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Institution:	Inter-American Court of Human Rights
Title/Style of Cause:	Arlei Jose Escher, Antonio Carlos Morete, Avanilson Alves Araujo, Dalto Luciano de Vargas, Dilo Angelin Kerber, Dirceu Luiz Bouflewer, Dominique M. Guhur, Edson Marcos Bragnara, Elson Borges dos Santos, Francisco Strozake, Gilmar Mauro Hugo, Francisco Gomes, Isabel Cristina Diniz, Ivanir Murinelli, Jacques Pellenz, Jaime Dutra Coelho, Jaime Matter, John Caruana, Jose Adalberto Maschio, Jose Aparecido da Silva, Jose Juveni Silva Santos, Jose Lino Warmling, Josinaldo da Silva Veiga, Maria de Fatima dos Santos, Marli Brambilla Kappaum, Roberto Baggio, Rogerio Antonio Mauro, Rosiany Maria da Silva, Sandra Mara Oliveira Soares Escher, Teresa Cofre, Valdir Braun, Valmir Fischborn, Vanderlei Braun and Zenildo Megiatto v. Brazil
Doc. Type:	Judgement (Preliminary Objections, Merits, Reparations, and Costs)
Decided by:	President: Cecilia Medina Quiroga; Vice President: Diego Garcia-Sayan; Judges: Sergio Garcia Ramirez; Manuel E. Ventura Robles; Leonardo A. Franco; Margarette May Macaulay; Rhadys Abreu Blondet; Roberto de Figueiredo Caldas
Dated:	6 July 2009
Citation:	Escher v. Brazil, Judgement (IACtHR, 6 Jul. 2009)
Represented by:	APPLICANTS: Justica Global, Rede Nacional de Advogados Populares, Terra de Direitos, Comissao Pastoral da Terra and Movimento dos Trabalhadores Rurais Sem Terra
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In the case of Escher et al.,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and to Articles 29, 31, 37(6), 56 and 58 of the Rules of Procedure of the Court [FN1] (hereinafter "the Rules of Procedure"), delivers this judgment.

[FN1] As established in Article 72(2) of the Rules of Procedure of the Inter-American Court which entered into force on March 24, 2009, "[c]ases pending resolution shall be processed according to the provisions of these Rules of Procedure, except for those cases in which a hearing has already been convened at the time of the entry into force of these Rules of Procedure; such cases shall be governed by the provisions of the previous Rules of Procedure." Hence, the Court's Rules of Procedure mentioned in this judgment correspond to the instrument

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approved by the Court at its forty-ninth session held from November 16 to 25, 2000, partially amended by the Court at its sixty-first session held from November 20 to December 4, 2003.

I. INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. On December 20, 2007, in accordance with the provisions of Articles 51 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the Court an application against the Federative Republic of Brazil (hereinafter "the State" or "Brazil"), originating from the petition presented on December 26, 2000, by the organizations: Nacional de Advogados Populares and Justiça Global on behalf of the members of the Cooperativa Agrícola de Conciliação Avante Ltda. (hereinafter "COANA") and the Associação Comunitária de Trabalhadores Rurais (hereinafter "ADECON"). On March 2, 2006 the Commission declared the case admissible in Report No. 18/06 and on March 8, 2007, approved Report on Merits No. 14/07, in the terms of Article 50 of the Convention, with specific recommendations for the State. This report was notified to Brazil on April 10, 2007, and the State was granted two months to inform the Commission of the actions undertaken to implement the said recommendations. After the State had been granted three extensions and, "after considering the information provided by the parties concerning the implementation of the recommendations in the Report on Merits and […] the absence of any substantive progress in complying with them," the Commission decided to submit the case to the Court's jurisdiction. It considered that this case represented a valuable opportunity to enhance inter-American case law concerning protection of the right to privacy and the right to freedom of association, as well as on the limits to the exercise of public authority. The Commission appointed Clare K. Roberts, Commissioner, and Santiago A. Canton, Executive Secretary, as delegates and Elizabeth Abi-Mershed, Deputy Executive Secretary, and the lawyers, Juan Pablo Albán and Andrea Repetto, as legal advisers.

2. According to the Commission, the application refers to "the [alleged] unlawful telephone interception and monitoring of the telephone lines of Arle[i] José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral, Celso Aghinoni […] and Eduardo Aghinoni, members of the organizations [ADECON] and [COANA], carried out by the Military Police of the state of Paraná between April and June 1999; [the dissemination of the telephone conversations] and the denial of justice and adequate reparation."

3. In the application, the Commission asked the Court to declare the State responsible for the violation of Articles 8(1) (Right to a Fair Trial), 11 (Right to Privacy [Honor and Dignity]), 16 (Freedom of Association) and 25 (Right to Judicial Protection) of the American Convention, in relation to the general obligation to respect and ensure human rights and the obligation to adopt domestic legal provisions established, respectively, in Articles 1(1) and 2 thereof, and also in consideration of the directives arising from the Federal Clause contained in Article 28 of this instrument. In addition, the Commission asked the Court to order the State to adopt specific measures of reparation.

4. On April 7, 2008, the organizations Justiça Global, Rede Nacional de Advogados Populares, Terra de Direitos, Comissão Pastoral da Terra (CPT) and Movimento dos

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Trabalhadores Rurais Sem Terra (MST) (hereinafter "the representatives") presented their brief with pleadings, motions and evidence (hereinafter "pleadings and motions brief"), pursuant to Article 23 of the Rules of Procedure. In this brief, they asked the Court, based on the facts set out by the Commission in its application, to declare the violation of the rights to judicial guarantees, privacy, freedom of association and judicial protection established in Articles 8, 11, 16 and 25 of the American Convention, all in relation to Articles 1(1), 2 and 28 thereof to the detriment of Arlei José Escher and Dalton Luciano de Vargas, and another 32 members of COANA and ADECON who were not indicated as alleged victims in the application. Consequently, they asked the Court to order measures of reparation. Lastly, in a power of attorney granted on April 16, 2007, these two organizations appointed the lawyers of Justiça Global, Andressa Caldas, Luciana Silva Garcia, Renata Verônica Cortes de Lira and Tamara Melo to be their legal representatives.

5. On July 7, 2008, the State presented a brief in which it filed three preliminary objections, answered the application, and made observations on the pleadings and motions brief (hereinafter "answer to the application"). The State asked the Court to consider that the preliminary objections were justified and, consequently: (i) not to admit the pleadings and motions brief and its attachments; (ii) to exclude the alleged failure to comply with Article 28 of the Convention from the analysis of the merits, and (iii) to declare itself incompetent owing to the failure to exhaust domestic remedies. It also maintained that the domestic courts had examined the conduct of the military police who requested the telephone interception, of the judge who authorized it, and of the Secretary for Public Security at the time who had disseminated part of the recordings, and concluded that there had been no unlawful conduct. It asked the Court to "acknowledged that the Brazilian State took every possible administrative and judicial measure that was requested of it, to investigate the facts that had been denounced, and that adequate and effective remedies were available to the alleged victims to contest the State's acts," and declared that Articles 1(1), 2, 8, 11, 16, 25 and 28 of the American Convention were not violated. The State appointed Hildebrando Tadeu Nascimento Valadares as its Agent, and Márcia Maria Adorno Cavalcanti Ramos, Camila Serrano Giunchetti, Bartira Meira Ramos Nagado and Cristina Timponi Cambiaghi, as deputy agents.

6. In accordance with Article 37(4) of the Rules of Procedure, the Commission and the representatives submitted their arguments on the preliminary objections filed by the State on August 24 and 27, 2008, respectively.

II. PROCEEDING BEFORE THE COURT

7. The Commission's application was notified to the State and to the representatives on February 6, 2008. [FN2] During the proceedings before the Court, in addition to the presentation of the principal briefs (supra paras. 1, 4 and 5) and others forwarded by the parties, the President of the Court (hereinafter "the President") decided in an Order of October 8, 2008, [FN3] that the testimony of eight witnesses proposed by the Commission, the representatives and the State, and also the reports of the two expert witnesses proposed by the representatives, be received by statements made before notary public (affidavit), and the parties were given the opportunity to submit observations on all of them. Also, bearing in mind the special circumstances of the case and the information provided to the Court, the President convened the Commission, the

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representatives and the State to a public hearing to listen to the testimony of Celso Aghinoni, Avanilson Alves Araújo and Harry Carlos Herbert offered by the Commission, the representatives and the State, respectively; the opinions of the expert witnesses Luiz Flávio Gomes and Maria Thereza Rocha de Assis Moura, the former proposed by the Commission and the latter by the State, and the final oral arguments of the parties on the preliminary objections and the possible merits, reparations and costs. [FN4]

[FN2] The Commission's application was forwarded to the State and to the representatives by the Court's Secretariat on January 30, 2008. On the same date, the State was advised that it could appoint a judge ad hoc to take part in the deliberation of this case. In this regard, on January 24, 2008, the Inter-American Commission forwarded the brief entitled "Position of the Inter-American Commission on Human Rights on the office of judge ad hoc." The original brief of the application with its attachments was received by courier by the State and representatives on February 6, 2008, and this is the date of notification, as the Secretariat opportunely advised the State. On March 24, 2008, following an extension granted by the Court, the State appointed Roberto de Figueiredo Caldas as judge ad hoc.
[FN3] Cf. Case of Escher et al. v. Brazil. Notice of a public hearing. Order of the President of the Court of October 8, 2008, first operative paragraph.
[FN4] Cf. Case of Escher et al. v. Brazil. Notice of a public hearing, supra note 3, fourth operative paragraph.
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8. The public hearing took place on December 3, 2008, during the thirty-seventh special session of the Court held in Mexico City, D.F. [FN5]

[FN5] At this hearing, there appeared: (a) for the Inter-American Commission: Juan Pablo Albán Alencastro, Lilly Ching Soto and Leonardo Alvarado, legal advisers; (b) for the representatives: James Cavallaro, Andressa Caldas and Luciana Silva Garcia de Justiça Global, and Josinaldo da Silva Veiga de la Rede Nacional dos Advogados Populares, and (c) for the State: Ambassador Tadeu Valadares, Ambassador Sérgio Augusto de Abreu e Lima, Minister Ana Lucy Gentil Cabral Peterson, Counselor Márcia Maria Adorno Cavalcanti Ramos, Secretary Camila Serrano Giunchetti, and the international advisers of the Special Human Rights Secretary Cristina Timponi Cambiaghi and Bartira Ramos Nagado.
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9. On January 19, 2009, the State, the Commission and the representatives forwarded their final written arguments. In response to a request from the President, the State and the representatives sent with their briefs, as helpful evidence, the laws in force at the time of the facts, relevant case law of the superior courts, and clarifications on the remedies known as mandado de segurança, embargos de declaração and recurso ordinário constitucional. [FN6]

[FN6] In its brief with observations on the helpful evidence, the representatives included allegations regarding the arguments submitted by the State. Brazil asked that these allegations

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should not be considered by the Court, because the said occasion was not a new procedural opportunity in this regard. Consequently, as indicated by the State, the Court will only consider the part of the representatives' brief relating to the helpful information requested. Subsequently, on June 30, 2009, the representatives submitted a brief with attachments referring to documents that they said they had not had access to at the time of the facts. On July 1, 2009, on the instructions of the President, the Secretariat clarified to the representatives that the said evidence had already been provided previously to the file of this case with the answer to the application and with the brief with pleadings and motions. In addition, it advised that the arguments in the brief in reference were time-barred, and accordingly would not be admitted by the Court. Cf. Note of the Court's Secretariat 12,353/114 of July 1, 2009 (Merits file, tome IV, folio 1991).

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10. On May 15, 2009, the Court received an amicus curiae brief from the Human Rights Clinic of the Law School of the Fundación Getulio Vargas of Rio de Janeiro. [FN7] This brief presented, inter alia, an analysis of the domestic resources used by the alleged victims and their conformity with national and international case law.

[FN7] This brief was submitted by Adriana Lacombe Coiro, Cesar Augusto Moacyr R. Beck, Gabriela Reis Paiva Monteiro, Isabela de Araújo Redisch, Maria Luiza Brandão Mortiz Atem, Marília Aguiar Monteiro, Nathalia Andrada de Sarvat, Roberta Santos Lixa and Thiago Silva de Castro Tostes.

III. PRELIMINARY OBJECTIONS

11. The State filed three preliminary objections in its brief answering the application, and the Court will examine them in the order in which they were raised.

A) Failure of the representatives to comply with the time limit established in the Rules of Procedure to submit the brief with pleadings and motions and its attachments

12. The State alleged that the representatives had failed to comply with the time frame established in Articles 26(1) and 36 of the Rules of Procedure. [FN8] According to the State, the representatives "were notified of the application on January 30, 2008, and their brief [with pleadings and motions] was received by the Secretariat of the Court on April 7 [, 2008]; that is one week after the time limit had expired." In addition, the original brief and its attachments were submitted on May 20, 2008, more than a month after the electronic presentation of the brief. The State indicated that "this defect prejudiced its defense and constituted a violation of the adversarial principle, because it had to make urgent and unexpected changes in its answer in order to refute the new claims of the representatives; also the five-week extension granted to it was less than the delay incurred by the representatives." Moreover, the mere fact that, "within the time limit for the answer to the application, it had to respond to two different briefs [the application and the pleadings and motions brief] resulted in an imbalance between the parties." Consequently, it asked the Court not to admit the pleadings and motions brief or its attachments.

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[FN8] Articles 26(1) and 36(1) of the Rules of Procedure, applicable to this case, establish:
Article 26. Filing of briefs
1. The application, the reply thereto, the written brief containing pleadings, motions, and evidence, as well as any other written material addressed to the Court, may be presented in person, by courier, facsimile, telex, mail or any other method generally used. When any such material is transmitted to the Court by electronic means, the original documents, as well as accompanying evidence, shall be submitted within seven days.
Article 36. Brief with pleadings, motions and evidence
2. When the application has been notified to the alleged victim, his next of kin or his duly accredited representatives, they shall have a period of two months, which may not be extended, to present autonomously to the Court their pleadings, motions and evidence.

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13. The Commission considered that this allegation by the State did not correspond to a preliminary objection, but rather to a formal observation on the pleadings and motions brief. Moreover, it said that it "would not refer [to it] because it was not aware of the date on which the victims had received their copy of the application with all its appendices and attachments and, consequently, the date from which the two months" granted them by the Court [to present the said brief] should be calculated."

14. The representatives alleged that, in a note from the Secretariat of June 9, 2008, in response to the request for clarification made by the State, the parties were advised that the representatives had received the original brief of the application and its attachments by courier on February 6, 2008. Hence, the term of two months to present the pleadings and motions brief expired on April 6, 2008. In the opinion of the representatives, since that date was a Sunday, the said period was extended until the following Monday: that is, April 7, 2008, the date on which they sent their pleadings and motions brief via facsimile. In relation to Article 26(1) of the Rules of Procedure, they indicated that the term of seven days stipulated in this provision refers to the "sending" of the original documents and their attachments. In this regard, they alleged that their pleadings and motions brief and its attachments were sent to the Court on April 14, 2008, within the said term.

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15. Although the American Convention and the Rules of Procedure do not clarify the concept of "preliminary objection," in its case law the Court has repeatedly stated that this measure questions the admissibility of an application or the competence of the Court to hear a specific case or an aspect of it, based on the person, the subject matter, the time or the place. [FN9] Thus, the Court has indicated that the purpose of a preliminary objection is to obtain a decision that prevents or impedes the examination of the merits of the matter questioned or of the case as a whole. Consequently, the claim must satisfy the essential juridical characteristics in content and purpose that confer on it the nature of "preliminary objection." Claims that do not conform to this description, such as those relating to the merits of the case, can be formulated by other procedural actions established in the American Convention, but not as a preliminary objection. [FN10]

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[FN9] Cf. Case of Las Palmeras v. Colombia. Preliminary objections. Judgment of February 4, 2000. Series C No. 67, para. 34; Gabriela Perozo et al. v. Venezuela. Order of the President of the Inter-American Court of Human Rights of March 18, 2008, seventh considering paragraph; Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs. Judgment of August 6, 2008. Series C No. 184, para. 39; and Case of Tristán Donoso v. Panama. Preliminary objection, merits, reparations and costs. Judgment of January 27, 2009. Series C No. 193, para. 15.

[FN10] Cf. Case of Castañeda Gutman, supra note 9, para. 39, and Case of Tristán Donoso, supra note 9, para. 15.

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16. In this case, the alleged failure of the representatives to comply with the time limit stipulated in the Rules of Procedure to submit the pleadings and motions brief and its attachments does not constitute a preliminary objection, because it does not contest the admissibility of the application or prevent the Court from hearing the case. Indeed, even if, hypothetically, the Court decided the State's argument affirmatively, it would in no way affect the competence of the Court to examine the merits of the dispute. Consequently, the Court rejects this argument because it does not constitute a preliminary objection.

17. Despite the above, the Court will examine the State's argument on the admissibility of the pleadings and motions brief and the evidence provided with it, in the chapter of this judgment concerning evidence (infra paras. 57 to 64).

B) Impossibility of alleging violations that were not considered during the proceedings before the Inter-American Commission

18. The State indicated that the violation of Article 28 of the American Convention [FN11] was not alleged during the proceedings before the Commission, but was included in the application after the State had mentioned the difficulty of communicating with the state of Paraná in the course of a working meeting between the litigants before the Inter-American Commission concerning compliance with the recommendations included in Report on Merits No. 14/07. It also alleged that the said provision does not establish a right or freedom, but rather rules for the interpretation and application of the Convention, and that this treaty, particularly its Articles 48(1) and 63, are clear when they stipulate that the organs of the inter-American system can only examine possible violations of rights and freedoms. Consequently, the Court should not assess the alleged violation of Article 28 of the Convention.

[FN11] Cf. infra note 190.

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19. The Commission argued that "Article 28 of the American Convention is not merely a rule of interpretation […]. This norm establishes obligations, compliance with which can be verified and ruled on by the supervisory organs of the inter-American system in the same way as the

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obligations arising from Articles 1(1), 2, 26 and 27 of the Convention." It also indicated that the State did not deny that it had used the supposed difficulties in coordination between the Federal authorities and those of the state of Paraná as a defense during the proceedings before the Commission. It was Brazil's position that led the Commission to include this matter in the Report on Merits in the case and, consequently, in the application submitted to the Court. Therefore, the Commission asked the Court to reject this preliminary objection.

20. The representatives refuted the State's assertion that Article 28 of the Convention cannot be included among the alleged violations and agreed with the Commission that this Article is not merely a norm of interpretation, but establishes obligations for the States Parties by expressly specifying that federal States must comply with all the provisions of the Convention. They also affirmed that the Court had recognized that "facts that occur after the application has been filed can be presented to the Court up until it has delivered judgment. As regards the inclusion of new Articles, the Commission and the [representatives] are legally authorized to [submit them to the Court], in the understanding […] that, failing to admit this possibility would restrict their status as subjects of international law." Lastly, they indicated that the Court has the authority to examine violations of the Articles of the Convention that have not been alleged by the parties based on the iura novit curia principle.

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21. The Court observes that the State's argument corresponds to a preliminary objection, whose purpose is to prevent the Court from examining the alleged failure to comply with Article 28 of the American Convention on the "federal clause".

22. When, the Commission's actions concerning the proceedings before it are questioned as a preliminary objection, the Court has stated that the American Convention establishes that the Inter-American Commission has autonomy and independence in the exercise of its mandate [FN12] and, particularly, in the exercise of its functions in relation to processing individual petitions, established by Articles 44 to 51 of the Convention. [FN13] Nevertheless, the Court has the authority to control the legality of the Commission's actions as regards the processing of matters that the Court itself is examining. [FN14] The Court has maintained the opinion that the American Convention grants it full jurisdiction over all matters relating to a case submitted to its consideration, including those concerning the procedural assumptions on which the possibility of it exercising its competence are founded. [FN15] This does not necessarily entail reviewing the proceedings before the Commission, except in exceptional cases where a grave error exists that violates the right to defense of the parties. [FN16]

[FN12] Cf. Control of the Legality of the Exercise of the Attributions of the Inter-American Commission on Human Rights (Arts. 41 and 44 to 51 of the American Convention on Human Rights). Advisory Opinion OC-19/05 of November 28, 2005. Series A No. 19, first operative paragraph, and Case of Castañeda Gutman, supra note 9, para. 40.

[FN13] Cf. Control of the Legality of the Exercise of the Attributions of the Inter-American Commission on Human Rights (Arts. 41 and 44 to 52 of the American Convention on Human

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Rights), supra note 10, Second operative paragraph, and Case of Castañeda Gutman, supra note 9, para. 40.
[FN14] Cf. Control of the Legality of the Exercise of the Attributions of the Inter-American Commission on Human Rights (Arts. 41 and 44 to 51 of the American Convention on Human Rights), supra note 10, third operative paragraph, and Case of Castañeda Gutman, supra note 9, para. 40.
[FN15] Cf. Case of Velásquez Rodríguez, Preliminary Objections. Judgment of June 26, 1987. Series C. No. 1, para. 29; Case of Castañeda Gutman, supra note 9, para. 40, and Bayarri v. Argentina. Preliminary objection, merits, reparations and costs. Judgment of October 30, 2008. Series C No. 187, para. 28.
[FN16] Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru, Preliminary objections, merits, reparations and costs. Judgment of November 24, 2006. Series C. No. 158, para. 66; and Case of the Saramaka People v. Surname. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2007. Series C No. 172, paras. 32 and 40, and Case of Castañeda Gutman, supra note 9, para. 40.
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23. Also, the party who states that a grave error which affected the right to defense has occurred owing to an action by the Commission during the proceedings before the latter must prove this injustice. [FN17] Hence, a complaint or difference of opinion with regard to the Inter-American Commission's actions is insufficient.

[FN17] Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.), supra note 16, para. 66; and Case of the Saramaka People, supra note 16, para. 32, and Case of Castañeda Gutman, supra note 9, para. 42.
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24. The Court observes that the case file does not support the State's argument that the alleged failure to comply with Article 28 was not considered during the proceedings before the Inter-American Commission and had only been included in the application after the State had made a comment relating to compliance with the reparations required in Report on Merits No. 14/07. During its proceedings, the Commission examined the facts of the case in light of Article 28 of the American Convention, concluding in the said Report on Merits that the State had failed to comply with the obligations deriving from the so-called "federal clause" and, consequently, alleged the supposed failure to comply with this norm in the application it filed before the Court.

25. The Court finds that the inclusion in the application of the supposed failure to comply with Article 28 of the American Convention, which appeared in the Commission's Report on Merits No. 14/07, is not contrary to the relevant provisions of the American Convention and the Commission's Rules of Procedure. Moreover, during the processing of the case before the Court, the State had the opportunity to submit its arguments for the defense on this aspect of the application. Furthermore, it has not proved that its right to defense was impaired owing to the said action of the Commission. Thus, the Court finds that there are no elements that would justify modifying what has been decided by the Inter-American Commission in this case.

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26. Lastly, according to Article 62(3) of the Convention, "[t]he jurisdiction of the Court shall comprise all cases submitted to it concerning the interpretation and application of the provisions of this Convention, provided that the States parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement." Therefore, the Court has competence to examine the alleged failure to comply with Article 28 of the Convention, irrespective of its juridical nature, whether it is a general obligation, a right, or a norm of interpretation. Based on the above, the Court rejects this preliminary objection.

C) Failure to exhaust domestic judicial remedies

27. The State alleged, in general, that the representatives did not comply with the requirement of prior exhaustion of domestic remedies before resorting to the inter-American system. In this regard, it indicated that: (i) the mandado de segurança was not the appropriate remedy to halt the alleged human rights violations, but rather habeas corpus; (ii) once the alleged victims chose to file the mandado de segurança, they should have exhausted the ordinary constitutional remedy (recurso ordinário constitucional) in order to challenge the ruling that extinguished the mandado de segurança without examining its merits; (iii) given the extinction of the mandado de segurança, they could have filed an ordinary action requesting a declaration that the evidence had been obtained illegally and also the destruction of the tapes, but they did not do so, and (iv) the alleged victims did not exhaust the domestic remedies in relation to the presumed violations of the rights to freedom of association and to honor and dignity. The State also affirmed that the criminal action concerning the dissemination of the recorded conversations was processed in accordance with due legal process and within a reasonable time, so that the Court would be acting as a fourth review instance if it examined the merits of the case. The State indicated that it had submitted these arguments during the admissibility phase before the Commission. It affirmed that the principle of estoppel had no bearing on the instant case and that the Court could examine the objection of non-exhaustion of domestic remedies. In this regard, the State asked the Court to decide that it was unable to examine the merits of the application.

28. The Court has developed criteria to examine the objection based on failure to comply with the rule of exhaustion of domestic remedies. [FN18] Regarding the formal aspect, given that this objection is a defense available to the State, procedural questions must be verified, such as the procedural moment at which the objection was filed; the facts about which it was filed, and whether the interested party has indicated that the admissibility decision was based on erroneous information or on an aspect that infringed the right to defense. Regarding the material presumptions, the Court will examine whether domestic remedies were filed and exhausted in keeping with generally recognized principles of international law; particularly, whether the State filing the objection specified the domestic remedies that were not exhausted, and the State must demonstrate that those remedies were available and were adequate, appropriate and effective. Since this question relates to the admissibility of a petition before the inter-American system, the premises underlying this rule must be verified, even though the analysis of the formal premises prevails over those of a material nature and, at certain times, the latter may be related to the merits of the case. [FN19]

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[FN18] Cf. Case of Velásquez Rodríguez, supra note 15, para. 88; Ríos et al. v. Venezuela. Preliminary objections, merits, reparations and costs. Judgment of January 28, 2009. Series C No. 194, para. 37, and Perozo et al. v. Venezuela. Preliminary objections, merits, reparations and costs. Judgment of January 28, 2009. Series C No. 195, para. 42.

[FN19] Cf. Case of Velásquez Rodríguez, supra note 15, para. 91; Case of Ríos et al., supra note 18, para. 37, and Case of Perozo et al., supra note 18, para. 42.

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29. The Court will examine this preliminary objection in the order in which the State presented its arguments.

C.1) Mandado de segurança

30. The State argued that the representatives of COANA and ADECON filed a mandado de segurança before the Court of Justice of the state of Paraná (hereinafter also "the Court of Justice") requesting that the telephone interceptions should cease and the recorded tapes be destroyed. This action was filed when the interceptions had ceased and, since it was not possible to respond to the request to suspend the surveillance, the action was considered unfounded and deemed to be extinct, without an examination of the merits. Based on this ruling, the representatives of the organizations filed embargos de declaração, [FN20] arguing that the Court of Justice had failed to rule on the request for destruction of the recorded tapes. This remedy was rejected by the Court of Justice on the grounds that the said means of contestation was not admissible against decisions in which the merits had not been examined. No other remedies were filed and the decision that declared the mandado de segurança extinguished became final.

[FN20] The remedy known as embargos de declaração is merely a means of clarification that does not entail a review of the merits of the contested decision. It is admissible if the judicial decision appealed is unclear, ambiguous or omissive on a point on which there should have been a ruling. This remedy is heard and decided by the court that delivered the contested decision. Code of Civil Procedure (Merits file, tome IV, folio 1852).

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31. Brazil argued that the mandado de segurança was not an appropriate remedy for the alleged victims' intended purpose. Pursuant to Article 5, subparagraph LXIX of the 1988 Federal Constitution (hereinafter "the Brazilian Constitution" or "the Constitution"), "[t]he sphere of application of the mandado de segurança is […] defined residually: it can only be filed when the real and specific right to be protected is not protected by habeas corpus or habeas data." It added that "[a]s the mandado de segurança does not include the possibility of producing evidence […], it was not the appropriate juridical instrument to obtain a positive decision on the request to destroy the tapes." It indicated that the Brazilian courts understand that habeas corpus is the appropriate remedy for requesting a declaration that evidence obtained by the presumed violation of the right to privacy is invalid. Moreover, considering that it was not possible to prove and declare that the recordings were illegal using the mandado de segurança, this action would not have been an adequate remedy for deciding that the recorded tapes should be destroyed.

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32. The State also indicated that the decision that ruled the mandado de segurança extinct was delivered according to the case law of the Brazilian higher courts. The State indicated that although this instrument was inappropriate, if the alleged victims chose it in order to request that the alleged violations cease, they should have exhausted all possible remedies within the framework of that action, which would have entailed filing a recurso ordinário constitucional. [FN21] This would have allowed the Superior Court of Justice to review the ruling and to examine the request that the recorded tapes be destroyed. In the State's opinion, the Commission erred by not taking into consideration the fact that the petitioners still had this remedy available to them, that they did not use the appropriate mechanisms that were available to protect their rights in the domestic sphere, and that the denial of a remedy that is inappropriate cannot constitute the exhaustion of domestic remedies. Furthermore, the petitioners could have availed themselves of ordinary justice, through an ordinary hearing to request a declaration that the evidence had been obtained illegally and that the tapes should be destroyed.

[FN21] Code of Civil Procedure, supra note 20, folio 1828. Art. 539. The following shall be heard using an ordinary remedy:
[…] II – by the Superior Court of Justice:
(a) the mandados de segurança decided in a single instance by the Federal Regional Courts or by the courts of the States and of the Federal District and Territories, when the decision has been a denial;
[…]

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33. The Commission stated that this preliminary objection is based on the State's disagreement with decisions taken at the opportune moment. It added that it had heard the arguments of both parties concerning the exhaustion of domestic remedies, strictly respecting the adversarial principle. The arguments were duly examined and considered in light of the Convention, the case law of the inter-American system, the evidence provided and the characteristics of the specific case and, consequently, "any new discussion of the issue became irreceivable." The Commission also maintained that, in its answer to the application, the State had not claimed that the decision on admissibility had been based on erroneous information or that it had resulted from a proceeding in which the parties did not act with equality of arms or that there had been a violation of the right to defense. For the Commission, "in principle, the content of the admissibility decisions adopted pursuant to the rules established in the Convention and in [its] Rules of Procedure […] should not be subject to a new substantive examination." Therefore, the Commission asked the Court to reject the preliminary objection filed by the State as unsubstantiated.

