**Summary and Outcome**

In 2009, the InterAmerican Court of Human Rights found Brazil responsible for violating the rights of privacy and freedom of association of a group of individuals part of two social organizations that worked on advancing agrarian reform in the Country. The case arose in 1999 after the Military Police of the State of Paraná carried out unlawful telephone monitoring and later disseminated the communications to local and national media outlets. The Court determined that the interception of the telephone conversations constituted an infringement of Article 11 of the American Convention of Human Rights (ACHR) by interfering with the victims' private lives because the conversations were private and since the victims did not authorize the wiretapping. Likewise, the Court found that the Sate's actions caused fear and tensions and affected the associations' image and credibility, thus altering the free and normal exercise of the right to freedom of association of the victims in violation of Article 16 of the ACHR.

**Facts**

Arlei José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral and Celso Aghinoni were members of two social organizations, *Associação Comunitária de Trabalhadores Rurais*  (ADECON) and *Cooperative Agrícola de Conciliação Avante Ltda* (COANA). The first had the objective of community development and the integration of its associates through cultural, sports, and economic activities. In contrast, the second sought to integrate farmers in promoting everyday financial activities and in the sale of products. Both organizations shared agrarian reform goals with the Land Workers' Movement (Movimento dos Trabalhadores Rurais Sem Terra; "MST"), a Brazilian social movement.

On April 28, 1999, Colonel Valdemar Kretschmer, the Deputy Commander and Chief of Staff of the Military Police, requested authorization from the Loanda Court to intercept and monitor two telephone lines COANA.

On May 5, 1999, Major Waldir Copetti Neves, Head of Águila Group of the Military Police of Paraná, filed a request before the Loanda Court to intercept and monitor the telephone line installed in the offices of COANA. According to Major Neves, there was "strong evidence that it was being used by MST leaders for criminal purposes." [para.90]. On the same day by, Judge Khater, while providing no grounds for her decision, ordered the tapping to begin.

On May 12, 1999, in a similar request, Military Police Sergeant Valdecir Pereira da Silva requested authorization to intercept and monitor the two telephone lines in the offices of ADECON. Yet again, the judge approved the request.

On May 25, 1999, Major Neves requested the Loanda Court to cease the interception and monitoring of the telephone line. On the same day, the request was granted by Judge Khater, and she sent an official letter to the director of the telephone company Telecomunicações do Paraná S/A (TELEPAR) requesting the cancellation of the interception of CONA and ADECON.

On June 7, 1999, extracts of the recorded conversations appeared on the *Jornal Nacional*, a Brazilian television news program widely viewed news program in the country. As a result of the broadcast, on June 8, the former Secretary of Security held a press conference in which he commented on the actions of the police in the operations to empty the MST headquarters. Additionally, he played some of the recordings and distributed a set of transcripts of the conversations to the journalists attending. Over the following days, several news outlets published and aired the fragments of the conversations depicting MST members preparing to engage in illegal activities.

On July 1, 1999, Major Neves handed over to Judge Khater more than 123 types of partial edits of the recorded conversations between May and June. In the recordings, Celso Aghinoni, Arlei José Escher, and Dalton Luciano de Vargas were mentioned.

On August 19, 1999, MST and *Comissão Pastoral da Terra* (CPT), requested the Prosecutor General's Office to open criminal investigations into the possible perpetration of the offenses of usurpation of public functions, illegal telephone interception, violation of judicial confidentiality, and abuse of authority of Secretary Martins, Judge Krater, Colonel Kretscherman, Major Neves and Sergeant Silva. Consequently, the Prosecutor General's Office opened a criminal investigation into the matter.

On October 5, 1999, COANA, ADECON, Arlei José Escher, Celso Aghinoni, and Avanilson Alves Araújo presented a writ of mandamus before the Court of Justice of the State of Paraná against Judge Khater, soliciting the suspension of the telephone interceptions and the destruction of the recorded tapes.

 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" [para.108]. Consequently, the plaintiffs filed *embargos de declaração*, to clarify the omissions in the judgment, specifically on the failure of the Court of Justice to rule on the request for destruction of the tapes.

On May 30, 2000, Judge Khater handed over the monitoring petition to the Prosecutor General's Office for analysis.

 On June 7, 2000: The Court of Justice rejected the *embargos de declaraçado*. The Court claimed that since an omission in the judgment could only be examined if the Court had examined the merits. Given that the plaintiffs failed to file other remedies, the Court's decision became final on August 28, 2000.

