

Escher et al. v. Brazil

ABSTRACT¹

This case is about the illegal wiretapping by Military Police of organizations or farmers and land-reform activists in the Brazilian State of Paraná. The case gave the Court the occasion to discuss at length the right to privacy and freedom of association under the American Convention, and to spell out the limits police and magistrates face when intercepting private communications. The Court also dwelled on Article 28 of the American Convention (Federal Clause) as some of the violations in question had been committed by authorities of the State of Paraná, but found no violation of that Article.

I. FACTS

A. Chronology of Events

April 28, 1999: Colonel Valdemar Kretschmer, the Deputy Commander and Chief of Staff of the Military Police, requests authorization from the Loanda district to intercept and monitor two telephone lines of Agricultural Cooperative of Conciliation Forward Limited Partnership (*Cooperativa Agrícola de Conciliação Avante Ltda*; “COANA”), a social organization that shares common agrarian reform goals with the Land Workers’ Movement (*Movimento dos Trabalhadores Rurais Sem Terra*; “MST”), a Brazilian social movement.² COANA members include Mr. Arlei José Escher, Mr. Dalton Luciano de Vargas, Mr. Delfinio José Becker, Mr. Pedro Alves Cabral, and Mr. Celso Aghinoni.³ Secretary Cândido Martins, the Secretary for Public Security of the state of Paraná, authorizes Colonel Kretschmer to submit the request to the Loanda court.⁴

1. Lorraine Hall, Author; Theodore Nguyen, Editor; Kathryn Benson, Chief IACHR Editor; Cesare Romano, Faculty Advisor.

2. Escher et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 200, ¶¶ 1, 88–89 (July 6, 2009).

3. *Id.* ¶ 88.

4. *Id.* ¶ 89.

May 5, 1999: Major Waldir Copetti Neves, the head of the Águila Group of Military Police of Paraná, files a request with the Court to intercept and monitor one COANA telephone line based on supposed evidence that MST leaders are using the line for illegal purposes.⁵ The request alleges that COANA leaders are diverting funds and are suspected of murder.⁶ On the same day, Judge Elisabeth Khater of the Loanda court authorizes the request for telephone tapping by signing her initials in the margin but fails to notify the Prosecutor General's Office.⁷

May 12, 1999: In a request similar to the prior, Military Police Sergeant Valdecir Pereira da Silva requests from Judge Khater authorization to intercept and monitor the two telephone lines in the offices of the Communal Association of Rural Workers (*Associação Comunitária de Trabalhadores Rurais*; "ADECOR").⁸ ADECOR is an organization similar to COANA in that its members include Mr. Escher, Mr. Luciano de Vargas, Mr. Becker, Mr. Cabral, and Mr. Aghinoni, but its purpose differs from COANA, as it primarily functions for community development rather than agrarian reform.⁹ Once again, Judge Khater approves the request by signing her initials without notifying the Prosecutor General's Office, even though the request fails to state a cause for the interception.¹⁰

May 14, 1999: The first set of recordings begins.¹¹

May 25, 1999: Major Neves requests that the court cancel the interception and monitoring of the telephone lines because it successfully produced the desired evidence.¹² That same day, Judge Khater sends a copy of the request to the telephone company.¹³

May 26, 1999: The first set of recordings ends.¹⁴

5. *Id.* ¶ 90.

6. *Id.*

7. *Id.* ¶ 91.

8. *Id.* ¶¶ 1, 92.

9. *Id.* ¶¶ 88, 92.

10. *Id.* ¶ 92.

11. *Id.* ¶ 97.

12. *Id.* ¶ 93.

13. *Id.*

14. *Id.* ¶ 97.

June 7, 1999: A widely viewed national news program airs parts of the recordings from the interception of the two telephone lines (the “Recorded Conversations”).¹⁵

June 8, 1999: Secretary Martins holds a press conference to discuss the actions taken against MST.¹⁶ He plays the Recorded Conversations and distributes selected transcripts of those conversations to the members of the press in attendance.¹⁷ That same day and over the next few days, the media publishes and airs the fragmented conversations.¹⁸ While the specific contents of the Recorded Conversations are not revealed, some of the articles indicate that MST members are planning to engage in illegal activities.¹⁹

June 9, 1999: A second set of recordings begins without authorization.²⁰

June 23, 1999: The second recordings end.²¹

July 1, 1999: Major Neves sends Judge Khater a report with over 123 tapes of Recorded Conversations from the May and June recordings.²² The recordings Major Neves sends are incomplete and edited to contain only the parts that police believe are relevant.²³ This report also includes the requests by Colonel Kretschmer for the interception and monitoring.²⁴

July 2, 1999: The telephone company stops the interception of the two telephone lines.²⁵

August 19, 1999: MST and another organization, Land Rights Commission Pastoral Land (*Comissão Pastoral da Terra*; “CPT”), ask the Prosecutor General’s Office to open criminal investigations into the conduct of Secretary Martins, Judge Krater, Colonel Kretscherman, Major

15. *Id.* ¶ 94.

16. *Id.* ¶ 95.

17. *Id.*

18. *Id.* ¶ 96.

19. *Id.*

20. *Id.* ¶ 97.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* ¶ 99.

25. *Id.* ¶ 100.