34. The representatives indicated that the State's claim that this action was inappropriate to contest the telephone interceptions should not be admitted. The request was received - although subsequently rejected - by the Court of Justice and its decision did not mention the supposed inappropriateness of the procedural mechanism used, thereby implicitly acknowledging the validity of the mandado de segurança for the intended purpose. If this domestic court had understood that the matter should be examined by means of another type of action, it could have

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processed the petition as habeas corpus or extinguished the proceedings owing to the inappropriateness of the request. The representatives stated that, when filing the mandado de segurança, the violations of the right to freedom of association and to honor and dignity had already been committed, so that they were using this remedy to attempt to prevent the continuation of these violations. Given the extinction of the proceedings without a judgment on the merits and the denial of the embargos de declaração, it was useless to continue the discussion on ending the telephone interceptions up to the Superior Court of Justice by means of a recurso ordinário constitucional, because the interceptions had ceased and because the mandado de segurança would not have allowed the alleged victims to obtain the sanction of the public agents involved in the unlawful activities. The representatives adduced that, since the interceptions had ceased when the mandado de segurança was filed, the specific remedy for the intended purpose had been exhausted. Consequently, the preliminary objection raised by the State should be rejected.

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35. The State filed the objection of failure to exhaust domestic remedies in relation to the mandado de segurança in the brief it presented to the Inter-American Commission on November 14, 2001, that is, during the admissibility stage of the petition. The Court finds that the objection was presented opportunely.

36. Regarding the appropriate remedy to halt the alleged violations of the presumed victims' human rights, the Court understands, as indicated by the expert witness proposed by the State, [FN22] that habeas corpus is a remedy whose application "is restricted to cases of a threat to or violation of freedom of movement […] by an unlawful action or abuse of authority." In turn, the mandado de segurança "is an instrument for the protection of a real and specific right violated or threatened by unlawful or abusive actions by public agents […]," which is characterized by the protection of rights other than freedom of movement that, consequently, "are not protected by habeas corpus." In the opinion of the said expert witness, "the mandado de segurança can be filed in cases of requests for […] telephone interceptions when the right to freedom of movement of the individual [subject of this measure] is not directly affected." The Court observes that the individuals whose conversations were intervened and recorded enjoyed freedom of movement and that, furthermore, this right was not threatened directly by a coercive measure against their personal liberty during the course of the telephone interception or subsequently. Therefore, taking into account that the right to freedom of movement was not being considered directly in this case, the appropriate remedy for the presumed victims' claim was not habeas corpus, but rather the mandado de segurança.

[FN22] Cf. Expert opinion provided by Maria Thereza Rocha de Assis Moura during the public hearing held before the Inter-American Court of Human Rights on December 3, 3008.

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37. The Court observes that, when the alleged victims filed the mandado de segurança, on October 5, 1999, [FN23] the telephone interceptions had indeed ceased and the dissemination of the recorded tapes taken place (infra paras. 97 and 94, respectively). Given the extinction of the

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mandado de segurança because the purpose had been eliminated, and the denial of the embargos de declaração, the State indicated that the representatives of the alleged victims should have filed other judicial remedies, such as a recurso ordinário constitucional or an ordinary hearing. These legal actions could possibly have resulted in another examination of the request for destruction of the recorded tapes by other courts.

[FN23] Cf. Record of the registration and opening of mandado de segurança No. 83.486-6 procedures (file of attachments to the pleadings and motions brief, attachment 2, folio 1007).

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38. The Court considers that the remedies that must be exhausted are those that are appropriate for the specific situation of the alleged human rights violations: in this case the interception and recording of telephone conversations and their dissemination. The Court understands that the destruction of the tapes containing the recordings would not determine the ceasing or the reparation of the violations claimed by the alleged victims. Indeed, the filing of a recurso ordinário constitucional or an ordinary hearing in order to obtain the destruction of the tapes of the recorded conversations could not repair the interception and dissemination that had already taken place, although it could be an appropriate remedy to prevent further dissemination and prevent possible human rights violations in the future. Hence, once the mandado de segurança was exhausted, it was unnecessary to file other legal mechanisms that would not have been intended to halt or repair the interception, recording and dissemination of telephone conversations that had already occurred. Based on the foregoing, the Court rejects this preliminary objection.

C.2) Criminal proceedings and the “fourth instance formula”

39. The State claimed that the alleged victims denounced the facts before the Public Prosecutor’s Office, by means of a representação criminal against the public officials supposedly involved in the interception, recording and dissemination of the telephone conversations. The Court of Justice decided to close this investigation with regard to the Military Police and Judge Elizabeth Khater, and ordered the criminal action to proceed only against the Secretary of Public Security of the state of Paraná at the time, Cândido Martins, for the dissemination of the recorded tapes. This public official was acquitted on appeal. The State added that “the criminal action was duly opened and heard, in accordance with due process of law and within a normal and reasonable time (slightly more than four years).” It stressed that the criminal action had concluded when the Commission examined admissibility and that, in itself, precluded admission of the petition. The Commission could only have justified its intervention if it had considered that the criminal action had not been processed in accordance with due process of law; that the decision had been delivered in a way which was contrary to the law or to the American Convention, or that an unjustified delay in processing it had occurred. It indicated that, according to the principle of subsidiarity, the domestic solution provided by the State should be respected unless manifestly illegal. In this case the Commission stated expressly that there was no evidence that the judicial proceedings or the decisions handed down were flawed. It asked the Court to remedy the situation, by not admitting the application and avoiding acting as a fourth court of review.

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40. In addition to the arguments indicated above (supra para. 33) regarding the investigation and the criminal action, the Commission alleged that when establishing the factual framework of the instant case, it had emphasized the flawed judicial activities designed to investigate the violations, and their failure to conform to the standards embodied in the Convention. The facts mentioned reveal a violation of the rights to judicial protection and guarantees, so that a decision on this matter, namely the effectiveness of domestic remedies, does not correspond to a preliminary objection, but should be elucidated as part of the merits of the case.

41. The representatives stated that the representação criminal filed by the alleged victims against the agents supposedly involved in the telephone interception and the dissemination of the recorded tapes is "the basic domestic remedy to obtain justice and not the mandado de segurança, the purpose of which was only to end the illegal interceptions."

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42. Regarding the filing of criminal remedies, the Court finds that their purpose was to determine the existence of a punishable fact and, if applicable, the criminal responsibility of the alleged perpetrators. Hence, their purpose was different but complementary to the one sought by the mandado de segurança, which sought an immediate ending to the interception and recording of the telephone conversations.

43. The Court observes that, during the admissibility stage before the Commission, the State provided information about the existence of several criminal actions and the progress made, denying that there had been delays in processing them. [FN24] Also, in its brief of October 12, 2005, [FN25] the State indicated that the criminal action against the Secretary of Public Security of the state of Paraná at the time, Cândido Martins, had concluded. Thus, the documentary evidence shows that when the Commission issued its Admissibility Report No. 18/06 of March 2, 2006, [FN26] the investigation against Judge Elisabeth Khater and the police agents supposedly involved in the telephone interception had already been closed, while the criminal action against the abovementioned Secretary of Public Security had ended with his acquittal. [FN27] Consequently, the Court finds that, in the instant case, the representatives had exhausted the appropriate remedy under criminal law to repair the alleged violation, because it sought to clarify the facts and, if applicable, obtain justice.

[FN24] Cf. Record of the hearing of November 14, 2001, held with the representatives and the State before the Inter-American Commission (file of attachments to the application, tome II, appendix 3, folios 928 and 931); the State's brief concerning the admissibility of case 12,353, presented on November 14, 2001 (file of attachments to the application, tome II, appendix 3, folio 934), and the State's brief presented on October 12, 2005, with additional information concerning the admissibility of case 12,353 (file of attachments to the application, tome II, appendix 3, folios 835 and 836).

[FN25] Brief with additional information from the State presented on October 12, 2005, supra note 24, folios 835 and 836.

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[FN26] Cf. Admissibility Report No. 18/06 of March 2, 2006 (file of attachments to the application, tome 1, appendix 2, folio 43).
[FN27] Cf. Decision No. 4745 of the Special Organ of the Court of Justice of the state of Paraná of October 6, 2000, in criminal investigation No. 82,516-5 (file of attachments to the application, tome I, attachment 9, folios 99 and 100), and decision of the Second Criminal Chamber of the Court of Justice of the state of Paraná of October 14, 2004, in criminal appeal No. 153.894-1 (file of attachments to the application, tome I, attachment 10, folio 114).
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44. Furthermore, with regard to the State's claims concerning the "fourth instance formula" (supra para. 39), the Court considers it opportune to recall, as it has repeatedly indicated in its case law, that clarification of whether a State has violated its international obligations owing to the actions of its judicial organs may require the Court to examine the respective domestic proceedings in order to establish their compatibility with the American Convention, which is not the same, evidently, as determining individual criminal responsibilities. In light of the above, the domestic proceedings must be considered as a whole. The function of the Court is to determine whether the proceedings, taken as a whole, were in conformity with the Convention. [FN28] This examination corresponds to the merits of the matter and will be examined in the respective chapter. The Court therefore rejects this preliminary objection.

[FN28] Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits. Judgment of November 19, 1999. Series C No. 63, para. 222; Case of Ríos et al., supra note 18, para. 54, and Case of Perozo et al., supra note 18, para. 65.

C.3) Failure to exhaust domestic remedies in relation to the right to freedom of association

45. The State claimed that the representatives "did not mention the violation of Article 16 of the American Convention [in the petition they submitted to the Commission;] therefore, the exhaustion of domestic remedies in relation to the alleged violation of the right to freedom of association was not discussed during the admissibility stage. The inclusion of this Article occurred [in the] Report on Admissibility, and Brazil had not been able to comment on it. The State affirmed that if there had been evidence of a restriction of freedom of association the representatives "could have filed a mandado de segurança to safeguard this right, or […] included [the said] violation among the grounds for the mandado de segurança that was filed." Consequently, the State was unable to decide the supposed violation of the right to freedom of association in its domestic jurisdiction.

46. The Commission did not present additional claims in relation to the inclusion of Article 16 of the Convention in its Admissibility Report and the exhaustion of domestic remedies in relation to the supposed violation of that right. According to this report, the Commission observed that it had adopted the report "strictly respecting the adversarial principle" and that, in its answer, the State had not claimed that this decision was based on erroneous information or that it was the result of a process in which the parties did not act with equal arms or that there

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had been a violation of the right to defense. Accordingly, the admissibility decision adopted by the Commission should be considered final.

47. The representatives repeated their argument that "the Commission and the Court have the prerogative to introduce new elements, at any moment of the processing of the proceedings, by including new Articles of the Convention to be examined, [in application] of the iura novit curia principle."

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48. The Court observes that Article 46(1) of the American Convention establishes the requirements for a petition to be admitted by the Inter-American Commission, and Article 28 of the Commission's Rules of Procedure establishes the elements that the petition should contain when it is presented. Neither Article requires the petitioner to specify the Articles they consider violated. Similarly, Article 32(c) of the Commission's Rules of Procedure in force at the date of presentation of the petition (current Article 28(f)) established the possibility of a petition being processed before it even if no specific reference was made to the Article presumed to have been violated. [FN29] Thus, in its admissibility reports, the Commission determines the possible violations of the rights embodied in the American Convention based on the facts denounced by the petitioner and on the legal considerations it deems pertinent.

[FN29] According to Article 32(c) of the Commission's Rules of Procedure in force on the date of presentation of the petition, complaints submitted to the Commission must include: "the State the petitioner considers responsible, by act or omission, for the violation of any of the human right recognized in the American Convention on Human Rights, in the case of States Parties, even if no specific reference is made to the Article(s) alleged to have been violated." The Rules of Procedure of the Inter-American Commission on Human Rights approved at its 49th period of sessions, during session 660, held on April 8, 1980, and modified at its 64th period of sessions, during session 840, held on March 7, 1985, in its 70th period of sessions, during session 938 held on June 29, 1987; in its 90th period of sessions, during session 1282, held on September 21, 1995; at its 92nd period of special sessions, during session 1311 held on May 3, 1996; at its 96th period of special sessions, during session 1354 held on April 25, 1997, and in its 97th period of sessions, during session 1366 held on October 15, 1997.

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49. In this case the Commission decided to include in its Admissibility Report No. 18/06 and also in its examination of the merits, the alleged violation of the right to freedom of association, "under the iura novit curia principle and because the alleged interceptions and recordings attempted to affect the exercise of the rights of the social organizations." [FN30] Once the possible violation of Article 16 of the Convention had been included in the said Admissibility Report during the proceedings before the Commission, the State commented on the merits of the supposed violation of the right to freedom of association, but failed to comment on the alleged failure to exhaust domestic remedies in that regard, or on the lack of opportunity to comment on it during the admissibility stage. [FN31] Brazil put forward this argument for the first time in its brief answering the application, even though it had been aware of this fact since April 21, 2006,

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when it had been notified of Admissibility Report No. 18/06. [FN32] Consequently, in accordance with the facts, which the State was aware of, and the circumstances of the case, the Court concludes that this preliminary objection must be rejected.

[FN30] Cf. Admissibility Report No. 18/06 of March 2, 2006, supra note 26, folio 51.
[FN31] Cf. Brief of November 30, 2006 with the State's arguments on the merits of case 12,353 (file of attachments to the application, tome II, appendix 3, folios 712 to 714).
[FN32] Cf. Note of the Executive Secretary of the Inter-American Commission on Human Rights of April 19, 2006 (file of attachments to the application, tome II, appendix 3, folio 810).

C.4) Failure to exhaust domestic remedies in relation to Article 11 of the American Convention – civil actions

50. The State indicated that "the individuals who considered they had been prejudiced by the interception of the telephone lines of the entities COANA and ADECON filed [civil actions before the domestic courts] for reparation of non-pecuniary damages almost four years after the petition had been presented to the [Commission]." The alleged victims "preferred to resort directly to the international court without granting the State the possibility of deciding on the admissibility of [the said] request in the domestic sphere. Therefore, the failure to use the Brazilian courts in relation to the violation of Article 11 [of the Convention] is evident, which constitutes […] failure to observe the rule of prior exhaustion of domestic remedies."

51. As this Court has already stated, the Commission presented its observations on the preliminary objection concerning the failure to exhaust domestic remedies in general, claiming, among other matters, that it duly considered the arguments of the parties, in light of the elements in the case file and therefore "a new discussion on this matter is not in order."

52. The representatives alleged that, according to the Court's case law, "civil remedies do not need to be exhausted for the petition to be examined by the inter-American system; the criminal action is the appropriate remedy to file charges regarding the responsibility of the agents involved in the violation, but in the absence of an effective criminal procedure, the victims cannot be penalized by requiring them to exhaust remedies that seek compensation in the civil sphere."

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53. The Court reiterates that, for the State to exercise its right to defense, a preliminary objection based on a presumed failure to comply with the exhaustion of domestic remedies should be submitted opportunely (supra para. 28). In the instant case, even though it was able to do so, the State did not allege the failure to exhaust the civil remedies at the due procedural moment; namely before the adoption of Admissibility Report No. 16/06 on March 2, 2006, [FN33] but rather it did so in its brief on the merits of the case presented on November 30, 2006. [FN34] Based on the above, the Court concludes that the State did not present this defense at the opportune procedural moment, so that this preliminary objection must be rejected.

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[FN33] Cf. Admissibility Report No. 18/06 of March 2, 2006, supra note 26, folio 44.
[FN34] Cf. The State's brief of November 30, 2006, with arguments on merits in case 12,353, supra note 31, folios 722 and 723.

IV. JURISDICTION

54. The Inter-American Court is competent to hear this case, pursuant to Article 62(3) of the Convention, because Brazil has been a State Party to the American Convention since September 25, 1992, and accepted the compulsory jurisdiction of the Court on December 10, 1998.

V. EVIDENCE

55. Based on the provisions of Articles 44 and 45 of the Rules of Procedure, as well as on its case law concerning evidence and its assessment, [FN35] the Court will examine and assess the documentary probative elements forwarded by the parties at different procedural opportunities or as helpful evidence requested by the Court, as well as the testimonial statements and expert opinions provided by means of a sworn statement before notary public (affidavit) and during the public hearing before the Court. To this end, it will abide by the principles of judicial discretion within the corresponding normative framework. [FN36]

[FN35] Cf. The "White Van" (Paniagua Morales et al.) v. Guatemala. Reparations and costs. Judgment of May 25, 2001. Series C No. 76, para. 50; Case of Perozo et al., supra note 18, para. 91, and Case of Kawas Fernández v. Honduras. merits, reparations and costs. Judgment of April 3, 2009. Series C No. 196, para. 36.
[FN36] Cf. Case of the "White Van" (Paniagua Morales et al.), supra note 35, para. 50; Case of Perozo et al., supra note 18, para. 91, and Case of Kawas Fernández, supra note 35, para. 36.

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56. Before making this assessment, the Court will examine the State's allegation that the evidence presented by the representatives in the pleadings and motions brief was time-barred (supra para. 12 to 17).

A. Evidence presented by the representatives in their pleadings and motions brief

57. First, with regard to the State's argument concerning the failure of the representatives to comply with the time limits established in Articles 26(1) and 36 of the Rules of Procedure, the Court considers it necessary to clarify that the original application brief and its attachments were received by Justiça Global on February 6, 2008. That is the date of notification of the application as of which the term of two months stipulated in Article 36 of the Rules of Procedure should be calculated. [FN37] Thus, by presenting their pleadings and motions brief on Monday, April 7, 2008, [FN38] the representatives submitted it to the Court with a delay of one day. This brief was duly forwarded to the State, which received it on April 10, 2008. [FN39]

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[FN37] Cf. Note of the Secretariat: CDH-12.353/032 of June 9, 2008 (merits file, tome II, folio 552).
[FN38] Cf. Note of the Secretariat: CDH-12.353/014 of April 10, 2008 (merits file, tome I, folio 362).
[FN39] Cf. Note of the Secretariat: CDH-12.353/016 of April 10, 2008 (merits file, tome I, folio 366).
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58. Regarding the transmittal of the attachments, the representatives sent them by mail, together with the original pleadings and motions brief on Monday, April 14, 2008. [FN40] Given the delay in receiving them, and in response to the request of the Court's Secretariat that they should be sent as soon as possible, [FN41] the representatives forwarded another copy of the pleadings and motions brief together with nine of the 12 attachments that accompanied it; these documents were received by the Secretariat on May 16, 2008. [FN42] On May 20, 2008, [FN43] the State received these nine attachments and the notification in which, ex officio, the President granted an extension until July 7, 2008, for Brazil to present its brief answering the application. Finally, also on May 20, 2008, the Court received the original pleadings and motions brief and all the attachments, which constituted the original correspondence sent by the representatives on April 14, 2008. [FN44] These documents were immediately forwarded by the Court and received by the State on May 23, 2008. [FN45]

[FN40] Cf. Communication of the representatives JG/RJ No. 074/08 of May 5, 2008 (merits file, tome I, folio 375).
[FN41] Cf. Notes of the Secretariat: CDH-12.353/014 of April 10, 2008 and CDH-12.353/019 of May 6, 2008 (merits file, tome I, folios 362 and 377).
[FN42] The following attachments were omitted from this correspondence: (i) attachment 8 – document of the Judiciary of the state of Paraná, composition of the Judicial Section–Londrina; (ii) attachment 9 – Law No. 13,115, of the state of Paraná of February 14, 2001, and (iii) attachment 12 – Curricula vitae of the expert witnesses. Cf. Note of the Secretariat CDH-12,353/022 dated May 23, 2008 (merits file, tome II, folio 463).
[FN43] Cf. Note of the Secretariat: CDH-12.353/024 de 20 de mayo de 2008 (merits file, tome II, folio 476).
[FN44] Cf. Communication of the representatives JG/RJ No. 063/08 of April 7, 2008, received by the Court's Secretariat on May 20, 2008 (merits file, tome II, folio 479).
[FN45] Cf. Note of the Secretariat: CDH-12.353/027 of May 23, 2008 (merits file, tome II, folio 549).
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59. The Court has indicated that the proceedings held before it are not subject to the same formalities as domestic judicial proceedings and that the incorporation of specific elements of the body of evidence must be made paying special attention to the specific circumstances of each case and bearing in mind the limits imposed by respect for legal certainty and the procedural balance between the parties. [FN46]

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[FN46] Cf. Case of Baena Ricardo et al. v. Panama. merits, reparations and costs. Judgment of February 2, 2001. Series C No. 72, para. 71; Case of Perozo et al., supra note 18, para. 32, and Case of Kawas Fernández, supra note 35, para. 82.

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60. With regard to the pleadings and motions brief, the Court observes that it was presented one day after the time limit had expired, on the first working day following the expiry. However, the Rules of Procedure do not make a distinction between working and non-working days. To the contrary, when time limits are granted in days, calendar days should be calculated. Similarly, a time limit in months should be calculated as "calendar months." [FN47] Consequently, even though the last day of the period was a Sunday, the representatives should have sent the brief on that date and not on the following working day. Despite this, the Court does not consider that admitting the representatives' brief in these specific circumstances affects legal certainty or the procedural balance of the parties, because it was received with a minimum delay. [FN48]

[FN47] Cf. Rules of Procedure of the Court. Article 2. Definitions, subparagraphs 11 and 21.

[FN48] In the Kimel case, the Court indicated that: "[a]s to the two-day delay incurred by the representatives in submitting their brief of closing arguments, the Court bears in mind that, according to its prior decisions in similar cases, 'the formalities inherent to certain branches of domestic law do not apply under International Human Rights Law, the main purpose of which is the due and adequate protection of such rights.' Hence, it considers that such delay does not amount to an excessive term which may be the grounds for rejecting said brief, taking into consideration that the access of individuals to the Inter-American system for the protection of human rights is particularly relevant for the elucidation of the facts and the determination of possible reparation measures". Case of Kimel v. Argentina. Merits, reparations and costs. Judgment of May 2, 2008 Series C No. 177, para. 12. Cf. Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs. Judgment of June 30, 2009, Series C No. 197, para. 13; Case of Escué Zapata v. Colombia. Order of the Inter-American Court of Human Rights of December 20, 2006, tenth considering paragraph; Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs. Judgment of July 1, 2006. Series C No. 148, para. 117, and The "White Van" (Paniagua Morales et al.) v. Guatemala. Preliminary objections. Judgment of January 25, 1996. Series C No. 23, paras. 37 and 39.

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61. Also, regarding the evidence provided with this brief, even though Article 36 of the Rules of Procedure establishes that the representatives have two months from the notification of the application to present their pleadings, motions and evidence, Article 26 of these Rules establishes that, if the pleadings and motions brief is remitted electronically, the original and the accompanying evidence "shall be submitted" ("deverão ser remitidos" [Note: must be forwarded in the Portuguese version]), within seven days at the latest. [FN49] It can therefore be interpreted, as the representatives have, that the said term of seven days refers to the act of the parties sending the said documents, and not to their reception by the Court. [FN50]

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[FN49] This expression corresponds, in the Spanish and French versions of the Rules of Procedure to "deberán ser remitidos" and "doivent être présentés," respectively.

[FN50] To avoid the possibility of ambiguity in the interpretations of this time limit, the Rules of Procedure of the Court in force as of March 24, 2009 establish:

Article 27(1). Filing of briefs

The application, the answer thereto, the brief containing pleadings, motions, and evidence, as well as any other written material addressed to the Court, may be presented in person, by courier, facsimile, telex, mail, or any other method generally used. When any such material is transmitted to the Court by electronic means, the original documents and annexes must be submitted to the Tribunal within a non-renewable term of 21 days as from the expiration of the deadline established to submit those documents. To ensure the authenticity of the documents the Court shall have an adequate protocol.

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62. Furthermore, the Court notes that the State had a copy of the pleadings and motions brief as of April 10, 2008, received nine of the twelve attachments mentioned in the said brief on May 20, 2008, and finally on May 23, 2008, received all the attachments. The extension granted, ex officio, by the President on May 20, 2008, for the State to present its answer to the application by July 7, 2008, was substantially the same as the time that elapsed between the expiry of the period stipulated in Article 26(1) of the Rules of Procedure and the date on which the State received the original pleadings and motions brief and its attachments.

63. Despite the State's affirmation that "the adversarial principle was violated, because it had to make urgent unexpected changes in its defense to answer new arguments by the representatives, and that it had been granted an extension of five weeks, which was less than the delay incurred by the representatives," it did not indicate what the supposed "new arguments of the representatives" were or the reasons that justified the difficulty in answering them. The Court notes that the arguments of the representatives are not developed in the attachments that were received in May, but rather in the pleadings and motions brief that the State received on April 10, 2008. Consequently, even after the extension granted, ex officio, by the President, the State had an additional four weeks and two days to the period established in the Rules of Procedure to consider the representatives' arguments while awaiting the attachments. The Court also recalls that the representatives are not allowed to include new facts in their brief, and that the factual framework of the case before the Court is established by the facts set out in the Commission's application.

64. Based on the foregoing, the Court does not observe the alleged prejudices to the State's defense, to the adversarial principle, or an imbalance between the parties, and therefore admits the pleadings and motions brief and the evidence that accompanies it.

B. Documentary, testimonial and expert evidence

65. The Court received the testimony of the witnesses and expert witness indicated in this section [FN51] on the issues mentioned below. This testimony was given before notary public

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[FN52] or the latter authenticated the deponent's signature. The content of these statements is included in the corresponding chapter:

(1) Arlei José Escher, (2) Delfino José Becker and (3) Pedro Alves Cabral. Presumed victims, proposed by the Inter-American Commission. Among other aspects, they testified on: (a) the connections between ADECON and COANA and MST; (b) the illegal interception and monitoring of the telephone lines of the said organizations; (c) the actions taken in the domestic sphere to have the interception suspended, the recordings destroyed and the authors of these acts sanctioned, and (d) the personal consequences and the consequences for ADECON and COANA of the dissemination of the recordings.
(4) Marli Brambilla Kappaum. Member of COANA and ADECON, who worked in the administrative area of the former organization at the time of the facts; witness proposed by the representatives. Among other aspects, she testified about the telephone interception, the dissemination of her conversations in the press, the presumed effects, and the alleged harassment of members of COANA.
(5) Teresa Cofré. Legal adviser to COANA and ADECON, witness proposed by the representatives. Among other aspects, she testified about the illegal telephone interceptions and her work as a lawyer who advised the said organizations at the time of the facts.
(6) Rolf Hackbart. President of the National Institute of Colonization and Agrarian Reform (INCRA), witness proposed by the State. He testified, among other matters, on the agrarian reform policy in Brazil and the relations of the Brazilian Government with the social movements of landless workers.
(7) Sadi Pansera. Legal adviser of the Ouvidoria Agrária Nacional [FN53] of the Ministry of Agrarian Development, witness proposed by the State. Among other aspects, he testified on the Brazilian State's policy to combat violence in rural areas.
(8) Sérgio Sauer. Degrees in Philosophy and Theology, a doctorate in Sociology, expert witness proposed by the representatives. Among other matters, he provided his expert opinion on the rural workers' fight for the right to land and the federal public policies as well as those of the state of Paraná in this regard.
(9) Luiz Flávio Gomes. Lawyer, specialist in criminal law, expert witness proposed by the Inter-American Commission. He testified on Law No. 9,296 of July 24, 1996, which regulated telephone interventions, the implementation of the law in general and in this case in particular.

[FN51] In communications dated November 10 and 14, 2008, the Inter-American Commission respectively: (i) advised that it had not been possible to obtain the statement of Dalton Luciano de Vargas and (ii) requested that the expert witness, Luiz Flávio Gomes, convened by the Court to provide his opinion during the public hearing, should be allowed to present this expert opinion by means of a statement sworn before notary public (merits file, tome III, folios 962 and 1041). The request was accepted by the Court on November 18, 2008. Also, in a communication of November 14, 2008 (merits file, tome III, folio 1042 and in the meeting held before the public hearing, the representatives asked the Court to allow the substitution of the witness, Avanílson Alves Araújo, convened to give his testimony during the public hearing, by the witness, Teresa Cofré, who had already submitted her statement before notary public. During this prior meeting, the State and the Inter-American Commission agreed to the representatives' request, and the

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President decided to receive the expanded testimony of Teresa Cofré during the public hearing. The representatives did not submit the expert opinion of Carlos Walter Porto-Gonçalves.
[FN52] On October 16 2008, the representatives asked the Court to allow the alleged victims, witnesses and expert witnesses they had offered, who should have made their statements before notary public, to provide their testimonies and expert opinions before the official in the Prosecutor General's Office, who is responsible for authenticating documents and has "competence to guarantee the presumption of truth of the statements." In this way, payment of notary fees would be avoided. In a note of October 24, 2008, the Court authorized the representatives' request. On November 4, 2008, the Inter-American Commission submitted a similar request, which was granted by the Court on November 6, 2008. Cf. Notes de la Secretariat: CDH-12.353/066 of October 24, 2008 and CDH-12.353/1070 of November 6, 2008 (merits file, tome III, folios 914 and 952, respectively).
[FN53] This entity was established by Decree 5033/04 of April 5, 2004, and its activities relate principally to the prevention, mediation and reduction of agrarian conflicts. Cf. Expert opinion of Sadi Pansera (merits file, tome III, folios 929 and 930).
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66. Regarding the evidence provided during the public hearing, the Court received the testimony of the following persons:

(1) Celso Aghinoni. Alleged victim, proposed by the Inter-American Commission. Among other aspects, he testified about: (a) the connection between the organizations ADECON and COANA and MST; (b) the illegal interception and monitoring of the telephone lines of the said organizations; (c) the actions undertaken in the domestic sphere to suspend the interception, and obtain the destruction of the recordings and the sanction of the authors of the said acts, and (d) the personal consequences and the consequences for the said organizations of the dissemination of the recordings.
(2) Teresa Cofré. Legal adviser to COANA and ADECON, witness proposed by the representatives. She expanded her testimony on the telephone interceptions and her work as a lawyer who advised the said organizations.
(3) Harry Carlos Herbert. Chief of Police, Director of the State Intelligence Department of the Secretariat of Public Security of the state of Paraná, witness proposed by the State. Among other aspects, he testified about the actions of the state of Paraná when monitoring telephone communications authorized by the courts.
(4) Maria Thereza Rocha de Assis Moura. Minister of the Superior Court of Justice of Brazil, expert witness proposed by State. She testified, among other matters, on the scope of the recurso ordinário constitucional, habeas corpus and the mandado de segurança under the Brazilian legal system and, with the agreement of the parties, on the application of Law No. 9:296/96.

C. Assessment of the evidence

67. In this case, as in others, the Court accepts the probative value of those documents forwarded by the parties at the opportune procedural moment, that were not contested or opposed, and whose authenticity was not questioned. [FN54] In relation to the documents forwarded as helpful evidence (supra para. 9), the Court incorporates them into the body of evidence, in application of the provisions of Article 45(2) of the Rules of Procedure.

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[FN54] Cf. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, para. 140; Case of Perozo et al., supra note 18, para. 94, and Case of Kawas Fernández, supra note 35, para. 39.