On June 30, 2000, On behalf of Mr. Escher, Mr. Luciano de Vargas, Mr. Becker, Mr. Cabral, and Mr. Aghinoni, *the Rede Nacional de Advogados Populares* (National Popular Lawyers Network) and the Center for Global Justice file Petition with the InterAmerican Commission on Human Rights (IACHR) against the State of Brazil.

On September 8, 2000, prosecutor Nayani Kelly Garcia indicated that a military police agent, with no connection to the Loanda jurisdiction, had no legitimacy to request the telephone interceptions. The prosecutor also held that the requests for the interceptions of the telephone lines were made without any explanation, and the monitoring petition were not connected to a criminal action or a police investigation. Additionally, the prosecutor stated that the 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." [para. 102]. As a result, the Prosecutor General's Office requested the Loanda Court to declare the interceptions invalid.

 On October 6, 2000, the Special Organ of the Court of Justice issued a decision ordering the closure of all the investigations against the public officials concerning the telephone interception. Additionally, the Special Organ of the Court ordered the case file be sent to a court of first instance to analyze the conduct of the former Secretary of Security relating to the dissemination of the intercepted conversations.

On April 11, 2001, once the investigation had ended, the Prosecutor General's Office filed a complaint against the former Secretary of Security, who on December 23, 2003, was sentenced to a fine and two years and four months' imprisonment, with the latter substituted by community service by the Second Criminal Court of the Comarca of Curitiba.

On November 14, 2001, the IACHR held a hearing on the admissibility of the petition presented on June 30, 2000, by the victims, and the State filed the objection of failure to exhaust domestic remedies in relation to the *mandado de segurança*.

On April 18, 2002, Judge Khater rejected the Prosecutor General's Office's request to suppress the Recorded Conversations on the grounds that it had not been proved that the telephone interceptions were illegal. However, on April 23, 2002, the tapes were burned on Judge Khater's orders.

On January 19, 2004, the former Secretary of Security filed an appeal against the decision before the Court of Justice. However, on October 14, 2004, the Second Criminal Chamber of the Court of Justice acquitted the former Secretary of Security. The Court of Justice held that the Secretary had not violated the judicial confidentiality of the information obtained through telephone interception since a television station had disseminated the information the previous day.

On March 2, 2006, the IACHR declared the case admissible and, on March 8, 2007, approved Report on Merits. In the report, the IACHR found 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, concerning 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." [para.3]. Additionally, the IACHR asked the State to adopt specific measures of reparation.

On December 20, 2007, after the State failed to adopt its recommendations, the IACHR submitted the case to the InterAmerican Court of Human Rights (IACtHR). The IACHR: requested the Court to declare that the State is responsible for violating Articles 8, 11, 16, and 25 of the American Convention.

**Decision Overview**

The main issue for the IACtHR to analyze was whether the State had violated Articles 8(1), 11, 16, and 25 of the ACHR, in relation to Article 1(1) of the ACHR, as a result of the interception and monitoring of the petitioners’ telephone lines and the dissemination of the information gathered from the monitoring.

According to the Court, Article 11 of the ACHR prohibits all arbitrary or abusive interference to the private life of individuals, including the privacy of their families, their home, or their correspondence. The IACtHR recalled its decision in the case of *Massacres de Ituango Vs. Colombia* to highlight that "the sphere of privacy is characterized by being exempt and immune from abusive and arbitrary invasion by third parties or public authorities." [para. 114]. The Court then noted that "Article 11 applies to telephone conversations irrespective of their content and can even include both the technical operations designed to record this content by tapping it and listening to it or any other element of the communication process." [para. 114].

The Court then noted that with new technologies, the fluidity of information places individuals' right to privacy at greater risk. Thus, the Court emphasized that States must raise their commitment to adjust traditional forms of protecting the right to privacy. However, the IACtHR underscored that Article 11(2) of ACHR establishes that the right to privacy is not absolute and can be restricted by the Sates. Yet, the Court stressed that such interference must not be abusive or arbitrary and must be established by law, pursue a legitimate purpose and be necessary in a democratic society. Furthermore, the Court accentuated that all individuals have the right to the respect of their honor and States carry the obligation to protect individuals against illegal attacks on these rights.