Neves and Sergeant Silva.²⁶ Consequently, the Prosecutor General's Office opens criminal investigation No. 82,516-5.²⁷

October 5, 1999: COANA, ADECON, Mr. Escher, Mr. Luciano de Vargas, Mr. Becker, Mr. Cabral, and Mr. Aghinoni all file a writ of mandamus with the Court of Justice of the state of Paraná against Judge Khater.²⁸ They request that the Court of Justice suspend the interception and monitoring of the two telephone lines.²⁹ They also request the Recorded Conversations to be destroyed.³⁰

April 5, 2000: The Court of Justice denies the victims' writ of mandamus but fails to rule on both the merits and the request to destroy the recordings.³¹ The victims file *embargos de declaração* to clarify these failures.³²

May 30, 2000: For the first time, Judge Khater sends the monitoring petition to the Prosecutor General's Office.³³

June 7, 2000: The Court rejects the *embargos de declaração*, stating that because the court examined the merits and did not rule on them, there are no omissions in the judgment.³⁴

September 8, 2000: A hearing is held regarding the Recorded Conversations, during which a prosecutor states that the Military Police had no legitimate reason to record the telephone lines and that the interceptions were arbitrary and lacked connection to any criminal activity.³⁵ Based on this showing that the interceptions were purely for monitoring MST activities, the Prosecutor General's Office requests the court not to use the Recorded Conversations and to declare them invalid.³⁶

26. *Id.* ¶ 105.

27. *Id.*

28. *Id.* ¶ 107.

29. *Id.*

30. *Id.*

31. *Id.* ¶¶ 108–109.

32. *Id.* An embargo of declaration (*embargos de declaração*) is a motion that the parties can make to request the court to clarify a decision or parts of a decision. The Brazilian Supreme Federal Court, *Legal Glossary*, <http://www.stf.jus.br/portal/glossario/verVerbete.asp?letra=E&id=147> (last visited Feb. 20, 2016).

33. Escher et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 101.

34. *Id.* ¶ 109.

35. *Id.* ¶ 102.

36. *Id.*

October 6, 2000: The Court of Justice closes all the criminal investigations into the named officials, except for Secretary Martins.³⁷ His case is sent to a court of first instance.³⁸

April 11, 2001: The Prosecutor General uses information from the investigation and files a complaint against Secretary Martins.³⁹

April 18, 2002: Judge Khater declines to follow the Prosecutor General's Office request to quash the Recorded Conversations on the grounds that the Prosecutor General did not prove the tapes were illegal.⁴⁰ Instead of granting the request, she orders the burning of the Recorded Conversations.⁴¹

April 23, 2002: The Recorded Conversations are burned.⁴²

December 23, 2003: Secretary Martins is sentenced to twenty-eight months in prison, community service, and a fine.⁴³

January 19, 2004: Secretary Martins appeals his sentence.⁴⁴

October 14, 2004: Secretary Martins is acquitted, and his conviction is revoked.⁴⁵

B. Other Relevant Facts

The State is under twenty years of military rule until 1985.⁴⁶ Even though the military rule ended approximately thirty years ago, the country is affected by it to this day.⁴⁷ The country has been slow to tran-

37. *Id.* ¶ 105.

38. *Id.*

39. *Id.* ¶ 106.

40. *Id.* ¶ 104.

41. *Id.*

42. *Id.*

43. *Id.* ¶ 106.

44. *Id.*

45. *Id.*

46. José Fonseca, *A Brief History of Brazil*, NYTIMES.COM (2006), available at http://www.nytimes.com/fodors/top/features/travel/destinations/centralandsouthamerica/brazil/riodejaneiro/fdrs_feat_129_9.html?n=Top%2FFeatures%2FTravel%2FDestinations%2FCentral+and+South+America%2FBrazil%2FRio+de+Janeiro.

47. *Id.*

sition away from the effects of that time.⁴⁸ The recent prevalence of intercepting and monitoring telephones lines in Brazil can be attributed to this past military dictatorship, during which it was common for the secret police to spy on political enemies.⁴⁹

The focus of the MST movement is Brazil's land allocations: approximately one percent of the landowners own approximately half of the country's agricultural land.⁵⁰ The mechanization of the land is detrimental to agricultural workers.⁵¹ Substantive portions of the land remain unused, and the Brazilian Constitution grants the government a controversial right "to expropriate unused land for redistribution to the landless poor."⁵² MST requests enforcement of this right through occupation of the unused land.⁵³ The government responds to the movement harshly, through killings, torture, harassment, and wiretapping.⁵⁴

II. PROCEDURAL HISTORY

A. *Before the Commission*

June 30, 2000: On behalf of Mr. Escher, Mr. Luciano de Vargas, Mr. Becker, Mr. Cabral, and Mr. Aghinoni, the National Popular Lawyers Network (*Rede Nacional de Advogados Populares*) and the Center for Global Justice (the "Petitioners") file Petition 12.353 with the Inter-American Commission on Human Rights against the State.⁵⁵

November 14, 2001: The Commission holds a hearing on admissibility, and the State submits arguments as to why the case is not admissible.⁵⁶

October 12, 2005: The State re-submits its arguments for inadmissibil-

48. *Brazil's Dictatorship: The Final Reckoning*, THE ECONOMIST (Dec. 13, 2014), available at <http://www.economist.com/news/americas/21636059-investigation-human-rights-abuses-names-culprits-far-too-late-final-reckoning>.