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68. With regard to the testimony and the opinions given by the witness and the expert witnesses during the public hearing and in sworn statements, the Court considers them pertinent to the extent that they comply with the purpose defined by the President of the Court in the Order requiring them, taking into account any observations submitted by the parties. [FN55]

[FN55] Cf. Loayza Tamayo v. Peru. Merits. Judgment of September 17, 1997. Series C No. 33, para. 43; Case of Ríos et al., supra note 18, para. 89, and Case of Perozo et al., supra note 18, para. 103.

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69. In this regard, the Commission observed that the sworn statement of the witness Sadi Pansera, offered by the State, "bore no relationship to the matter litigated in the instant case" and advised that it had no observations to make on the other sworn statements provided by the State and the representatives.

70. The representatives contested the way in which the testimonies of Sadi Pansera and Rolf Hackbart were rendered. They indicated that these statements were not made before notary public, but rather the latter merely authenticated the witnesses' signature on the written statements. They stated that the correct procedure for an affidavit entailed "the State official, responsible for authenticating documents, receiving the statement and certifying its truth in the presence of the deponent." Therefore, the requirements of Article 47 of the Rules of Procedure of the Court and the Order of the President of October 8, 2008, were not complied with. Consequently, they asked the Court not to consider the said testimony. The representatives also commented on the content of both statements. [FN56]

[FN56] Among other considerations the representatives indicated that: (a) Sadi Pansera's statement merely listed the State entities that combated violence in rural areas, their functions and action plans, without presenting information on the impact of their actions on reducing or eliminating the problem. In addition, the representatives presented statistical data in order to prove "to the Court the ineffectiveness of the public policies mentioned by [the said] witness"; and (b) the witness, Rolf Hackbart, gave "merely a general description of the agrarian reform policy and the entities responsible for implementing it[, without presenting] information on the results of this policy." The representatives countered the affirmation of the witness with the data contained in the expert opinion of Sérgio Sauer. Regarding the Brazilian legislation on freedom of association, mentioned in the testimony, the representatives stated that they had not alleged the inexistence of these norms, but rather that State agents had violated them. Cf. Briefs of the

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representatives of November 19 and 28, 2008 (merits file, tome IV, folios 1063, 1064, 1097 and 1098).

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71. In its answer, the State claimed that the presumed victims should be heard just to provide information and not as witnesses, because they had an interest in the result of the case and did not have the necessary neutrality required of a witness. The State also submitted observations on the sworn statements of the witnesses Teresa Cofré and Marli Brambilla Kappaum and the expert witness Sérgio Sauer, offered by the representatives, and the witnesses Pedro Alves Cabral, Arlei José Escher and Delfino José Becker, offered by the Commission. [FN57]

[FN57] Among other considerations, the State indicated that: (a) in her testimony, Teresa Cofré had "extrapolated the purpose of her statement and expressed an opinion without presenting supporting documents regarding the supposed unlawful actions of law enforcement agents and members of the judiciary in the state of Paraná." The State refuted the testimony as regards the affirmations that the Secretary of Public Security of the state of Paraná at the time had decided on the dissemination of the recorded tapes and that the Court of Justice had refused the request to destroy them; (b) the testimony of Marli Brambilla Kappaum showed that she was unaware of many of the facts about which she was questioned and her replies were evasive, lacking precision and objective information; (c) the expert opinion of Sérgio Sauer sought to indicate that, in Brazil, a regime criminalizing social movements and of omission by the State was in force, and it therefore vehemently rejected" this expert opinion. Brazil indicated that, regarding "the actions of the Public Prosecutor's Office of the State of Rio Grande do Sul, it was processing before the Inter-American Commission […] a request for information from the state […]. Given that the matter could possibly become a petition or a case before the [Commission], [the Court] should not consider comments made by the expert witness [Sérgio] Sauer on the matter mentioned at this time, because […] it could lead to a possible bis in idem in the international sphere." Among other matters, the State submitted information on investments in infrastructure and the number of families settled to "correct information presented by the said expert witness"; and (d) the witnesses, Pedro Alves Cabral, Arlei José Escher and Delfino José Becker, revealed that they were not aware of several details of the facts and could not even indicate the judicial measures related to the said events. The State underscored that they had affirmed that COANA and ADECON had no links to MST, and therefore asked for rectification of the information provided to the case file by the Commission and the representatives. Brief of the State of November 28, 2008 (merits file, tome IV, folios 1102 to 1106).

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72. Regarding the observations made by the parties, in keeping with the criteria reiterated in its case law, the Court considers that it cannot assess alone the testimony of Arlei José Escher, Delfino José Becker, Pedro Alves Cabral and Celso Aghinoni, alleged victims in this case, or that of Teresa Cofré and Marli Brambilla Kappaum, who were named as presumed victims in the representatives' pleadings and motions brief, since they all have a direct interest in the case; the Court will therefore assess them in conjunction with the whole body of evidence in the proceedings. [FN58]

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[FN58] Cf. Case of Loayza Tamayo, supra note 55, para. 43; Case of Perozo et al., supra note 18, para. 103, and Case of Kawas Fernández, supra note 35, para. 40.

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73. Second, in relation to the observations on the way in which the written statements were made, the Court notes that: (a) the opinion of the expert witness Sérgio Sauer was made before notary public; (b) a notary public authenticated the signatures on the testimony of Sadi Pansera and Rolf Hackbart, and on the opinion of the expert witness Luiz Flávio Gomes, and (c) the other five statements were made before an official in the Prosecutor General's Office, in keeping with the request presented by the representatives and the Commission and granted by the Court (supra note 52).

74. In this regard, the Court considers it opportune to recall that the proceedings before it are not subject to the same formalities as domestic judicial proceedings. [FN59] Thus, on previous occasions, the Court has admitted sworn statements that were not made before notary public, when this did not affect the legal certainty and procedural balance between the parties. [FN60] In the instant case, the Court finds that there are no grounds to consider that the admission of the contested statements, namely those where the signature was certified by a notary public, has affected the legal certainty or the procedural balance of the parties. In any case, the deponent did not reject or ignore the content of the testimony attributed to him but, by his signature certified before notary public, assured that he was the author of that statement, assuming the legal consequences of that act. Based on the foregoing, the Court admits as evidence the statements on which the signature of the witness or the expert witness appears duly certified by a notary or other public official authorized to authenticate documents, and will assess them together with the entire body of evidence, applying the rules of sound judicial discretion and taking into consideration the objections of the parties. [FN61]

[FN59] Cf. Case of Baena Ricardo et al., supra note 46, para. 71; Case of Perozo et al., supra note 18, para. 32, and Case of Kawas Fernández, supra note 35, para. 82.

[FN60] The Serrano Cruz Sisters v. El Salvador. Merits, reparations and costs. Judgment of March 1, 2005. Series C No. 120, para. 39; Servellón García et al. v. Honduras. Merits, reparations and costs. Judgment of September 21, 2006. Series C No. 152, para. 46, and The La Rochela Massacre v. Colombia. Merits, reparations and costs. Judgment of May 11, 2007. Series C No. 163, para. 62.

[FN61] Case of the Serrano Cruz Sisters, supra note 60, para. 40; Carpio Nicolle et al. v. Guatemala. Merits, reparations and costs. Judgment of November 22, 2004. Series C No. 117, para. 72, and Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs. Judgment of June 23, 2005. Series C No. 127, para. 46.

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75. In addition, with regard to the observations about the content of the statements, the Court will take into consideration the claims of the parties (supra paras. 69 to 71) and will assess the statements only to the extent that they refer to the purpose required in the Order of the President and in conjunction with the other elements of the body of evidence.

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76. Regarding the newspaper Articles presented by the parties, the Court has considered that they can be assessed when they refer to well-know public facts or declarations of State officials, or when they corroborate aspects related to the case. [FN62]

[FN62] Cf. Case of Velásquez Rodríguez, supra note 54, para. 146; Case of Perozo et al., supra note 18, para. 101, and Case of Kawas Fernández, supra note 35, para. 43.

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77. After examining the probative elements in the case file, the Court will decide who are the alleged victims in the instant case, and will examine the alleged violations of the American Convention in accordance with the proven facts and the arguments of the parties.

VI. DETERMINATION OF THE PRESUMED VICTIMS

78. In the application brief the Commission concluded that "the State incurred international responsibility for [human rights] violations to the detriment of Arle[i] José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral, Celso Aghinoni and Eduardo Aghinoni," members of the organizations COANA and ADECON. [FN63]

[FN63] The Commission issued its Reports on Admissibility and Merits with regard to Arlei José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral, Celso Aghinoni and Eduardo Aghinoni. Cf. Report on Admissibility No. 18/06 of March 2, 2006, supra note 26, folio 48, and Report on Merits No. 14/07 of March 8, 2007 (File of attachments to the application, tome I, appendix 1, folio 40).

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79. In their pleadings and motions brief, the representatives presented a list of thirty-four individuals who, in their opinion, were the presumed victims in this case. [FN64] They stated that, owing to the confidential nature of the telephone interception and recording procedure established in Act No. 9,296/96, "at no time, during the proceedings before the [Commission], had they identified the [presumed] victims of the violations by naming them[, since] in 2000, when the petition was submitted, the petitioner organizations did not know the scope of the illegal telephone interceptions [and] all the people whose telephone conversations had been intercepted and recorded by the Military Police of the state of Paraná. [They merely knew] of a small group of members and leaders of COANA and ADECON whose telephone calls had been intercepted because their conversations were disseminated in the local and national newspapers […]. It was only in 2004 [… that they] were able to learn about and have access to all the transcripts of the recordings."

[FN64] The representatives named the following persons as alleged victims: 1) Antonio Carlos Morete, 2) Arlei Jose Escher, 3) Avanilson Alves Araújo, 4) Dalto Luciano de Vargas, 5) Dilo Angelin Kerber, 6) Dirceu Luiz Bouflewer, 7) Dominique M. Guhur, 8) Edson Marcos Bragnara,

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9) Elson Borges dos Santos, 10) Francisco Strozake, 11) Gilmar Mauro Hugo, 12) Francisco Gomes, 13) Isabel Cristina Diniz, 14) Ivanir Murinelli, 15) Jacques Pellenz, 16) Jaime Dutra Coelho, 17) Jaime Matter, 18) John Caruana, 19) José Adalberto Maschio, 20) José Aparecido da Silva, 21) José Juveni Silva Santos, 22) Jose Lino Warmling, 23) Josinaldo da Silva Veiga, 24) Maria de Fátima dos Santos, 25) Marli Brambilla Kappaum, 26) Roberto Baggio, 27) Rogerio Antonio Mauro, 28) Rosiany Maria da Silva, 29) Sandra Mara Oliveira Soares Escher, 30) Teresa Cofré, 31) Valdir Braun, 32) Valmir Fischborn, 33) Vanderlei Braun and 34) Zenildo Megiatto. Cf. Pleadings and motions brief (merits file, tome I, folios 358 and 359).

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80. The State disagreed with the inclusion of presumed victims other than those indicated in the application brief, who had not been mentioned in the proceedings before the Commission.

81. The Court observes that, when submitting its petition to the Commission on December 26, 2000, the representatives knew who the members of COANA and ADECON were whose telephone conversations had been disseminated by the press in June 1999. However, in their petition to the Commission, they did not mention the names of these individuals or give any other details about them, referring to them in general as "the members of COANA and ADECON." Moreover, even though the representatives stated that it was only "in 2004 [… that they] were able to learn about and have access to all the transcripts of the recordings" and, consequently, identify the individuals supposedly victims of the telephone interception and recordings, they did not inform the Commission, even though the latter had not yet ruled on the admissibility of the petition, which they did in March 2006. It was only in the brief of May 10, 2007, on their position concerning the submission of the case to the Court's consideration that the representatives presented the Commission with a list of 34 alleged victims, of whom only Arlei José Escher and Dalton Luciano Vargas had been included in Report on Merits No. 14/07.

82. As the Court has stated in its case law, the alleged victims must be indicated in the petition and in the Commission's report under Article 50 of the Convention. In addition, according to Article 33(1) of the Rules of Procedure, it is the responsibility of the Commission and not the Court to identify the presumed victims in a case before the Court precisely and at the opportune procedural moment. [FN65] Based on the foregoing, the Court considers that those indicated in the Commission's application brief are the presumed victims.

[FN65] Cf. Case of the Ituango Massacres, supra note 48, para. 98; Case of Ríos et al., supra note 18, para. 43, and Case of Kawas Fernández, supra note 35, para. 27.

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83. Despite the foregoing, the Court notes that although Eduardo Aghinoni was indicated as a presumed victim by the Inter-American Commission in the application, he died on March 30, 1999, [FN66] that is, more than a month before the first request for telephone interception on May 3, 1999, that initiated the facts that are claimed to have violated the American Convention. Consequently, prior to his decease, Eduardo Aghinoni could not have suffered the alleged violation of his rights to privacy, honor, association, judicial guarantees and judicial protection that is alleged based on facts that took place following his decease.

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[FN66] Cf. Testimony given by Celso Aghinoni during the public hearing held on December 3, 2008, before the Inter-American Court of Human Rights, and telephone interception request of May 3, 1999, within the framework of Monitoring Petition No. 41/99 (file of attachments to the answer to the application, attachment 10, folio 2132).

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84. In view of the above, the Court considers Arlei José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral and Celso Aghinoni presumed victims.

VII. ARTICLE 11 (RIGHT TO PRIVACY [HONOR AND DIGNITY]) [FN67] IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) [FN68] OF THE AMERICAN CONVENTION

[FN67] Article 11 of the Convention stipulates that:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

[FN68] Article 1(1) of the Convention establishes that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

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85. The Commission claimed the violation of the right to privacy, honor and reputation of the alleged victims by attributing to the State the responsibility for the interception and recording of the telephone conversations, for the dissemination of their content and for the refusal of the Judiciary to destroy the recorded material. The representatives agreed substantially with the claims of the Commission. The State responded that the alleged violation had not been committed, because there were no irregularities in the proceeding relating to the telephone interceptions; that the eventual decision in that proceeding would not result in prejudice to the honor or dignity of any individual, and that the conduct of the agents involved in these events was duly examined in the domestic jurisdiction and, consequently, a review of these proceedings by the international court is inadmissible.

86. In order to examine the alleged violation of Article 11 of the American Convention, the Court: (1) will establish the facts of this case, and (2) will make some observations on the right to privacy, honor and reputation, and examine the arguments of the parties concerning: (i) the interception and recording of the private telephone conversations, and (ii) the dissemination of the contents of the recorded material.

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1) Facts of the instant case

87. The facts of this case occurred in a context of social conflict related to the agrarian reform in several Brazilian states, including Paraná, [FN69] which led the state to implement a series of public policies and measures to deal with it. [FN70]

[FN69] Cf. Report entitled Conflictos de Tierra por Estado Federado – Brasil – 1999, by the Comissão Pastoral da Terra (file of attachments to the pleadings and motions brief, attachment 1, folio 982); testimony of Marli Brambilla Kappaum rendered before notary public on November 7, 2008 (merits file, tome III, folio 981 and 982); testimony of Teresa Cofré rendered before notary public on November 6, 2008 (merits file, tome III, folio 975 and 976) and at the public hearing held on December 3, 2008 before the Inter-American Court of Human Rights; expert opinion of Sérgio Sauer rendered before notary public on November 7, 2001 (merits file, tome III, folio 985 to 992); note entitled "PM tem tática especial de ação para desocupar áreas invadidas" in the issue of the Folha do Paraná newspaper published on June 23, 1999 (file of attachments to the brief with pleadings and motions, attachment 10, folios 2016 and 2017), and Article entitled "Terror no Paraná" in the magazine, Caros Amigos, edition No. 27 of June 1999 (file of attachments to the brief with pleadings and motions, attachment 10, folios 2030 to 2039), among others.

[FN70] The measures adopted by the State included: (i) implementation of a national plan to combat violence in rural areas (File of attachments to the answer to the application, tome I, attachment 11, folios 2228 to 2245) (ii) elaboration of a manual of national guidelines on the execution of court orders to maintain or reinstate collective ownership (File of attachments to the answer to the application, tome I, attachment 11, folios 2246 to 2254), and (iii) promulgation of Decree No. 6,044 of February 12, 2007, establishing the "National Policy for the Protection of Human Rights Defenders" (file of attachments to the answer to the application, tome I, attachment 12, folios 2256 to 2259).

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88. At the time of the facts, Arlei José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral and Celso Aghinoni were members of the social organizations ADECON and COANA. [FN71] The purpose of ADECON was community development and the integration of its members, through cultural, sporting and economic activities, while COANA sought to integrate farmers into joint economic activities and the sale of their products. The two organizations had a de facto relationship with MST, with which they shared the common goal of advancing agrarian reform. [FN72]

[FN71] Cf. Minutes of the third General Assembly of COANA of March 13, 1999 (file of attachments to the pleadings and motions brief, attachment 2, folio 1023); Minutes No. 24 of the Special Assembly of ADECON of March 7, 1998 (file of attachments to the answer to the application, tome I, attachment 10, folio 2207), and COANA Statutes signed on December 5, 1999 (file of attachments to the answer to the application, tome I, attachment 10, folio 1068).

[FN72] In their testimony, Arlei José Escher, Delfino José Becker and Pedro Alves Cabral stated that they "were unaware of a specific connection between [COANA] or ADECON and the

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Landless Movement [MST].” However, Alves Cabral and Becker stated, respectively, that “the two [organizations] support agrarian reform” and that “they are made up of settlers, who hail from MST.” Also, Celso Aghinoni indicated that COANA and ADECON were composed of former landless workers who had been settled and had had their rural property regularized, and that the organizations made their physical structure, such as its office, telephone and vehicle, available to MST, because they also support the agrarian reform. Cf. Testimony given by Arlei José Escher before notary public on November 7, 2008 (merits file, tome III, folio 966); testimony given by Delfino José Becker before notary public on November 7, 2008 (merits file, tome III, folio 968); testimony given by Pedro Alves Cabral before notary public on November 7, 2008 (merits file, tome III, folio 970), and testimony given by Celso Aghinoni during the public hearing, supra note 66. In addition to these statements, the Court notes that other evidence indicates a relationship between COANA, ADECON and MST: (a) Marli Brambilla declared that “the cooperative is not disconnected from [MST] and, from the time […] the settlement was created, [organized the productive activities of the settlers]”; (b) the State affirmed during the public hearing that “in Paraná 80 per cent of the settled families have links to MST”; (c) the telephone interception request of May 3, 1999, stated that the leaders of COANA are leaders of MST; (d) the latter was a co-petitioner of the criminal action to investigate the agents involve in the telephone interception and the dissemination of the tapes; (e) the ruling that acquitted the Secretary of Public Security at the time mentioned that COANA and ADECON were linked to [MST], and (f) Colonel Valdemar Kretschmer, Judge Elisabeth Khater and the prosecutor Nayani Kelly Garcia testified to this effect also. Cf. respectively, testimony given by Marli Brambilla Kappaum before notary public on November 7, 2008, supra note 69, folio 981; oral arguments of the State in the public hearing held on December 3, 2008, before the Inter-American Court of Human Rights; telephone interception request of May 3, 1999, supra note 66, folios 2131 and 2132; representação criminal filed before the Public Prosecutor’s Office on August 19, 1999 (file of attachments to the brief with pleadings and motions, attachment 3, folios 1212 to 1227); decision of the Second Criminal Chamber of the Court of Justice of the state of Paraná of October 14, 2004, supra note 27, folio 112; Testimony of Colonel Kretschmer of October 4, 1999, during criminal investigation No. 82.561-5 (file of attachments to the pleadings and motions brief, attachment 3, folio 1315); official communication No. 74/99-g.j. of November 18, 1999, signed by Judge Elisabeth Khater, during criminal investigation No. 82.561-5 (file of attachments to the pleadings and motions brief, attachment 3, folio 1518), and testimony of Nayani Kelly Garcia of May 13, 2000, during criminal investigation No. 82.561-5 (file of attachments to the pleadings and motions brief, attachment 3, folio 1560).

1(i) Interception and dissemination of the telephone conversations

89. In a brief dated April 28, 1999, the Deputy Commander and Chief of Staff of the Military Police, Colonel Valdemar Kretschmer (hereinafter “Colonel Kretschmer”), asked the Secretary for Public Security of the state of Paraná at the time, Cândido Martins (hereinafter also the “former Secretary of Security” or the “former Secretary), to obtain the necessary authorization from the Court of Law of the district of Loanda (hereinafter “ the Loanda Court”) “to carry out the interception and monitoring of telephone communications on the lines of COANA, Nos. (044) 462-14[XX] and (044) 462-13[XX].” This brief also includes an authorization of the same

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date, from the former Secretary of Security for Colonel Kretschmer to submit the request to the competent court [FN73] (infra para. 99).

[FN73] Cf. Telephone interception request of April 28, 1999, within the framework of Monitoring Petition No. 41/99 (file of attachments to the answer to the application, attachment 10, folios 2161 and 2162).

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90. On May 5, 1999, Major Waldir Copetti Neves, Head of Águila Group of the Military Police of Paraná (hereinafter "Major Neves"), filed before the Loanda Court a request to intercept and monitor the telephone line (044) 462-14[XX], installed in the offices of COANA, "owing to the strong evidence that it was being used by MST leaders for criminal purposes." The request mentioned supposed indications of diversion by COANA leaders of financial resources granted through the National Family Agriculture Program (PRONAF) and the Program of Special Credit for the Agrarian Reform (PROCERA) to the workers of the Pontal do Tigre Settlement, in the municipality of Querência do Norte. It also referred to the murder of Eduardo Aghinoni, "the authorship of which was being investigated and [it was suspected that] one of the motives for the crime [was the] diversion of the said resources." [FN74] The Loanda Court received this request, and initiated the telephone interception procedure known as request to monitor a telephone terminal No. 41/99 (hereinafter "monitoring petition").

[FN74] Cf. Application for telephone interception of May 3, 1999, supra note 66, folios 2131 and 2132.

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91. On May 5, 1999, Judge Elisabeth Khater (hereinafter "Judge Khater"), head of the Loanda Court, authorized the request for telephone interception by a simple annotation in the margin of the petition, in which she wrote "R. and A. Defiro. Ofície-se. 05.05.99" [R[eviewed] and A[nalyzed]. I agree. So ordered]. The Judge did not notify her decision to the Prosecutor General's Office. [FN75]

[FN75] Cf. Application for telephone interception of May 3, 1999, supra note 66, folios 2130.

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92. On May 12, 1999, Military Police Sergeant-Third Class, Valdecir Pereira da Silva (hereinafter "Sergeant Silva") submitted to Judge Khater, within the framework of the monitoring petition, a second request for telephone interception, repeating the request to intervene the line (044) 462-14[XX] and including also the telephone line (044) 462-13[XX], installed in the offices of ADECON. [FN76] The second request did not include any reasons or grounds to justify it. Nevertheless, it was again granted by Judge Khater with a simple annotation, similar to the previous one, in the margin of the petition. [FN77] She did not notify the Prosecutor General's Office of the second authorization either.

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[FN76] In the telephone interception request of April 28, 1999, Colonel Kretschmer indicated that both telephone lines belonged to COANA (supra para. 89). Subsequently, Sergeant Silva requested the interception of the said lines, but stated that one of them belonged to ADECON. Cf. telephone interception request of April 28, 1999, supra note 73, folio 2162, supra note 73, folio 2162; telephone interception request of May 12, 1999, in the context of Monitoring Petition No. 41/99 (file of attachments to the answer to the application, tome I, attachment 10, folio 2135), and telephone bill for the line (044) 462-13XX owned by ADECON (file of attachments to the answer to the application, tome I, attachment 10, folio 2171).
[FN77] Judge Khater's authorization is dated May 11, 1999, and states "R. Defiro. Ofície-se" ordered]. Cf. Application for telephone interception of May 12, 1999, supra note 76, folio 2135.

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93. On May 25, 1999, Major Neves asked the Loanda Court "to cease the interception and monitoring of the telephone line indicated in [monitoring petition] No. 041/99 because the monitoring carried out up until that time had already produced the desired effect." [FN78] Judge Khater responded to his request on the same day and an official communication was sent to the director of the telephone company Telecomunicações do Paraná S/A (hereinafter "TELEPAR") copying the request to cancel the interception of the COANA and ADECON lines. [FN79]

[FN78] Request for cancellation of interception of May 25, 1999, under monitoring petition No. 41/99 (file of attachments to the answer to the application, tome I, attachment 10, folio 2138 and file of attachments to the answer to the application, tome I, attachment 10, folio 2138).
[FN79] Official communication No. 478/99 of May 25, 1999, from the Loanda Court to the Director of TELEPAR (File of attachments to the answer to the application, tome I, attachment 10, folio 2140).

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94. On the evening of June 7, 1999, extracts of the recorded conversations appeared on the Jornal Nacional, a national television news program with one of the largest audiences in the country. [FN80] However, the case file does not reveal the contents of the conversations disseminated by this means or any elements to identify the contents of the material handed over to the Globo Television network, from which fragments were taken and broadcast on the news.

[FN80] Testimony of the journalist Evandro Cesar Fadel during criminal investigation No. 82.561-5 (file of attachments to the pleadings and motions brief, attachment 3, folios 1438); testimony of the journalist Fabiana Prohmann during criminal investigation No. 82.561-5 (file of attachments to the pleadings and motions brief, attachment 3, folio 1482); newspaper Articles in O Estado do Paraná entitled "Grampo revela ameaça de sem-terra a juíza" of June 8, 1999, and "Baggio:`Sabíamos do grampo e fizemos sátira´" of June 9, 1999 (file of attachments to the pleadings and motions brief, attachment 10, folio 2009 and 2011, respectively).

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95. During the afternoon of June 8, 1999, the former Secretary of Security organized a news conference with journalists from different media in which he commented on the actions of the police in the operations to empty the MST camps; he provided explanations with regard to the telephone interceptions and gave his opinion on the conversations disseminated and the measures that the Secretariat of Security would adopt in that regard. During this press conference recordings were played of some of the intercepted conversations and, the press secretary of the Secretariat of Public Security handed out material with extracts transcribed from the intercepted discussions of members of COANA and ADECON to the journalist who were present. [FN81]

[FN81] Cf. Testimony of the journalist Evandro Cesar Fadel during criminal investigation No. 82.561-5, supra note 80, folios 1438 and 1439; document with the transcript of four conversations of members of COANA and ADECON provided by the journalist Evandro Cesar Fadel to criminal investigation No. 82.561-5 (file of attachments to the pleadings and motions brief, attachment 3, folios 1441 and 1442); testimony of the journalist Luciana Pombo during criminal investigation No. 82.561-5 (file of attachments to the pleadings and motions brief, attachment 3, folio 1443); testimony of the journalist Fabiana Prohmann during criminal investigation No. 82.561-5, supra note 80, folio 1482, and video recordings of two items broadcast on the national news programs on June 8 and 9, 1999 (file of attachments to the pleadings and motions brief, attachment 10, folio 2040).

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96. That same day and over the following days fragments of the recordings were again disseminated by the television and written media. Some Articles indicated that the landless workers were planning specific crimes and that the former Secretary of Security had published new extracts from the tapes during the press conference. [FN82]

[FN82] Cf. Video recordings of two items broadcast on the national news programs on June 8 and 9, 1999, supra note 81; Article entitled “Candinho revela as fitas” published in the newspaper O Estado do Paraná, on June 9, 1999; Article entitled “Governo divulga diálogos gravados em escuta” published in the newspaper Folha do Paraná, on June 9, 1999, and Article entitled “Fitas entregues à polícia” published in the newspaper Tribuna do Paraná (file of attachments to the application, tome 1, attachment 5, folios 74 to 76, respectively); Articles in the newspaper Folha do Paraná of June 20, 1999 (file of attachments to the pleadings and motions brief, attachment 10, folios 2012 and 2013).

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97. On July 1, 1999, Major Neves sent an official communication to Judge Khater in which he made certain charges against the MST and handed over to her 123 tapes with the telephone conversations recorded during the interception of the two telephone lines. [FN83] According to this document, the first stage of recordings took place from May 14 to 26, 1999. The second stage, for which the case file does not contain either a request or an authorization, occurred from June 9 to 23, 1999. Integral transcripts of the material obtained from the telephone interceptions were not submitted, [FN84] but rather summaries of the extracts the police considered relevant. [FN85] In these summaries, conversations of Celso Aghinoni – also identified as “gringo”

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[FN86] – Arlei José Escher and Dalton Luciano de Vargas were mentioned. However, the report did not reveal the content of many of the conversations or the speakers, merely indicating that the conversations dealt with "different matters," that no "description appeared on the list" and, in general, that the telephone calls originated from or were made to COANA. [FN87] The document also shows that the calls were monitored until June 30, 1999, but, owing to problems with the technical equipment, it was only possible to record conversations up until June 23, 1999. [FN88]

[FN83] Cf. Report of delivery of the 123 tapes in the context of Monitoring Petition No. 41/99 (file of attachments to the answer to the application, tome I, attachment 10, folios 2142 to 2146).
[FN84] Cf. Request of the Public Prosecutor's Office of September 8, 2000, in the context of Monitoring Petition No. 41/99 (file of attachments to the answer to the application, tome I, attachment 10, folio 2220).
[FN85] Cf. Control sheets for the recorded tapes, in the context of Monitoring Petition No. 41/99 (file of attachments to the answer to the application, tome I, attachment 10, folios 2147 to 2160); request of the Prosecutor General's Office in the procedure on the request to intercept a telephone line (file of attachments to the answer to the application, tome I, attachment 10, folio 2220), and brief of the Public Prosecutor's Office of September 8, 2000, supra note 84, folio 2220.
[FN86] Cf. Testimony of Celso Aghinoni during the public hearing of December 3, 2008, supra note 66.
[FN87] Cf. Control sheets for the recorded tapes, supra note 85, folios 2147 to 2160).
[FN88] The document indicates that "as of [June 23, 1999,] and until June 30, 1999, we had problems with the recording equipment and it was not possible to record the tapes." Cf. Control sheets for the recorded tapes, supra note 85, folio 2160.
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98. In this report Major Neves also mentioned that the military police officer A.C.C.M. "unlawfully handed over […] probative material to the press and/or other individuals, because the said police officer was an agent clandestinely infiltrated into the Police Force, receiving favors and/or [money] to provide 'MST' with important information on Police preparations and actions […]." [FN89] According to the report, the Military Police were taking the necessary measures to investigate and punish the said person for disseminating the recorded material. [FN90] The State did not submit any information or evidence regarding the said investigation.

[FN89] Cf. Record of the delivery of the 123 tapes, supra note 83, folio 2143.
[FN90] Cf. Record of the delivery of the 123 tapes, supra note 83, folio 2144.
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99. According to the case file of the monitoring petition, the interception request of April 28, 1999, made by Colonel Kretschmer and ratified by the former Secretary of Security (supra para. 89), was only included on July 1, 1999, together with the report by Major Neves. [FN91]

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[FN91] Cf. Report of the delivery of the 123 tapes, supra note 83, folio 2146.