 Regarding the right to private life and the interception and recording of telephone conversations, the Court considered that, since the telephone conversations were private and the petitioners had not approved them to be transferred to third parties, the interception of the exchanges by State agents constituted interference.

The Court then examined whether this interference was arbitrary or abusive in light of the requirements established in Article 11(2) of the ACHR.

First, the IACtHR examined if the measures complied 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" [para. 130]. In other words, the norm which establishes the restriction must be formal and substantial. According to the Court, telephonic interception can convey a severe interference in the private life of individuals; consequently, such measure must be based on a law that must be precise and indicate the corresponding clear and detailed regulation.

Then, the Court analyzed if the interception of telephone conversations complied with the National legal provisions. First, the IACtHR noted that Article 5 (XII) of the Brazilian Constitution establishes that the confidentiality of telephone conversations is inviolable, except in the circumstances and as set by law for purposes of a criminal investigation or the preliminary investigation in a criminal action. The latter exception is regulated by Law No. 9,296/96, which establishes that 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. Further, the Law states that a judge may authorize the measure ex officio. However, under Law No. 9,296/96, "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" [para. 132] and the interception procedure is subject to judicial control. Furthermore, the Law establishes that any 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." [para. 32]. After mentioning the applicable legal provisions, the IACtHR noted that the elements entrenched in them were in accordance with the Convention.

The Court then dissected whether the telephone interception procedure in the immediate case complied with the requirement of legality. The Court stated that 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 of a criminal act. However, in both cases, the Court deemed that the monitoring petitions were not processed in proceedings linked to previously-established police investigations or criminal proceedings. Therefore, both requests failed to comply with the provision.

Regarding the reasons for the telephone interception application established in Articles 2 and 4 of the Law, the IACtHR found that "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" [para. 134]. Furthermore, they failed to demonstrate that the means used were the only possible to obtain the said evidence.

Concerning the persons authorized to request telephone interceptions, the Court remarked that Article 3 of Law No. 9,296/96 establishes that the police authority may do this within the framework of a criminal investigation. Yet, the IACtHR observed that in light of Article 144 of the Brazilian Constitution, civil police are exclusively responsible for investigating the criminal acts referred to in the interception application owing to their ordinary nature. Thus, the only police officers were legally empowered to request the interception of the COANA and ADECON telephone lines.

The Court considered that even though judge Khater was empowered to order the telephone interception ex officio, her decisions stated that when ordering it, she had authorized the requests of the military police agents and not on her own initiative, thus infringing Article 3 of Law No. 9,296/96.

Regarding Article 5 of Law No. 9,296/96, which establishes that the decision authorizing a telephone interception must be founded and shall also indicate how the procedure is to be carried out, the IACtHR held that in her decision, judge Khater failed to 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. Therefore, the Court considered that such omission entailed a limitation of a fundamental right of the alleged petitioners and an infringement of Article 5.

Furthermore, the IACtHR noted that 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. However, the Court observed that the transcripts of the recorded material were not provided to the case file of the monitoring petition. Consequently, the Court considered that the provisions of Article 6 of Law No. 9,296/96 were infringed.

Moreover, the Court explained that Article 9 of Law No. 9,296/96 specifies that any recording that is not of interest as evidence in the investigation or the criminal proceedings must be destroyed following a judicial decision, at the request of the Prosecutor General's Office or the interested party. Nevertheless, the Court found that the destruction of the tapes did not form part of the matters being examined in the immediate case, and thus, the Court decided not to explore this argument further.

As a result, the IACtHR concluded 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" [para. 146]. Thus, since they did not comply with the requirement of legality, it was considered unnecessary to review the purpose and necessity of the interception.

Based on the above, the Court determined that the State violated the right to privacy established in Article 11 of the ACHR related to the obligation embodied in Article 1(1) thereof, to the detriment of Arlie José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral, and Celso Aghinoni.

The IACtHR then proceeded to analyze the possible infringement of the right to privacy, honor, and reputation by disseminating the telephone conversations. The Court deemed that portions of the recordings obtained by the telephone interceptions shown on the news program Jornal Nacional were conversations of the petitioners and those related to the organizations they were members of were private and that none of the speakers authorized the discussions being heard by third parties. Thus, the Court considers that by the dissemination of private conversations, the State violated the petitioners’ right to the protection of their privacy, honor, and reputation as established in Articles 11(1) and 11(2) of the American Convention to the detriment of Arlie José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral, and Celso Aghinoni.

