IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF LUCIANO BENÍTEZ

PETITIONERS

v.

THE REPUBLIC OF VARANÁ

RESPONDENT

MEMORIAL FOR THE STATE

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ABBREVIATIONS

1. ACHR = American Convention on Human Rights "Pact of San José, Costa Rica"

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STATEMENT OF FACTS

THE REPUBLIC OF VARANÁ

The Republic of Varaná ("**Varaná**"), an independent island nation since May 17, 1910, has a diverse population of people who identify as descendants of Paya indigenous people, white and Afro-descendants.[1] Its Constitution establishes Varaná as a unitary, presidential, democratic, pluralistic and participatory state[2].

The Government consists of three branches: executive, legislative and judicial. The judicial branch comprises all the judges of the Republic, which includes the administrative, criminal and civil courts and courts of appeal, as well as a single Supreme Court of Justice that adjudicates special appeals alleging constitutional violations and abstract constitutional reviews through specific actions[3].

During the "Ocean Era", the Ocean Party had won every presidential election and had obtained a majority of legislative seats until recently[4]. This period was characterized by accelerated economic development, due to the exploitation of the region's natural resources, including oil and a newly discovered material named varantic[5]. This metal is one of the most important raw materials for the world of technology, replacing silicon due to its superior performance in the processor industry. The exploitation of varantic began in 2007, through Holding Eye S.A. ("**Eye"**), a large corporation that owns subsidiaries in hardware, software, and natural resource exploitation sectors key[6]. Eye,

[1] Hypo, [1]
[2] Hypo, [2]
[3] Hypo, [3]
[4] Hypo, [14]
[5] Hypo, [15]-[16]
[6] Hypo, [19]

through its subsidiary Lulo, also owns LuloNetwork, a social media network that allows users to interact using both personal and public profiles ("blogs"), as well as a mapping application called "Lulocation"[7].

LUCIANO BENÍTEZ

Luciano Benítez, a direct descendant of the Payas, was born in the small coastal city of Río del Este on August 5, 1951. This city holds the most famous celebration of the Sea Festival, an age-old tradition of Paya origin that pays homage to the gods of the ocean, with over 800,000 visitors flocking to the city during the month of November[8].

In 1968, Luciano left for the capital, Mar de Luna, where he became a father and grandfather. He worked there from 1974 until his retirement in 2014. Since young, Luciano has and involved in protecting the environment and preserving Paya culture. He regularly participated in meetings of Paya activists to discuss the government's environmental policies and the actions of private companies and opposed the exploration and exploitation of varantic in marine areas rich in coral reefs and biodiversity. Due to his eloquence and knowledge, he was an opinion leader among his neighbors, friends in the capital and the inhabitants of his hometown[9].

Luciano always saw new technological developments as an opportunity to make his life easier and uses technology in many aspects of his life. In 2014, when Luciano's mobile carrier, P-Mobile, offered him all the apps available from Lulo for free on his plan without the need for a wi-fi

[7] Hypo, [20]
[8] Hypo, [21]-[22]
[9] Hypo, [25]

network, he started using switched from Moving Guide to Lulocation[10]. From this point, he became a regular user of the app, using it daily.

LULONETWORK

Luciano had used LuloNetwork since February 7, 2010, when he got his first smartphone. He used his social media account to organize protests and disseminate information. As one of the main opponents of a project by Eye to build a large industrial complex on the outskirts of his hometown, he used his "blog" to spread information about this project and subsequent protests[11]. He also used his profile to discuss issues that he considered of interest to his neighborhood in the capital and to his hometown. Consequently, his blog gained over 80,000 fans and Luciano became a well-known figure[12].

On October 3,2014, Luciano received screenshots allegedly showing illegal payments by Holding Eye to a government official, as well as confidential internal memos from the company stating the need to promote content on all its social media and search platforms favorable to the development of Eye's industrial complex in Río del Este the email address whistlewhistle@pato.com. With the content he had received, Luciano wrote and published an article on his LuloNetwork blog[13].