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100. On July 2, 1999, TELEPAR deactivated the technical equipment for monitoring the COANA and ADECON telephone lines. [FN92]

[FN92] Cf. Official communication of TELEPAR of December 1, 1999 (file of attachments to the pleadings and motions brief, attachment 2, folio 1150).

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101. On May 30, 2000, that is more than a year after the interception orders, Judge Khater sent the file of the monitoring petition to the Prosecutor General's Office for analysis for the first time. [FN93]

[FN93] Cf. Decision of Judge Khater of May 30, 1999, in Monitoring Petition No. 41/99 (file of attachments to the answer to the application, tome I, attachment 10, folio 2215).

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102. During the hearing of September 8, 2000, the prosecutor Nayani Kelly Garcia (hereinafter "the prosecutor") indicated, among other matters, that: (i) a military police agent, with no connection to the Loanda jurisdiction, who was not responsible for any criminal investigation in that area, had no legitimacy to request the telephone interception; (ii) the request was made arbitrarily and was not based on a criminal action, a police investigation or a civil action; (iii) the interception of the telephone line of ADECON was requested by Sergeant Silva without any explanation; (iv) the monitoring petition was not linked to a criminal action or to a police investigation; (v) the decisions authorizing the requests were not founded, and (vi) the Prosecutor General's Office was not notified of the procedure. The prosecutor also stated that these facts "show that the procedure was not aimed at investigating and elucidating a crime, but rather at monitoring MST activities; in other words, it was strictly political in nature, with total disregard for the constitutional right to intimacy, privacy and freedom of association." Consequently, the Prosecutor General's Office requested the Loanda Court to declare that the interceptions were invalid, and that the recorded tapes should not be used. [FN94]

[FN94] Cf. Brief of the Prosecutor General's Office of September 8, 2000, supra note 84, folios 2216 to 2220.

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103. On April 18, 2002, Judge Khater "[r]ejected 'in totum' the opinion [of the Prosecutor General's Office], because it had not been proved that the telephone interceptions were illegal." However, "in order to avoid delays," she ordered that the tapes be incinerated, and this was done on April 23, 2002. [FN95]

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[FN95] Cf. Decision of Judge Khater of April 18, 2002, in Monitoring Petition No. 41/99 (file of attachments to the answer to the application, tome I, attachment 10, folio 2221), and record of the incineration of the recorded tapes of April 23, 2002, in the context of Monitoring Petition No. 41/99 (file of attachments to the answer to the application, tome I, attachment 10, folio 2222),

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104. Following the destruction of the tapes, the COANA and ADECON lawyer requested authorization to obtain a complete copy of the proceedings of the monitoring petition on three different occasions and this was granted. [FN96]

[FN96] Cf. Requests of December 6, 2002, and of April 2 and 5, 2004, for complete copies of the case file of the Monitoring Petition (file of attachments to the answer to the application, attachment 10, folios 2223 to 2225).

1(ii) Legal actions and normative framework

a) Criminal investigation and proceedings

105. On August 19, 1999, MST and CPT filed before the Prosecutor General's Office a representação criminal against the former Secretary of Security, Judge Khater, Colonel Kretschmer, Major Neves and Sergeant Silva, asking that their conduct be investigated for possible perpetration of the offenses of usurpation of public functions, illegal telephone interception, violation of judicial confidentiality, and abuse of authority. [FN97] The Prosecutor General's Office sent the notitia criminis to the Court of Justice and criminal investigation No. 82,516-5 was opened, as required by the representação criminal. [FN98] On October 6, 2000, the Special Organ of the Court of Justice issued decision No. 4745 ordering the closure of all the investigations against the public officials mentioned in relation to the telephone interception, and that the case file be sent to a court of first instance for the analysis of the conduct of the former Secretary of Security in relation to the dissemination of the intercepted conversations. In its decision, the Court of Justice considered that the errors in which Judge Khater had incurred constituted, on first analysis, errors related to her functions [FN99] (infra para. 201).

[FN97] Cf. Representação criminal filed before the Prosecutor General's Office on August 19, 1999, supra note 72, folios 1212 to 1227.
[FN98] Cf. Criminal investigation No. 82,516-5 (file of attachments to the pleadings and motions brief, attachment 3, folios 1303 and 1304).
[FN99] Cf. Decision No. 4745 of the Special Organ of the Court of Justice of the state of Paraná of October 6, 2000, supra note 27, folios 98 to 107.

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106. On April 11, 2001, once the investigation had concluded, the Prosecutor General's Office filed a complaint against the former Secretary of Security, [FN100] who was sentenced in first instance by a decision of the Second Criminal Court of the Comarca of Curitiba of December 23,

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2003, to a fine and to two years and four months' imprisonment, with the latter substituted by community service. [FN101] On January 19, 2004, the former Secretary of Security filed an appeal against this decision before the Court of Justice. On October 14, 2004, the Second Criminal Chamber of the Court of Justice revoked the conviction and acquitted the former Secretary of Security, based on the argument that "the appellant did not violate the judicial confidentiality of the information obtained through the telephone interception, because it was not possible to violate […] the confidentiality of information that had been disseminated the previous day by a television station." [FN102]

[FN100] Cf. Complaint of the Prosecutor General's Office of April 11, 2001, against the former Secretary of Security (file of attachments to the pleadings and motions brief, attachment 3, folios 1208 and 1209).
[FN101] Cf. Decision of the Second Criminal Court of the District of Curitiba of December 23, 2003, in the context of criminal action No. 2001.2125-5 (file of attachments to the pleadings and motions brief, attachment 4, folio 1741).
[FN102] Cf. Decision of the Second Criminal Chamber of the Court of Justice of the state of Paraná of October 14, 2004, supra note 27, folio 114.

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b) Mandado de segurança

107. On October 5, 1999, the organizations COANA and ADECON, and Arlei José Escher, Celso Aghinoni and Avanilson Alves Araújo filed before the Court of Justice of the state of Paraná a mandado de segurança against Judge Khater, requesting the suspension of the telephone interceptions and the destruction of the recorded tapes. [FN103]

[FN103] Cf. Record of the registration and opening of the procedure of Mandado de segurança No. 83,486-6, supra note 23, folios 1007 to 1018.

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108. On April 5, 2000, the Court of Justice ordered the extinction of the mandado de segurança without ruling on its merits, considering that the interceptions had ceased and that the action had therefore lost its purpose. [FN104] Consequently, the authors of this action filed embargos de declaração, in order to clarify the omissions in the judgment, in particular the failure of the Court of Justice to rule on the request for destruction of the tapes. [FN105]

[FN104] Cf. Decision of the Court of Justice of the state of Paraná of April 5, 2000, in the context of mandado de segurança N° 83,486-6 (file of attachments to the application, tome I, attachment 7, folios 93 and 94).
[FN105] Cf. Brief of April 26, 2000, filing embargos de declaração (file of attachments to the pleadings and motions brief, attachment 2, folios 1181 to 1183).

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109. On June 7, 2000, this recourse was rejected based on the argument that this request could only be examined if the merits of the mandado de segurança had been examined and that, since the latter had extinguished without an examination of the merits, there were no omission in the judgment. [FN106] The presumed victims did not file other remedies and the decision of the Court of Justice became final on August 28, 2000. [FN107]

[FN106] Cf. Decision of the Court of Justice of the state of Paraná of June 7, 2000, in the context of embargos de declaração No. 83,486-6/01 (file of attachments to the pleadings and motions brief, attachment 2, folios 1192 to 1199).
[FN107] Cf. Certification of the Court of Justice of the state of Paraná of August 28, 2000 (file of attachments to the answer to the application, tome I, attachment 7, folio 2123).
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c) Administrative proceedings

110. On November 17, 1999, an administrative complaint was filed against Judge Khater. It was processed under case file No 1999.118105 and, among other matters, it referred to the judge's conduct in the context of the monitoring petition. [FN108] On September 28, 2001, the Corregedoria-Geral da Justiça (Judicial Administrative Department) [FN109]decided several administrative complaints filed against Judge Khater, including the one relating to the instant case. [FN110] The Corregedoria-Geral considered that the "matter was assessed during criminal investigation No. 85516-2 and the decision […] understood that the offenses of usurpation of public functions, abuse of authority and responsibility with which [Judge Khater] and others had been charged had not been committed" and ordered that the case be closed. [FN111] Subsequently, responding to the recommendations of the Inter-American Commission's Report on Merits No. 14/07, the Special Human Rights Secretariat of the Presidency of the Republic sent the case to the National Council of Justice for review. [FN112] The latter rejected this request, because it understood that "the criminal action had dealt with the matter […] and had not left any [aspect pending] for proceedings by the judicial administrative body, and there was an evident lack of interest in this proceeding." [FN113]

[FN108] Cf. Decision of the Corregedoria-Geral da Justiça of September 28, 2001 (file of attachments to the answer to the application, tome V, attachment 21, folio 3195).
[FN109] Cf. Decision of the Corregedoria-Geral da Justiça of September 28, 2001, supra note 108, folios 3194 and 3198.
[FN110] Cf. Decision of the Corregedoria-Geral da Justiça of September 28, 2001, supra note 108, folio 3198).
[FN111] Cf. Decision of the Corregedoria-Geral da Justiça of September 28, 2001, supra note 108, folio 3195.
[FN112] The National Council of Justice (Conselho Nacional de Justiça) is the constitutional organ with competence to supervise the administrative and financial aspects of the Judiciary, as well as due compliance by judges with their institutional duties. Brief of the State with final arguments (merits file, tome IV, folio 1802).

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[FN113] Cf. Opinion of the Conselho Nacional de Justiça of May 30, 2008 (file of attachments to the answer to the application, tome VIII, attachment 25, folio 3694).
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d) Civil actions

111. On May 4, 2004, and on May 15, 2007, Arlei José Escher and Dalton Luciano de Vargas, respectively, filed civil actions against the state of Paraná for reparation of non-pecuniary damage. The final judgment has not yet been handed down in these proceedings. However, the civil action filed by Dalton Luciano de Vargas was decided in first instance on August 9, 2007, and considered irreceivable. Mr. Vargas filed an appeal against this decision. [FN114]

[FN114] Cf. Procedural motion referring to the civil action for reparation of damage filed by Arlei Escher Da Silva (file of attachments to the answer to the application, tome I, attachment 9, folio 2127); procedural motion referring to the civil action for reparation of damage filed by Dalton Luciano Vargas (file of attachments to the answer to the application, tome I, attachment 8, folio 2125); judgment of the Fourth Vara da Fazenda Pública of Curitiba of August 9, 2007, within the framework of the civil action filed by Dalton Luciano de Vargas (file of attachments to the application, tome II, appendix 3, folio 382).
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e) Normative framework

112. At the time of the facts of this case, the 1988 Brazilian Constitution established the inviolability of the privacy, honor and reputation of the individual, as well as the confidentiality of telephone communications. [FN115] Law No. 9,296/96 was also in force, which "regulates the final part of paragraph XII of Article 5 of the Federal Constitution" determining the circumstances and the requirements that should be observed in a telephone interception procedure for the purpose of criminal or pre-trial investigations.

[FN115] Cf. Constitution of the Federative Republic of Brazil (file of attachments to the answer to the application, tome VIII, attachment 35, folios 3995 and 4039).
Article 5.
All persons are equal before the law, without distinctions of any nature, and Brazilians and foreigners residing in the country are guaranteed the inviolability of the right to life, to freedom, to equality, to security and to property, as follows:
[…]
X. Intimacy, privacy, honor and a person's reputation are inviolable, and the right to compensation for the pecuniary or non-pecuniary damage caused by their violation is guaranteed; […]
XII. The confidentiality of correspondence and telegraphic communications, of data and of telephone communications is inviolable except, in the latter case, under the circumstances and in the way established by law for purposes of a criminal investigation or a pre-trial investigation;
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2) The right to privacy, honor and reputation

113. Article 11 of the Convention prohibits all arbitrary or abusive interference in the private life of individuals, setting out different aspects of this, such as the privacy of their families, their home or their correspondence. In this regard, the Court has stated that "the sphere of privacy is characterized by being exempt and immune from abusive and arbitrary invasion by third parties or public authorities." [FN116]

[FN116] Cf. Case of the Ituango Massacres, supra note 48, para. 194; Case of Escué Zapata v. Colombia. Merits, reparations and costs. Judgment of July 4, 2007. Series C No. 165, para. 95, and Case of Tristán Donoso, supra note 9, para. 55.

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114. As this Court has indicated previously, even though telephone conversations are not expressly mentioned in Article 11 of the Convention, they are a form of communication included within the sphere of the protection of privacy. [FN117] Article 11 protects conversations using telephone lines installed in private homes or in offices, whether their content is related to the private affairs of the speakers, or to their business or professional activity. [FN118] Hence, Article 11 applies to telephone conversations irrespective of their content and can even include both the technical operations designed to record this content by taping it and listening to it, or any other element of the communication process; for example, the destination or origin of the calls that are made, the identity of the speakers, the frequency, time and duration of the calls, aspects that can be verified without the need to record the content of the call by taping the conversation. In brief, the protection of privacy is manifested in the right that individuals other than those conversing may not illegally obtain information on the content of the telephone conversations or other aspects inherent in the communication process, such as those mentioned.

[FN117] Cf. Case of Tristán Donoso, supra note 9, para. 55.
[FN118] Similarly, Cf. ECHR Case of Halford v. the United Kingdom, judgement of 27 May 1997, Reports 1997-III, paras. 44 and 45.

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115. Today, the fluidity of information places the individual's right to privacy at greater risk owing to the new technological tools and their increased use. This progress, especially in the case of telephone interceptions and recording, does not mean that the individual should be placed in a situation of vulnerability when dealing with the State or other individuals. Thus, the State must increase its commitment to adapt the traditional forms of protecting the right to privacy to current times.

116. Nevertheless, as Article 11(2) of the Convention makes clear, the right to privacy is not an absolute right and can be restricted by the States, provided interference is not abusive or arbitrary; to this end, it must be established by law, pursue a legitimate purpose and be necessary in a democratic society. [FN119]

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[FN119] Cf. Case of Tristán Donoso, supra note 9, para. 56.

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117. Lastly, Article 11 of the Convention recognizes that every person has the right to respect for his honor, prohibits an illegal attack against honor and reputation, and imposes on the States the obligation to provide legal protection against such attacks. In general, the right to honor relates to self-esteem and self-worth, while reputation refers to the opinion that others have of a person. [FN120]

[FN120] Cf. Case of Tristán Donoso, supra note 9, para. 57.

2(i) Private life and interception and recording of telephone conversations

118. The Commission alleged that although the laws that authorize the interception and monitoring of telephone or any other type of communications were formulated to combat crime, they can become an instrument for spying and harassment if they are interpreted and applied improperly. Hence, owing to the inherent danger of abuse in any monitoring system, this measure must be based on especially precise legislation with clear, detailed rules. The American Convention protects the confidentiality and inviolability of communications from any kind of arbitrary or abusive interference from the State or individuals; consequently, the surveillance, intervention, recording and dissemination of such communications is prohibited, except in the cases established by law that are adapted to the objects and purposes of the American Convention.

119. In addition, the Commission indicated in its application that, in the instant case, the interception and monitoring authorization was only requested for telephone line No. (044) 462-14[XX] belonging to COANA; therefore no authorization had been granted to intercept ADECON telephone line No. (044) 462-13[XX] in violation of Article 10 of Law No. 9,296/96. [FN121] The telephone interception and monitoring application was submitted by a military police agent who, according to Article 144 of the Constitution, was not authorized to make this request. In light of the said Article, since the offenses attributed to the COANA leaders were of an ordinary nature, the investigation fell within the exclusive competence of the civil police. Consequently, only a civil police agent could apply to the competent court for the intervention of a telephone line under Article 3 of Law No. 9,296/96. The Commission also indicated that: (i) the alleged victims were not subject to a criminal investigation; (ii) the interception of the telephone lines lasted for 49 days and the State did not provide any evidence to prove that it had been extended when the initial 15-day period had concluded; (iii) the decision authorizing the interception "was not duly founded; it did not indicate the way in which the measure should have been carried out or its duration," and (iv) the Prosecutor General's Office was not notified of its issue, all of which was contrary to Articles 5 and 6 of Law No. 9,296/96. The Commission therefore concluded that the telephone intervention application, the decision authorizing it and its implementation "were illegal, unlawful and invalid."

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[FN121] During the public hearing, the Commission stated that judicial authorization had been granted for the interception of the ADECON line, but this was after the monitoring had started.

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120. Lastly, the Commission indicated that "the Judiciary's refusal to destroy the 123 tapes obtained by monitoring the [COANA and ADECON] telephone numbers violated the right to privacy of the owners, Arle[i] José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral [and] Celso Aghinoni."

121. The representatives endorsed the allegations of the Commission concerning the violations of the Constitution and of Law No. 9,296/96. They maintained that, in cases where there are specific indications of criminal offenses that must be investigated, Articles 11 and 32 of the Convention establish that the State must weigh the privacy of the individual against the public interest. They stated that Judge Khater granted the two applications for telephone interception without founding her decisions and disregarded the two basic requirements for granting the measure: (i) the probability of authorship and participation in a criminal offense or the existence of a criminal offense, and (ii) that the evidence was essential for the criminal investigation. Furthermore, Military Police agents were not authorized to submit the said application and the Prosecutor General's Office was not notified of the procedure. They added that the alleged victims only had access to some of the transcripts of the recorded tapes. They also stated that, if the purpose of the interceptions was to verify evidence of diversion of public funds and the murder of Eduardo Aghinoni, this objective had been totally invalidated. In the summaries of the recorded conversations, the military police had only highlighted extracts that referred to the strategies developed by the landless workers to confront the persecution against them perpetrated by the Judiciary and the Military Police.

122. The State argued that privacy is protected by Article 5, paragraph X, of the Constitution. Nevertheless, that right was not absolute and restrictions were permitted in view of the need to protect other guarantees, as established in Article 30 of the Convention and in Article 5, paragraph XII, of the Constitution. Consequently, Law No. 9,296/96 regulates this restriction with regard to telephone communications.

123. According to the State, the monitoring request did not contain flaws that could lead to a human rights violation. It affirmed that the first telephone interception application with regard to the COANA line was made by Major Neves on May 3, 1999, and authorized by Judge Khater on May 5 that year. The second application for interception, also authorized by the courts, was presented by Sergeant Silva on May 12, 1999, and referred to both the COANA and ADECON telephone lines. The interception application was duly founded and referred to the need to investigate criminal practices; thus involving a conflict between two fundamental values. In view of this situation, "in which the law makes it possible to decide on the restriction of the right to privacy, in order to favor a right with a higher value," Judge Khater decided to grant the interception application. The said procedure was initiated on May 14, 1999, and, therefore, "the first judicial authorization [of May 5, 1999,] never came into force, because it was absorbed by the second authorization, granted for the application made by [Sergeant Silva]." The first phase

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of interceptions extended until May 26, 1999, and the second phased took place from June 9 to 23 the same year, thus respecting the 15-day limit established in Law No. 9,296/96, renewable for a similar period. Major Neves did not act with malice or criminal intent when he applied for the interception, because his application included the transcript of a citation from legal doctrine referring to the extensive jurisdiction of the Military Police – which could have induced Judge Khater in error. In addition, he communicated the investigative purpose of the application officially to the Secretary of Security at the time. Also, Law No. 9,296/96 allowed a judge to order telephone interceptions ex officio, in order to overcome possible defects concerning the alleged lack of competence of the authorities requesting them. Regarding the participation of the Prosecutor General's Office in the monitoring petition, the State argued that Article 6 of the said Act did not require this Office to be notified before the interception was authorized, but rather when the measure was implemented. In addition, it indicated that a possible flaw in the monitoring application would result in the nullity of the evidence provided by this measure, if it was produced in a criminal proceeding, and would not prejudice the honor and dignity of the individuals involved. The State added that "the alleged victims […] were not adversely affected by the evidence that was produced unlawfully," because the recorded tapes were not used as evidence in a criminal action against them, but were incinerated ex officio on April 23, 2002.

124. Similarly, the State argued that there was no inertia in the investigation into the facts related to the telephone interception and that the conduct of those involved had been examined in the criminal, administrative and civil spheres. The State took all pertinent measures to process the criminal action normally and even examined the conduct of Judge Khater by means of an administrative procedure. The State also indicated that the inaction of the alleged victims, because they failed to use all the appropriate remedies, particularly the civil actions for compensation and the mandado de segurança, could not give rise to the State's international responsibility. In brief, it indicated that the said individuals had been heard and had received a response to all their claims; accordingly, it could not be said that Article 11 had been violated owing to the alleged omission of the Judiciary to examine and resolve the matter.

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125. The COANA and ADECON telephone lines were intercepted from 14 to 26 May, 1999, and from 9 to 30 June, 1999. The body of evidence in this case shows clearly that the telephone conversations of the alleged victims Celso Aghinoni, Arlei José Escher and Dalton Luciano de Vargas were intercepted and recorded by State agents (supra para. 97).

126. The other alleged victims, Delfino José Becker and Pedro Alves Cabral, were not mentioned in the summaries of the recorded fragments presented by Major Neves to the Loanda Court.

127. The Court has established that the use of circumstantial evidence, presumptions and indications to found a judgment is legitimate, "provided consistent conclusions about the facts can be inferred from them." [FN122] In this regard, the Court has indicated that, in principle, the burden of proving the facts on which a complaint is founded falls on the complainant; nevertheless, it has stressed that, contrary to domestic criminal law, in proceedings relating to human rights violations, the State's defense cannot rest on the impossibility of the complainant

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to procure evidence, when it is the State that controls the means of clarifying facts that occurred on its territory. [FN123]

[FN122] Cf. Case of Velásquez Rodríguez, supra note 54, para. 130; Case of Perozo et al., supra note 18, para. 112, and Case of Kawas Fernández, supra note 35, para. 95.
[FN123] Cf. Case of Velásquez Rodríguez, supra note 54, para. 135; Case of Ríos et al., supra note 18, para. 98, and Case of Kawas Fernández, supra note 35, para. 95.

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128. The Court has no evidence of the content of all the intercepted telephone conversations and the individuals involved, because the transcripts of the recorded material were not provided to the case file of the monitoring petitions (despite the provisions of Article 6 of Law No. 9,296/96), or to the file of the instant case. Consequently, the Court finds it reasonable to grant probative value to the evidence arising from the case file. Bearing in mind, therefore, the duration of the telephone monitoring and the role played in the organizations by Delfino José Becker and Pedro Alves Cabral who, at the time of the facts were, respectively, a COANA Board member and the President of ADECON, [FN124] it is very possible that their communications were intercepted. Thus, even though it is not possible to prove the interception directly and with total certainty, the Court concludes that there was also interference in the private live of Delfino José Becker and Pedro Alves Cabral.

[FN124] Cf. Minutes of the third General Assembly of COANA of March 13, 1999, supra note 71, folios 1021, 1039 and 1068, and Testimony of Delfino José Becker rendered before notary public on November 7, 2008, supra note 72, folio 968.

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129. Since the telephone conversations of the alleged victims were private and they had not authorized that their conversations be conveyed to third parties, the interception of the conversations by State agents constituted interference in their private life. Therefore, the Court must examine whether this interference was arbitrary or abusive in the terms of Article 11(2) of the Convention or whether it was compatible with the said treaty. As indicated previously (supra para. 116), to conform to the American Convention any interference must comply with the following requirements: (a) it must be established by law; (b) it must have a legitimate purpose, and (c) it must be appropriate, necessary and proportionate. Consequently, the absence of any of these requirements implies that the interference is contrary to the Convention.

(a) Legality of the interference

130. The first step to evaluate whether a right established in the American Convention can be adversely affected in light of that treaty consists in examining whether the questioned measure complies with the requirement of legality. This means that the general conditions and circumstances under which a restriction to the exercise of a specific human right is authorized must be clearly established by law. [FN125] The norm that establishes the restriction must be a law in the formal and substantial sense. [FN126]

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[FN125] Article 30 of the American Convention establishes:
The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.
[FN126] Cf. The Word "Laws" in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of May 9, 1986. Series A. No. 6, paras. 27 and 32, and Case of Tristán Donoso, supra note 9, para. 77.

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131. Taking into account that telephone interception can represent a serious interference in the private life of an individual, this measure must be based on a law that must be precise and indicate the corresponding clear and detailed rules, [FN127] such as the circumstances in which this measure can be adopted, the persons authorized to request it, to order it and to carry it out, and the procedure to be followed.

[FN127] ECHR. Case of Kruslin v. France, judgment of 24 April 1990, Series A, No. 176-A, para. 33, and Case of Huvig v. France, judgment of 24 April 1990, Series A No. 176-B, para. 32.

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132. Article 5, paragraph XII, of the Brazilian Constitution establishes that the confidentiality of telephone conversations is inviolable, except in the circumstances and as established by law for purposes of a criminal investigation or for the preliminary investigation in a criminal action. The constitutional provision is regulated in ordinary law by Law No. 9,296/96, which establishes that the telephone interception may be requested by the police authority in a criminal investigation, or by the Public Prosecutor's Office in a criminal or pre-trial investigation. In addition, a judge may authorize the measure ex officio. In any of these circumstances, reasonable indications of the authorship or participation in a criminal offense of the individual subjected to the measure must be provided, and also that the evidence cannot be obtained by other means. The interception procedure is subject to judicial control. The judge who authorizes it should duly found the decision; indicate the manner and the maximum period of the procedure, which is 15 days that may be extended for a similar period provided it is determined that this means of obtaining evidence is essential, and communicate the order to the Office of the Prosecutor General, who may supervise its execution. These elements allow the Court to consider that, in general, this law is in conformity with the Convention. Therefore, the Court will proceed to examine whether the telephone interception procedure that is the object of this case is in keeping with this norm, and thus complied with the requirement of legality.

Purpose of the application for telephone interception and processing of the case file – Articles 1 and 8 of Law No. 9,296/96 [FN128]

[FN128] Law No. 9,296 of July 24, 1996.

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Article 1. The interception of telephone communications of any nature to obtain evidence in a criminal investigation and in pre-trial criminal proceedings shall comply with the provisions of this act and shall depend on the order of the competent judge of the principal action, respecting judicial confidentiality. […]
Art. 8. The interception of telephone communications of any nature shall be recorded in autonomous case files, attached to the case file of the police investigation or the criminal proceedings, preserving the confidentiality of the respective procedures, recordings and transcripts.
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133. According to Article 1 of Law No. 9,296/96, telephone interception must be for the purpose of a criminal investigation or for the preliminary investigation in a criminal action. In this case, even though the application made by Major Neves indicated the need to investigate alleged criminal practices, namely the murder of Eduardo Aghinoni and the diversion of public funds, it was not submitted within the framework of an investigative procedure aimed at verifying those facts. The interception application did not even mention the murder investigation for which the civil police of Querência do Norte were responsible, and neither was the respective police chief notified in this regard. [FN129] In addition, there is no evidence that, at the time of the facts, an investigation was underway for the supposed diversion of public funds by COANA and ADECON leaders. The application by Sergeant Silva did not indicate the purpose of the intended interceptions or their connection to a criminal investigation or proceeding. Thus, contrary to Article 8 of Law No. 9,296/96, the monitoring petition was a separate procedure, and was not processed in proceedings linked to a previously-established police investigation or criminal proceeding. Therefore, both requests failed to comply with the provisions of the said Articles.

[FN129] According to the prosecutor, Nayani Kelly Garcia, the chief of civil police of Loanda and Querência do Norte did not know that this measure had been executed. She also indicated that "the [said official] was involved in the investigation into the death of Eduardo [Aghinoni] and, in this investigation, there was no record of the telephone interception," and that she had received "an official communication from the Civil Police affirming that it had not played a part in the [procedure]." Brief of the Public Prosecutor's Office of September 8, 2000, in the context of Monitoring Petition No. 41/99, supra note 84, folio 2218, and testimony of the prosecutor, Nayani Kelly Garcia, in the context of criminal investigation No. 82.561-5, supra note 72, folio 1560.

Reasons for the telephone interception application – Articles 2 and 4 of Law No. 9,296/96 [FN130]

[FN130] Law No. 9,296 of July 24, 1996, supra note 128, folio 54.
Article 2. The interception of telephone communications shall not be admitted in the following hypotheses:
I. There are no reasonable indications of authorship or participation in the criminal offense;

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II. The evidence can be obtained by other available means; […]
Sole paragraph. In any case, the situation that is the purpose of the investigation must be described clearly, indicating and categorizing those investigated, except in cases of duly justified evident impossibility.[…]
Article 4. The request for telephone communication interception shall include proof that it is necessary in order to verify a criminal offense, with an indication of the means to be used. […]
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134. Neither the interception requests nor the decisions granting them provided reasonable indications of authorship or participation of the members of COANA and ADECON in the criminal offenses supposedly investigated or the means to be used to implement the requested interception; also, they did not indicate clearly the facts that were the object of the investigation. Furthermore, they failed to show that the means used was the only one possible to obtain the said evidence. Consequently, Articles 2 and 4 of Law No. 9,296/96 were not respected.

Authorities empowered to request telephone interceptions – Article 3 of Law No. 9,296/96 [FN131]

[FN131] Law No. 9,296 of July 24, 1996, supra note 128, folio 54.
Article 3. The interception of telephone communications may be decided by the judge, ex officio, or following a request:
I. By the police authority, in a criminal investigation;
II. By the representative of the Prosecutor General's Office, in a criminal investigation and in a pre-trial criminal investigation.
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135. Regarding the persons authorized to request telephone interceptions, Article 3 of Law No. 9,296/96 establishes that the police authority may do this within the framework of a criminal investigation. In this regard, the expert witness, Maria Thereza Rocha de Assis Moura indicated that when Law No. 9,296/96 entered into force "a difference of opinion [had arisen] as to which police force would be responsible for carrying out the request, [and] if the term police authority referred only to the civil police or also to the Military Police." This expert witness stated that, "if an ongoing investigation exists, it is easy to see who should be responsible for the request. If the investigation was being conducted by the civil police, the police authority would normally be the head of the civil police [or] the Secretary for Public Security." [FN132] While the expert witness, Luiz Flávio Gomes, said that "the said police authority can be a member of the Military Police, in the hypothesis that a military investigation is involved." [FN133]

[FN132] Cf. Expert opinion of Maria Thereza Rocha de Assis Moura at the public hearing, supra note 22.
[FN133] Cf. Expert opinion of Luiz Flávio Gomes (merits file, tome IV, folio 1077).
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136. In this regard, the Court observes that in light of Article 144 of the Constitution, [FN134] the civil police were exclusively responsible for investigating the criminal acts referred to in the interception application owing to their ordinary nature. Hence, the only police authorities legally empowered to request the interception of the COANA and ADECON telephone lines were the chief of police responsible for the investigation or the Secretary for Security in substitution of the former. In the instant case, even though the former Secretary, Cândido Martins, endorsed the application made by Colonel Kretschmer, the application and its authorization were placed in the case file of the monitoring petition after the measure had ended, together with the police report on the delivery of the recorded tapes. Consequently, the Loanda Court did not make a ruling in this regard. To the contrary, Judge Khater issued her authorizations based on the requests submitted by Major Neves and by Sergeant Silva, both members of the Military Police, and merely noted on the applications that she had examined the requests and granted them (supra paras. 91 and 92).

