Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 18/06; Petition 12.353
Session:	Hundred Twenty-Fourth Session (27 February – 17 March 2006)
Title/Style of Cause:	Arley Jose Escher, Celso Anghinoni and Avanilson Alves Araujo v. Brazil
Doc. Type:	Decision
Decided by:	President: Evelio Fernandez Arevalos; Second Vice-President: Florentin Melendez; Commissioners: Clare K. Roberts, Freddy Gutierrez Trejo, Paolo Carozza, Victor E. Abramovich. Commission member Paula Sergio Pinheiro, of Brazilian nationality, did not take part in the deliberations or vote on the present report, in accordance with Article 17.2.a of the Rules of Procedure of the Commission.
Dated:	2 March 2006
Citation:	Jose Escher v. Brazil, Petition 12.353, Inter-Am. C.H.R., Report No. 18/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 (2006)
Represented by:	APPLICANTS: the National Popular Lawyers Network and the Center for Global Justice
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I. SUMMARY

1. On June 30, 2000, the National Popular Lawyers Network (RENAAP), and the Center for Global Justice (CJG) (hereinafter "the petitioners"), lodged a complaint with the Inter-American Commission on Human Rights ("the Commission") against the Federative Republic of Brazil (the "State") claiming the alleged violation of the rights to due legal process (Article 8), to respect for personal honor and dignity (Article 11), and judicial protection (Article 25), and also the violation of the obligation to respect rights (Article 1.1) stipulated in the American Convention on Human Rights (the "American Convention") to the detriment of members of the social organizations ADECON and COANA, two cooperatives associated with the Landless Workers' Movement, through the alleged illegal tapping and monitoring of their telephone lines between April and June, 1999 by the Paraná military police.

2. Regarding the requirements for admissibility, the petitioners stated that they attempted to put an end to these violations and by means of a mandado de seguranca to bring a criminal charge and attempt to bring those responsible to justice. Furthermore, they allege that they lodged this complaint within the period of six months and have fulfilled the other formal requirements established by the Convention and the Rules of Procedure of the Commission for the presentation of petitions.

3. The State, for its part, alleges that the petitioners have not launched a constitutional appeal before the Supreme Federal Court and so have not exhausted the remedies available under domestic law, thus establishing grounds for the inadmissibility of the petition, in accordance with the terms of Article 45.1.a of the American Convention.

4. Having examined the positions of the parties, the Commission concludes that it has competence to decide on the complaint lodged by the petitioners, and that the case is admissible, in accordance with Article 46 of the American Convention. Consequently, the Commission decides to notify its decision to the parties, to publish the present Admissibility Report, and to include it in its Annual Report.

II. PROCESSING BY THE COMMISSION

5. On December 26, 2000, the Commission received a complaint lodged by the National Network of Autonomous People's Lawyers (RENAAP) and the Center for Global Justice, for which it acknowledged receipt on December 27 of the same year. On December 27, 2000, the Commission transmitted the complaint to the Government so that it could reply within 90 days. On August 8, 2001, the petitioners requested the IACHR to hold a hearing on the case. The Commission granted a hearing to discuss the question of the admissibility of the case, and this was held on November 14, 2001. At the end of the hearing, the State presented a written record of its position concerning the admissibility of the case, which was transmitted to the petitioners on November 26, 2001. On January 22, 2002, the Commission received the petitioners' reply, which was immediately transmitted to the State. On October 15, 2002, a working meeting was held with the parties in the headquarters of the Commission. On May 20, 2005, a new communication was received from the petitioners. On October 12, 2005, the IACHR received a communication from the State in which it repeated its position concerning the admissibility of the case. On October 25, 2005, the Commission received an amicus curiae brief in support of the admissibility of the petition presented by the Robert F. Kennedy Memorial Center for Human Rights.