In response, Eye filed a tort action against Luciano on October 31, 2014, to compel him to disclose his source and to pay the company R$50,000 for the "smear campaign" against it[14]. In an interlocutory order, the Civil Trial Court of the Capital found that Luciano was not a journalist, as he only had a blog on LuloNetwork and could not claim the right to protect the confidentiality of

[10] Hypo, [29]-[30]
[11] Hypo, [35]
[12] Hypo, [36]
[13] Hypo, [37]
[14] Hypo, [39]

his source. Luciano appealed his interlocutory order but still attended the hearing on December 5, 2014. During the hearing, Eye asked Luciano "Who gave you the information about the company?". In response, Luciano asked the Judge "Do I have to answer?" and the Judge replied, "The decision is up to you, but if you answer, this case may be over faster." With this clarification, Luciano answered and revealed the email account he had contacted to obtain the information he published[15]. Afterward, Eye asserted at the hearing that this information was sufficient to identify the source and protect its rights and withdrew all its claims on December 8, 2014[16].

Since the source was revealed and the case was moot, the appellate court dismissed the appeal filed by the NGO Blue Defense on behalf of Luciano. A request for clarification was filed, stating that even though the case is closed, it was in Luciano's interest as one objective of the appeal was for the court to find that Luciano was indeed a journalist. The Court denied this motion on the grounds that it was not procedurally necessary to continue with the case, since the origin of the controversy had been resolved and to continue to process the case would undermine procedural economy and create a needless backlog in the courts.

A few weeks after the hearing, on February 4, 2015, the user of the email address whistlewhistle@pato.com approached him. The man informed Luciano that he was fired from his position as a junior lawyer at Eye's legal department and held liable for the breach of his confidentiality agreement with Eye. He was being sued in a confidential legal action for R$400,000 and feared that he might be charged criminally. Hearing this information, Luciano was very upset and stopped posting on his blog for several days[17].

[15] Hypo, [41]
[16] Hypo, [42]
[17] Hypo, [43]

THE ARTICLE

On December 7, 2014, Federica Palacios, journalist and blogger for the state-owned digital media outlet VaranáHoy, published an article entitled "Luciano Benítez: Environmental Fraud and Partner of Extractivists?" on her personal LuloNetwork blog, "Inconsistencies Revealed," and in the online newspaper VaranáHoy[18].

Federica based her article on information given to her by an anonymous source but still met all the requirements of truthfulness and impartiality. She verified that the information was accurate and unmodified through a systems engineer and other sources. Lastly, she contacted Luciano to give him the opportunity to dispute the content of the article, but he refused to read or be part of the article[19].

The contents of the article revealed places Luciano has frequented for readers to draw their own conclusion about him[20]:

(1) On August 16, 2014, Luciano marched in support of Holding Eye's Varanátic operations, following the route from where it convened to exactly where it ended.

(2) On the Wednesdays in August 2014, Luciano was present at the Carrera 90 Building, where David Murcia's campaign headquarters are located. David Murcia's is a National Assembly candidate known for his association with Holding Eye and the extractive sector.

(3) In September 2014, Luciano met David Murcia's legislative aide, Roberto Parra, for lunch at Cecilia pizzeria and Origen restaurant. An unnamed woman was also present.

[18] Hypo, [44]
[19] Hypo, [45]
[20] Hypo, [46]

(4) Luciano engaged with all 257 of Holding Eye's LuloNetwork posts, including expressing discontent, thereby increasing their visibility.

This article quickly spread across various internet platforms and gained traction on radio and television within 24 hours, sparking widespread discussion among Varanásians[21]. Luciano was subsequently removed from all the groups he belonged to on his instant messaging apps and his prominence among environmental advocates and Payas decreased[22].

On December 10, 2014, Luciano published a statement on LuloNetwork denying the assumptions that arose from Federica's article. He clarified that it was his granddaughter that attended the march while using his cell phone. His presence at Carrera 90 Building can be explained as it is where his reading group was held. Thirdly, his granddaughter and Roberto was dating and she wanted her grandfather to spend time with her. On December 11, 2014, Federica amended her article, stating that Luciano presented his version of the story and provided a link to his statement[23].