49. Antonio Regalado, *In Brazil, Business as Usual Often Involves Wiretapping*, THE WALL ST. J. (Oct. 7, 2008), available at <http://www.wsj.com/articles/SB122331824781908463>.

50. Linda Pressly, *Brazil's Land Reform Dilemma*, BBC NEWS (Aug. 13, 2003), available at http://news.bbc.co.uk/2/hi/programmes/crossing_continents/3146937.stm.

51. *Id.*

52. Kevin E. Colby, *Brazil and the MST: Land Reform and Human Rights*, 16 N.Y. INT'L L. REV. 1, 2-5 (2003) (discussing the history of MST).

53. *Id.*

54. *Id.*

55. *Escher et al. v. Brazil*, Admissibility Report, Report No. 18/06, Inter-Am. Comm'n H.R., Case No. 12.353, ¶ 1 (Mar. 2, 2006).

56. *Id.* ¶ 5.

ity.⁵⁷

October 25, 2005: The Robert F. Kennedy Memorial Center for Human Rights submits an amicus curiae brief to the Commission supporting the admissibility of the petition.⁵⁸

March 2, 2006: The Commission declares the case admissible.⁵⁹

March 8, 2007: The Commission approves the Report on Merits No. 14/07, finding violations of Article 8 (Right to a Fair Trial), Article 11 (Right to Privacy), Article 16 (Freedom of Association), and Article 25 (Right to Judicial Protection) of the American Convention, all in relation to Article 1(1) (Obligation of Non-Discrimination) and Article 2 (Obligations to Give Domestic Legal Effect to Rights) of the American Convention.⁶⁰ The Commission recommends that the State: 1) investigate the facts surrounding the wiretaps and telephone recordings; 2) provide reparations to the victims and their relatives; 3) create programs to educate judicial officials and police on the right to privacy; and 4) immediately implement laws that comply with the American Convention to protect individuals' rights to privacy and freedom of association.⁶¹

B. Before the Court

December 20, 2007: The Commission submits the case to the Court after the State failed to adopt its recommendations.⁶²

1. Violations Alleged by Commission⁶³

Article 8 (Right to a Fair Trial)

Article 11 (Right to Privacy)

Article 16 (Freedom of Association)

Article 25 (Right to Judicial Protection)

57. *Id.*

58. *Id.*

59. *Id.* ¶ 36, "Decides" ¶ 1.

60. *Id.* "Decides" ¶ 1; *Escher et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, ¶ 3.

61. *Escher et al. v. Brazil*, Petition to the Court, Inter-Am. Comm'n H.R., Case No. 12.353, ¶ 26 (Dec. 20, 2007) (Available only in Spanish).

62. *Escher et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, ¶ 1.

63. *Id.* ¶ 3.

all in relation to:

Article 1(1) (Obligation of Non-Discrimination)

Article 2 (Obligation to Give Domestic Legal Effect to Rights)

2. Violations Alleged by Representatives of the Victims⁶⁴

Same Violations Alleged by Commission.

April 7, 2008: The victims' representatives present their brief, motions, and evidence.⁶⁵

July 7, 2008: The State files preliminary objections to the representatives' pleadings and motions brief, seeking to exclude its failure to ensure compliance with Article 28 (Federal Clause) of the American Convention from the analysis of the merits and alleging that the victims failed to exhaust domestic remedies.⁶⁶

March 24, 2008: The State appoints Roberto de Figueiredo Caldas as judge *ad hoc*.⁶⁷

May 15, 2009: The Human Rights Clinic of the Law School of the Fundação Getulio Vargas of Rio de Janeiro submits an *amicus curiae* brief to the Court.⁶⁸ The brief analyzes the domestic resources the victims attempted to utilize and whether those resources conform to national and international law.⁶⁹

64. *Id.* ¶¶ 4, 183. The representative named additional victims but the Court found that the case was limited to Mr. Escher, Mr. Luciano de Vargas, Mr. Becker, Mr. Cabral, and Mr. Aghinoni because the other 32 members of CONNA and ADECON were not named in the petition or in the Commissioners' report as required by case law. In addition, Mr. Eduardo Aghinoni was excluded because he died before the request for the first interception; therefore, it is impossible his rights were violated by the facts of the case. *Id.* ¶¶ 82–83.

65. *Id.* ¶ 4. The victims are represented by Global Justice (*Justiça Global*), National Network of Popular Lawyers, Land Rights (*Terra de Direitos*), and Land Rights Commission Pastoral Land (*Comissão Pastoral da Terra*; CPT) (collectively, the "Representatives"). *Id.*

66. *Id.* ¶¶ 5, 215.

67. *Id.* n.2.

68. *Id.* ¶ 10.