III. POSITIONS OF THE PARTIES

A. Petitioners

6. The petitioners allege that in addition to the physical violence to which rural workers in Brazil are subject – specifically in the state of Paraná – members of those organizations that work for the fair distribution of land are also the victims of political persecution. An example of this persecution described in their complaint concerns the illegal tapping, in the year 1999, of the telephone lines of the COANA organizations. There organizations constitute a cooperative to market the output of the settlements of rural workers who belong to the Movement of Rural Landless Workers (MST) and ADECON, an association of rural workers that is also linked to the MST.

7. The petition states that on April 28, 1999, the Commander-in-Chief of the military police in the state of Paraná requested the State minister for public security to tap and monitor two telephone lines (one belonging to COANA and the other to ADECON) as part of an investigation

into crimes supposedly committed by persons affiliated to the MST. The petitioners allege that this request was in violation of Brazilian Law No 9.296 of 1999, which stipulates that the only authority empowered to request such interceptions is the civilian police director in charge of criminal investigations, and not the military police.

8. The petitioners allege that, notwithstanding the above-mentioned irregularities, the minister for public security asked the judge of the town of Loanda in the state of Paraná to tap the telephone lines. On May 5, 1999, the judge in Loanda, while providing no grounds for her decision, ordered the tapping to begin. The petitioners allege that the tappings and recordings began on May 14, 1999, and during the time the judicial order was in force (it was extended until May 25, 1999) 65 recordings were made. The petitioners allege that the authorities made a further 58 recordings after the time covered by the judicial order. Therefore, on July 1, 1999, military police major Wilmer Copetti Neves surrendered 123 recordings to the Loanda judge, highlighting sections relating to personal or intimate conversations that were irrelevant to a criminal investigation.

9. The petitioners alleged that isolated fragments of these recorded conversations were broadcast by the authorities on Brazil's largest television channel on June 8, 1999, in order to undermine the activities of the MST. According to the petitioners, the Paraná State minister for public security, Cándido Manuel Martins de Oliveira, himself confirmed to the local press that he was responsible for having released the recorded conversations.

10. When they learned about the telephone tapping, rural workers Arley José Escher, Celso Anghinoni, and Avanilson Alves Araujo in their own right and in representation of the organizations COANA and ADECON brought an action before the Paraná State Court of Justice called Mandado de Seguranca Criminal seeking an end to the violation of their right to intimacy.[FN2] According to the petitioners, on December 17, 1999, the Paraná State Attorney General's office deemed the tapping and monitoring of the telephonic communications to be an illegal act, but they could not agree on the merits in view of the fact that the tapping had by then ceased and the petition was therefore unwarranted.

[FN2] Article V of the Brazilian constitution defines the remedy of mandado de seguranca in the following terms:
LXIX A writ of mandamus shall be issued to protect a clear and perfect right, not covered by habeas corpus or habeas data, whenever the party responsible for the illegal actions or abuse of power is a public official or an agent of a corporate legal entity exercising duties of the Government.

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11. The complainants brought an action for embargo de declaracao and argued that the decision had refrained from ordering the destruction of the recordings, even though this had been requested. In judgment on June 19, 2000, the Court summarily rejected this petition.

12. Furthermore, the petitioners stated that on August 19, 1999, representatives from the organizations ADECON and COANA filed a criminal complaint with the Paraná State General

Prosecutor's office requesting an investigation of the alleged criminal behavior of the public officers involved. In the opinion of the petitioners, both the mandado de seguranca as well as the criminal complaint were the appropriate remedies available to them and both were tried.

13. The petitioners claimed they had exhausted remedies available under domestic law with the mandado de seguranca. And with regard to the criminal action, they stated that one year and four months after it was brought, no person had been brought before a competent judicial authority, for which reason they met the terms of the exception to the rule of exhaustion of remedies under domestic law envisaged in Article 46.2.c of the American Convention.

