 2004, an armed conflict developed in the northern city of Gonaïves, which propagated to other cities. It is in the city of Saint-Marc, located south of Gonaïves, where Neptune is alleged to have ordered the Haitian police to terminate the opposition; thus, initiating the social repression and the massacres that resulted thereof.¹⁶

On 29 February 2004, the United States Government assisted the former President Aristide by transporting him to the Central African Republic. Subsequently, an interim government was emplaced, which abrogated Neptune's term of office as Prime Minister. Neptune, soon after, went into hiding due to death-threats from adversaries. Furthermore, the Saint-Marc Trial Court announced an order for his arrest in issuance of the initiation and participation of the Saint-Marc massacres and arson. On 27 June 2004, Neptune surrendered himself to the authorities and was arrested.

The Trial Court concluded the initial criminal investigation and ordered that Neptune be tried as an accomplice for the perpetration of the Saint-Marc massacre, among other allegations. This resolution was appealed to the Gonaïves Appellate Court, which concluded that, given the status of Neptune as a Prime Minister, ordinary courts had no jurisdiction over the charges. In addition to its lack of jurisdiction, the Appellate Court failed in notifying Neptune, through a written form, of its decision. The Haitian High Court of Justice was the only court that had jurisdiction over Neptune's case, but the High Court never reviewed the charges. Though established in the Constitution, the High Court of Justice is not yet a functioning institution. On 27 July 2006, Neptune was released from prison for humanitarian reasons. However, his criminal charges remained opened.

The Court emphasises that its role is to review the general obligations of the State under the Convention and not to condemn individuals for criminal violations. Therefore, whether Neptune is guilty of the Saint-Marc allegation is not a relevant issue for the Court to decide. The issue before the Court is whether the State violated Neptune's due process and human rights while under investigation and incarceration.

The Court found that Neptune's right to be tried by a competent court protected under Article 8(1) of the Convention was violated. The trial and subsequent detention of the petitioner by a court that was later declared without jurisdiction, coupled with the inexistence of the High Court, left the petitioner in an indefinite legal status with indefinite pending criminal charges. The Court held that the case's lack of final determination within a reasonable time resulted in the violation of Neptune's right to

¹⁶ There is testimony declaring, *inter alia*, systematic rapes and vandalism, as well as, individuals being deliberately burned in their homes.

judicial protection mandated under Article 25 of the Convention. The Court further held the Haitian judicial system as insecure, inefficient, and incompetent.

In addition, the Court found that Neptune's detention violated his right to personal liberty under Article 7 of the Convention on several grounds. First, the Court reasoned that the detention was arbitrary as it resulted from a criminal trial conducted by a court that lacked jurisdiction. Second, the Court held that petitioner was not informed of the charges pending against him within a reasonable time. Neptune was only made aware of those charges when the trial court concluded the initial investigations and referred the case for trial 14 months after his incarceration. Third, the Court found that Neptune was never brought before a court to review the legality of his detention. He was released two years after his arrest without a decision analysing that matter. The charges, to date, are still pending against Neptune and he remains vulnerable to incarceration at any time. In sum, the Court concluded that Neptune's detention violated Articles 7(1), (2), (3), (4) and (5) of the Convention.

Evidence further exhibited that Neptune was denied humane treatment while in prison. The penitentiary lacked security; was overcrowded; lacked beds; lacked ventilation; had scarce hygienic facilities; scarce potable water; lack of medical attention; grave sanitary risks; and a deficient diet. Neptune frequently feared for his life. He received several death-threats, was beaten, and was the object of attempted murder while incarcerated. Neptune, although in an isolated cell, was never segregated from other common convicted criminals. The guards also insulted and threatened him. For these events, among others, the Court held that Neptune's condition while detained constituted inhumane treatment. Thus, the Court concluded that the State violated Articles 5(1), (2) and (4), in connection to Article 1(1) of the Convention.

The Court mandated the State to compensate Neptune for the infringement of his rights and required that judicial measures are adopted to finalise the criminal charges against him. The Court concluded that if the State decides to subject Neptune to another legal proceeding, then it must be done in accordance with the constitution, due process, and other judicial guarantees. Furthermore, the State must adopt legislation and all other judicial requisites to regulate Supreme Court procedures and ensure competency in the system. Moreover, the Court ordered the publication of parts of its judgement in the official gazette and another publication of national distribution. Last, it mandated the State to adopt a plan of action to substantially improve the conditions of Haitian prisons within a two-year period. Notably, the reparations afforded in this case extended beyond the individual victim and intended to force the State to take action on a number of issues, such as the inexistence of a functioning judiciary or inhumane prison conditions affecting the general Haitian prison population.