69. *Id.*

III. MERITS

A. *Composition of the Court*

Cecilia Medina Quiroga, President
Diego García-Sayán, Vice President
Sergio García Ramírez, Judge
Manuel E. Ventura Robles, Judge
Leonardo A. Franco, Judge
Margarette May Macaulay, Judge
Rhadys Abreu Blondet, Judge
Roberto de Figueiredo Caldas, Judge *Ad Hoc*

Pablo Saavedra Alessandri, Secretary
Emilia Segares Rodríguez, Deputy Secretary

B. *Decision on the Merits*

July 6, 2009: The Court issues its Judgment on Preliminary Objections, Merits, Reparations, and Costs.⁷⁰

The Court rejected the State's preliminary objections.⁷¹

As to the first preliminary objection, the Representatives' failure to comply with a time limit,⁷² the Court found that this was not a proper preliminary objection because it neither addressed an admissibility issue nor prevented the Court from adjudicating.⁷³ In regards to the second preliminary objection, the State's alleged failure to incorporate Article 28 (Federal Clause) in domestic proceedings,⁷⁴ the Court found it was not improper procedure when looking at the relevant rules of the American Convention and the Commission's Rules of Procedure.⁷⁵ In addition, the State could have submitted defenses addressing this during the processing of the case and did not.⁷⁶ Finally, the State failed to prove that its right to defense was impaired.⁷⁷ Lastly, the third prelimi-

70. Escher et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs.

71. *Id.* ¶¶ 11–53, “Operative Paragraphs” ¶ 1.

72. *Id.* ¶ 11(A).

73. *Id.* ¶¶ 11(A), 15–16.

74. *Id.* ¶ 17(B).

75. *Id.* ¶¶ 17(B), 18, 25.

76. *Id.*

77. *Id.*

nary objection, that the victims did not exhaust domestic remedies,⁷⁸ was rejected because the State did not raise this defense at the right time even though it had an opportunity.⁷⁹

The Court found unanimously that the State had violated:⁸⁰

Article 11 (Right to Privacy), in relation to Article 1(1) of the Convention, to the detriment of Mr. Escher, Mr. Luciano de Vargas, Mr. Becker, Mr. Cabral, and Mr. Aghinoni,⁸¹ because:

Article 11 (Right to Privacy) of the Convention protects the right to privacy by recognizing that everyone has the right “to have his honor respected and his dignity recognized” and the law protects this right from interferences and invasions.⁸² Telephone conversations in both private homes and offices are included in the protection of privacy.⁸³ However, Article 11(2) (Prohibition of Arbitrary Interference with Private Life, Family, Home, Correspondence, and Unlawful Attacks on Honor, and Dignity of the Convention) recognizes that there are limitations to this right, but these limitations cannot be arbitrary or abusive interferences.⁸⁴ To determine if an interference is arbitrary or abusive, the Court will look to compliance with the following three factors: (1) it must be established by law; (2) it must have a legitimate purpose; and (3) it must be appropriate, necessary and proportionate.⁸⁵ All three factors must be met for the Court to rule that the interference was arbitrary or abusive.⁸⁶

Here, the Court did not have any evidence beyond the Recorded Conversations.⁸⁷ Additionally, the State could not base its defense on the lack of evidence because the State burned the tapes and did not submit the transcripts to the Court.⁸⁸ Therefore, the Court granted probative value to the evidence it did have and held it was “very possible” the tel-

78. *Id.* ¶ 26(C).

79. *Id.* ¶¶ 26(C), 53.

80. *Id.* “Operative Paragraphs” ¶ 2.

81. *Id.*

82. *Id.* ¶ 83, n.67.

83. *Id.* ¶ 114.

84. *Id.* ¶ 116.

85. *Id.* ¶ 129.

86. *Id.*

87. *Id.* ¶ 128.

88. *Id.* ¶¶ 127–28.

ephone lines were record.⁸⁹ In addition, the Court determined the interception of the telephone conversations constituted an interference in the private lives of the victims because the conversations were private and the victims did not authorize the wiretapping.⁹⁰

Since the Court concluded interception into private lives did occur, the Court then examined if it was arbitrary or abusive.⁹¹ To determine if it was arbitrary or abusive, the Court first looked to see if there was a restriction to this right that is established by law.⁹²

According to Article 30 (Restrictions Can Only Be Applied in Accordance with Laws Enacted for Reasons of General Interest) of the Convention, any law that restricts a right must be enacted in the interest of the public and implemented for this purpose.⁹³ Therefore, the law must be clear and precise with detailed rules to establish the boundaries of the restriction.⁹⁴ This includes the specific circumstances when the restriction applies, who can request the restriction, who can order it, who can carry it out, and procedurally how to implement it.⁹⁵

Brazil did have a valid law that conformed with Article 30 (Restrictions Can Only Be Applied in Accordance with Laws Enacted for General Interest) of the Convention; the Brazilian Constitution provides telephone conversations can be intercepted for certain criminal investigations or preliminary investigations.⁹⁶ The Court found that Brazilian law provides that the requests to intercept and monitor phone lines can come from police authorities, the chief of police, and Secretary Martins, or the judge may do so ex officio.⁹⁷ The request must be accompanied by reasonable indications that the person is involved in a crime and evidence that the desired information cannot be obtained through other investigatory methods.⁹⁸ Judicial authorization should be accompanied by an explanation of the decision and impose the fifteen day time limit unless otherwise extended.⁹⁹

89. *Id.* ¶ 128.

90. *Id.* ¶ 129.

91. *Id.*

92. *Id.* ¶ 130.

93. *Id.* ¶ 130, n.125.

94. *Id.* ¶ 131.

95. *Id.*

96. *Id.* ¶ 132.