Despite this effort, his credibility remained tarnished, leading him to consider creating an anonymous account on the popular platform Nueva to protect his honor. He wanted to publish the facts under a pseudonym to rehabilitate his life, name and reputation[24]. However, under Law 22 of 2009, Nueva required him to attach a photo of his national ID. Nueva's notice stated that under the public action of unconstitutional 1010/13, the court held that online social networking platforms must have accurate and sufficient information to identify all active users. The notice also stated that it was possible to create a public username and an "@" that did not match the name on

[21] Hypo, [47]
[22] Hypo, [49]
[23] Hypo, [51]
[24] Hypo, [55]

the national ID card but the account would privately still be associated with the "identity stated on the person's document". Ultimately, Luciano decided against creating a profile[25]. Meanwhile, he continued using social networks, such as LuloNetwork, to publicize events and facts[26].

On August 28,2015, Federica published a second installment of her article with Luciano's statement and evidence after learning more about his version of events[27]. Feeling dissatisfied with the new instalment and what he considered to be negligible circulation of the corrected article, he commenced a tort action against Federica and Eye to sought to recover damages and request the de-indexing of the information related to his name[28]. Federica denied the claim and asserted that she had complied with her journalistic duties by verifying the information and giving Luciano the opportunity to comment on her article. She also had complied with the ratification requirement by publishing all additional information she knew. Eye, who also owned LuLook, the search engine where Federica's blog and the newspaper could be found, contended that it could not be held liable for Federica's content as an intermediary[29]. On November 4, 2015, the trial court judge denied Luciano's claims on the grounds that Federica had published a second installment with the information he had provided and that this was sufficient to protect his honor and good name. In addition, the court accepted LuLook's defense and dismissed it as a defendant in the action. The appellate judge affirmed the lower court's decision on April 22, 2016. On August 17, 2016, the Supreme Court denied Luciano's extraordinary appeal[30].

[25] Hypo, [56]
[26] Hypo, [58]
[27] Hypo, [65]
[28] Hypo, [67]
[29] Hypo, [68]
[30] Hypo, [69]

THE HACKING

On August 8,2015, it was revealed that the Office of Prosecutor General of the Nation had been investigating since October 2014 Pablo Méndez and Paulina Gonzáles, two IT experts working in the intelligence service of the Ministry of the Interior, for the use of "phishing" software to obtain personal data of human rights activist and journalist from social media accounts and mapping applications[31]. This software was acquired to support the investigation of serious crimes and threats to national security but was used by the individuals for personal desire to counteract the public engagement of profiles they believed could hinder the Ocean Party's victory in the 2014 National Assembly elections[32]. The Prosecutor's Office stated that the police "were very efficient in the criminal case" such that by May 2015, both individuals were sentenced to 32-month imprisonment and were ordered to pay R$20,600 (about US$15,000) in civil damages to each of the 10 hacking victims, including Luciano[33].

[31] Hypo, [62]
[32] Hypo, [63]
[33] Hypo, [76]

LEGAL ANALYSIS

MERITS

Varaná complied with its obligations under Articles 13 and 25 of the ACHR in allowing Holding Eye to sue Luciano.

(1) Varaná complied with Article 13

Luciano's freedom of thought and expression were protected as, although the lawsuit was allowed, Varaná had ultimately not imposed any liability on Luciano for his article regarding Holding Eye. Luciano's speech also cannot benefit from special protection as he is not a journalist. In any event, Varaná did not breach Article 13 as any imposition of subsequent liability under Article 13 would be justified.

Varaná accepts that the article Luciano had published on his LuloNetwork blog is protected by Article 13 as everyone has the freedom to impart information and ideas of all kinds[34].

(2) There *was no liability imposed on Luciano for his article*

A violation of Article 13 arises when the subsequent imposition of liability does not comply with Article 13(2). However, on the facts, Holding Eye withdrew all of its claims and the case was dismissed. Since there was no imposition of liability on Luciano, his freedom of thought and expression was not restricted and there was no breach.