The Court then examined if the State had infringed the petitioners’ right to freedom of association. The IACtHR began by illustrating that Article 15 of the ACHR recognizes the right of peaceful assembly without arms. In contrast, the Court clarified that freedom of association, entrenched in Article 16, establishes the right of assembly "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" [para. 169]. The Court noted that 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" [para. 169].

The IACtHR then proceeded to examine exclusively whether the State violated Article 16 of the ACHR to the detriment of the petitioners. First, the Court indicated that, as previously indicated in its decisions of *Baena Ricardo et al. v. Panamá, Cantoral Huamaní and García Santa Cruz v. Peru and Kawas Fernández v. Honduras,* Article 16(1) of the ACHR establishes that anyone subject to the jurisdiction of a State 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. By recalling its case of *Huilca Tease v. Peru*, the IACtHR held that in addition to the negative obligations, 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." [para. 154].

The Court stressed that according to the Commission, 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 the same vein, the Court recalled its cases of *Nogueira de Carvalho et al. v. Brazil* and *Valle Jaramillo et al. v. Colombia* to highlight the obligation States have 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" [para. 172]. Furthermore, Court emphasized that the ACHR recognizes the right to associate freely and, at the same time, however, that the exercise of this right may be subject to restrictions specified by law that have a legitimate purpose and that, ultimately, may be necessary in a democratic society. According to the Court, in the present case, 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 the alleged offenses – and resulted in the monitoring of the activities of the members of the said associations" [para. 178]. Consequently, the Court found that the monitoring of the telephone communications of the association followed by their dissemination through various media channels caused fear and tensions and affected the image and credibility of both associations. Thus, the IACtHR considered that State altered the free and normal exercise of the right to freedom of association which entailed an interference that is contrary to Article 16(1) of the Convention. Further, since the petitioners feared for themselves because of their affiliation to the associations, the Court deemed the State violated the right to freedom of association of Mr. Escher, Mr. Luciano de Vargas, Mr. Becker, Mr. Cabral, and Mr. Aghinoni.

Finally, the IACtHR found that the State had not failed to comply with the Federal Clause established in Article 28 of the ACHR.

As a result, the IACtHR concluded the following:

First, that the Judgment on Preliminary Objections, Merits, Reparations, and Costs constituted *per se* a form of reparation to the victims.

Second, the State pays the sum of US $20,000.00 to each victim as compensation for non-pecuniary damage and costs and expenses. The Court held that the payment had to be paid directly to the beneficiaries within one year.

Third, that the State publicly acknowledges international responsibility by publishing in the Official Gazette and in another a newspaper of wide circulation in the State of Paraná, once on the cover page, Chapters I, VI to XI of the decision. Further, the Court held the obligation of the State to publish the complete ruling on the official website of the federal State and of the State of Paraná.

Fourth, regarding the handing over and disseminating of the tapes with the recorded conversations, the State must investigate the facts and take the necessary measures.

Furthermore, the Court determined that it shall supervise full compliance with the decision and considered that once the State has fully complied with the provisions of the ruling, the case closed. The IACtHR held that the State, within one year, had submitted a report on the measures adopted to comply with the judgment.

Judge Sergio García Ramírez presented a concurring opinion where he held that the acceptance of the interference of the telephone lines must be conditioned to strict requirements that mark the frontier in a democratic society between the legitimate exercise of authority and the intolerable abuse of power. He considered that the "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." [p.11].

Moreover, he stated any conduct that impairs the right to privacy must be examined to safeguard society. Judge García warned that authoritarianism prospers outside the channels, principles, and conditions lawfully established to restrict rights. "We have not left the Orwellian "1984" behind us, even though the calendar may say so. It could be before us." [p.12]

Judge Ad Hoc Roberto de Figueiredo Caldas presented a separate opinion. Regarding the legal principles debated, he agreed with the terms of the judgment. However, Judge de Figueiredo believed that even though the Court had considered that the presentation of the brief with pleadings, motions, and evidence by the victims’ representatives was untimely a day after the two-month period established in Article 36 of the Court’s Rules of Procedure, he deemed 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.

**Decision Direction**

The IACtHR expanded freedom of expression through this decision by holding the state accountable for unlawful telephone monitoring and later disseminated the communications to local and national media outlets. Likewise, through this ruling, the Court emphasized the consequences of illegal wiretapping on individuals by damaging the associations' image and credibility and altering the free and normal exercise of the right to freedom of association.