14. In short, the petitioners allege that their right to private and intimate life has been violated by the illegal tapping, recording, and subsequently publication of their telephone conversations. Furthermore, they allege that in spite of having denounced the facts to the judicial authorities, who accepted the illegality of the acts by the State, no-one has been sanctioned for what took place, in violation of their rights to due legal process and access to justice. With regard to the requirements for admissibility, the petitioners allege they have tried to bring to an end the violations and have sought to have those responsible brought to justice by a mandado de seguranca and a criminal action. They also claim that they presented their petition within a reasonable period.

B. State

15. The State says that on April 28, 1999, the office of the Minister of Public Security for the State of Paraná requested the judge for the area of Loanda-Paraná to authorize the tapping of a telephone line belonging to COANA, a cooperative of workers linked to the MST. The tap was authorized on May 5, 1999. Later, representatives of COANA and other workers affiliated to the Movement for Rural Landless Workers lodged a mandado de seguranca against the judicial authorization referred to and alleged amongst other things the illegitimacy of the police authority that requested the limitation on the right to intimacy and the lack of basis in law for the judicial decision. The plaintiffs also lodged a criminal charge against the judge in the case and against the Minister for Public Security for having divulged to the press the content of the recordings.

16. The State alleges that "on learning that the established and definite right of the plaintiffs was no longer being violated at the time when the mandamus was lodged, the State of Paraná court extinguished the proceedings without considering the merits of the case." Because they did not agree with this decision, the petitioners lodged remedies called embargos de declaracao requesting the court to pronounce specifically with regard to the petition for destruction of the recordings.

17. The State argued that the facts described indicate that the petitioners have not complied with the requirement to exhaust all remedies available under domestic law. In particular, the State points out that the petitioners have not exhausted the constitutional appeal established in Article 105, II, b of the Federal Brazilian Constitution.

18. The State alleges that under domestic law, following a decision that puts an end to the proceedings of mandado de seguranca it is possible to open a constitutional appeal to be

considered by the High Court. The State indicates that domestic law accepts that the decision that rejected the mandado de seguranca refers as much to those cases where the remedy is denied because of incidental questions as to when the merits of the case are decided. Because of this, if the petitioners were not in agreement with the decision, they should have indicated it through the constitutional channels provided under Brazilian law.

19. Therefore, according to the State, the petitioners have not exhausted the remedy of the constitutional appeal and so are disqualified from applying to the bodies of the inter-American system. Consequently, the State requests that the petition should be declared inadmissible in accordance with Articles 47.a and 46.1.a of the American Convention.

IV. ANALYSIS

A. Competence ratione personae, ratione materiae, ratione temporis, and ratione loci of the Inter-American Commission

20. According to Article 44 of the American Convention and Article 23 of its Rules of Procedure, the petitioners, as legally recognized non-governmental bodies, are empowered to lodge petitions before the IACHR, concerning alleged violations of the American Convention. With reference to the State, the Commission observes that the Federative Republic of Brazil is party to the American Convention, having ratified it on September 25, 1992. The Commission finds that the petition names as alleged victims Arley José Escher, Celso Anghinoni, and Avanilson Alves Araujo among others in the organizations of ADECON and COANAL, and they are persons whose rights under the Convention Brazil is committed to respect and protect. Therefore, the Commission has competence ratione personae to examine the petition.

21. The petition alleges violations of rights protected in the American Convention. Therefore, the Commission has competence ratione materiae to examine the petition.

22. The Commission equally has competence ratione temporis because the events alleged in the petition took place when the obligation to respect and protect the rights enshrined in the Convention was already in force for the State, which ratified the American Convention on September 25, 1992.

23. Finally, the Commission has competence ratione loci to examine this petition because it alleges violations of rights protected by the American Convention that took place within territory belonging to the Brazilian State.