Additionally, the mere act of allowing Holding Eye to file a tort action is not a restriction on the freedom of thought and expression as civil recourse is allowed under Article 13(2). Article 11 of the ACHR recognizes that everyone has the right to have his honor respected and his dignity

[34] Article 13(1), ACHR

recognized. This right also protects companies; the court in *Uson Ramirez recognized* that the protection of the right to the reputation of companies is a legitimate purpose to restrict the right to the freedom of expression[35]. Thus, it is legitimate for Holding Eye to resort to the judicial mechanisms established by Varaná to protect its honor when its reputation had been affected. *Kimel v Argentina* held that every fundamental right is to be exercised with regard for other fundamental rights[36]. Thus, the right to freedom of expression and thought should ultimately be balanced with the right to honor. In this case, the right to honor should prevail because no restriction was placed on Lucaino's freedom of expression.

Luciano's speech should not be accorded the special measure of protection because he is not a journalist.

This Court has highlighted that it is essential that journalists enjoy the necessary protection and independence to exercise their functions comprehensively[37]. Although the Court has yet to define the term "journalists", AO OC-5/58[38] opined that journalism cannot be limited to merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional "colegio". It is submitted that in considering whether an individual is a journalist, "a certain occupational tendency should be required, i.e. a journalist typically works regularly and receives some form of remuneration for his

[35] Usón Ramírez v. Venezuela, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 207, para. 65
[36] Kimel v. Argentina, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 177, (May 2, 2008))("Kimel"), para 74
[37] Thomas M. Antkowiak and Alejandra Gonza, *The American Convention on Human Rights* (OUP 2017), pg 240
[38] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, November 13, 1985, Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985). ("AO OC-5/58"), [71]

or her work"[39]. This more limited scope of defining a journalist is necessary to balance conflicting rights and values, such as the right to freedom of expression and thought and the right to honor.

Applying the above to the facts, Luciano uses his "blog" profile on LuloNetwork to promote causes that he is interested in. However, his activity on social media is not his occupation, nor does he receive remuneration for his blog posts on this platform. Therefore, Luciano should not be considered a journalist, and his article should not enjoy a special measure of protection.

In any event, Varaná would have been justified in imposing subsequent liability under Article 13(2).

The requirements for the imposition of subsequent liability are threefold[40]:

a. [the sanction] must be expressly established by law, in both the formal and substantial sense;

b. it must respond to either the respect for the reputation of others or protection of national security, public order or public health or morals; and

c. it must be necessary in a democratic society (and to this end must comply with the requirements of suitability, necessity and proportionality)

The first requirement requires every limitation to freedom of expression to be established in advance, expressly, restrictively and clearly in a law[41] – in the formal and material sense. This requirement is met as the tort action brought against Luciano was previously and expressly

[39] Council of Europe Committee of Ministers, *Explanatory Memorandum to Recommendation No. R (00) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information*, [13]

[40] Supra, note 37, pg 247
[41] AO OC-5/58 (n 38), [39]-[40]

established by law. The second requirement was also met as the lawsuit was in response to the respect for the reputation of Holding Eye.

The last requirement of "necessary in a democratic society" is met as well. To determine the suitability of the measure, the court considers whether the restriction is a suitable or adequate means to help achieve a legitimate purpose established in the Convention[42]. For the test for the necessity of the measure, the Court will weigh alternatives for achieving the restriction's legitimate purpose in order to establish if there is a less restrictive way to achieve the purpose[43]. The proportionality analysis will consider whether the restriction is proportionate to the underlying interest and in direct furtherance of such legitimate purpose, interfering as little as possible with the effective exercise of the right to freedom of thought and expression[44].

In cases where there is public interest (a) political speech and speech regarding matters of public interest; (b) speech regarding public officials in the exercise of their duties or candidates for public office, a higher threshold of protection should apply[45]. Although a higher threshold of protection may apply for Luciano's article as it pertains to statements about the corruption of a public official and the expression about Holding Eye are relevant to the public interest, this higher "threshold of protection" should make no practical difference. Statements concerning public interest are not given a clear preferential status but, instead, this court has held that the right to honor and freedom of expression "deserve equal protection and must coexist harmoniously." [46]Instead, a stricter test

[42] Kimel, [70]
[43] Ibid,[74]
[44] Ibid,[83]
[45] Inter-American Commission on Human Rights. Office of the Special Rapporteur on Freedom of Expression, (OAS official records ; OEA Ser.L/V/II CIDH/RELE/INF.), [99]
[46] Kimel, [51]

of necessity is applied when dealing with expressions regarding these issues.47In applying the test of proportionality, the right to honor and reputation must be balanced against the interests of an open debate on public affairs.