[FN134] Constitution of the Federative Republic of Brazil, supra note 115, folio 4039.
Article 144. Public security, which is an obligation of the State, and the right and responsibility of all, is exercised for the preservation of public order and the security of people and property, by the following entities: […]
§ 4. The civil police, headed by career police chiefs, are responsible, with the exception of the jurisdiction of the Union, for the functions of the judicial police and the clarification of criminal offenses, except offenses by the military; […]
§ 5. The military police are responsible for the "ostensiva" [Note: observable as opposed to secret] police and for the preservation of public order; […]

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137. Furthermore, even though the judge was empowered to order the telephone interception ex officio, her decisions stated that when ordering it, Judge Khater acted authorizing the requests of the military police agents and not on her own initiative, without respecting Article 3 of Law No. 9,296/96.

Justification of the telephone interception order and maximum duration of the procedure – Article 5 of Law No. 9,296/96 [FN135]

[FN135] Law No. 9,296 of July 24, 1996, supra note 128, folio 55.
Article 5. The decision shall be founded, or to the contrary it will be null; it shall also indicate the means of executing the procedure, which may not exceed 15 days, renewable for the same duration provided that its essential nature as a means of evidence has been verified.

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138. Article 5 of Law No. 9,296/96 establishes that the decision authorizing a telephone interception shall be founded (to the contrary it will be null) and shall also indicate how the procedure is to be carried out.

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139. On previous occasions, when examining judicial guarantees, the Court has emphasized that decisions adopted by domestic bodies that could affect human rights must be duly founded and justified; otherwise such decisions would be arbitrary. [FN136] Using rational arguments, the decisions should explain the grounds on which they were based, taking into consideration the arguments and the body of evidence provided to the proceedings. The obligation to state the reasons for the decision does not require a detailed response to every argument included in the application, but may vary according to the nature of the decision. In each case, it is necessary to assess whether this guarantee has been satisfied. [FN137] In proceedings whose juridical nature requires the decision to be issued without hearing the other party, the grounds and justification must show that all the legal requirements and other elements that justify granting or refusing the measure have been taken into consideration. Hence, the judge must state his or her opinion, respecting adequate and effective guarantees against possible illegalities and arbitrariness in the procedure in question.

[FN136] Cf. Case of Yatama, supra note 16, para. 152; Apitz Barbera et al. ("First Administrative Court") v. Venezuela, Preliminary objection, merits, reparations and costs.. Judgment of August 5, 2008, Series C No. 182, para. 78, and Case of Tristán Donoso, supra note 9, para. 153.

[FN137] Cf. Case of Apitz Barbera et al. ("First Administrative Court"), supra note 136, para. 90 and Case of Tristán Donoso, supra note 9, para. 153.

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140. Contrary to the foregoing, Judge Khater authorized the telephone interceptions with a mere annotation that she had received and examined the requests and granted them: "R. and A. Defiro. Oficie-se." In her decision, the judge did not explain her analysis of the legal requirements or the elements that caused her to grant the measure, or the way in which the procedure should be carried out or its duration; this entailed a limitation of a fundamental right of the alleged victims in violation of Article 5 of Law No. 9,296/96.

141. As regards the duration of the measures authorized, the Court finds that the telephone interceptions started as of the second judicial order, which responded to the intervention request submitted by Sergeant Silva on May 12, 1999. The latter expanded the purpose of the interception request of May 3, 1999, asking that the monitoring of the ADECON telephone line should be included in the procedure (supra paras. 90 to 92). Hence, as explained by the State itself, "the first judicial authorization [of May 5, 1999] never came into effect, because it was absorbed by the second authorization, granted to the request made by [Sergeant Silva]". Consequently, the first phase of the interception of the two telephone lines took place over thirteen days, from May 14 to 26, 1999, based on the abovementioned second judicial authorization. The next stage of interception took place over a period of twenty-two days, from June 9 to 30, 1999 (supra para. 97), in violation of Article 5 of Law No. 9,296/96, which states that the measures may not exceed 15 days, renewable for the same period of time provided that the essential nature of the evidence had been confirmed. In this context, the Court emphasizes that there was no request or authorization to extend the telephone interceptions in the monitoring petition procedure. To the contrary, on May 25, 1999, Major Neves requested the Loanda Court to end the interceptions, and Judge Khater authorized this on the same date. Consequently, the

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second period of interception was carried out without the authorization of the competent judge, in violation of Article 1 of Law No. 9,296/96. Moreover, that could be considered an offense in light of Article 10 of the said law, which establishes that "it is an offense to carry out telephone communication interceptions […] without judicial authorization or for purposes that are not authorized by law." [FN138]

[FN138] Law No. 9,296 of July 24, 1996, supra note 128, folio 55.
Article 10. The interception of telephone, electronic or telematic communications or the breach of judicial confidentiality without judicial authorization or for purposes that are not authorized by law is an offense. Penalty: two to four years' imprisonment and a fine.

Notification of the Prosecutor General's Office and transcript of the tapes – Article 6 of Law No. 9,296/96 [FN139]

[FN139] Law No. 9,296 of July 24, 1996, supra note 128, folio 55.
Article 6. When the request has been approved, the police authority will conduct the interception procedure, notifying the Prosecutor General's Office, who may supervise implementation.
1. If the procedure makes it possible to record the intercepted communication, it shall be transcribed.
2. When the procedure has been completed, the police authority shall submit the result of the interception to the judge, accompanied by a detailed report, which should contain a summary of the operations conducted.
3. After the judge has received these elements, he or she shall determine the measure under art. 8, and it shall be notified to the Prosecutor General's Office.

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142. Article 6 of Law No. 9,296/96 establishes that, when the request has been granted, the police authority shall conduct the interception procedure and shall communicate the order authorizing the measure to the Prosecutor General's Office, who may supervise the procedure. The Court observes that, to the contrary, the Prosecutor General's Office was not advised of the interception orders and only received the file of the monitoring petition on May 30, 2000; that is, more than a year after the interception orders were issued and eleven months after the telephone interventions had ceased.

143. Additionally, Article 6, paragraph 1, of the said law stipulates that if the procedure makes it possible to record the intercepted communication, it shall be transcribed. As mentioned above, the transcripts of the recorded material were not provided to the case file of the monitoring petition (supra para. 97). Consequently, in the instant case, the provisions of Article 6 of Law No. 9,296/96 were not complied with.

Destruction of the recorded tapes – Article 9 of Law No. 9,296/96 [FN140]

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[FN140] Law No. 9,296 of July 24, 1996, supra note 128, folio 55.
Article 9. The recording that is not required as evidence shall be destroyed following a judicial ruling during the investigation or the pre-trial criminal investigation, or subsequently at the request of the Office of the Prosecutor General or the interested party.

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144. As established in Article 9 of Law No. 9,296/96, any recording that is not of interest as evidence in the investigation or in the criminal proceedings shall be destroyed following a judicial decision, at the request of the Prosecutor General's Office or the interested party.

145. Regarding the argument concerning the judiciary's refusal to destroy the tapes obtained by the illegal monitoring, the Court notes that the destruction of the tapes does not form part of the matters being examined in this case (supra paras. 37 and 38 and infra para. 199) and that they were destroyed on November 23, 2002, by order of Judge Khater, at the request of the Prosecutor General's Office in the monitoring petition case file. Consequently, the Court will not examine this argument.

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146. The Court concludes that the telephone conversation interceptions and recordings that are the object of this case did not comply with Articles 1, 2, 3, 4, 5, 6 and 8 of Law No. 9,296/96 and, therefore, were not based on the law. Thus, since they did not comply with the requirement of legality, it is unnecessary to examine the purpose and necessity of the interception. Based on the above, the Court concludes that the State violated the right to privacy established in Article 11 of the American Convention, in relation to the obligation embodied in Article 1(1) thereof, to the detriment of Arlei José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral and Celso Aghinoni.

2(ii) Privacy, honor and reputation, and dissemination of the telephone conversations

147. The Commission claimed that the recordings in question were in the hands of State organs and were safeguarded by judicial confidentiality. The organs responsible for ensuring this confidentiality failed to comply with their legal obligation, because the information reached the press and was published by different media, affecting the privacy and dignity of the victims. The recordings were not public information, so that their dissemination without the authorization of the authors was illegal. In addition to dissemination by the media, the contents of the conversations were again disseminated out of context and the activities of members of COANA and ADECON discredited during the press conference offered by the former Secretary of Security. The Commission considered that, pursuant to Article 10 of Law No. 9,296/96, the former Secretary of Security was obliged not only to abstain from disseminating the contents of the conversations, but also to order an investigation into the facts owing to his situation as a State agent and to the nature of his functions. In the Commission's opinion, "although the State […] has acquitted the person who was presumably responsible [for the dissemination of the telephone conversations] through a decision of the courts, this does not exempt it from responsibility, because the international protection of human rights should not be confused with criminal

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justice." The Brazilian Judiciary acknowledged that the recordings were disseminated even though they were under the exclusive custody and control of the State. The dissemination of the recorded tapes constituted a violation of the right to honor and dignity of every individual, which includes their privacy, according to Article 11 of the American Convention, read in conjunction with Articles 30 and 32(2) thereof.

148. In their pleadings and motions brief, the representatives indicated that, during the press conference held on June 8, 1999, the former Secretary of Security distributed partial transcripts and a copy of part of the tapes with illegally recorded conversations to journalists, thus failing to observe the judicial confidentiality established by law. Subsequently, these recordings were broadcast on an important television news program in Brazil, the Jornal Nacional. [FN141] The representatives claimed that the said official made a statement to the press accusing the victims of criminal offenses that had not been proved in court, including the illegal possession of firearms and a plan to attack police and court officials. According to the representatives, the disparaging remarks of the former Secretary of Security reinforced the pattern of criminalizing the activities of human rights defenders and social movements fighting for land in Brazil carried out by State agents. In summary, the representatives affirmed that the State had interfered illegally, abusively and arbitrarily in the privacy, honor and dignity of the people whose conversations were intercepted, recorded and disseminated by State agents.

[FN141] The representatives alleged that "[o]n the evening of the day [of the press conference], June 8, portions of some of the intercepted calls were disseminated out of context during the evening news program called 'Jornal Nacional.'" Brief with pleadings and motions (merit file, tome I, folio 316).

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149. The State asserted that a criminal action had been filed to examine the alleged violation of judicial confidentiality by the former Secretary of Security, as a result of which "he was acquitted because his conduct did not characterize a crime," since it had been proved during the proceedings that it was not this official who disseminated part of the contents of the tapes. The criminal offense supposedly committed by the former Secretary of Security was examined by the domestic courts, and the criminal action was tried in keeping with the predominant national case law as well as international jurisprudence, according to the Inter-American Commission's conclusion in its Report on Merits that the Convention had not been violated by the way in which the criminal investigation had been conducted (infra para. 182). Accordingly, the State claimed that the conduct of the former Secretary Cândido Martins should not be discussed before the Court, because it did not reveal aspects that could constitute the alleged violation of Article 11 of the Convention.

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150. The Court observes that portions of the recordings obtained by the telephone interceptions were shown on the news program Jornal Nacional on June 7, 1999 (supra para. 94). An investigation was never conducted into the handing over to the television network of the probative material that was in the State's custody and protected by judicial confidentiality and on

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which this news report was based. In view of the State's failure to determine what occurred, the information that was illegally handed over, and the State agents responsible (infra para. 205) it is not possible to identify the exact contents of the material distributed to third parties, in this case the people who decided to publish it and who prepared the news item for the television channel.

151. As indicated above (supra para. 127), in cases such as this one, the State's defense cannot be based on the impossibility of the complainant to provide evidence to the case file when it is the State who controls the means of clarifying the facts that occurred. Despite the absence of an investigation into the facts relating to this dissemination, the Court observes that, in his report on the interceptions presented to the Loanda Court, Major Neves mentions that a military official "illegally handed over video and audio tapes that were probative material to the press and/or other individuals." [FN142] Moreover, the statements of Colonel Kretschmer and the former Secretary of Security during the criminal action against the latter agree that the tapes were in the custody of the Military Police and that it was said that they had been handed over to the press by the official mentioned by Major Neves in his report. [FN143]

[FN142] Cf. Record of the delivery of the 123 tapes, supra note 83, folio 2143. Similarly, testimony of Major Neves of November 5, 2002, within the framework of criminal action No. 2001.2125-5 (file of attachments to the answer to the application, attachment 18, tome IV, folio 2742).

[FN143] Cf. Testimony of the former Secretary of Security of October 18, 1999, within the framework of criminal action No. 82.516-5 (file of attachments to the answer to the application, attachment 18, tome II, folios 2447 and 2448); testimony of the former Secretary of Security of August 6, 2001, within the framework of criminal action No. 2001.2125-5 (file of attachments to the answer to the application, attachment 18, tome IV, folio 2730); and testimony of Colonel Kretschmer of November 5, 2002, within the framework of criminal action No. 2001.2125-5 (file of attachments to the answer to the application, attachment 18, tome IV, folio 2743).

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152. Despite the fact that it does not have all the elements to verify which conversations were disseminated on this first occasion or who the speakers were, owing to the said absence of an investigation, the Court notes that, as a result of this monitoring petition, some of the conversations of the victims were intercepted and were not published, together with those that were broadcast on the news. Consequently, the Court considers it highly probable and reasonable to assume that the audio material handed over to the television network contained the recording of the victims' telephone conversations. [FN144] Accordingly, their private life was interfered with.

[FN144] Records of the recorded tapes, supra note 85, folio 2147; videos of two news items broadcast on the national news programs on June 8 and 9, 1999, supra note 81, and the Folha do Paraná newspaper published on June 20, 1999, Article entitled "Conversas incluem propostas de pressão" (file of attachments to the brief with pleadings and motions, attachment 10, folio 2029).

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153. With regard to the dissemination of the telephone conversations by the former Secretary of Security, the decision issued in the criminal action indicated that "the information obtained by the telephone interception […] was not disseminated at the press conference organized by [the said agent], who considered it his duty to clarify the facts that had been disseminated previously." Thus, the Court of Justice concluded that the former Secretary of Security "did not betray the confidentiality of the information obtained through the telephone interception, because […] it had already been disseminated by a television network the previous day." [FN145] The Court notes that there are no elements in the file of the criminal action identifying the content of the report broadcast on the Jornal Nacional on June 7, 1999. During that action it was merely proved that the television network broadcast some extracts from the recorded conversations, and neither the extracts nor the speakers were identified during the criminal action or before the inter-American system. In view of these omissions, the Court is unable to compare the information broadcast by the news program and that disseminated by the former Secretary of Security during the press conference.

[FN145] Cf. Decision of the Second Criminal Chamber of the Court of Justice of the state of Paraná of October 14, 2004, supra note 27, folio 114.

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154. During this criminal action, the former Secretary Cândido Martins testified that, during the said press conference, he "analyzed with the journalists the fragments that the [television] network had broadcast previously; that [he] did not hand over or disseminate any extract from the recordings, […] merely responding to the questions posed by the journalists concerning the fragments that had already been broadcast on television." [FN146] However, the Court notes that the journalists called to testify during the criminal action against the former Secretary of Security stated in their testimony that he made those present at the press conference listen to some of the recorded tapes and that copies of the transcript of several conversations were distributed to the journalists. In this regard, the journalist Evandro César Fadel declared that, during the conference, the press secretary of the Secretariat of Security handed the journalists a copy of the transcript of short portions of the conversations. [FN147] The journalist Fabiana Prohmann stated that "during the interview a recording of the telephone interception was transmitted and the text of the said recording was distributed to the journalists; on the basis of this information, the deponent prepared the report that was published next day." [FN148] Similarly, the journalist Luciana Pombo declared that "following the interview, the press secretary of the Secretariat of Public Security handed out material with recorded tapes to the radio and television media and written extracts to the newspapers." [FN149]

[FN146] Testimony of the former Secretary of Security of August 6, 2001, supra note 143, folio 2730.

[FN147] Cf. Testimony of the journalist Evandro César Fadel, supra note 80, folios 1438 and 1439.

[FN148] Testimony of the journalist Fabiana Prohmann, supra note 80, folio 1482..

[FN149] Testimony of the journalist Luciana Pombo, supra note 81, folio 1443.

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155. The news reports on television coincided with the testimony of the witnesses and, in addition, affirmed that the former Secretary of Security presented new extracts of the recordings during the press conference. One of the videos in the case file shows the image of a person reading a text entitled "Recorded conversations of MST leaders (the recordings were obtained with the authorization of the courts)," and states that "yesterday afternoon, the Secretariat of Security disseminated new extracts from the interception of telephone calls made by the landless [workers]." [FN150] In another video, the reporter states that "during the late afternoon, the Secretary of Security Cândido Martins de Oliveira gave a collective interview during which he disseminated new portions of the recordings of the telephone conversations of members of MST," and showed an audio of a recorded conversation that allegedly was part of "one of the fragments disseminated today [June 8, 1999]." [FN151]

[FN150] Cf. Video recordings of two news items shown on the national news programs on June 8 and 9, 1999, supra note 81.
[FN151] Cf. Video recordings of two news items shown on the national news programs on June 8 and 9, 1999, supra note 81.

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156. Accordingly the Court concludes that the former Secretary of Security did not merely comment on the material presented previously on the news program. Cândido Martins let other people hear fragments of the recordings, based on which diverse reports were prepared for the written and televised media, and he even may have distributed new portions of the recordings, according to the journalists' testimony. The Court emphasizes that, at no time, was it argued or proved that this dissemination occurred with judicial authorization or that the purpose of this dissemination was authorized by law, as required by Article 10 of Law No. 9,296/96 in order to breach judicial confidentiality.

157. The Court finds that, on this second occasion, in the same way as for the dissemination of June 7, 1999, there was interference in the private life and in the honor and reputation of the victims. Even if their conversations were not specifically reproduced by the press, the information disseminated in this case by the State alluded to activities of the organizations administered by the victim or of which they were members, and their names could be negatively related to criminal activities.

158. Based on the above, the Court considers that the telephone conversations of the victims and those related to the organizations they were members of were of a private nature and none of the speakers authorized the conversations being heard by third parties. Thus, the dissemination by State agents of the telephone conversations that were protected by the judicial confidentiality entailed interference in the privacy, honor and reputation of the victims. The Court must examine whether this interference was compatible with Article 11(2) of the Convention.

159. In order to assess whether the interference in the privacy and in the honor and reputation of the alleged victims was allowed in light of the American Convention, the Court will first

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examine whether the dissemination of the recorded conversations complied with the requirement of legality as described above (supra paras. 116 and 130).

a) Legality of the interference

160. The Brazilian Constitution establishes the right to the inviolability of the confidentiality of telephone communications, except in the situations defined in Law No. 9,296/96. Article 9 of this norm stipulates that, during a telephone interception procedure of any kind, "the confidentiality of the procedures, the recordings and the respective transcripts" must be preserved. Moreover, Article 10 of this law defines as an offense the act of "breaching judicial confidentiality without judicial authorization or for purposes that have not been authorized by law" (supra para. 141).

161. In the instant case, the material obtained by the telephone interceptions, which was in the custody of the State and protected by judicial confidentiality, was made known to third parties who were not involved in the monitoring petition on two occasions: (i) by an unidentified State agent who delivered to the Globo Television Network the tapes on which the report shown on June 7, 1999, was based, and (ii) by the former Secretary of Security, who handed over transcripts of portions of the recordings to journalists present at the press conference on June 8, 1999, and let them hear audio extracts from the recorded tapes.

162. Regarding the first dissemination, the State has not provided a satisfactory explanation as to how private conversations intercepted and recorded during a criminal investigation and protected by judicial confidentiality ended up in the hands of one of the media. The delivery of the material to the television station was contrary to Articles 1, 8 and 10 of Law No. 9,296/96. The Court considers that it is a State obligation to respect the confidentiality of telephone conversations intercepted during a criminal investigation, that is: (a) necessary to protect the privacy of the persons subjected to a measure of this nature; (b) pertinent for the effects of the investigation itself, and (c) fundamental for the satisfactory administration of justice. In the instant case, this was information that should have remained known only to a limited number of police and judicial authorities and the State failed to comply with its obligation to protect it adequately.

163. Regarding the dissemination by the former Secretary of Security, his conduct could have had the purpose of informing the population about a matter of general interest by presenting a factual summary of the events. However, in the press conference, he allowed other persons to hear the tapes of the recordings and he distributed printed portions of the conversations without legal authorization or a court order as required by Law No. 9,296/96.

164. Consequently, the Court considers that, by disseminating private conversations that were protected by judicial confidentiality without respecting the legal requirements, the State violated the victims' right to the protection of their privacy, honor and reputation established in Articles 11(1) and 11(2) of the American Convention, in relation to the obligation to Article 1(1) thereof, to the detriment of Arlei José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral and Celso Aghinoni. Moreover, a possible violation of the American Convention

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with regard to the alleged flaws in the investigation of the facts of the instant case will be examined in Chapter IX of this judgment, corresponding to Articles 8 and 25 of the Convention.

VIII. ARTICLE 16 (FREEDOM OF ASSOCIATION) [FN152] IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) OF THE AMERICAN CONVENTION

[FN152] Article 16 of the Convention establishes:

1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.
3. The provisions of this Article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.

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165. The Commission underscored "the State's obligation not to interfere in the exercise of the right to hold meetings or form associations, [and] the obligation to adopt, in certain circumstances, positive measures to ensure the effective exercise [of this right]." It claimed that restrictions to freedom of association constitute "serious obstacles to the possibility of individuals defending their rights, presenting their claims, and seeking change or a solution to the problems that affect them." Also, "arbitrary interference in the communications of individuals [belonging to an association] restricts not only the freedom of association of the individual, but also the right and the liberty of a specific group to associate freely, without fear." Freedom to form associations and to try and achieve certain collective purposes is indivisible, so that a restriction to the possibility of forming associations represents an explicit limit to the right of the collectivity to achieve its goals. The State's security forces may need to conduct legally-approved intelligence operations to combat crime and protect the constitutional order. However, these actions are legitimate when they constitute a measure that is strictly necessary to safeguard the democratic institutions, and when adequate guarantees exist to prevent abuse. In the instant case "both the interception, and the monitoring and recording of the victims' telephone communications, were carried out in order to control their associative activities, and the dissemination of these communications, protected by judicial confidentiality, was done expressly to detract from the legitimacy of the work of the associations of which the victims were members." Owing to "the nature of their activities, as well as the tendency to harass the defenders and representatives of the landless workers, […] the Commission considered that the interventions, the monitoring, and the dissemination of [the] information in question constituted a veiled means of restricting the freedom of association [of the victims]." Consequently, it asked the Court to declare the violation of Article 16 of the American Convention.

166. The representatives agreed with the Commission and added that, in this case, the violation "was clearly characterized by the criminalization and harassment of the human rights defenders and the social movements [in] order to demoralize and […] silence the movements' leaders […]." The right to freedom of association of the members of COANA and ADECON

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was violated owing to the "attacks on the victims by the Judiciary – represented by Judge [Khater] – and the Executive – represented by members of the Military Police and by the [former Secretary of Security] – [who created] serious obstacles for the organizations to promote human rights, specifically 'the right to land.'" The representatives claimed that the State's actions prejudiced the activities of COANA and ADECON, not only because they affected the reputation of the said associations, but also because, following the interception and dissemination of the telephone conversations, several of their members were detained or fled the region because they were threatened, and because the association lost its standing with companies and banks, which made it impossible to obtain financial resources. It is obvious that, in addition to criminalizing [and intimidating] the victims, the purpose of the State's actions was to weaken the rural workers associations linked to MST that are fighting to obtain access to land, the elimination of the latifundios (extensive landholdings) and fair distribution of rural property." The representatives stressed the importance of combating the impunity of State officials responsible for violating the rights of human rights defenders. Also, despite the creation in 2004 of the "National Program for the Protection of Human Rights Defenders" of the Special Human Rights Secretariat of the Presidency of the Republic, there is no effective State protection, because the structure of the program is "incipient and inadequate" and it lacks a legal framework to consolidate it politically and financially. They claimed that the program has not even been implemented in the state of Paraná. According to the representatives, MST members have been threatened and murdered in the region and the State has not taken any measures, which reveals the inexistence of effective protection.

167. The State affirmed that the Commission had erroneously considered the right to hold meetings and the right to form associations together, even though the Convention ensures those rights under different Articles. It indicated that the mention of freedom to hold meetings is inappropriate in this case and asked the Court not to take into account the Commission's observations in this respect. Brazil denied the violation of the victims' right to form associations and the existence of "a tendency to harass rural workers and an indirect limitation of the right to form associations." The inclusion of the violation of the right to form associations in the Commission's application was based merely on the iura novit curia principle, without a clear description of the facts that constituted the supposed violation. No one suffered a restriction to his right to form associations or to remain a member of an association owing to the facts of the case. The State observed that, based on the testimony provided by the Commission, there is no relationship between COANA and ADECON and MST. Therefore, the argument "that the telephone interceptions were aimed at restricting MST activities or harassing its leaders is not consistent with the facts."

168. In addition, Brazil indicated that paragraphs XVII to XXI of Article 5 of the Constitution ensure the protection of the right in question. In this regard, the only possible State interference to eliminate or suspend its exercise would be by means of a judicial decision based on the existence of an unlawful purpose of association. Hence, this right is guaranteed by the Constitution and, furthermore, any violations could be repaired by means of the mandado de segurança. Telephone interceptions do not violate, per se, the right to freedom of association, this only occurs when there are irregularities in the procedure and harm is caused. In the instant case, the basis for the interception and monitoring of the telephone lines was the investigation that was underway into the possible diversion by leaders of COANA and ADECON of public resources

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from PRONAF and PROCERA, as well as the murder of Eduardo Aghinoni. According to the State, there was no irregularity in this procedure and no indications that the request was intended to impede the exercise of freedom of association, so that Article 16 of the Convention had not been violated. It considered that, if the Commission's arguments were accepted, an absurd situation would arise where the State would be unable to authorize criminal investigations against leaders of associations, because this could intimidate such individuals and prevent them from forming associations. Lastly, the State asserted that it was implementing "diverse measure to support and promote the exercise of the right to form associations, aimed particularly at associations of rural workers." Regarding the protection of human rights defenders, public policies had been implemented, such as the "National Program for the Protection of Human Rights Defenders" and the "National Policy for the Protection of Human Rights Defenders." These mechanisms had been implemented in several states of the federation and the state of Paraná would be included among them. It added that agreements existed with civil organizations representing the rural workers to provide families in the settlements with the services of human rights defenders, community services and legal assistance, in addition to the participation of those organizations in "specific discussion mechanisms to develop programs relating to the agrarian reform policy," as well as policies to combat violence in rural areas.

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169. Article 15 of the American Convention recognizes the right of peaceful assembly, without arms; while freedom of association, embodied in Article 16 of the Convention establishes the right of assembly and is characterized by authorizing individuals to create or take part in entities or organizations in order to act collectively to achieve very diverse purposes, provided they are legitimate. Contrary to freedom of association, the right of assembly does not necessarily involve the creation of or participation in an entity or organization, but can be expressed in a sporadic meeting or assembly for very diverse purposes, while it is peaceful and in keeping with the Convention. In view of the foregoing, and considering that the arguments of the parties in this case refer principally to restrictions imposed by the State on the freedom of association of the members of COANA and ADECON that were possibly unjustified, the Court will proceed to examine exclusively whether the State violated the right embodied in Article 16 of the Convention to the detriment of the victims.

170. The Court has indicated that Article 16(1) of the American Convention establishes that anyone who is subject to the jurisdiction of a State Party has the right to associate freely with other persons, without an intervention of the public authorities that restricts or obstructs the exercise of the said right. This then is the right to assemble in order to seek the common achievement of a lawful purpose, without pressure or interference that could alter or distort this purpose. [FN153]

[FN153] Cf. Case of Baena Ricardo et al., supra note 46, para. 156; Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary objection, merits, reparations and costs. Judgment of July 10, 2007. Series C No. 167, para. 144, and Case of Kawas Fernández, supra note 35, para. 143.

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171. In addition to the said negative obligations, the Inter-American Court has observed that freedom of association also "gives rise to positive obligations to prevent attacks against it, to protect those who exercise it, and to investigate violations of this freedom." These positive obligations must be adopted even in the sphere of relations between individuals, when necessary. [FN154]

[FN154] Case of Huilca Tecse v. Peru. Merits, reparations and costs. Judgment of March 3, 2005. Series C No. 121, para. 76; Case of Cantoral Huamaní and García Santa Cruz, supra note 153, para. 144 and Case of Kawas Fernandez, supra note 35, para. 144.

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172. In the instant case, according to the Commission and the representatives, the alleged violation of freedom of association was related to the work of the promotion and defense of the human rights of rural workers. In this regard, as this Court has emphasized, [FN155] States have the obligation to facilitate the means for human rights defenders to carry out their activities freely, to protect them when they are threatened in order to avoid attempts against their life and personal integrity, to abstain from imposing obstacles that obstruct their work, and to investigate seriously and effectively any violations perpetrated against them, combating impunity.

[FN155] Case of Nogueira de Carvalho et al. v. Brazil. Preliminary objections and merits. Judgment of November 28, 2006. Series C No. 161, para. 77; and Valle Jaramillo et al. v. Colombia. Merits, reparations and costs. Judgment of November 27, 2008. Series C No. 192, para. 91, and Case of Kawas Fernandéz, supra note 35, para. 145.

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173. The Court underscores that the American Convention recognizes the right to associate freely and, at the same time, establishes that the exercise of this right may be subject to such restrictions established by law that have a legitimate purpose and that, ultimately, may be necessary in a democratic society. In this regard, the system established by the Convention is balanced and appropriate for harmonizing the right to associate with the need to prevent and investigate possible conduct that domestic law characterizes as criminal.