B. Other requirements for admissibility 1. Exhaustion of remedies under domestic law 24.

Article 46.1 of the American Convention states that admission of a petition is subject to the requirement that it has previously exhausted the remedies available under the domestic law of the state. The petitioners claim that they initiated two types of remedy for these events. The first, a mandado de seguranca, to bring the tapping to an immediate halt. The second, a criminal charge to determine the responsibility of the state authorities who participated in the events. Subsequently, the latter divided into two aims: a) the investigation of the judge who had ordered a restriction on a right without stating the reasons for her decision; and b) the investigation of the

responsibility of the Security Secretary for divulging the content of the recordings. The petitioners allege that the first remedy was exhausted by the decision on June 19, 2000, in which it was stated that the violation had existed but because the phone tapping was no longer taking place, it could not be resolved. The petitioners alleged that the criminal charge, after one year and four months, remained at the instruction stage, thus qualifying as an exception to its exhaustion due to the unwarranted delay in its proceedings, in accordance with the terms of Article 46.2.b of the Convention.

25. The State, for its part, alleged that the decision dated June 19, 2000, in the mandado de seguranca proceedings was susceptible to appeal by means of a "constitutional appeal" before the Supreme Federal Court. However, in the opinion of the State, the petitioners have not attempted to pursue that remedy and therefore the petition should be declared inadmissible. With regard to the criminal proceedings, the State observed that during August 2000, the Public Attorney's office found that for lack of evidence of malicious conduct, the case was dismissed against the judge who had issued the order to tap and monitor the telephone communications. Subsequently, the State indicated that on October 6, 2000, a court sentenced the Public Security Secretary who was involved in the events, to two years and four months imprisonment. This sentence was appealed and on October 14, 2004, the Second Criminal Chamber of the Paraná Court revoked the finding, and acquitted the appellant on the grounds that his conduct had been atypical.

26. The Commission reasserts that the requirement of prior exhaustion of remedies available under domestic law was established in order to ensure that the State would be able to resolve disputes within its own legal framework. In this way, any State that invokes an exception on the grounds that remedies have not been exhausted under domestic law carries the burden of proving that remedies remain under domestic law and that such remedies are adequate and effective.[FN3]

[FN3] IACHR, Report N° 60/03 (Admissibility), petition 12,108 Marcel Claude Reyes et al. vs. Chile, October 10, 2003, paragraph 51, IACHR, Annual Report 2000, Report No. 02/01, Case 11,280, Juan Carlos Bayarri, Argentina, January 19, 2001, paragraph 30.

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27. In this context it is appropriate to clarify the remedies available under domestic law that should be exhausted in each particular case. The Inter-American Court of Human Rights has indicated that only those remedies that provide appropriate remedy for the violations that are alleged to have taken place should be exhausted. For the remedies to be adequate means that: "those remedies which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific date, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable.[FN4]

[FN4] I/A Court of H/R, Velásquez Rodríguez. Judgment July 29, 1988, Series C, No. 4, paragraph 64.

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28. The Commission has also indicated that the requirement to exhaust all remedies available under domestic law does not mean that the alleged victims are obliged to exhaust all the remedies at their disposal. As to the exhaustion of domestic remedies, the Commission has reiterated that if the alleged victim endeavored to resolve the matter by making use of a valid, adequate alternative judicial remedy available in the domestic legal system and the State had an opportunity to remedy the issue within its jurisdiction, the purpose of the international legal precept is fulfilled[FN5].

[FN5] IACHR, Report N° 57/03 (Admissibility), petition 12,337, Marcela Andres Valdés Díaz vs. Chile, October 10, 2003, paragraph 40, and IACHR, Report N° 70/04 (Admissibility), petition 667/01, Jesús Manuel Naranjo et al. vs. Venezuela, October 13, 2004, paragraph 52.