On the facts, this tort action was suitable as an imposition of damages is a suitable means of compensation for the loss of reputation due to his article. It was the least restrictive way to address the loss of reputation because, as opposed to requiring to remove the harmful article, he would be able to keep his article up on his blog. Furthermore, this is proportionate as the damage was done to Holding Eye's reputation and does not require the Court to impose a more extreme order such as removing the blog post or banning his blog. Thus, both the right to honor and reputation and interests of open debate on public affairs would be upheld. Although the quantum of the damages the company was seeking was large, Luciano posted his article on his account with 80,000 fans, so the negative publicity to Holding Eye reached a substantial number of people.Thus, the three requirements were met and any imposition of liability upon Luciano would be warranted.

Varaná complied with Article 25 because all of Luciano's fundamental rights were protected, and there is no necessity for judicial recourse.

i. *Since Luciano's rights to freedom of thought and expression are protected, Varaná's duty to ensure judicial protection does not arise.*

On a plain reading of Art 25, it is clear that the right to simple and prompt recourse arises when there has been an act that violates an individual's fundamental right. As established in [paragraph

[47] I/A Court H.R., Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74

numbers] above, Luciano's right to freedom of thought and expression were protected, thus Varaná's duty under Art 25 does not arise.

ii. *In any event, Varaná has sufficiently discharged their duty under Article 25(1) by granting Luciano the right to file an appeal, which constitutes an effective remedy.*

The court has found the judicial remedy granted to be ineffective in cases where they are incapable of producing the intended result for which they were designed[48]. This occurs when the remedy is illusory. For example, in *Paniagua Morales et al. v. Guatemala*, *Suárez Rosero v. Ecuador*, and *Ivcher Bronstein v. Peru* the court held that the remedy was illusory because the judiciary lacks independence or has no means to enforce its judgments[49]. The Court stressed that for a remedy to be effective, it need not necessarily be granted, so long as there existed at least a serious possibility that they will be[50].

On the facts, there was a serious possibility of a trial to determine if Luciano was a journalist. Luciano was afforded the right to file for an appeal to request for the trial to continue. Such a right amounts to a realistic chance that the trial would be allowed.

In any case, even if he were considered a journalist, he effectively relinquished any claim to confidentiality by disclosing his source. Consequently, no legal recourse could rectify the forfeiture of that right.

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[48] Case of Velásquez Rodríguez v. Honduras, para. 66.
[49] OC-9/87, para. 24. Also see, *inter alia*, case of Paniagua Morales et al. v. Guatemala, para. 164; Case of Suárez Rosero v. Ecuador, para. 63; Case of Ivcher Bronstein v. Peru, paras. 136–137;
[50] Case of Velásquez Rodríguez v. Honduras, paras. 67 and 68. Also see, inter alia, OC-9/87, para. 24; Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, paras. 111–113; Case of the Constitutional Court v. Peru, para. 90; Case of Bámaca Velásquez v. Guatemala, para. 191; Case of Cesti Hurtado v. Peru, para. 125; Case of Paniagua et al. v. Guatemala, para. 164; and Case of Suárez Rosero v. Ecuador, para. 63.