174. In this case, the Court finds it has been proved that the State intercepted and recorded the telephone conversations of the two social organizations without respecting the legal requirements; it failed to comply with its obligation to safeguard the private information intercepted and disseminated this without judicial authorization, all in violation of Article 11 of the Convention in relation to Article 1(1) thereof, to the detriment of the victims, who were members and leaders of COANA and ADECON (supra paras. 146 and 164). Even though the State affirms that the interception of the communications was not contrary to freedom of association, because it sought a legitimate purpose - the investigation of an offense - according to the documents in the case file, there is no evidence that the purposes declared by the police authority in its telephone interception request, namely, the investigation into the death of a member of COANA and the alleged diversion of public funds, was really what it was seeking.

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175. The Court notes that Major Neves indicated, when requesting the termination of the interception, that the "monitoring carried out up until [that] date had already achieved the required results," [FN156] despite the fact that it had not led to progress in the investigation into the death of Eduardo Aghinoni or into the diversion of funds, which were the supposed reasons for the telephone interception, or in any other investigative action by the police or other State authorities of any kind. Moreover, in the report on the results of the interception sent to Judge Khater, Major Neves did not include or refer to any conversation related to the facts allegedly investigated, but only indicated extracts of conversations that, according to this official, confirmed that a member of MST had infiltrated the Military Police. [FN157]

[FN156] Cf. Request for suspension of telephone interception of May 25, 1999, supra note 78, folio 2138.
[FN157] Cf. Report of delivery of 123 tapes, supra note 83, folio 2143.

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176. The Court also notes that, in the summaries of the recorded tapes, none of the segments highlighted by the police authorities bears any relationship to the investigative purpose indicated in the interception request. [FN158]

[FN158] Control sheets of the recorded tapes, supra note 85, folios 2147 to 2160.

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177. In addition, the Court observes that State officials and entities indicated that the interception request did not seek the declared objective. Thus, in the file of the monitoring petition, the agent of the Prosecutor General's Office indicated that the "telephone interception did not have a specific objective[, but] sought to monitor MST activities, by coincidence, at the time the government [of Paraná] had decided to move settlers from rural properties [in the region]." [FN159] The report of the disciplinary organ of the Civil Police of Paraná on the actions of the Military Police in the telephone interceptions of COANA and ADECON endorsed this when it states that "there is strong evidence that the [said] interception, although disguised with a veil of legitimacy (owing to the existence of the questionable judicial authorization), had intrinsic objectives that were not authorized by law, thus constituting the offense established in Article 10 of Law [9,296/96]." [FN160]

[FN159] Brief of the Public Prosecutor's Office of September 8, 2000, supra note 84, folio 2219.
[FN160] Opinion of the Disciplinary Body of the Civil Police of the state of Paraná of July 7, 1999 (file of attachments to the answer to the application, tome II, Attachment 18, folio 2369).

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178. The Court notes, therefore, that, in addition to failing to comply with the legal requirements, the State's interference in the communications of COANA and ADECON did not comply with the supposedly legitimate purpose proposed – namely the criminal investigation of

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the alleged offenses – and resulted in the monitoring of the activities of the members of the said associations.

179. In addition, in his testimony, Arlei José Escher stated that "the dissemination denigrated him and the association of which he was a member. It even created conflicts and doubts within [COANA] and ADECON" and also "greatly affected [their activities,] which were paralyzed, and their projects were interrupted." He stated that he "was afraid that the harassment would start up again because he had testified." [FN161] Delfino José Becker testified that he "did not know whether the activities of ADECON and COANA were affected or not by the dissemination; however, it affected their reputation." [FN162]Furthermore, in his testimony, Pedro Alves Cabral stated "that owing to the dissemination, [his] personal and professional life was affected significantly and he had even been harassed by the police, [and that he was] imprisoned after the facts, but was not convicted. The dissemination made the farmers who were members of the cooperative afraid" and "the activities of ADECON and COANA were affected at the time, due to fear and apprehension." [FN163] Similarly, Marli Bambrilla Kappaum testified that "she was afraid to testify, because [owing to the facts of the case] she distrusted the State," and that the dissemination "gave the impression that [the associations] were […] organizations created to perpetrate crimes." [FN164] Lastly, Celso Aghinoni testified before the Court that the image of the associations was prejudiced, that "everyone began to see [them] as criminals, as terrorists"; that the projects being implemented within the cooperative to assist production "were frozen for five years, until […] it was possible to regain the trust […] of the companies, the banks, and the government agencies, [so they] suffered immense moral and financial prejudice"; that "the civil and military police systematically harassed [the members of the associations]," and that, following the facts, he "avoided saying that […] he was a member of COANA." [FN165]

[FN161] Testimony of Arlei José Escher rendered before notary public on November 7, 2008, supra note 72, folio 697.
[FN162] Testimony of Delfino José Becker rendered before notary public on November 7, 2008, supra note 72, folio 969.
[FN163] Testimony of Pedro Alves Cabral rendered before notary public on November 7, 2008, supra note 72, folio 971.
[FN164] Testimony of Marli Brambilla Kappaum rendered before notary public on November 7, 2008, supra note 69, folio 982.
[FN165] Testimony given by Celso Aghinoni during the public hearing, supra note 66.

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180. The Court does not have other elements that would allow it to find that the harassment and the pecuniary damage claimed by the representatives – such as the loss of earnings and the organizations' possibilities of obtaining credit as a result of the said facts – had been proved. Nevertheless, the abovementioned statements made by the witnesses are consistent in revealing that when they found out about the interception and dissemination of their telephone conversations, they were extremely fearful and, also, that the dissemination caused problems for the members and the farmers linked to COANA and ADECON, in addition to affected the image of these associations. The State made some observations on the content of some of these statements, referring to other aspects of them. [FN166] Consequently, the Court finds it proved

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that the monitoring of the telephone communications of the association – without respecting the legal requirements, with stated objectives that were not supported by the facts and the subsequent conduct of the police and judicial authorities – followed by their dissemination caused fear and tensions and affected the image and credibility of the associations. Hence, they altered the free and normal exercise of the right to freedom of association of the abovementioned members of COANA and ADECON, and this entailed an interference that is contrary to the American Convention. Based on the above, the State violated the right to freedom of association established in Article 16 of the American Convention, in relation to the obligation to respect rights embodied in Article 1(1) thereof, to the detriment of Arlei José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral and Celso Aghinoni.

[FN166] Cf. supra note 57.

IX. ARTICLES 8(1) (RIGHT TO A FAIR TRIAL) [FN167] AND 25(1) (RIGHT TO JUDICIAL PROTECTION) [FN168] IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) OF THE AMERICAN CONVENTION

[FN167] In this regard, Article 8(1) of the Convention establishes:
Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. […]
[FN168] Article 25(1) of the Convention establishes:
Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

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181. The Commission indicated that the inexistence of an effective remedy to counter violations of the rights established in the Convention constitutes a violation of the Convention by the State Party and places the individual in a situation of defenselessness. It stated that it was not enough that the remedies existed formally, but rather "their application by the competent authority should be effective." The victims resorted to the national courts to obtain the protection of fundamental rights embodied in the Constitution, in domestic law, and in the American Convention, by filing the mandado de segurança and the embargos de declaração in order to obtain the cessation of the recordings and the destruction of the tapes. However, the domestic court did not examine the merits of the victims' claims," by not ruling on the request for the destruction of the tapes. The Commission considered that "the results of the remedies filed in the domestic sphere indicate […] a series of interferences in the private life of the victims [and in] their right to associate and that the State did not respond with due diligence." Given "these judicial decisions, the victims lacked an effective judicial remedy to protect their right to privacy,

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which constituted a violation of the rights protected by Articles 8(1) and 25, in relation to Article 1(1) of the American Convention."

182. In its application, the Commission also indicated with regard to the criminal investigation into the facts, that "in its Report on Merits […] it decided not to examine a potential violation of the rights to judicial protection and to judicial guarantees with regard to the acquittal of the authors of the human rights violations that are the subject of this case, because this did not necessarily entail a violation of Articles 8 or 25 of the Convention. During the proceedings before it, the Commission did not receive evidence proving that the criminal proceedings were conducted irregularly or outside the parameters established in Article 8 of the Convention." However, it insisted that "the State has the obligation to investigate human rights violations, prosecute those responsible and avoid impunity" and therefore "it should conduct an investigation to determine the administrative, civil or any other responsibilities of the public officials involved in the violations of the human rights [of the victims]." During the public hearing in this case, the Commission stated that it "disagreed absolutely with [the State's opinion] that a judicial error was not sufficient to give rise to the State's responsibility, [because] evidently the Judiciary's actions can determine the international responsibility of the State." Regarding the State's claim that the criminal and administrative proceedings had been processed very diligently, the Commission recalled the Court's case law on the concept of fraudulent res judicata and stated that "this concept […] results from a trial in which the rules of due process have not been respected, or in which the judges did not act with independence and impartiality [and that, in] the instant case, it had been proved that the proceeding before the domestic courts was flawed owing to these serious defects." In its final written arguments, the Commission reiterated that an investigation should be conducted to determine the administrative or any other responsibilities of the public officials involved in the violations that had occurred and insisted that the State had the obligation to investigate the human rights violations, prosecute those responsible and avoid impunity." It concluded that the State violated the victims' right to due judicial guarantees, as well as the possibility of a prompt, effective and simple remedy as established in Articles 8 and 25 of the American Convention in relation to Article 1(1) thereof.

183. The representatives indicated that Brazil had violated the judicial guarantees of Article 8 and the judicial protection of Article 25 of the Convention: (a) by authorizing the telephone interception by means of a judicial decision delivered contrary to the provisions of Law No. 9,296/96 and Articles 5, paragraph XII, and 93, paragraph IX, of the Federal Constitution; (b) by the dissemination of the intercepted telephone conversations to the written and television media by the former Secretary of Security; (c) by not guaranteeing an effective judicial remedy to prevent the continuation of the illegal telephone interceptions and to ensure the destruction of the recordings; (d) by failing to guarantee the due impartiality and independence of the trial court during the criminal investigation; (e) by not ensuring that the victims had a remedy that required an administrative investigation to establish the responsibility of the public agents involved in the interceptions, and (f) by not guaranteeing an effective judicial remedy, within a reasonable time, to make civil reparation for the damage caused by the illegal interceptions and the dissemination of the recordings by the public agents.

184. The representatives stated that, following the decision of the Court of Justice of the state of Paraná, the victims filed embargos de declaração to correct the omission of the ruling as

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regards the request to destroy the tapes. The said court refused to admit this remedy and maintained its original decision concerning the extinction of the mandado de segurança since the purpose had ceased to exist, without examining the request to destroy the tapes. The representatives added that the recurso ordinário constitucional would not have been effective for the victims because the violation of the right to honor and privacy had already been perpetrated; the intention was to prevent the continuation of the violation over time and they had therefore filed the mandado de segurança. Since the interceptions had already been suspended owing to a decision of the judge of the Comarca de Loanda, there was no need to file the recurso ordinário constitucional before the Superior Court of Justice. They indicated that the victims filed a criminal action (representação criminal) before the head of the Office of the Prosecutor General of the state of Paraná (Procurador Geral de Justiça) against the public agents supposedly involved in the illegal interceptions for the offenses of usurpation of public functions and abuse of authority, among other aspects. However, none of the public agents was declared responsible by the Brazilian Judiciary. Moreover the administrative department of the Court of Justice did not sanction Judge Khater administratively, "despite [this court's] express recognition that the right to privacy protected by the Constitution had been violated. They stated that the victims had filed civil actions to obtain reparation before the courts in May 2004 and, to date, no final ruling had been made and no time limit has been set for concluding these actions; consequently, the cases had not been decided within a reasonable time.

185. Lastly, the representatives considered that Judge Khater violated impartiality: (a) by granting 45 orders to reinstate possession (mandados de reintegração de posse) in favor of the latifundistas (large-scale landowners) of the northwestern region of Paraná, in a minimum time; (b) by authorizing the request to intercept the COANA and ADECON telephone lines submitted by the Military Police of Paraná who did not have the necessary authority, without due legal grounds and without informing the Prosecutor General's Office, and (c) by her ties of friendship with the landowners. In addition, the Court of Justice of the state of Paraná violated the principle of impartiality when considering the criminal responsibility of Judge Khater and by not filing proceedings to establish her responsibility in the administrative sphere despite strong evidence that she had committed an illegal act. They concluded that not only was Judge Khater not found responsible for her conduct, but she was rewarded in both the functional sphere, by being promoted to the Comarca de Londrina, and the political sphere, by being distinguished by the legislature with the title of honorary citizen of the state of Paraná.

186. The State asserted that Articles 8(1) and 25 of the Convention had not been violated, because the victims had at least two options to claim their right, the recurso ordinário constitucional and habeas corpus, in accordance with the said Article 25. If they had used the appropriate remedy, they would have been heard with all the guarantees established in Article 5 of the Constitution, including the prohibition of special courts (tribunales de excepción), the principle of the natural judge, due legal process and the guarantee of access to justice, in accordance with the provisions of Article 8(1) of the Convention. It also indicated that during the mandado de segurança procedure, all the guarantees of due process of law established in Law No. 1,533 of December 31, 1951, were respected: this procedure was examined by the Court of Justice of the state of Paraná, the competent body; the decision was handed down according to case law, and an appropriate remedy was available to the parties to appeal the decision.

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187. The State added that the judicial decision authorizing the interception of the telephone lines of COANA and ADECON occurred due to an error of the judge concerning the appropriate legal procedure. That error was extensively investigated in the three spheres of the State's responsibility: criminal, administrative and civil, with the resulting conclusion that the situation did not merit the assessment of this error by an international court. It indicated that, as a result of the criminal action (representação criminal) filed by the victims, the Court of Justice of the state of Paraná concluded that the mere request for interception did not constitute an offense; hence the military police agent who requested the interception could not be charged with criminal liability. The same conclusion was applied to the former Secretary of Security in relation to recommending the interception. Regarding the conduct of the judge, the court decided that she did not act in bad faith or with criminal intent, so that her error did not constitute an offense. In addition, the former Secretary of Security was acquitted in second instance because it was proved that he was not the person responsible for the partial dissemination of the content of the tapes. The State indicated that the "Commission itself [in its application] stated that there was no evidence to show that the criminal proceedings had been conducted irregularly or to the detriment of the rights guaranteed in the American Convention." The State considered that it was inadmissible to decide that there had been a violation of Articles 1(1), 8 and 25 of the Convention simply because the decisions handed down by the domestic courts of law were not favorable to the victims, and even less considering that the latter could have availed themselves of domestic remedies to try and reverse the decision.

188. The State affirmed that there had been no negligence in the administrative proceeding established by the Corregedoria Geral da Justiça regarding the conduct of Judge Khater, and "considered that the facts had already been examined by the Special Organ of the Court [of Justice] during the criminal investigation proceeding, and it had ruled that [this official] had not acted with criminal intent."

189. Lastly, Brazil indicated that the victims were using available judicial remedies to defend their rights in the civil sphere. These remedies were filed almost four years after the facts occurred, following the submission of the petition to the Commission. With the passage of time, obtaining documents and testimonies becomes more problematic and takes more time. The late filing of an action cannot be attributed to the State, which had already ruled in first instance on some of the actions, and several of the decisions were pending appeal.

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190. In its application, the Commission did not claim the alleged violation of the guarantee of impartiality by Judge Khater or the violation of the guarantees of impartiality and independence of the Court of Justice that examined the conduct of the said judge. These allegations were made only by the representatives.

191. In this regard, this Court has established that the presumed victim, his next of kin or his representatives may invoke rights that differ from those included in the Commission's application, based on the facts presented by the latter. [FN169]

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[FN169] Cf. Case of the "Five Pensioners" v. Peru. Merits, reparations and costs. Judgment of February 28, 2003. Series C No. 98, para. 155; Case of Perozo et al., supra note 18, para. 32, and Case of Kawas Fernández, supra note 35, para. 127.

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192. When referring to the content of Articles 8(1) and 25 of the Convention, the Commission mentioned the need for an independent and impartial judge and court. However, the Court observes that the claims related to the supposed partiality of Judge Khater in this specific case (supra para. 185(a) and (c)), are based on facts that cannot be inferred from the application and were not examined in the Inter-American Commission's Report on Merits No. 14/07. Therefore, the Court will not consider them. Regarding the allegation on the authorization of the telephone intervention order within the framework of the monitoring petition (supra para. 185(b)), the Court has already examined the pertinent elements in the chapter of this judgment on Article 11 of the Convention.

193. Furthermore, regarding the actions of the court of justice that intervened in the criminal investigation, the representatives indicated that this body did not act pursuant to the guarantees of impartiality and independence when prosecuting Judge Khater, without submitting grounds or probative elements to explain which acts that occurred when processing this procedure would constitute a violation of these guarantees. Also, the Court found it proved that an administrative proceeding had taken place to process the conduct of Judge Khater before the administrative department of the court of justice within the framework of the monitoring petition (supra 110). Hence, the file contains no evidence of the facts that, according to the representatives, allegedly violated the guarantees of impartiality and independence. Consequently, the Court rejects the said arguments.

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194. Regarding the acts and omissions of domestic judicial bodies, the Court has indicated that Articles 8(1) and 25(1) of the Convention establish the scope of the principle of generation of responsibility based on the acts of any State organ. [FN170] In addition, it has maintained that, in order to comply with the obligation to guarantee rights, the State must not only prevent, but also investigate any violation of the human rights established in the Convention, as well as re-establish the violated rights if possible, and repairing the damage produced by the human rights violations. [FN171]

[FN170] Cf. Case of Velásquez Rodríguez, supra note 54, paras. 164, 169 and 170; Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs. Judgment of August 12, 2008. Series C No. 186, para. 140, and Ticona Estrada et al. v. Bolivia. Merits, reparations and costs. Judgment of November 27, 2008. Series C No. 191, para. 78.

[FN171] Cf. Case of Velásquez Rodríguez, supra note 54, para. 166; Case of Heliodoro Portugal, supra note 170, para. 142 and Case of Ticona Estrada et al., supra note 170, para. 78.

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195. The duty to investigate is an obligation of means and not results. The Court has stated repeatedly that the State must assume this du as a legal obligation and not as a mere formality preordained to be ineffective, [FN172] or as a measure of special interest that depends on the procedural initiative of the victims or of their next or kin or on the private contribution of probative elements. [FN173] The existence of this guarantee constitutes one of the basic pillars of the American Convention and of the rule of law in a democratic society, according to the Convention. [FN174]

[FN172] Cf. Case of Velásquez Rodríguez, supra note 54, para. 177; Case of Tristán Donoso, supra note 9, para. 146, and Case of Kawas Fernández, supra note 35, para. 101.
[FN173] Cf. Case of Velásquez Rodríguez, supra note 54, para. 177; Case of Ticona Estrada et al., supra note 170, para. 84 and Case of Tristán Donoso, supra note 9, para. 146.
[FN174] Cf. Case of Castillo Páez v. Peru. Merits. Judgment of November 3, 1997. Series C No. 34, para. 82; Case of Castañeda Gutman, supra note 9, para. 78, and Case of Bayarri, supra note 15, para. 102.

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196. In addition, the Court has indicated that, for the State to comply with Article 25 of the Convention it is not sufficient that remedies exist formally, but they must also be effective in the terms of that provision. [FN175] The Court has reiterated that this obligation means that the remedy must be appropriate to combat the violation and that it must be implemented by the competent authority. [FN176]

[FN175] Cf. Ximenes Lopes v. Brasil. Preliminary objection. Judgment of November 30, 2005. Series C No. 139, para. 4; Claude Reyes et al. v. Chile. Merits, reparations and costs. Judgment of September 19, 2006. Series C No. 151, para. 131; and Case of Castañeda Gutman, supra note 9, para. 78.
[FN176] Cf. Acosta Calderon v. Ecuador. Merits, reparations and costs. Judgment of June 24, 2005. Series C No. 129, para. 93; López Alvarez v. Honduras. Merits, reparations and costs. Judgment of February 1, 2006. Series C No. 141, para. 139, and Case of Claude Reyes et al., supra note 175, para. 131.

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197. In accordance with the foregoing, the Court must decide whether the State has violated the rights established in Articles 8(1) and 25(1) of the Convention, in relation to Article 1(1) thereof. To this end, the Court has established that "[t]he elucidation of whether the State has violated its international obligations owing to the actions of its judicial organs may mean that the Court has to examine the respective domestic proceedings." [FN177]

[FN177] Cf. Case of Case of the "Street Children" (Villagrán Morales et al.), supra note 28, para. 222; Case of Heliodoro Portugal, supra note 170, para. 126, and Case of Tristán Donoso, supra note 9, para. 145.

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198. Consequently, the Court will examine the claims relating to: (1) the mandado de segurança, as well as the actions before the (2) criminal, (3) administrative and (4) civil jurisdictions, in light of the standards established in the American Convention, and will decide whether judicial guarantees and the right to judicial protection were violated during these domestic proceedings.

1) Mandado de segurança

199. Regarding the alleged lack of an effective judicial remedy to protect the victims' right to privacy, the Court indicated that the mandado de segurança was the appropriate remedy in that regard (supra para. 36). However, when the victims filed this remedy, the telephone interceptions had already ceased and the conversations had been disseminated (supra paras. 37, 94 and 97). Consequently, the mandado de segurança was unable to produce the desired result in the specific case, not because of a circumstance that could be attributed to the State or to the victims, but because the facts that were alleged to have violated specific rights had ceased. Also, the request for the destruction of the tapes included in the mandado de segurança was not the appropriate mechanism for producing a suspension of the interception and the dissemination that had already taken place, but was aimed at preventing fresh disseminations in the future (supra para. 38), so that its analysis does not form part of the merits of the instant case. The Court also observes that domestic law includes remedies that could result in the destruction of the tapes, which were not used in this case (supra para. 37). Consequently, the Court finds no evidence that there has been a violation of Articles 8 and 25 of the American Convention in this regard.

2) Criminal jurisdiction

200. According to the facts and the evidence in the case file, criminal investigation No. 82,516-5 originated from a complaint against the former Secretary of Security, Judge Khater, Colonel Kretschmer, Major Neves and Sergeant Silva, for the possible perpetration of the offenses of usurpation of public functions, illegal telephone interception, breach of judicial confidentiality, and abuse of authority. This investigation culminated in decision No. 4745 of the Special Organ of the Court of Justice of the state of Paraná deciding to close this proceeding against the said public officials as regards the telephone interception, and to forward the case file to a court of first instance for the examination of the conduct of the former Secretary of Security in relation to the intercepted conversations (supra para. 105).

201. To reach this conclusion, the Court of Justice of the state of Paraná considered that the "mere request for a telephone interception does not constitute […] a criminal offense, so that the conduct of the military police involved does not fall with the definition of an offense." [FN178] Regarding the actions of Judge Khater, it considered that "despite the errors made by the judge, which on first examination constitute function-related errors," [FN179] it had not been proved that she acted with criminal intent, so that she could not be considered to have committed a criminal act. Lastly, in relation to the actions of the former Secretary of Security, it considered that "[his] situation is different because it has been proved that during the collective interview he disseminated the content of the intercepted conversations and even decided to distribute abundant material in this regard." [FN180]

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[FN178] Decision No. 4745 of the Special Organ of the Court of Justice of the state of Paraná of October 6, 2000, supra note 27, folio 102.
[FN179] Decision No. 4745 of the Special Organ of the Court of Justice of the state of Paraná of October 6, 2000, supra note 27, folio 104.
[FN180] Decision No. 4745 of the Special Organ of the Court of Justice of the state of Paraná of October 6, 2000, supra note 27, folio 105.
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202. From the evidence in the case file, the Court finds that the statements of those allegedly responsible were taken during the criminal investigation, together with those of the complainants and of other persons. Based on these statements, and on the legal considerations mentioned above (supra para. 201) the Court of Justice of the state of Paraná considered that the only conduct that could be criminally prosecuted was that of the former Secretary of Security. The Court finds that the body of evidence does not include elements for analyzing a possible violation of Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) thereof, with regard to this first phase of the criminal proceedings.

203. Pursuant to the ruling of the said court, a criminal action was filed against the former Secretary of Security for the alleged dissemination of the intercepted telephone conversations and the said official was sentenced and convicted in first instance by a judgment of the Second Criminal Court of the Comarca of Curitiba. Nevertheless, on appeal, the Second Criminal Chamber of the Court of Justice of the state of Paraná decided to annul the conviction and acquit him (supra para. 106), based on the argument that "the [former Secretary of Security] did not violate the judicial confidentiality of the information obtained by the telephone interception, because the judicial confidentiality of information that had already been broadcast the previous day on a widely-watched news program on a television network, could not be violated." [FN181]

[FN181] Cf. Decision of the Second Criminal Chamber of the Court of Justice of the state of Paraná of October 14, 2004, supra note 27, folio 114.
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204. The Court has indicated that, without judicial authorization, the former Secretary of Security revealed the audio version of the recordings to other people and distributed printed fragments of the conversations, and he may also have disseminated new portions of the recordings (supra paras. 95 and 156). Despite the differences between the testimony of the former Secretary of Security and that of the three journalists summoned to give testimony about what happed during the press conference, particularly with regard to the distribution of transcripts of parts of some of the intercepted conversations and the audio reproduction of the recordings during the said event, no other evidence was sought that might have clarified the facts. In this regard, the respective television channels were not asked to provide the tapes with the news items broadcast on the Journal Nacional on June 7 and 8, 1999, or the recording of the said press conference. Hence, the Court considers that the Second Criminal Chamber of the Court of Justice of the state of Paraná concluded that the former Secretary of Security did not

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disseminate new extracts of the telephone conversations without having this evidence or comparing the material involved in the two disseminations. [FN182]

[FN182] Cf. Case file of Criminal Appeal No. 153.894-1 (file of attachments to the answer to the application, tomes II to IV, attachment 18, Volumes 1 to 3, folios 2289 to 2928), and decision of the Second Criminal Chamber of the Court of Justice of the state of Paraná of October 14, 2004, supra note 27, folios 109 to 114.

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205. The Court also observes that the State did not take other investigative measures that could have determined who was responsible for the first dissemination of the recorded material; namely the delivery of the tapes to the television channel. Despite the findings in the judgment of the Court of Justice of the state of Paraná in relation to the evidence about who was the author of the delivery of the recorded tapes to the press, the principal suspect being a member of the Military Police, no measures were taken to clarify these facts and, if applicable, punish those responsible, despite the provisions of Article 10 of Law No. 9,296/96 and the fact that the offense of the breach of judicial confidentiality should have been investigated by the State ex officio.

206. Based on the above, the Court indicates that the absence of a response by the State is a determining element when assessing whether non-compliance with Articles 8(1) and 25(1) of the American Convention exists, because it is directly related to the principle of effectiveness that must characterize the implementation of such investigations. [FN183] In the instant case, the State authorities did not act with due diligence or in accordance with the provisions of the said Articles concerning the obligation to conduct an investigation (infra para. 214).

[FN183] Cf. García Prieto et al. v. El Salvador. Preliminary objections, merits, reparations and costs. Judgment of November 20, 2007. Series C No. 168, para. 115; Case of Heliodoro Portugal, supra note 170, para. 157, and Case of Ticona Estrada et al., supra note 170, para. 95.

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3) Administrative procedure

207. On November 17, 1999, an administrative proceeding was filed against Judge Khater which culminated in the decision of September 28, 2001, by the Corregedoria-Geral da Justiça (supra para. 110). In this decision, the latter stated that the "matter [of the administrative errors in which Judge Khater may have incurred] had already been decided with the ruling of the Special Organ (No. 4745 – Criminal Investigation N No. 82,516-5 […]) and since there was no other residual error to investigate that would justify continuing the disciplinary procedure, its closure was ordered." [FN184]

[FN184] Decision of the Corregedoria-Geral da Justiça of September 28, 2001, supra note 108, folio 3195.

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208. The Court has indicated that the grounds [for a decision] "are the exteriorization of the reasoned justification that allows a conclusion to be reached." [FN185] In general, the obligation to provide grounds for a decision is a guarantee related to the proper administration of justice, which grants credibility to juridical decisions in a democratic society. [FN186] The same can be said in this case with regard to the administrative decision on the functional responsibility of the judge. The Court has stated previously that the provisions of Article 8(1) apply to the decisions of administrative bodies, which should "comply with these guarantees designed to ensure that the decision is not arbitrary"; [FN187] hence, such decisions must be duly founded.

[FN185] Cf. Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objection, merits, reparations and costs. Judgment of November 21, 2007. Series C No. 170, para. 107; Case of Apitz Barbera et al. ("First Administrative Court"), supra note 136, para. 77, and Case of Tristán Donoso, supra note 9, para. 152.

[FN186] Cf. Case of Apitz Barbera et al. ("First Administrative Court"), supra note 136, para. 77 and Case of Tristán Donoso supra note 9, para. 152.

[FN187] Case of Claude Reyes et al., supra note 175, para. 119.

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209. The Court considers that the Corregedoria-Geral da Justiça should have founded its decision regarding the absence of the functional errors attributed to Judge Khater that are mentioned in the criminal investigation into the interception and recording of the telephone conversations, and not merely indicate that the facts had already been examined by the Court of Justice of the state of Paraná, when it was precisely that court which had indicated that the judge's actions did not constitute a criminal offense, but rather a functional error (supra para. 201). If the administrative organ understood that these errors did not exist, as revealed by the decision, it should have established the reasons why it reached this conclusion and, if applicable, examine why Judge Khater was not responsible, rather than remitting the case to a court whose material competence was distinct and that had determined the need for an administrative investigation. Consequently, the Court finds that the State failed to comply with its obligation to provide grounds for the administrative decision concerning responsibility for the interception and recording of the telephone conversation (infra para. 214).

210. In addition, the Court finds no evidence that any procedures were initiated to examine the administrative responsibility of the Military Police agents and the former Secretary of Security for the interception and dissemination of the telephone conversations.

4) Civil proceedings

211. The Court observes that the filing of a civil action for compensation depends on the initiative of the interested party and there is no evidence in this case that Delfino José Becker, Pedro Alves Cabral and Celso Aghinoni filed an action of this nature. Therefore, the Court finds that the factual presumption required in order to examine a possible violation of judicial guarantees and judicial protection in relation to these three victims in the context of the civil actions does not exist.

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212. Arlei José Escher and Dalton Luciano de Vargas filed civil actions for compensation against the state of Paraná, on May 14, 2004, and on May 15, 2007, respectively; [FN188] in other words, five and seven years after the facts.

[FN188] Cf. Procedural motion referring to the civil action for reparation of damage filed by Dalton Luciano de Vargas, supra note 114, folio 2125; procedural motion referring to the civil action for reparation of damage filed by Arley José Escher, supra note 114, folio 2127.