97. *Id.*

98. *Id.*

99. *Id.*

The Court found that neither the request by Major Neves nor the request by Sergeant Silva specified a crime.¹⁰⁰ While the interception may have been made for the purpose of a criminal investigation such as murder and diversion of public funds, the applications failed to identify such a purpose.¹⁰¹ The Court found there was no legitimate purpose for the request because it failed to indicate the crime of murder at all, it lacked evidence that the victims were diverting public funds, and procedural errors failed to link the request to previous investigations.¹⁰²

Moreover, neither request came from the proper police authority; it came from the Military Police.¹⁰³ And while Judge Khater had the authority to authorize such a restriction ex officio, she did not do so in this case; she responded to requests from the Military Police.¹⁰⁴ In addition, the requests lacked the required indications that these members were participants in crimes, they failed to show the objective of the investigation, and they failed to show that interception was the only effective method for obtaining the desired information.¹⁰⁵ Furthermore, the request did not comply with the judicial procedural elements because Judge Khater failed to explain whether the action would comply with the rules of the Convention; instead she approved the request simply by signing her initials in the margin.¹⁰⁶ Finally, the second interception occurred over twenty-one days without a request for a continuation and, therefore, violated the fifteen days rule.¹⁰⁷

Because one of the three elements necessary to prove an Article 11(2) (Prohibition of Arbitrary Interference with Private Life, Family, Home, Correspondence, and Unlawful Attacks on Honor, and Dignity of the Convention) violation was not satisfied, the Court did not need to determine if the restriction was appropriate, necessary, and proportionate.¹⁰⁸ Therefore, the wiretapping in this case was a violation of the right to privacy guaranteed by Article 11 (Right to Privacy) of the Convention.¹⁰⁹

100. *Id.* ¶ 133.

101. *Id.*

102. *Id.*

103. *Id.* ¶ 136.

104. *Id.*

105. *Id.* ¶ 134.

106. *Id.* ¶ 140.

107. *Id.*

108. *Id.* ¶ 146.

109. *Id.*

Article 11 (Right to Privacy) of the Convention forbids illegal attacks on “honor and reputation,” where honor relates to self-esteem and reputation relates to the opinion people have about a person.¹¹⁰ The States must protect against such attacks.¹¹¹ The Court concluded that the dissemination of the Recorded Conversations was a violation of Article 11 (Right to Privacy) of the Convention because they were not public information and, therefore, the government had a duty to keep them confidential to protect the honor and reputation of the victims.¹¹² This act was not a limitation provided by Brazilian law but in fact was in violation of Article 9 of the Brazilian Constitution, which states that confidentiality of the recordings must be maintained.¹¹³

Article 16 (Freedom of Association), in relation to Article 1(1) of the Convention to the detriment of Mr. Escher, Mr. Luciano de Vargas, Mr. Becker, Mr. Cabral, and Mr. Aghinoni,¹¹⁴ because:

Article 16 (Freedom of Association) of the Convention establishes that everyone has the right to freedom of association for “ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.”¹¹⁵ While Article 16 (Freedom of Association) of the Convention recognizes the right to assemble freely, it also recognizes that legal restrictions may be applicable when there is a legitimate purpose.¹¹⁶

Here, the Court found that while there may have been a legitimate purpose for the wiretapping, the State did not meet the proper legal under Article 11 (Right to Privacy).¹¹⁷ Moreover, the summaries of the Recorded Conversations did not have any apparent relevance to the investigations.¹¹⁸ Finally, the Court determined that witness statements consistently reflected an intense fear that the dissemination of the Recorded Conversations would harm the farmers associated with the organizations.¹¹⁹ The Court also found that the images and credibility of the as-

110. *Id.* ¶ 117.

111. *Id.*

112. *Id.* ¶¶ 159, 164.

113. *Id.* ¶ 160.

114. *Id.* “Operative Paragraphs” ¶ 3.

115. *Id.* n.152.

116. *Id.* ¶ 173.

117. *Id.* ¶ 174.

118. *Id.* ¶ 176.

119. *Id.* ¶ 180.

*sociations were negatively affected as a result of the dissemination.*¹²⁰ Thus, because the victims feared for themselves because of their affiliation with COANA, the State violated the right to freedom of association of Mr. Escher, Mr. Luciano de Vargas, Mr. Becker, Mr. Cabral, and Mr. Aghinoni.¹²¹

Articles 8 (1) (Right to a Hearing Within a Reasonable Time by a Competent and Independent Tribunal) and 25 (Right to Judicial Protection), in relation to Article 1(1) of the Convention to the detriment of Mr. Escher, Mr. Luciano de Vargas, Mr. Becker, Mr. Cabral, and Mr. Aghinoni in regards to criminal and administrative proceedings,¹²² because:

*Both Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the Convention establish that State judicial organs must prevent human right violations, investigate any violations, repair the damaged caused by the violations, and, when possible, re-establish the violated rights.*¹²³ This duty is a legal obligation with which the State must comply.¹²⁴

*The criminal complaint against Secretary Martins, Judge Khater, Colonel Kretschmer, Major Neves, and Sergeant Silva alleged “the possible perpetration of the offenses of usurpation of public functions, illegal telephone interception, breach of judicial confidentiality, and abuse of authority.”*¹²⁵ The proceedings were closed except for the charge against Secretary Martins because the Court of Justice of the State of Paraná concluded that his conduct alone warranted prosecution for his role in the dissemination of the Recorded Conversations.¹²⁶ The Court found nothing to indicate the Court of Justice of the State of Paraná investigated human rights violations in relation to Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the Convention.¹²⁷ The criminal investigation of Secretary Martins ended in an annulment of his conviction on appeal and, thus, he was acquitted.¹²⁸ During his ap-

120. *Id.*

121. *Id.*

122. *Id.* “Operative Paragraphs” ¶ 4.