Varaná complied with Articles 8 and 13 when Luciano had revealed the source of his LuloNetwork posts in a civil lawsuit;

> ***(1)*** *i. Luciano does not have the right to keep his source of information confidential under Article 13 as he was not a social communicator. In any event, he revealed his source on his own accord.*

Principle 8 of the Declaration of Principles on Freedom of Expression states that "every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential". The court has recognized individuals as social communicators when it is part of their profession to publish their views. In the case of *Manuel Cepeda Vargas v. Colombia*[51], the petitioner served on the editorial board of the weekly newspaper Vox, where he had published a political column for several years. In the case of *Carvajal Carvajal v. Colombia*, the petitioner was a journalist, director of the radio programs, a teacher and director of the Los Pinos Education Center. Similar to the argument for a narrow definition of journalism canvassed above in [23], a narrow definition for social communicator should also be adopted as the right to freedom of speech should be balanced with other rights, such as the right to honor and dignity as recognized in Article 11. Thus, Luciano should not be considered a social communicator, and he does not have the right to keep his source of information confidential.

Even if Luciano had a right to keep his source of information confidential, this was not violated as he revealed his source by choice. Luciano was told that the decision on whether he wanted to reveal his sources was "up to him, but if you answer, this case may be over faster." Upon hearing the

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[51] I/A Court H.R., Manuel Cepeda Vargas V. Colombia, Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2011, [2]

benefits of revealing this source, he chose to answer and reveal the email account on his own accord without sanctions by the state[52].

Varaná complied with its duty of fair trial under Article 8 because the court was objective and impartial.

The court has emphasized that personal impartiality is presumed unless there is evidence to the contrary consisting, for example, in the demonstration that a member of a court or a judge has personal prejudices or biases against the litigants53. To remain impartial, a judge must behave only and exclusively based on the law54.

On the facts, the appellate court should be presumed impartial unless evidence suggests otherwise. The only contentious issue is whether the presumption of impartiality can be rebutted by the Judge's answer in response to Luciano's question of whether he had to reveal his source. The Judge told Luciano that '[i]f you answer, this case may be over faster'. It is submitted that the Judge was impartial as this statement was not biased but a factual observation. It was not prejudiced against the litigants, but rather aimed at ensuring an efficient trial, therefore aligning with legal considerations. Thus, the Judge remained impartial, ensuring that Luciano's right to a fair trial was upheld.

[52] Hypo, [41]
[53] Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela, para. 56, and Case of Atala Riffo and daughters v. Chile, para 189.
[54] Norín Catriman et al, [222]

(iii) Varaná had complied with its duty under Articles 11 and 25 despite the fact that Luciano had been hacked or his personal data had been disclosed to third parties;

a. Varaná complied with Article 11 as it should not be responsible for the act of individuals acting out of personal desire

Varaná should not be responsible for the independent acts of private individuals[55].There is no dispute that the hacking was not caused by Varaná, but rather two IT experts who "had acted out of a personal desire" and were not authorized by Varaná in any way[56].

b. In any event, Varaná had sufficiently discharged its obligation under Article 11(3) and 25(1) by efficiently investigating, arresting, and sentencing the criminals.

Varaná has a duty under Art 11(3) to ensure that there is protection of the law against arbitrary or abusive interference or unlawful attacks. Varaná has fulfilled its obligation under Art 11(3) to ensure that there is protection of the law as evidenced by its diligent efforts in investigating the matter, securing the arrest of the perpetrators, and bringing them to justice through legal proceedings.

Similarly, Varaná has a duty under Article 25(1) to ensure that individuals have a right to an effective recourse. An effective recourse is one that achieves its intended outcome, ending rights violations, preventing recurrence, and ensuring the full exercise of protected rights[57].

[55] League of Nations, Official Journal, 4th Year, No. 11 (November 1923), p. 1349.
[56] Hypothetical, [63]

[57] Case of López Mendoza v. Venezuela, para. 184

In the same vein, an effective remedy for the present case would be one that can effectively end the violation of the right to privacy, to deter repetition of hacking, and to fairly compensate the victims. On the facts, the fairly harsh punishment of 32 months of imprisonment for both criminals serve 3 main functions: 1) physically incapacitate the two criminals from committing hacking for 32 months, 2) deter them from committing the crime after their jail term by instilling fear in them through threat of future punishment, and 3) deter would-be offenders, so that they will desist from offending, by making an example of the offenders. On the other hand, compensation of R$26,000, which is approximately 40 times the minimum wage, is given to every single one of the 10 hacking victims. Such a substantial amount sufficiently corrects the violation of rights and compensates the victims for the losses they suffered due to the hacking.