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213. Civil action No. 48,598/07 filed by Dalton Luciano de Vargas was deemed to be irreceivable in first instance, because "the State's responsibility for the judicial act does not arise solely in cases of judicial error [and] a judge cannot be made responsible for his or her interpretation of the norm or for the weight attributed to the facts; otherwise the functioning of justice would be prejudiced and the independence of the judge compromised […]. Consequently, no damage exists that can be attributed to the [State]." [FN189] Dalton Luciano de Vargas appealed this decision. The appeal was forwarded for examination by the Court of Justice on June 9, 2008. Civil action No. 431/04, filed by Arlei José Escher, was not heard in first instance. Both proceedings are pending a final judgment. Despite this, the Court does not have the respective procedural case files or other elements that could prove the lack of effectiveness of the civil actions and possible violations of the rights embodied in Articles 8 and 25 of the American Convention.

[FN189] Cf. Judgment of the 4th Vara da Fazenda Pública of Curitiba of August 9, 2007, supra note 114, folio 1940.

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214. Based on the above, the Court does not have any elements that prove the existence of a violation of the rights embodied in Articles 8 and 25 of the American Convention as regards the mandado de segurança, and the civil actions examined in this case (supra paras. 199 and 213). However, in relation to the criminal proceedings and administrative procedures mentioned (supra paras. 204, 205 and 209), the Court concludes that the State violated the rights established in Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Arlei José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral and Celso Aghinoni.

X. ARTICLE 28 (FEDERAL CLAUSE) [FN190] IN RELATION TO ARTICLES 1(1) AND 2 OF THE AMERICAN CONVENTION

[FN190] Article 28 of the American Convention establishes:

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1. Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.
2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.
3. Whenever two or more States Parties agree to form a federation or other type of association, they shall take care that the resulting federal or other compact contains the provisions necessary for continuing and rendering effective the standards of this Convention in the new state that is organized.

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215. The Commission indicated that, in light of Article 28 of the Convention, "Brazil should have ensured that the state of Paraná adopt measures to provide those affected by the telephone intervention with a guarantee designed to avoid it, and should have made appropriate remedies available to end the intervention, if due legal process determined that this was in order." This Article "gives rise to the Federal Government's obligation to take pertinent measures to ensure that the competent authorities of the states of the Federation or Union […] are able to adopt provisions to comply with the said treaty." The Commission considered that "Brazil's efforts, either directly or through the state government, have been insufficient to ensure respect for the American Convention." The obligation to adopt measures derived from Article 2 of the Convention is "strengthened and defined by Article 28 thereof," provisions that, interpreted in accordance with Article 1(1) eliminate "the possibility of the State invoking the complexity of its structure in order to elude the obligations […] assumed." The safeguard of the rights established in the Convention "eliminates any reference to the internal distribution of the jurisdictions or organization of the entities that compose a federation." The federal states, as parts of the Federal State, "are also bound by the provisions of the international treaties" ratified by the latter. The Commission concluded that Article 28 of the Convention cannot be interpreted so that the obligation contained in the Federal Clause converts the protection of human rights into a decision that is purely discretional, subject to the will of each State Party. Based on the foregoing, it asked the Court to declare that the State had failed to comply with Article 28 of the American Convention.

216. The representatives submitted similar arguments and stated that, during the proceedings before the Commission, at a working meeting held on October 11, 2007, the State had advised that "it had been unable to establish contact with the Paraná authorities and, therefore, it could not [provide] information on compliance with the Commission's recommendations." They added that, in its brief submitted to the Commission of September 21, 2007, the State had indicated, among other matters, that it "acknowledges that it faces difficulties in dealing with the issue [of precise reparations ordered by the Commission], and had asked the state of Paraná to appoint a specific spokesman in order to make progress in the discussions on compliance with that recommendation. In addition, it was examining other ways of raising the awareness of the government of Paraná in order to discuss possible forms of reparation." In addition, the representatives indicated that the State had affirmed that "it is important to stress the efforts made by the Federal Government to include the federated states in compliance with all the

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recommendations, […] in order to foster their responsibility and commitment to the inter-American system. The effort to convince the states is a permanent one, and occasionally it requires more time to bear fruit, as in this case." Lastly, they claimed that this position of the State was maintained up until just before the public hearing before the Court and they mentioned an episode that occurred during the process to obtain a passport for the victim who testified as a witness before the Court. According to the representatives, this revealed the Federal State's lack of interest in taking positive steps to resolve the problem and the absence of coordination between the State and the federal entities. They concluded that, based on its federal structure, the State "is repeatedly trying to excuse itself from its international responsibility for human rights violations."

217. The State affirmed that Article 28 of the American Convention is merely a rule for interpretation and application of the Convention. Consequently, the Court was unable to examine an alleged violation of that Article. It had alluded to internal communication difficulties merely to explain why all the recommendations in the Commission's Report on Merits had not been complied with immediately. The affirmations were "a demonstration of its good faith and transparency, erroneously considered a violation by the Commission and the representatives of the presumed victims." Nevertheless, the affirmations did not prevent the State from complying partially with the Commission's recommendations, with the collaboration of the authorities of the state of Paraná. Therefore, the State "rejects the use of declarations made during a working meeting as an argument to prove non-compliance with the Federal Clause." It recalled that the said working meeting had not been scheduled and was held at the special request of the Commission. Brazil had been "unable to prepare itself and agreed to attend based simply on the State's good faith; [moreover] it had not expected that this attitude of collaboration would be used maliciously by the petitioners." The State was aware of its commitments to the inter-American system and had never tried to excuse itself from complying with the Commission's recommendations.

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218. As already mentioned (supra para. **), the Inter-American Court has competence to interpret and apply the provisions of the American Convention, not only those that establish specific rights, but also those that establish obligations of a general nature, such as those arising from Articles 1 and 2 of the treaty, which are regularly interpreted and applied by the Court, as well as other provisions, including the norms of interpretation established in Article 29 of this instrument.

219. Regarding the so-called "Federal Clause" in Article 28 of the American Convention, on previous occasions the Court has referred to the scope of the international human rights obligations of Federal States. Within the framework of its contentious competence, the Court has established clearly that "case law, which has stood unchanged for more than a century, holds that a State cannot plead its federal structure to avoid complying with an international obligation." [FN191] The Court also examined this matter under its advisory competence, establishing that "international provisions that concern the protection of human rights in the American States […] must be respected by the American States Parties to the respective conventions, regardless of whether they have a federal or a unitary structure." [FN192] Thus, the Court considers that States

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Parties must guarantee and ensure respect for all the rights embodied in the American Convention to all persons subject to their jurisdiction, without any limitation or exception based on the said internal structure. The legal system and practices of the entities that form a Federal State Party to the Convention must conform to the American Convention.

[FN191] Cf. Garrido and Baigorria v. Argentina. Reparations and costs. Judgment of August 27, 1998. Series C No. 39, para. 46.
[FN192] Cf. The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 140. The Court has ruled similarly in its decisions on provisional measures: "Brazil is a federal State and […] the Urso Branco Prison is located in one of is federative units; however, this does not excuse the State from complying with its protection obligations. […] The State must organize its internal structure and adopt the measures that are necessary, according to its political and administrative organization, to comply with these provisional measures. […]. Matter of the Urso Branco Prison. Provisional measures with regard to Brazil. Order of the Inter-American Court of Human Rights of May 2, 2008, fourteenth considering paragraph.
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220. The Court finds that the claim concerning a possible failure to respect the obligations arising from Article 28 of the Convention should refer to a fact that has sufficient substance to be considered true non-compliance. In this case, the mere mention by the State of communication difficulties with a component entity of the Federal State during an unscheduled working meeting and in a brief does not, of itself, signify or entail non-compliance with the provision. The Court notes that, prior to the proceedings before it, the State had not invoked its federal structure to avoid complying with an international obligation. As indicated by the State, and not disproved by the Commission or the representatives, these statements constituted an explanation about progress in implementing the recommendations in the Commission's Report on Merits. This is the meaning revealed even by the transcripts that the representatives made of the State's affirmations. [FN193] Based on the above, the Court does not find that the State has failed to comply with the obligations arising from Article 28 of the American Convention, in relation to Articles 1 and 2 thereof.

[FN193] Cf. Final written arguments of the representatives (merits file, tome IV, folios 1767 and 1768).

XI. REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION) [FN194]

[FN194] Article 63(1) of the Convention stipulates:
If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure

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or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

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221. It is a principle of international law that any violation of an international obligation which results in harm entails the obligation to make adequate reparation. [FN195] All aspects of this obligation to make reparation are regulated by international law. [FN196] The Court has based its decisions on Article 63(1) of the American Convention.

[FN195] Cf. Case of Velásquez Rodríguez, supra note 54, para. 25; Case of Perozo et al., supra note 18, para. 404, and Case of Kawas Fernández, supra note 35, para. 156.
[FN196] Cf. Aloeboetoe et al. v. Suriname. Merits. Judgment of December 4, 1991. Series C No. 11, para. 44; Case of Ríos et al., supra note 18, para. 395, and Case of Perozo et al., supra note 18, para. 404.

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222. Pursuant to the findings on the merits and the violations of the Convention declared in the corresponding chapters, as well as in light of the criteria established in the Court's case law concerning the nature and scope of the obligation to make reparation, [FN197] the Court will proceed to examine the claims submitted by the Commission and by the representatives, and also the corresponding arguments of the State, so as to order measures tending to repair the said violations.

[FN197] Cf. Case of Velásquez Rodríguez, supra note 54, paras. 25 a 27; Case of Perozo et al., supra note 18, para. 406, and Case of Kawas Fernández, supra note 35, para. 157.

A) Injured party

223. The Court reiterates that, in the terms of Article 63(1) of the Convention, the injured party is considered to be the person who has been declared a victim of the violation of any right embodied therein. In this regard, the Court rejected the request to expand the number of presumed victims made by the representatives, because they were not mentioned in the Commission's application brief (supra para. 82). Regarding Eduardo Aghinoni, the Court considers that he did not suffer a violation of his rights based on facts that occurred after he was deceased (supra para. 83). When examining the merits of the case, the Court found that the State had violated the human rights of Arlei José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral and Celso Aghinoni (supra paras. 146, 164, 180 and 214), and therefore considers them "injured parties" and beneficiaries of the reparations ordered below.

B) Compensation

i) Pecuniary damage

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224. In its case law, the Court has developed the concept of pecuniary damage and the hypotheses in which it should be compensated. [FN198]

[FN198] The Court has established that pecuniary damage supposes "the loss or detriment to the income of the victims, the expenses incurred as a result of the facts and the consequences of a pecuniary nature that have a causal relationship to the facts of the case." Bámaca Velásquez v. Guatemala. Reparations and costs. Judgment of February 22, 2002. Series C No. 91, para. 43; Case of Perozo et al., supra note 18, para. 405, and Case of Kawas Fernández, supra note 35, para. 162.

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225. The Commission set out the general principles in this regard and emphasized that "the victims incurred important financial expenditure in order to obtain justice at the domestic level" and to overcome the consequences that the State's actions caused them. Moreover, it requested that, without detriment to the claims submitted by the representatives, the Court should establish, based on the equity principle, the amount of the compensation for loss of earnings and for indirect damage.

226. In their brief with final arguments, the representatives considered that, for almost five years, the victims had been subjected to harassment and were prevented from freely exercising their professional activities as small rural producers and members of the cooperatives. Bearing in mind that the main activity of COANA and ADECON was growing and marketing rice, the representatives indicated that the average price of a 60-kilogram bag of rice in southern Brazil was the equivalent of US$25.00 (twenty-five United States dollars), and that the annual production of a small-scale farmer was 2,100 bags of rice. Consequently, the representatives calculated that the gross annual income of a small-scale farmer, such as the victims in this case, equaled US$52,500.00 (fifty-two thousand five hundred United States dollars). Accordingly, each victim should receive US$262,500.00 (two hundred and sixty-two thousand five hundred United States dollars) as compensation for pecuniary damage. The representatives stated that, if the Court recognized as victims only those persons indicated by the Commission in its application, it should order the creation of a fund to be administered by COANA and ADECON over and above the individual pecuniary reparation for each victim, "owing to the decidedly collective nature of the violations and harassment endured."

227. The State claimed that "neither the Commission nor the representatives of the victims had proved that pecuniary damage had occurred, either in the form of loss of earnings or indirect damage […]"; nor had they "presented proof of the harm, or vouchers for the expenses incurred." In relation to the alleged loss of earnings resulting from potential violations of Articles 8 and 25 of the Convention, it indicated that "possible flaws in the administration of justice would not cause a decrease in the alleged victims' income; nor could the alleged failure to comply with the obligations established in Articles 1(1), 2 and 28 [of the Convention] result in loss of earnings, because they are general obligations"; and, regarding the alleged violation of Articles 11 and 16 of this instrument, it argued that "possible defects when granting the [judicial] authorization [to intercept and record the telephone conversations] did not cause a decrease in the income of the alleged victims." Lastly, in relation to indirect damage, it maintained that criminal

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actions are initiated by the Prosecutor General's Office and, accordingly, investigations and criminal proceedings are paid for by the State. Regarding the civil actions filed by some of the victims, it indicated that they benefited from the fact that justice is free. Consequently, it considered that, whatever the arguments, there would be no need for reparations for indirect damage.

228. The Court observes that, despite the claims of the representatives and the testimony of one of the victims that the dissemination of the contents of the recorded conversations caused serious financial damage to COANA and ADECON and led to a decrease in the victims' income, no documentary or other evidence was provided to authenticate the alleged pecuniary damage. Furthermore, in their testimony before this Court, other victims and a witness were not consistent in indicating that the associations had suffered financial harm such as that mentioned (supra para 179). Therefore, the Court will not establish compensation for pecuniary damage based on the alleged loss of earnings from the victims' employment, owing to the lack of elements proving that the said losses really occurred and what they amounted to.

ii) Non-pecuniary damage

229. The Court has developed the concept of non-pecuniary damage and the circumstances in which it should be compensated. [FN199]

[FN199] The Court has established that non-pecuniary damage "can include both the suffering and hardship caused to the direct victim and to his next of kin, the harm to values that are very significant for the individual, as well as the changes of a non-pecuniary nature in the living conditions of the victim or his family." Case of the "Street Children" (Villagrán Morales et al., supra note 28, para. 84; Case of Perozo et al., supra note 18, para. 405, and Case of Kawas Fernández, supra note 35, para. 179.

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230. The Commission stated that the victims "suffered mental anguish, suffering, uncertainty and changes in their life, owing to the undue interference in their private life and correspondence; the arbitrary dissemination of their conversations and communications, and denial of justice for the events of which they were victims, even though the authors were fully identified, together with the personal and professional consequences of these facts." It asked the Court to establish the amount of the compensation for non-pecuniary damage based on the equity principle. Despite the foregoing, it indicated that the representatives were in a better position to quantify the victims' claims concerning the amount of the compensation.

231. In their pleadings and motions brief, the representatives indicated that non-pecuniary damage arose from the interference in the private life of the victims and the subsequent dissemination of the material obtain by the illegal telephone interceptions; these were State acts that sought "to criminalize the social movement […] attempting to attribute [the authorship] of illegal acts to its members." Consequently, these acts caused the victims anxiety and fear and gave rise to an environment of harassment against the social sectors to which they belonged. Lastly, they added that the victims also suffered owing to the lack of a proper investigation into

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the alleged harassment. In their final arguments brief, the representatives indicated that the sum of US$50,000.00 (fifty thousand United States dollars) corresponded to each victim as compensation for non-pecuniary damage.

232. The State affirmed that, despite the alleged non-pecuniary damage and mental harm to the victims, no criteria or elements had been produced that could be examined in order to prove this. It considered that symbolic reparation would constitute a form of non-pecuniary satisfaction, without the need to make a monetary payment. However, if the Court's opinion differed, the State indicated that, when determining the compensation for non-pecuniary damage, it should bear in mind that the victims were not even mentioned in the publication of the recorded conversations in the press.

233. This Court has established repeatedly that a judgment declaring the existence of a violation constitutes, per se, a form of reparation. [FN200] Nevertheless, considering the circumstances of the case, and the consequences that the violations committed may have caused to the victims, the Court finds it pertinent to determine the payment of compensation for non-pecuniary damage established on the basis of the equity principle.

[FN200] Cf. Neira Alegría et al. v. Peru. Reparations and costs. Judgment of September 19, 1996. Series C No. 29, para. 57; Case of Perozo et al., supra note 18, para. 413, and Case of Kawas Fernández, supra note 35, para. 184.

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234. In order to establish the compensation for non-pecuniary damage, the Court considers that the right to privacy and honor of Arlei José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral and Celso Aghinoni was violated owing to the interception, recording and dissemination of the telephone conversations (supra paras. 146 and 164). In addition, these individuals were victims of the violation of their rights to freedom of association, to judicial guarantees and to judicial protection (supra paras. 180 and 214)

235. Based on the above, the Court finds it pertinent to determine the payment of the sum of US$20,000.00 (twenty thousand United States dollars) to each victim as compensation for non-pecuniary damage. The State must pay this amount directly to the beneficiaries, within one year of notification of this judgment.

C) Measures of satisfaction and guarantees of non-repetition

236. In this section, the Court will decide the measures of satisfaction that seek to repair the non-pecuniary damage, and that are not of a pecuniary nature, and will order measures with public scope and repercussions.

i) Obligation to publish the judgment

237. The Commission asked the Court to order the State to publish this judgment in a national newspaper as a measure of satisfaction for the victims.

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238. Neither the representatives nor the State submitted specific arguments in this regard.

239. As the Court has ordered in other cases, [FN201] the State must publish once in the Official Gazette and in another newspaper with widespread circulation in the state of Paraná, the cover page, Chapters I, VI to XI, without the footnotes, and the operative paragraphs of this judgment as a measure of satisfaction. In addition, as the Court has ordered on previous occasions, [FN202] this judgment must be published in its entirety on an official web site of the Federal State and of the state of Paraná. The State must make these publications in the newspapers and on the Internet within six and two months, respectively, of notification of this judgment.

[FN201] Cf. Barrios Altos v. Peru. Reparations and costs. Judgment of November 30, 2001. Series C No. 87, Operative paragraph 5(d); Case of Perozo et al., supra note 18, para. 415, and Case of Kawas Fernández, supra note 35, para. 199.
[FN202] Cf. Case of the Serrano Cruz Sisters, supra note 60, para. 195, and Palamara Iribarne v. Chile. Merits, reparations and costs. Judgment of November 22, 2005. Series C No. 135, para. 252.

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ii) Public acknowledgement of international responsibility

240. The Commission asked the Court to order to State to publicly acknowledge its international responsibility for the violation of the victim's human rights in this case.

241. The representatives, in their pleadings and motions brief, asked that an act of apology and redress should be organized in the same media and at the same times as those at which the reports on the dissemination of the intercepted conversations were presented.

242. The State did not submit additional arguments in this regard.

243. The Court has considered the characteristics of this case and notes that, usually although not exclusively, it orders a public act to acknowledge international responsibility as a measure of reparation for violations of the right to life and to personal integrity and freedom. [FN203] The Court does not find that this measure is necessary to repair the violations found in this case, because the judgment and its publication constitute, per se, important measures of reparation.

[FN203] Cf. Case of Castañeda Gutman, supra note *, para. 239.

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iii) Obligation to investigate, prosecute and, if applicable, punish those responsible for the human rights violations

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244. The Commission asked the Court to order the State to carry out "a complete, impartial and effective investigation into the facts in order to establish the civil and administrative responsibilities for the telephone interventions and recordings […] and their subsequent dissemination." It stated that "comprehensive reparation requires that the State investigate the facts with due diligence, in order to prosecute and punish those responsible"; that "[t]he victims have full access and capacity to act at all stages and in all instances of these investigations, in accordance with domestic law and the provisions of the American Convention," and that "the State ensure effective compliance with the decision adopted by the domestic courts, in compliance with this obligation [and that the] result of the proceedings be published so that Brazilian society can know the truth." In addition, it considered that "while the State has not complied with its obligation to investigate, charge and punish, […] it incurs in a continuing violation of the right established in Article 25 and of the obligation embodied in Article 1(1) of the Convention." It maintained that, in the instant case, this violation would only cease with adequate reparation.

245. The representatives endorsed the Commission's arguments and added that, despite the fact that sufficient time had elapsed to constitute a statute of limitations in the administrative sphere, the decision that acquitted Judge Khater of her functional responsibility constituted "fraudulent res judicata" and, according to the Court's case law, [FN204] in such cases the ruling could be reviewed based on a decision by the Court.

[FN204] In this regard, the representatives mentioned Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs. Judgment of September 26, 2006. Series C No. 154, para. 154.

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246. The State affirmed that, in addition to the administrative proceeding filed before the Corregedoria-Geral de Justiça in order to determine the responsibility of Judge Khater, the Corregedoria of the National Council of Justice initiated a new proceeding with the same purpose, so that her functional responsibility has been extensively analyzed and there was no omission in the State's actions. In addition, under Brazilian law, the possibility of ordering sanctions in administrative matters prescribes after five years, and this period has expired. Regarding the civil sphere, the State argued that two of the victims filed actions for compensation and that one of these actions had already been decided in first instance.

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

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iv) Training for officials of the Judiciary and the Police

248. The Commission asked the Court to order the State to adopt "measures to provide training to police and justice officials on the limits to their functions and investigations, in compliance with the obligation to respect the right to privacy."

249. The representatives did not submit any additional claims regarding this measure of reparation.

250. The State advised that it had organized several courses on human rights for Administration officials, judges, and members of the police forces, emphasizing the rights to privacy and to freedom of association. It added that the Court of Justice of Paraná, through the School of the Judiciary, had undertaken to include the subject of human rights, emphasizing the issues of freedom of association and the right to privacy, in training courses for judges. Also, the School of Administrators of Justice of the state of Paraná, in collaboration with the University of the State of Paraná, had prepared a compact disc that operated as a virtual course on the topic "Status and protection of fundamental rights," highlighting the right to privacy, honor and reputation in investigation procedures. The virtual course was sent to all the comarcas of the state of Paraná for all administrators of justice. From July 2006 to June 2008, the state of Paraná Intelligence Department, which is now responsible for controlling the interception of telephone communications authorized by the courts, provided training on the topic, even for judges. Lastly, the curricula of the training courses for the military and civil police of the state of Paraná include courses on human rights; the Civil Police Training School offered refresher training in human rights to 920 civil police from 1997 to 1999, and the military police have developed similar initiatives offering 20 hours of classes on human rights and citizenship in training and refresher courses for corporals and sergeants.

251. The Court considers that training is a way of providing public officials with new skills, developing their capabilities, allowing them to specialize in specific new areas, preparing them to occupying different posts and adapting their capacities to improve the way they perform their tasks. [FN205] The Court appreciates the State's effort to offer training courses to the Judiciary and the Civil and Military Police to ensure that these officials respect human rights when performing their functions. However, training, as a continuing education system, should extend over a significant period in order to comply with the said objectives; the State must therefore continue to provide training for police and justice officials.

[FN205] Cf. Claude Reyes et al. v. Chile. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of November 24, 2008, nineteenth considering paragraph.

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v) Revocation of Law 15662/07

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252. The representatives asked the Court to order the State to revoke Law No. 15662/07 granting Judge Khater the title of honorary citizen of the state of Paraná.

253. Neither the Commission nor the State presented additional arguments in this regard.

254. The Court is competent to order a State to annul a domestic law when its terms violate the rights embodied in the Convention, and are thus contrary to Article 2 thereof, but, in the instant case, this was not alleged or proved by the representatives. Consequently, the Court does not admit the request made by the representatives.

d) Costs and Expenses

255. As the Court has indicated on other occasions, costs and expenses are included in the concept of reparations embodied in Article 63(1) of the American Convention. [FN206]

[FN206] Cf. Case of Garrido and Baigorria, supra note 191, para. 79; Case of Ríos et al., supra note 18, para. 407, and Case of Perozo et al., supra note 18, para. 417.

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256. The Inter-American Commission asked the Court to order the State to "pay reasonable and necessary costs and the expenses that are duly authenticated, […] arising from the processing of the instant case in both the domestic sphere and before the inter-American system."

257. In their final arguments brief, the representatives asked the Court to order the State to pay the costs of the domestic and international processing of the case amounting to US$10,000.00 (ten thousand United States dollars) to each victim.

258. The State argued that none of the proceedings in the domestic sphere generated expenditure for the victims because, in the civil sphere, they benefited from free justice and in the criminal sphere, the proceeding did not entail expenses because it was conducted on the State's initiative, independently of the activity of private individuals. In this regard, it asserted that neither the Commission nor the representatives had submitted vouchers for costs and expenses at the opportune procedural moment. The State rejected the need to make a payment for costs and expenses.

259. The Court has indicated that "the claims of the victims or their representatives for costs and expenses and the evidence to support them must be submitted to the Court at the first procedural moment granted them; that is, in the pleadings and motions brief, without detriment to these claims being updated later, in keeping with new costs and expenses incurred owing to the proceedings before the Court." [FN207] In their pleadings and motions brief, the representatives of the victims did not provide documentation authenticating such expenditure. Moreover, the Court observes that the representatives of the victims did not refute the State's arguments that they had benefitted from free justice in the domestic sphere. Furthermore, from the evidence in the case file it is clear that the victims who filed civil actions obtained this

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benefit. [FN208] Regarding the criminal and administrative proceedings, the Court notes that they were filed by State organs. According to the representatives, they did not incur expenditure for legal assistance in the international sphere either, because they acted pro bono. However, the Court also notes that the victims' representatives incurred expenses to attend the public hearing of the case held in Mexico City, D.F. Based on the above, the Courts decides, in equity, that the State must deliver the sum of US$10,000.00 (ten thousand United States dollars) to the victims, for costs and expenses. This sum includes any future expenses that the victims may incur during the monitoring of compliance with this judgment and should be delivered and distributed in equal parts within one year of the notification of this judgment. The victims shall deliver, as applicable, the amount they consider appropriate to their representatives in the domestic sphere and in the proceedings before the inter-American system.

[FN207] Cf. Case of Chaparro Álvarez and Lapo Íñiguez, supra note 185, para. 275; Case of Ticona Estrada, supra note 170, para. 180, and Case of Tristán Donoso, supra note 9, para. 215.
[FN208] Cf. Procedural motion relating to the civil action for reparation of damage filed by Arlei José Escher, supra note 114, folio 2127 and judgment of the 4ª Vara da Fazenda Pública of Curitiba of August 9, 2007, supra note 114, folio 1933.

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e) Means of complying with the payments ordered

260. The payment of the compensation for non-pecuniary damage and the reimbursement of costs and expenses established in this judgment shall be made directly to the victims, within one year of notification of this judgment, taking into consideration the provisions of paragraphs 235 and 259 hereof. Should any of the victims have died before the payment of the respective amounts, these shall be delivered to their successors, in accordance with the applicable domestic law.

261. The State shall comply with its pecuniary obligation by payment in United States dollars or the equivalent amount in national currency, using the rate in force on the New York market the day before the payment to calculate the exchange rate.

262. If, for causes that can be attributed to the victims, it is not possible to pay the amounts decided within the specified time, the State shall deposit the said amounts in an account or a certificate of deposit in favor of the victims in a solvent Brazilian financial institution in the most favorable financial conditions allowed by banking practice and law. If, after 10 years, the sum allocated has not been claimed, the amount shall be returned to the State with the accrued interest.

263. The amounts assigned in this judgment for non-pecuniary damage and reimbursement of costs and expenses shall be delivered to the victims in full, as established in this judgment, and may not be affected or conditioned by any current or future taxes or charges.

264. If the State falls in arrears, it shall pay interest on the amount owed corresponding to bank interest on arrears in Brazil.

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265. In keeping with its consistent practice, the Court reserves the authority, inherent in its attributes and derived also from Article 65 of the American Convention, to monitor compliance with all aspects of this judgment. The case will be closed when the State has fully complied with the judgment. Within one year of notification of this judgment, the State shall submit a report to the Court on the measures adopted to comply with it.

XII. OPERATIVE PARAGRAPHS

Therefore,

THE COURT

DECIDES

Unanimously,

1. To reject the preliminary objections filed by the State, in the terms of paragraphs 11 to 53 of this judgment.

DECLARES,

unanimously that:

2. The State violated the right to privacy and the right to honor and reputation recognized in Article 11 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Arlei José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral and Celso Aghinoni, owing to the interception, recording and dissemination of their telephone conversations, in the terms of paragraphs 125 to 146 and 150 to 164 of this judgment.
3. The State violated the right to freedom of association recognized in Article 16 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Arlei José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral and Celso Aghinoni, owing to the infringement of the exercise of this right, in the terms of paragraphs 169 to 180 of this judgment.
4. The Court does not possess any evidence to prove the existence of a violation of the rights embodied in Articles 8 and 25 of the American Convention in relation to the mandado de segurança and to the civil actions examined in this case, in the terms paragraphs 199 and 211 to 213 of this judgment. However, the State violated the rights to judicial guarantees and judicial protection recognized in Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Arlei José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral and Celso Aghinoni, in relation to the criminal action filed against the former Secretary of Security, in the terms of paragraphs 200 to 204 of this judgment; the failure to investigate those responsible for the first dissemination of the telephone conversations, in the terms of paragraph 205 of this judgment, and the lack of grounds for the decision in the administrative court in relation to the functional conduct of the judge who authorized the telephone interception, in the terms of paragraphs 207 to 209 of this judgment.

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5. The State did not fail to comply with the Federal Clause established in Article 28 of the American Convention, in relation to Articles 1(1) and 2 thereof, to the detriment of Arlei José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral and Celso Aghinoni, in the terms of paragraphs 218 to 220 of this judgment.

AND DECIDES,

unanimously that:

6. This judgment constitutes per se a form of reparation.
7. The State must pay Arlei José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral and Celso Aghinoni, the amount established in paragraph 235 of this judgment for non-pecuniary damage, within one year of notification hereof and as stipulated in paragraphs 260 to 264 of this judgment.
8. The State must publish once in the official gazette, in another national newspaper with widespread circulation, and in a newspaper with widespread circulation in the state de Paraná, the cover page, Chapters I, VI to XI, without the corresponding footnotes, and the operative paragraphs of this judgment, and must publish the entire text of this judgment on an official web page of the Federal State and of the state of Paraná. The publications in the newspapers and on the Internet must be made within six and twelve months, respectively, of notification of this judgment, in the terms of paragraph 239 hereof.
9. The State must investigate the facts that gave rise to the violations in the instant case, in the terms of paragraph 247 of this judgment.
10. The State must pay the amount established in paragraph 259 of this judgment in reimbursement of costs and expenses, within one year of notification hereof and as stipulated in paragraphs 260 to 264 of this judgment.
11. The Court will monitor full compliance with this judgment, in exercise of its attributes and in fulfillment of its obligations under the American Convention. It will consider the instant case concluded when the State has complied fully with all aspects of it. The State must provide the Court with a report on the measures adopted to comply with this judgment within one year of notification hereof.