123. *Id.* ¶ 194.

124. *Id.* ¶ 195.

125. *Id.* ¶ 200.

126. *Id.* ¶¶ 200–201.

127. *Id.* ¶ 202.

128. *Id.* ¶¶ 106, 203–04.

peal the Court of Justice found that he did not disseminate the Recorded Conversations, although the evidence available suggested the contrary.¹²⁹ Finally, the Court noted the State neglected to investigate which parties were responsible for the dissemination of the Recorded Conversations to the media and failed to punish those responsible in order to repair the damage done.¹³⁰ Because of these lapses in the criminal proceedings, the State violated both Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the Convention.¹³¹

In the administrative proceedings, the Court also found that the State violated Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) because the administrative matters were dropped, having “already been decided” in the criminal proceedings.¹³² However, they were dropped without further explanation.¹³³ The Court noted that Article 8 (Right to a Fair Trial) applied to administrative bodies and in this case Article 8 (Right to a Fair Trial) was violated because it appeared that no investigation was present.¹³⁴

The Court found unanimously that the Court did not have sufficient evidence to prove a violation of:

Article 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection), in relation to the writ of mandamus and the civil actions,¹³⁵ because:

While a writ of mandamus was the appropriate judicial remedy to protect the victims’ right to privacy,¹³⁶ in this case the victims filed the writ petition after the State ceased its unlawful activities.¹³⁷ Therefore, it was impossible for the writ of mandamus to be carried out.¹³⁸ In addition, the destruction of the recordings intended to prevent future disseminations, which also prevented the use of the tapes in considering the merits of this case.¹³⁹

129. *Id.*

130. *Id.* ¶ 205.

131. *Id.* “Operative Paragraphs” ¶ 4.

132. *Id.* ¶ 207.

133. *Id.* ¶ 209.

134. *Id.*

135. *Id.* “Operative Paragraphs” ¶ 4.

136. *Id.*

137. *Id.* ¶ 30.

138. *Id.*

139. *Id.* ¶ 38.

The Court found no evidence that Mr. Becker, Mr. Cabral, and Mr. Aghinoni ever filed a civil action.¹⁴⁰ While Mr. Escher and Mr. Vargas filed civil actions against the state of Paraná, the Court could not determine these civil suits were ineffective.¹⁴¹ Thus, the Court could not prove Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the Convention were violated as to these judicial proceedings.¹⁴²

The Court found unanimously that the State did not fail to comply with:

Article 28 (Federal Clause), in relation to Articles 1(1) and 2 of the Convention to the detriment of Mr. Escher, Mr. Luciano de Vargas, Mr. Becker, Mr. Cabral, and Mr. Aghinoni,¹⁴³ because:

Article 28 (Federal Clause) of the Convention operates to protect the integrity of protected human rights by disallowing a State to use its federal structure to avoid international obligations.¹⁴⁴ In other words, it serves as a way to ensure that the State's legal system complies with and conforms to the American Convention.¹⁴⁵ In this case the State never referred to a statute as an excuse for noncompliance, and therefore, the State did not fail to comply with Article 28 (Federal Clause) of the Convention.¹⁴⁶

C. Dissenting and Concurring Opinions

1. Concurring Opinion of Judge Sergio García Ramírez

In a separate concurring opinion Judge Ramírez addressed the modern concerns of privacy that emerged in this case.¹⁴⁷ He observed that the concept of intimacy had been made more vulnerable since advances in science and technology.¹⁴⁸ He warned that governments, now capable of using technology without limitations to intrude on privacy,

140. *Id.* ¶ 211.

141. *Id.* ¶¶ 212–13.

142. *Id.* ¶ 213.

143. *Id.* “Operative Paragraphs” ¶ 5.

144. *Id.* ¶ 219.

145. *Id.*

146. *Id.* ¶ 220.

147. *Escher et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Concurring Opinion of Judge Sergio García Ramírez, Inter-Am. Ct. H.R. (ser. C) No. 200, ¶¶ 1, 12 (July 6, 2009).*

148. *Id.* ¶¶ 2, 5.

could be a “‘fatality’ derived from progress, not a benefit subject to regulation and control.”¹⁴⁹

Judge Ramírez expressed a desire for transparency in government actions because government surveillance on its citizens can be a method to chip away at freedom, without violence or upheavals.¹⁵⁰ While Judge Ramírez expressed that the right to intimacy was an important human right, he acknowledged times when limitations can be appropriate.¹⁵¹ However, he maintained that even a legal invasion of privacy is as an invasion of privacy; therefore, the legitimate purpose ends the moment the information is illegally disseminated.¹⁵² He cautioned that “tyrants” could defend the invasions of privacy based on concepts of national security.¹⁵³