(iv) Varaná allowing cell carriers to offer zero rating apps is compliant with Article 13, because zero-rating apps are not indirect restrictions.

Varaná allowing cell phone carriers to offer zero-rating apps is not a violation of the freedom of expression under Article 13, but instead promotes the freedom of thought and expression. Article 13(3) establishes that the "right to expression may not be restricted by indirect methods or means". This provision targets State and private restrictions, including abusive controls over media and "any other means tending to impede the communication and circulation of ideas and opinions." There are two categories of cases where the court had found there to be indirect restrictions[58]. The first is where there were severe violations of Article 13(2). The second is where the state has taken measures such that victims were deprived of their freedom to impart or receive information. For example in *Ivcher Bronstein v. Peru*, a director of a television channel that criticized the government had his citizenship revoked, preventing him from continuing his work at the channel.

[58] Thomas, pg 257

Or in *Granier v Venezuela*, the State had refused to renew the license of RCTV, a television broadcast that had criticized the government. It was held that both the individuals associated with RCTV and the Venezuelan society who were completely deprived of access to the station's point of view had their right infringed upon.

Conversely, this is a case of allowing cell phone carriers in a free market to offer benefits to make their plans more attractive. This practice is prevalent and allowed in many countries, such as mobile companies in South American countries such as Brazil, Chile, Colombia, and Ecuador offer Zero-Rating Applications. For example, Movistar, Claro, Tigo, Oi, TIM, CNT, and others offer a data-capped bundle of access to WhatsApp, Facebook, and Instagram on a sliding scale from 24 hours to one month[59]. Zero-rating apps should not be held to be an indirect restriction, as it merely makes access to certain applications easier but does not restrict individuals from accessing other applications. Users in Varaná are still easily able to access competitor's social networks, platforms, or navigating apps. Even though the P-Mobile plan offered Luciano all the apps available from Lulo free on his mobile plan, it is evident that Luciano still has the ability to access competitors such as Nueva. Even if the provision of zero- application apps allowed Lulo to decide what information that users are receiving, they can still freely receive information on other service providers. Thus, individuals still retain their freedom to impart or receive information on other platforms and there was no indirect restriction imposed.

Moreover, it is argued that zero - rating apps reduce the digital divide, thereby promoting the freedom of expression. Principle 2 of the Declaration on Principles on Freedom of Expression has emphasized that all people should be afforded equal opportunities to receive, seek and impart

[59] Triviño, Roberto & Franco-Crespo, Antonio & Ochoa, Rafael. (2023). Zero Rating Effects in South American Countries. 10.1109/ICEDEG58167.2023.10121948.

information by any means of communication without any discrimination for reasons of economic status among others. Allowing zero- rating applications increases access to information and presents opportunities for people to express themselves through social networks or other platforms. This in turn accelerates the process of social mobility[60],and the freedom of assembly and association online.

(v) Varaná had complied with Article 5, 11 and 13 when refusing to order the de-indexing of the news article "Luciano Benítez: Environmental Fraud and Partner of Extractivists?"

a. Varaná had complied with Article 5 as the refusal to order the de-indexing of the news article is not torture or degrading treatment.

i. Varaná's refusal to order the de-indexing did not cause torture against Luciano

Above all, Varaná was not involved in the negative public reaction against the news article. Since the state should not be responsible for the independent acts of private individuals[61], whom in the current case refer to those who attacked Luciano online and removed him from instant-messaging groups, Varaná's refusal to de-index the news article did not cause torture against Luciano.

In the alternative that State's involvement is disregarded, Varaná's refusal to order the de-indexing did not constitute as torture. To make out torture, two elements must be fulfilled: (i) intentional, (ii) causes severe physical or mental suffering[62].