Judges Sergio García Ramírez and Roberto de Figueiredo Caldas advised the Court of their concurring and separate opinions, which accompany this judgment.

Done at San José, Costa Rica, on July 6, 2009, in the Spanish, Portuguese and English languages, the Spanish text being authentic.

Cecilia Medina Quiroga
President

Diego García-Sayán
Sergio García Ramírez
Manuel Ventura Robles
Leonardo A. Franco
Margarette May Macaulay

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Rhadys Abreu Blondet

Roberto de Figueiredo Caldas
Judge Ad hoc

Pablo Saavedra Alessandri
Secretary

So ordered,

Cecilia Medina Quiroga
President

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ IN RELATION TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE CASE OF ESCHER ET AL. V. BRAZIL OF JULY 6, 2009.

1. Issues that are new – for this jurisdiction – are being submitted to the Court so that they can incorporate the wide-ranging list of topics on which it works to the benefit of the rights and freedoms of the inhabitants of the Americas; a constantly evolving case law. Evidently, many questions that are of interest to the situation of the contemporary individual are still pending review and have not yet been submitted to the Court's consideration in either advisory opinions or litigation. However, new issues that open up spaces for reflection and protection have been added with growing frequency to the traditional offenses that were the starting point for this case law, including some issues that the Inter-American Court examines in the judgment in Escher et al. v. Brazil, to which I am adding this opinion.

2. Together with life, integrity and freedom, the wide-ranging domain of privacy is among the most important rights. This is the region of our existence that the legal human rights system – both the domestic system, described in constitutional provisions, and the international system, consigned in international human rights law – protects from undue interference. This is a space controlled by the individual alone, in which the individual ensures – or trusts – his development, shapes his destiny, cultivates his freedoms. It constitutes a very personal "reserved area" that is only entered by its owner, who preserves and regulates it. This sphere – according to the Court – "is characterized by being exempt from and immune to abusive or arbitrary invasions or aggression by third parties or the public authorities (paragraph 113 of the judgment).

3. In this intimacy – area and shield of protection – many issues of life appear, are analyzed and resolved; protected – always relatively – from outside circumstances and protected from the will of others. In brief, it is the reserved space in which the reflections and decisions, thoughts and feelings, experiences and hopes that will, in due course, influence the conduct and fate of the individual, take refuge. It is where the essential individual resides, alone and free: in front of the mirror in which he looks at himself, removed from examination by others.

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4. Evidently, the invasion of the reserved zone confers an immense power on the invader and profoundly affects the autonomy of the person who suffers it. Clearly, it is of interest to preserve and develop all the rights of the increasing status of the individual, but none of them will be sufficient and robust enough, if they are not rooted in the intimacy of the owner of the rights. Hence, the importance of preserving this profound region of the personality with effective guarantees, and hence also the growing temptation, cultivated by authoritarianisms of different types – open or veiled despotism – to breach the frontiers of intimacy, take over the reserved zone, submit it to scrutiny and, based on the knowledge and the invasion, take charge of the fate of the individual. This is the foremost, the most effective and expeditious way to rule the thoughts and the will. The power to know, to intervene, to influence, to decide, without the individual authorizing, wanting or even knowing it, is advancing on the right to be "left in peace" – or left alone, free to ruminate, protected from obligations and demands. Often, the invader works clandestinely.

5. Scientific and technological progress – to which the judgment in the Case of Escher et al. refers – provides instruments of protection, but can also make the individual vulnerable, inasmuch as it provides means or tools for invasion that, a few years ago, we could only surmise. If, in other times, "possession" by fantastic powers was feared, today, a "modern" version is practiced which has nothing to do with fantasy; by ever more complex, penetrating and invasive means. This desecrates the "inviolable sanctuary" of the individual, dissolves intimacy, opens up the reserved zone to the eyes and ears of the world; in brief, influences the entire course of existence. The individual, who is exposed, weakened, by the undue visibility, robbed of autonomy, is placed at the mercy of the observer. In sum, the all-seeing mechanism is updated – "big brother is watching you" – the probing, all-embracing look, respects no frontiers. The observers look, listen, inquire, invade and, finally, dictate. If free rein were to be given to the interferences associated with the development of technology, it would be a "fatality" derived from progress, not a benefit subject to regulation and control.

6. We reject the furtiveness with which the tyrant hides his intolerable arbitrariness. We condemn the secrecy that shrouds the symbols of authoritarianism. We censure opacity in the exercise of public authority. We demand – and we are achieving, step by step, based on the argument of human rights – transparency in the acts of Government and in the conduct of those who govern us. All well and good; but, beside this legitimate clarity another type of surveillance lies in wait and advances: this one does not throw light on the conduct of those who govern, but invades the intimacy of those who are governed, through the actions of the former who, in this way, extend their arbitrary powers and annul or dissuade, without violence or upheaval, the exercise of the freedoms.

7. Hence, there is a right to privacy, to intimacy, to the inviolability or integrity of that reserved zone– the deepest and the most secret - in an individual's existence. It is not merely a matter of protecting the good reputation, the prestige, the honor, the social acceptability of the individual. The right to intimacy – privacy, in the best term – exists with absolute independence of fame, or the social or public position of the individual who has and enjoys it. It is a right in itself, above and beyond the harm caused by the intruder, deliberately or not, to the enjoyment and exercise of other rights, affected by unlawful surveillance or undue revelations.

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8. Obviously, these invasions can generate harmful consequences or even involve serious danger to the enjoyment and exercise of other rights. In this case, the harm would be two-fold, as can be seen in the Case of Escher et al., which underscores the violation of the right to intimacy, on the one hand, and its consequence – also a violation – on the right to free and lawful association. Moreover, the unlawful dissemination of the contents of communications increases the violation, extends the damage to private life, and annuls intimacy.

9. It has been rightly said that individual rights are not absolute. They can be restricted, limited, their exercise conditioned in function of higher-ranking rights and requirements: for example, the rights of others or the common good. However, this frontier of the individual rights only cedes under the justifying and regulating control of certain principles, precisely those that the Inter-American Court has explored, with particular care, when they refer to legitimate restrictions to the right to freedom, for example, through precautionary measures: legality, necessity (and even, inevitability; the means used must be the only one possible), appropriateness, proportionality, timeliness. No restriction is admissible when these principles are not respected. It must be shown that the public authority has considered the application of each of them in the specific case and that the restriction has passed this test of legitimacy.

10. In the judgment in the Case of Escher et al., the Inter-American Court examined the issue of telephone interceptions on the basis – real or apparent – of a criminal investigation. Obviously, the protection of privacy is not limited to this matter. It goes much further than the illegal listening to private conversations by third parties. But this listening and the subsequent dissemination are the specific issue of the Case of Escher et al. The Court in no way criticizes the public authority's interference in the space of individual liberty, the intimate and reserved zone, normally removed from unknown invasions or inferences, unauthorized and unwanted by the owner. It accepts the possibility of carrying out certain interventions, as it accepted, for a long time, the invasion of the home – the "inviolable sanctuary" – correspondence, and movement.

11. Nevertheless, the acceptance of this interference is conditioned by strict requirements that mark the frontier – in a democratic society – between the legitimate exercise of authority and the intolerable abuse of power. Those principles enter into play that legitimate the conduct of the authority, and their inobservance entails a violation of rights and involves the responsibility of those who fail to observe them. Evidently, the requirements that regulate the intervention in an individual's privacy restrict the revelation of the findings derived from this intervention. Basically, intervention and revelation are the two sides of a single coin: invasion of private life, lawful or unlawful. The legitimate purpose that could justify the interception – or the interference in spaces of private life – ceases in the face of the unlawful dissemination of information that should have been known only by the authorities and safeguarded by them.

12. It is important that these issues have been brought to the fore by the ruling of a human rights court because, nowadays, interferences with privacy are increasing, as the ways to practice them multiply. And these ways do not always respect the principles set out above, in accordance with strict procedures and under the control of the authorities who should ensure protection of the rights – especially the judicial authorities – all based on the discourse that compares, in a false antithesis, public safety and fundamental rights. This inadmissible and dangerous rhetoric –

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which must be denounced constantly – proposes the decrease of right on the pretext of safety, or threatens the reduction of safety because of rights. On several occasions, I have challenged – and I do so again – this false dilemma, which jeopardizes the rule of law and the fundamental rights, and entails harm or danger to all.

13. To defend their excesses, the "classic" tyrants – allow me to use this expression – who oppressed many countries in our hemisphere, invoked reasons of national security, sovereignty, public peace. Based on this reasoning, they wrote their chapter in history. There was clearly an ideological component to their reasoning; there were powerful interests operating behind them. Other, more recent, forms of authoritarianism, invoke public safety and the fight against crime to impose restrictions on rights and to justify the infringement of freedom. With a biased discourse, they attribute the lack of security to the constitutional guarantees and, in brief, to the rule of law, to democracy and freedom.

14. In this regard, we should examine and assess any conduct that impairs the right to privacy, not to leave society unprotected – which would be absurd – but as a guarantee for its members. We have already indicated that there are channels, principles and conditions for restricting rights. Outside those channels, in the margin of those principles, without respecting those conditions, only authoritarianism prospers. We have not left the Orwellian "1984" behind us, even though the calendar may say so. It could be before us.

Sergio García Ramírez
Judge

Pablo Saavedra Alessandri
Secretary

SEPARATE OPINION OF JUDGE AD HOC ROBERTO DE FIGUEIREDO CALDAS IN RELATION TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE CASE OF ESCHER ET AL. V. BRAZIL OF JULY 6, 2009

1. I submit this separate opinion, which concurs on the whole with the Court's conclusions, for two main reasons. The first is to place on record my understanding of some specific issues examined by the judgment with which I agree. The second is to express a contrary – dissenting – opinion regarding the Court's conclusion that the brief with pleadings, motions and evidence of the victims' representatives was untimely, even though it did not apply the effects deriving from this declaration, but rather received the brief as timely, and as entirely useful.

2. Regarding the legal principles debated, I fully agree with the terms of the judgment, which was drawn up in a collegial manner.

I. Timeliness – a time limit that expires on a non-working day is extended to the next working day

3. Owing to a delay of one day, the Court considered that the presentation of the brief with pleadings, motions and evidence by the victims' representatives on April 7, 2008 (Monday), was

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untimely. This was because the Secretariat of the Court established that the original brief with the application and its attachments had been received by the representative of Justiça Global on February 6, 2008, while the two-month period established in Article 36 of the Court's Rules of Procedure [FN1] expired on April 6, 2008 (Sunday).

[FN1] Article 36. Written Brief Containing Pleadings, Motions and Evidence
1. When the application has been notified to the alleged victim, his next of kin or his duly accredited representatives, they shall have a period of 2 months, which may not be extended, to present autonomously to the Court their pleadings, motions and evidence.

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4. The Court's Rules of Procedure are silent as regards the way in which time limits should be calculated.

5. Since there is also no provision for calculating working and non-working days in its Rules of Procedure – and because Article 2(21) of the Rules of Procedure defines "month" as "calendar month" [FN2] – the Court concluded that the presentation of the brief with pleadings, motions and evidence was untimely. Nevertheless, the Court admitted it, based on generosity, and this could lead to questions, given the clarity of the provision drawn up by the Court itself, which states that this time limit cannot be extended. However, the brief was admitted in light of the fact that the Court's proceedings are not subject to the same judicial formalities as the domestic proceedings of the countries, and also because the Court considered that the delay of only one day was reasonable, and had not affected either the legal certainty or the procedural balance of the parties.

[FN2] Article 2. Definitions
For the purposes of these Rules of Procedure: (...) 21. the term "month" shall be understood to be a calendar month.

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6. To the contrary, I consider that the brief was entirely timely.

7. To clarify: even though most members of the Court have understood that the brief was untimely, it accepted it as timely for all legal purposes, which, ultimately, converged with my understanding.

8. However, I feel the need to record my reasoning so that the issue can be debated in a future case and that case law will not remain silent in this regard, concessa venia, since this would be the case if the presentation of the brief with pleadings, motions and evidence of the representatives de las victims, or of any parties in a similar situation, should be considered timely.

9. A first aspect to consider is that, usually, the calculation of time limits in days should begin (dies a quo) on the subsequent working day. In this case, since the time limit was

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established on the basis of months, this rule does not apply. Time limits in months or years are calculated according to the calendar unit corresponding to the calendar day on which the period commenced, as agreed to simplify the calculation for the parties and for the courts. For example, if the time limit starts on the 5th, it will expire on the 5th day of the respective month or month-year.

10. However, from this other perspective and a fortiori, with regard to the day of expiry (dies ad quem) of the procedural time limit, the general rule must be to extend it to the following working day in cases when the date of expiry occurs on a non-working day (that is, a holiday or weekend). This, irrespective of the calculation of the time limit in days, months or years.

11. Precisely in the case of dates of expiry where the traditional calculation did not allow an extension – in other words, if the period expired on a non-working day – it was not extended until the following working day, but had to be brought forward to the previous working day; however, the actual tendency is to extend the period to the first working day. This is in the understanding that procedure should merely be an instrument, and not an end in itself, and that it should be simple. Also, it should be noted that the instant case does not refer to a lapsed period, or even to prescription, but to a simple procedural time limit in which the discussion of non-extension owing to a lapsed period does not exist. Therefore, it should not exist in these proceedings either.

12. If the Rules of Procedure are omissive in this regard – which is intentional, a truly eloquent silence, to avoid redundancy and innovation in the domestic law of the jurisdictional State – national laws are not. Even though the Rules of Procedure are silent in this respect, since they do not include a provision with regard to the day of expiry that can be used, we should not adopt the restrictive interpretation of expiry over a weekend, when the Court is not even functioning. Moreover, requiring the period to be brought forward to the previous working day is also an undesirable and unacceptable restriction for the comprehensive right to defense of the parties.

13. Logically, the expiry of the time limit can only occur on a working day, when the parties can use any of the formally established means to submit briefs. Article 26 of the Rules of Procedure provides for them expressly. Clearly some of the means of presenting briefs could not be used during weekends and holidays, simply because there would be no Court official to receive them. These are precisely the traditional forms of presentation, which are in person, by mail or courier. If the briefs reach their destination and cannot be delivered, it is reasonable to wait until the following day, when the Court officials and judges can act on them, and no delay has occurred.

14. Although at first glance, it could appear that the emphatic nature of the words “which may not be extended” expressly included in Article 36 – transcribed above in a footnote – refer to the expiry (dies ad quem) of the time limit, constituting a real obstacle to the extension when it falls on a holiday, in truth this interpretation is unsustainable because it is not coherent with the continental or even the universal procedural system.

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15. The words “which may not be extended” mean that the time limit should not be extended by an agreement between the parties or the generosity of the Court (except in extremely exceptional cases that need not be discussed) since, according to Chiovenda’s classification, [FN3] it is a “strictly peremptory” time limit [FN4] that results in absolute preclusion and does not admit extension.

[FN3] CHIOVENDA, Giuseppe. Instituciones de derecho procesal civil. Translated by Paolo Capitanio, Campinas (Brazil): Bookseller, 1998. 3v., pp. 12/14.
[FN4] Chiovenda distinguishes three types of time limits: (a) strictly peremptory; (b) extendible, and (c) comminatory or simple.

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16. Time limits, such as the one under consideration here, are only peremptory and non-extendible to act, to answer and to have access into the procedural relationship as a party, correctly established in the Court’s Rules of Procedure, Article 36 (autonomous access of the victims or their representatives) and Article 38 (answer by the State).

17. The calculation of the time limit is another issue and has rules that have been accepted universally for centuries. It is subject to rules that go back to the origins of the Latin legal aphorisms (brocardos) (at least to classical Roman law, which began in the first century of the Christian era). Subsequently, in the eleventh century during Medieval times, these aphorisms were compiled, [FN5] and have survived the passage of time and remain strong and vigorous as rules that have duly passed the test of time.

[FN5] The word “axiom” is not Latin. It results from the latinization of the name of the jurist Burchard (or Burckard), Bishop of Worms, Germany, from the year 1000 to 1025, who compiled 20 volumes of the Regulae Ecclesiasticae (ecclesiastic rules) which included maxims and axioms, subsequently called “brocardos” (aphorisms). The term was adopted definitively as of 1508 when the book of juridical maxims “Brocardia Juris” was published in Paris.

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18. Maxims and time-honored phrases, such as those that follow, which constitute legal norms under diverse legal systems derive from them:

a) dies a quo non computatur in termino (the initial day is not calculated as part of the time period);
b) dies ad quem computatur in termino (the last day is calculated in the period);
c) dies dominicus non est juridicus [FN6] (Sunday is not a court day);
d) dies non (abbreviation of dies non juridicus) [FN7] (non-working or not a court day)
e) dies feriati [FN8] (holidays)
f) dies utiles [FN9] (working day).

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[FN6] BLACK, Henry Campbell. Black's law dictionary; centennial edition (1891-1991). 6th ed., actual. By the Publisher's Editorial Staff, co-authors Joseph R. Nolan et alii. St. Paul: West Publishing Co., 1990. p. 455. According to this dictionary under the entry "[d]ies dominicus non est juridicus. Sunday is not a court day, or day for judicial proceedings, or legal purposes."
[FN7] Ibid. Entry "dies non juridicus. A non-juridical day; not a court day. A day on which courts are not open for business, such as Sundays and some holidays."
[FN8] Ibid. Entry "dies feriati. In civil law, holidays."
[FN9] Ibid., pp. 455/456. Entry "dies utiles. Juridical days; useful or available days. A term of the Roman law, used to designate special days occurring within the limits of a prescribed period of time upon which it was lawful, or possible, to do a specific act."
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19. We can easily conclude, based on the sequence of the ancient aphorisms transcribed above, that this type of calculation, which is made in these proceedings, is customary, universally accepted and used. Moreover, in defense of the legal certainty that this Court so often urges, this tradition should be followed; even because, as we have noted, the expression "that may not be extended" is directed at the judge and at the parties, and not at the way the time limit is calculated.

20. It is also important to note that the domestic law of several countries worldwide contains normative rules for calculating judicial time limits that incorporate the Latin aphorisms, even as regards establishing that if the day of expiry of a time limit occurs on a non-working day, it must be transferred to the following working day by fluid, logical, consequent natural law.

21. The fact is that those ancient aphorisms wound up incorporating authentic procedural principles for calculating time limits, which have extended to universal common rules inspired today by Italian procedural law, the reference for most national procedural codes. As an example of the said actuality, it is sufficient to recall the 1940 "Codice di Procedura Civile" (Italian Code of Civil Procedure) in force today, in its extremely clear Article 155:

Art. 155. (Computo dei termini)
Nel computo dei termini a giorni o ad ore, si escludono il giorno o l'ora iniziali.
Per il computo dei termini a mesi o ad anni, si osserva il calendario comune. I giorni festivi si computano nel termine.
Se il giorno di scadenza è festivo, la scadenza è prorogata di diritto al primo giorno seguente non festivo.
[…] [FN10]

[FN10] Free translation :
Article 155 (Calculation of time limits)
When calculating periods in hours or days, the initial hour or day are excluded.
To calculate the periods in months or years, the ordinary calendar is used.
Holidays are calculated within the period.
If the day of expiry is a holiday, the expiry is legally extended until the first subsequent working day.

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[...]
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22. The same rules are followed even in the case of time limits for prescription, regarding which greater normative care is normally taken not to extend them, according to Article 2,963 of the Italian Civil Code, in the sense that, in the case of a time limit that expires on a non-working day, it should be postponed to the following working day.

23. Consequently, the general rule is applicable to any type and periodicity of time limit, whether hour, day, month or year. Some differences exist as regards the calculation of the initial day of the period, whether the date on which notification is received or the following day, but not as regards the day of expiry. We should underscore the legal opinion on the calculation of the time periods in months or years: “if the day of expiry is a holiday, the expiry is legally extended to the next working day.”

24. Another example that supports this argument is that the domestic law of the State where the application originated, Brazil, follows the same rules. The systematization adopted by the Brazilian Code of Civil Procedure is present in its Article 184, § 1º, [FN11] which states: “It shall be deemed that the time limit is extended until the first working day, if the time limit expires on a holiday.”

[FN11] “Art. 184. Unless there is a provision to the contrary, time periods shall be calculated excluding the initial day and including the day of expiry.
§ 1º. The period shall be deemed extended until the first working day if the expiry falls on a holiday or on a day on which: I. The court will be closed; II. The legal file was closed before the usual time.”
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25. Randomly, to confirm the legal certainty of this system of calculation, we take a rapid glance at the domestic law of another country, which follows as an example:

The Peruvian Civil Code:
Article 183. Rules for calculating time limits
The time is calculated according to the Gregorian calendar, pursuant to the following rules:
1. The period indicated by days is calculated by natural days, unless the law or a legal act establishes that it should be calculated by working days.
2. The period indicated by months expires in the month of expiry and on the day of this month corresponding to the date of the initial month. If that day is lacking in the month of expiry, the period expires on the last day of the said month.
3. The period indicated in years is governed by the rules established in subparagraph 2.
4. The period excludes the first day and includes the day on which it expires.
5. The period whose last day is non-working, shall expire on the first subsequent working day. [Bold added]

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26. In addition, the rule interpreted in theory is in the interests of all jurisdictional parties before this Court – including the States – and results from the understanding that the procedure, while relevant, is merely the instrument for applying the law.

27. The procedural time limits merely contribute to ensuring that there is no delay in settlement of the litigation. Accepting the expiry of a time period on a non-working day would punish the party that exercised a reasonable interpretation of the Court's Rules of Procedure, in defense of an extremely short, indeed insignificant, span of time for the course of the procedure, especially because the Court does not work on Sunday.

28. In conclusion, the brief of the victims' representatives is entirely timely, because the day of expiry of the time limit was Sunday, a non-working day of the courts, and was therefore extended until the following day.

II – Possibility of alleging violations that were not examined during the proceedings before the Inter-American Commission

29. The State argued, in its answer, that the alleged violation of Article 28 of the American Convention (Federal Clause), an aspect of the Commission's application, cannot be examined, because it had not been brought up previously during the proceedings before the Commission and also because the said provision does not establish a right or freedom, but merely some rules for the interpretation and application of the American Convention.

30. In addition to the well-founded reasons given in the judgment, I would like to add some elements that concur with the admission of allegations, even though they have not been brought up previously, since the legal issue has been approached and discussed.

31. The State also alleged that the violation Article 28 of the American Convention (Federal Clause) was introduced in the application merely as the result of an affirmation concerning the difficulty of communicating with the state of Paraná made during a working meeting before the Commission on compliance with the recommendations of Report on merits No. 14/07.

32. The Court's ruling, with which I concur fully, is not to admit the arguments because: (1) the Commission has independence and autonomy to define the content of the application; (2) the inclusion in the application of the supposed failure by Brazil to comply with Article 28 of the Convention when the said provision appears in Report on merits No. 14/07 of the Commission is not contrary to the American Convention or to the Rules of Procedure of the Commission; (3) during the processing of the application before the Court, Brazil had the opportunity to defend itself in relation to the alleged violation; hence the right to defense was not harmed; (4) in accordance with Article 62(3) of the Convention, the Court has competence to examine the non-compliance of provisions, irrespective of their legal nature (general obligation, law or norm of interpretation).

33. In particular, I would like to add a justification invoked by the victims' representatives: the Court has the authority to examine violations of the articles of the Convention that have not been alleged by the parties, which is also supported by the Convention, by the iura novit curia

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principle, an interpretation that the Court has adopted on other occasions [FN12] and of its consequent legal principle da mihi factum dabo tibi jus ([to the party] give me the fact, and I [the judge] will give you the law).

[FN12] […] This Court also has the authority to analyze possible violation of articles of the Convention that were not included in the application brief and in the reply to the application, as well as in the representatives' brief containing pleadings and motions, based on the principle of iura novit curia, firmly supported by international jurisprudence, "in the sense that the judge has the authority and even the duty to apply pertinent legal provisions in a case, even when the parties do not explicitly invoke them," in the understanding that the parties will always be allowed to submit the pleadings and evidence they deem pertinent to support their position regarding all the legal provisions examined. Cf. Case of the "Juvenile Reeducation Institute" Judgment of September 2, 2004. Series C No. 112, paras. 124 to 126; Case of the Gómez Paquiyauri Brothers. Judgment of July 8, 2004. Series C No. 110, para. 178; Case of the "Five Pensioners". Judgment of February 28, 2003. Series C No. 98, para. 156; Case of Cantos. Judgment of November 28, 2002, Series C No. 97, para. 58.

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34. Iura novit curia is a classic principle. Besides being a maxim of Roman law, even before, in Aristotle (BC. 384 to 322) a clear preview, a prediction, an anticipation is found. In the first pages of his volume "Rhetoric" in which the philosopher explains the attributes of a lawyer, the position of a judge, and the purpose of laws, he criticizes rhetoric, the exaggerated assessment of the non-essential to the detriment of facts that are relevant for the judicial decision. Note how this applies perfectly to the iura novit curia principle and to da mihi factum dabo tibi jus, another Latin maxim that is consequent with the former. According to Aristotle, it is fully within the competence of the judge to decide on the importance or lack of importance, on the justice or injustice of a fact without taking his instructions from the litigants.

35. Calamandrei, when examining the provision concerning the formal assumption in the remedy of cassation of the right to demand an indication of the legal principle on which the appeal is founded [FN13] was thoughtful when he admitted: [FN14] "[...] the indication that may also be lacking when the violated norms are equally identifiable, given the description of the charges or when the violation refers to general principles that have not been formulated in an article."

[FN13] CPC, Art. 366. (Contenuto del ricorso)
Il ricorso deve contenere, a pena di inammissibilita:
(…)
4) i motivi per i quali si chiede la cassazione, con l'indicazione delle norme di diritto su cui si fondano; [text prior to the 2006 reform].
[FN14] CALAMANDREI, Piero. Casación Civil. Translation by Santiago Sentís Melendo and Marino Ayerra Redín. Buenos Aires: EJEA, 1959, p. 119.

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36. Long ago, the universal human rights system established the right to a simple judicial proceeding to protect the individual from complicated proceedings and appeals, complex for public defenders and lawyers, understood with difficult by the ordinary jurisdictional person, for the individual who rarely brings a case to trial, all in the interest of the guarantee of access to justice and an effective remedy (or proceeding).

37. It is also evident that the law can establish supposedly general remedies, but excessive rigor restricting their observance, in addition to those restrictions expressed by law will always act against due access to justice, especially because the less privileged layers of society, which undoubtedly have greater difficulty in hiring the best lawyers who dominate the complex and increasingly specialized procedural techniques, will find themselves at a considerable disadvantage. This real inequality becomes a concrete impediment to access to justice and the simplicity of the remedy.

38. In turn, in the 1948 American Declaration on the Rights and Duties of Man, the inter-American regional system included a very clear text on the right to a simple, brief procedure. [FN15]

[FN15] Article XVIII - Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

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39. Likewise, in the case of the American Convention on Human Rights (Pact of San José, Costa Rica), its Article 25 [FN16] would be violated if the arguments were not accepted on the basis of the reason alleged by the State.

[FN16] Art. 25. Right to Judicial Protection. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

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40. Consequently, the Commission’s reference to Article 28 of the American Convention (Federal Clause) should be accepted for reasons other than those already cited by the Court, which are the iura novit curia principle and its consequent da mihi factum dabo tibi jus, and also in observance of the obligation in the provision of the Convention cited above (Article 25 – judicial protection or, more specifically, right to a simple and prompt procedure).

41. Finally, condemning the State for violating Article 28 of the American Convention (Federal Clause), which the Court finally accepts, should not be seen as linked to a more severe punishment. To the contrary, in the instant case, despite Brazil’s tenacity in defending its

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position, its understanding and respect for the victims' position was clear to see; and this was not observed in its federal unit, Paraná, as was evident during the proceedings before the Commission, especially owing to the communication difficulties between the federal and state spheres. In fact, the recognition of the violation of Article 28 helped to define the domestic responsibilities for the violations.

III – Obligation to publish the judgment on the electronic sites of the Union and of the government of the state of Paraná

42. We proposed a significant innovation in this ruling, which was accepted by the Court as a measure of satisfaction and a guarantee of non-repetition. This was the obligation imposed on Brazil to publish the summary and the entire content of this judgment on Internet websites of the Union and the state of Paraná, at least until full compliance with the judgment (minimum obligation imposed) or longer, which could be equal to the duration of the cases to be tried, calculated from the date of the facts until the publication of this judgment, or (b) definitively (ability and commitment of the State).

43. It is a simple, inexpensive means, resulting in better and more widespread dissemination than the burdensome publications in newspapers, which could be substituted in future decisions.

44. It is a recourse that is fully adapted to contemporary life; one that expands the scope of the non-pecuniary reparation to the victims and promotes more effectively the disincentivation of the repetition of conducts and omissions similar to those that resulted in the violations recognized in this specific case, in view of the facility of access to the contents of the Court's judgment.

45. Since it is evident that access to the global Internet is increasingly more frequent and of easier access to everyone throughout the world, the deliberations of the Court should not fail to consider among its measures of satisfaction and guarantees of non-repetition, ordering the measure that, in a pioneering fashion, is established in this case.

46. The power of the pedagogical nature of the judgment is undeniable, as is its prompt distribution given the speed not only of access, but also of the dissemination of information by Internet, in addition to the ease with which the State can comply with the said obligation by the State.

III.a. Regarding the time limit

47. Regarding the time limit, the Court has preferred to leave this open, trusting in the State to execute the judgment, and we agree; however, this opinion leaves a record; a suggestion promoting citizenship, democracy and human rights. Despite this, we understand that judicial decisions should include clear, specific and objective rulings that leave no margin for misinterpretation by those executing them, as can be appreciated from the unforgettable lessons of Judge Antônio Augusto Cançado Trindade, former President of this Court, either when he speaks of overcoming the traditional idea of the optional clause of obligatory jurisdiction, or when he discusses the "compétence de la compétence," in which he advocates that the Court

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should reduce the sphere of discretion in the execution of judgments up until the complete satisfaction of the judicial ruling, thus reducing the possibility of executions being obstructed by the States. Since we trust that in this case, there are indications that the State will comply amply, we adhere to the unanimity.

III.b. Regarding the form and the place of publication

48. Also, with regard to the form of dissemination by Internet and the place of publication (on what site and of which public entity), the Court preferred not to establish this directly, trusting that the State would be better able to indicate this in order to ensure the greatest dissemination of the information, which will be analyzed by the Court subsequently, when monitoring execution of the judgment.

Roberto Figueiredo Caldas
Jugde ad hoc

Pablo Saavedra Alessandri
Secretary