Judge Ramírez concluded his opinion with advice and an ominous warning.¹⁵⁴ He advised that conduct that violates the right to privacy should be treated as a “guarantee” for society’s members.¹⁵⁵ He warned that the Orwellian “1984”¹⁵⁶ is not behind us, but rather, “it could be before us.”¹⁵⁷

2. Separate Concurring Opinion of Judge Robert de Figueiredo Caldas

In a separate concurring opinion, Judge de Figueiredo Caldas expressed an overall agreement with the Court and the terms of the judgment but dissented on a timing issue involved when the victims filed their brief because it was reasonable that it was one day off.¹⁵⁸ Judge de Figueiredo Caldas discussed the judicial authority of the Court to examine violations when the parties did not assert those claims; the Court did not mention this.¹⁵⁹ He ended this section with a suggestion that the potential Article 28 (Federal Clause) violation should not be viewed as a punishment but, rather, as a way to clarify the

149. *Id.* ¶ 5.

150. *Id.* ¶ 6.

151. *Id.* ¶ 9.

152. *Id.* ¶ 11.

153. *Id.* ¶ 13.

154. *Id.* ¶ 14.

155. *Id.*

156. George Orwell, *1984* (Erich Fromm, 1949). The government uses technology to spy on its citizens and to deprive them of freedoms.

157. *Escher et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Concurring Opinion of Judge Sergio García Ramírez, ¶ 1.

158. *Escher et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Separate Opinion of Judge Robert De Figueiredo Caldas, Inter-Am. Ct. H.R. (ser. C) No. 200, ¶¶ 1, 5, 6 (July 6, 2009).

159. *Id.* at 5, ¶¶ 33, 40.

“domestic responsibilities for violations.”¹⁶⁰

Judge de Figueiredo Caldas ended his opinion with a review of the Court’s order to publish the entire judgment on a website.¹⁶¹ He agreed with the Court on both the time frame and the method of publication.¹⁶² However, he noted that while in this case it was appropriate to leave the timing open for the State to execute on its own, it is usually better to have clear judicial orders.¹⁶³

IV. REPARATIONS

The Court ruled unanimously that the State had the following obligations:

A. Specific Performance (Measures of Satisfaction and Non-Repetition Guarantee)

1. Publish the Judgment

The State must publish the cover page of the Judgment, Chapters I, VI to XI excluding footnotes, and the operative paragraphs once in the Official Gazette and in a second paper with widespread circulation in Paraná.¹⁶⁴ The State must also publish the entire Judgment on an official State website and on an official website of the state of Paraná.¹⁶⁵

2. Publicly Acknowledge International Responsibility

The State’s publication of the Judgment and its excerpts will satisfy this reparation; therefore, no additional measures were needed to resolve this matter.¹⁶⁶

3. Investigate, Prosecute, and Punish Those Responsible

The State must take all steps necessary to investigate the dissemination of the contents of the Recorded Conversations and the actual

160. *Id.* ¶ 41.

161. *Id.* ¶ 42.

162. *Id.* ¶¶ 47–48.

163. *Id.* ¶ 47.

164. *Escher et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs*, ¶ 239, “Operative Paragraphs” ¶ 8.

165. *Id.*

166. *Id.* ¶ 243.

recordings and to prosecute those responsible.¹⁶⁷

4. Provide Human Rights Training for Judiciary Officials and Police

The State must provide continuous training over a significant period of time in order to ensure that agents of the State act in accordance with human rights obligations.¹⁶⁸

B. Compensation

The Court awarded the following amounts:

1. Pecuniary Damages

The Court did not award any pecuniary damages due to a lack of evidence that the victims suffered pecuniary losses.¹⁶⁹

2. Non-Pecuniary Damages

The Court awarded \$20,000 each to Mr. Escher, Mr. Luciano de Vargas, Mr. Becker, Mr. Cabral, and Mr. Aghinoni¹⁷⁰ for harm incurred as a result of the State's violations of their rights to privacy, honor, freedom of association, judicial guarantees, and judicial protection.¹⁷¹ The State must pay non-pecuniary damages in full and directly to the victims.¹⁷² However, if one or more of the victims die before receiving the payment, the payment shall go to appropriate successors as governed by domestic law.¹⁷³

3. Costs and Expenses

The Court awarded \$10,000, to be distributed in equal parts, to Mr. Escher, Mr. Luciano de Vargas, Mr. Becker, Mr. Cabral, and Mr. Aghinoni for expenses incurred by their legal representatives at the Court's public hearing in Mexico City and for future legal expenses in-

167. *Id.* ¶ 247, "Operative Paragraphs" ¶ 9.

168. *Id.* ¶ 251.

169. *Id.* ¶ 228.

170. *Id.* ¶ 235.

171. *Id.* ¶ 234.

172. *Id.* ¶¶ 235, 260–61.