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29. The IACHR stresses that in determining the admissibility of the petition it must decide whether the petitioners have exhausted the appropriate remedy for resolving the principal situation in question. In other words, the IACHR must determine what was the appropriate and effective remedy for rectifying the alleged situation.[FN6] In the present case, the State alleges that following the decision of June 19, 2000, which rejected the mandado de seguranca, a constitutional appeal should have been lodged. Having studied the domestic judgments and proceedings, the Commission concludes that from the time (that is to say, after June 19, 2000) when the State indicated that the aforementioned remedy was not appropriate for resolving the violation, although it lacked object, the Supreme Court could not order the authorities to cease the acts alleged to infringe the rights of the petitioners. At that time, it was only possible to seek an investigation of the events, and if the case was proved, to apply to those responsible the appropriate sanction. In fact, the Court of Justice of the State of Paraná concluded that the matter would be best dealt with through criminal proceedings, as the Attorney General's office had envisaged when it said:

Opinion to the effect that, since the telephone interception determined through an injunction, which violates a prima facie right of the petitioners, is no longer being carried out and the authority allegedly liable is being investigated for the act by the competent organ, the requests are denied, since the injunction issued and the materials recorded, whose destruction was also requested, must be evaluated in criminal investigation 82516-5, which is under way in the Special Organ of the Court of Justice.[FN7]

[FN6] IACHR, Report Nº 57/03 (Inadmissibility), petition P12, 303, Mariblanca Staff Wilson and Oscar E Ceville R, vs. Panamá, October 22, 2003, paragraph 42.
[FN7] Ministerio Público do Estado do Paraná, parecer n.º 002198 del 17 de diciembre de 1999, en el proceso Madado de segurança criminal n.º 83486-6.

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30. The Commission finds that as the national courts indicated, the remedy that should have been tried was the criminal action. The alleged victims brought this action, and it was the State's responsibility to advance and drive it further. For these reasons, the remedy proposed by the State lacked suitability, and consequently it was not necessary to exhaust it. In the light of these considerations, the Commission concludes that the requirement detailed in Article 46.1 of the American Convention had been complied with.

2. Deadline for presentation of petitions

31. Article 46.1 of the Convention states that a petition must be lodged within a period of six months from the date on which the petitioner was notified of the final judgment that remedies available under domestic law had been exhausted. The petitioners lodged their petition on December 26, 2000, claiming that they were within the period of six months in respect of the final judgment of the mandado de seguranca, and within a reasonable period in terms of penal actions. Taking into account that the petition was lodged on December 26, 2000, the IACHR considers that it met the requirement stipulated in Article 46.1.b of the Convention.

3. Duplication of procedures and res judicata

32. The file concerning the petition contains no information that would suggest that this subject is currently pending in another international proceeding, or is substantially the same as one previously studied by the Commission or another international organization, as stated in Articles 46.1.c and 47.d respectively.

4. Description of the alleged facts

33. Article 47.b of the Convention states that the Commission shall consider inadmissible any petition or communication that "does not state facts that tend to establish a violation of the rights guaranteed by this Convention." The Commission considers that the facts alleged by the petitioners and described in Section III of the present report, might amount to prima facie violations of Articles 8, 11, and 25 of the American Convention in relation to the obligations stated in Article 1.1 of the same statute.

34. Equally, on the grounds of iura novit curia, and that the alleged tapping and recordings were intended to affect how the social organizations exercised their rights might amount to a violation of the right to freedom of association, the IACHR additionally admits this case on the grounds of alleged violation of Article 16 of the American Convention.

35. Consequently, the IACHR concludes that in this point the petition is admissible in accordance with Article 47.b.

V. CONCLUSIONS

36. The Commission concludes that the petition is admissible and that it has competence to examine the complaint lodged by the petitioners alleging violation of Articles 6, 11, 16 and 25,

in conformity with Articles 1.1 and 2 of the American Convention, in accordance with the requirements established in Article 46 of the same instrument.

37. Based on the foregoing considerations of fact and law, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this petition admissible in relation to Articles 8, 11, 16, 25 of the American Convention in accordance with Articles 1.1 and 2 of the same instrument.
2. To give notice of this decision to the parties.
3. To continue the analysis of the merits of the case.
4. To publish this decision and include it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 2nd day of the month of March, 2006. (Signed): Evelio Fernández Arévalos, President; Florentín Meléndez, Second Vice-President; Clare K. Roberts, Freddy Gutiérrez Trejo, Paolo Carozza and Víctor E. Abramovich, Commissioners.