173. *Id.* ¶ 260.

volved in monitoring the Judgment.¹⁷⁴ Mr. Escher, Mr. Luciano de Vargas, Mr. Becker, Mr. Cabral, and Mr. Aghinoni shall distribute an amount they determine appropriate to their representatives.¹⁷⁵

4. Total Compensation (including Costs and Expenses ordered):

\$110,000

C. Deadlines

The State must publish the cover page of the Judgment, Chapters I, VI to XI excluding footnotes, and the operative paragraphs in the Official Gazette and in a second paper within the six months following notice of the Judgment.¹⁷⁶

The State must publish the entire Judgment on an official State website and on an official website of the state of Paraná within two months following notice of the Judgment.¹⁷⁷

The State must pay non-pecuniary damages to the victims within the year following notice of the Judgment.¹⁷⁸

The State must pay costs and expenses within the year following notice of the Judgment.¹⁷⁹

V. INTERPRETATION AND REVISION OF JUDGMENT

November 3, 2009: The victims' representatives submitted a request for interpretation of the Judgment.¹⁸⁰ They sought clarification about paragraph nine of the Judgment, which states, "the State must investigate the facts that gave rise to the violations" of Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the Convention; specifically, the "duty to investigate" and whether it extends to: the administrative investigation into Judge Khater for her role in authorizing the interception of the telephone lines; the administrative investigation into the military police's and Secretary Martins' roles in intercepting the lines and dissemi-

174. *Id.* ¶ 259.

175. *Id.*

176. *Id.* ¶ 239.

177. *Id.*

178. *Id.* ¶¶ 235, 261.

179. *Id.* ¶ 260.

180. *Escher et al. v. Brazil, Interpretation of the Judgment of the Preliminary Objections, Merits, Reparations, and Costs, Order of the Court, Inter-Am. Ct. H.R. (ser. C) No. 208, ¶ 2 (Nov. 20, 2009).*

nation of the Recorded Conversations; and the procedure relating to these investigations.¹⁸¹

*A. Composition of the Court*¹⁸²

Diego García-Sayán, President in Exercise
Sergio García Ramírez, Judge
Manuel E. Ventura Robles, Judge
Margarette Mac Macaulay, Judge
Rhadys Abreu Blondet, Judge

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary

B. Merits

The Court found unanimously that the meaning and scope of the duties in the judicial investigation should have included the dissemination of information from the intercepted phone calls and the Recorded Conversation, as was explained in the Judgment.¹⁸³

VI. COMPLIANCE AND FOLLOW-UP

May 17, 2010: The Court determined that the State's obligation to publish the Judgment was not an error.¹⁸⁴ The Court ordered this reparation because the relevant paragraphs show the content of the reparation and provide the time frame for the State to fulfill its obligations.¹⁸⁵ Moreover, the length of the publication was appropriate given the relation to the human rights violated.¹⁸⁶

However, a substitution can be made to the required publication in order to reduce the cost but not diminish the effect.¹⁸⁷ Thus, the Court

181. *Id.* ¶ 2; Escher et al. v. Brazil, Judgment, Preliminary Objections, Merits, Reparations, and Costs, ¶ 247, “Operative Paragraphs” ¶ 9.

182. Escher et al. v. Brazil, Interpretation of the Judgment of the Preliminary Objections, Merits, Reparations, and Costs, n.1. Judges Cecilia Medina Quiroga, Leonardo A. Franco, and Roberto de Figueiredo Caldas did not participate due to *force majeure*. Therefore, Judge Medina assigned Judge García-Sayán as President in exercise.

183. *Id.* ¶ 2, n.1.

184. Escher et al. v. Brazil, Monitoring Compliance with Judgment, Order of the Court, “Considering That” ¶ 13 (May 17, 2010).

185. *Id.*

186. *Id.* ¶ 14.

187. *Id.* ¶ 20.

ordered that the State must publish the cover page of the Judgment, “paragraphs [one] to [five], 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, without footnotes, and the operative paragraphs.”¹⁸⁸ This publication must occur within the two months following notice of the order.¹⁸⁹

June 19, 2012: The State fully complied with all obligations, and the Court closed the case.¹⁹⁰

VII. LIST OF DOCUMENTS

A. *Inter-American Court*

1. Preliminary Objections

[Escher et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. \(ser. C\) No. 200 \(July 6, 2009\).](#)

2. Decisions on Merits, Reparations and Costs

[Escher et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. \(ser. C\) No. 200 \(July 6, 2009\).](#)

3. Provisional Measures

[None]

4. Compliance Monitoring

[Escher et al. v. Brazil, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. \(May 17, 2010\).](#)

[Escher et al. v. Brazil, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. \(June 19, 2012\).](#)

5. Review and Interpretation of Judgment

188. *Id.*

189. *Id.*

190. Escher et al. v. Brazil, Monitoring Compliance with Judgment, Order of the Court, “Decides” ¶¶ 1–2 (June 19, 2012).

[Escher et al. v. Brazil, Interpretation of the Judgment of the Preliminary Objections, Merits, Reparations, and Costs, Order of the Court, Inter-Am. Ct. H.R. \(ser. C\) No. 208 \(Nov. 20, 2009\).](#)

B. Inter-American Commission

1. Petition to the Commission

[Not Available]

2. Report on Admissibility

[Escher et al. v. Brazil, Admissibility Report, Report No. 18/06, Inter-Am. Comm'n H.R., Case No. 12.353 \(Mar. 2, 2006\).](#)

3. Provisional Measures

[None]

4. Report on Merits

Escher et al. v. Brazil, Report on Merits, Report No. 14/07, Inter-Am. Comm'n H.R., Case No. 12.353 (Mar. 8, 2007).

5. Application to the Court

[Escher et al. v. Brazil, Petition to the Court, Inter-Am. Comm'n H.R., Case No. 12.353 \(Dec. 20, 2007\) \(Available only in Spanish\).](#)

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