Firstly, the psychological harm suffered by Luciano was not intentionally inflicted. Torture must be carried out intentionally. Intentionality requires that "the acts committed were deliberately

[60] Background and Interpretation of the Declaration of Principles by Special Rapporteurship for Freedom of Expression, https://www.oas.org/en/iachr/expression/showarticle.asp?artID=132&lID=1 ,[9]
[61] League of Nations, Official Journal, 4th Year, No. 11 (November 1923), p. 1349.
[62] Espinoza Gonzales v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 289, para. 143 (Nov. 20, 2014)

inflicted upon the victim and not the result of negligent conduct, an accident or force majeure". In other words, there must be an intention to cause, or substantial grounds for believing that the individual concerned faces a real risk of being subjected to, physical or mental pain or suffering as a necessary element of the act[63]. In this case, Varaná had not committed any act that had deliberately inflicted upon the victim psychological harm.

Secondly, the psychological harm does not pass the threshold of severity required. A multi-factorial test including objective and subjective factors is applied. Objective factors include the characteristics of mistreatment, duration, methods or manner used to inflict harm, physical and psychological effects such harm may cause. Subjective factors include the age, gender, and health condition of the individual. Objectively, the mistreatment he endured—stemming from legal challenges, defamation, and social media harassment—lacks the intensity, systematic abuse, or physical violence typically associated with severe psychological harm in human rights contexts. Furthermore, while Luciano's experiences were prolonged, the intermittent nature and the lack of direct physical threats or violence mitigate the overall psychological impact. Subjectively, Luciano's older age may have increased his vulnerability to distress; however, without more severe factors such as a pre-existing health condition that significantly elevated his susceptibility to harm, his experience does not meet the high threshold of severity required by international standards. His psychological effects, including undergoing treatment for depression and social isolation, are significant yet must be contextualized within the broader spectrum of psychological harm, noting that not all forms of distress meet the stringent criteria for a human rights violation. As such, Luciano's psychological suffering was not severe enough to amount to torture.

[63] Chahal v. United Kingdom, European Court, (1996) 23 EHRR 413, at 457.

ii. Varaná's refusal to de-index is not a degrading treatment.

By definition, treatment which grossly humiliates an individual before others or drives him to act against his will or conscience is 'degrading'[64]. More specifically, in the European case of *Ireland v. United Kingdom,* degrading treatment was defined as treatment capable of "arous[ing] in [the] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance[65]." This test has been supported in recent rulings[66]. It can be reasonably inferred that the standard to find a treatment degrading is fairly high.

On the facts, Luciano's associations with the opposing party from the side he claimed to be leaning towards reasonably raise suspicion from the public regarding his moral character. The public reaction that transpired was also reasonable based on the level of shock and blameworthiness presented by the news article. Moreover, the identity of Luciano as a internet personality should also be recognised as widening the limits of acceptable criticism because as an internet celebrity , he inevitably and knowingly lay himself open to close scrutiny of their acts, both by the press and bodies representing the public interest[67]. Therefore, Luciano was expected to be subjected to a wider range of acceptable criticism as he was an internet personality instead of an average private individual. As such, when a wide range of acceptable criticism was expected, the refusal of de-indexing cannot be said to be degrading.

b. Varaná's duty to offer protection of the law under Article 11 doesn't arise because there was no arbitrary or abusive interference nor unlawful attacks.

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[64] Denmark et al v. Greece, European Commission, (1976) 12 Yearbook.
[65] Ireland v. United Kingdom (1978) 2 EHRR 25, at 145
[66] 1. Jayawickrama N. The right to freedom from torture. In: The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence. Cambridge University Press; 2002:296-352. p.310
[67] Fayed v. United Kingdom, European Court, (1994) 18 EHRR 393.

The refusal to de-index the news article does not constitute an arbitrary or abusive interference.

Interference that is arbitrary or abusive is one involving an act meant to act unreasonably where reasonable behavior was required or one that involves abuse of power by public bodies[68].

The State's decision not to de-index the information related to Luciano's name is a testament to its commitment to reasoned and fair governance. Through thorough legal scrutiny, the State deemed that adequate measures had been taken to address any potential harm to Luciano's reputation. This decision reflects a careful balance between protecting freedom of expression and ensuring the integrity of individuals' reputations. By upholding these principles, the State demonstrates its adherence to reasoned judgment and fairness in legal proceedings, thereby avoiding any semblance of arbitrary or abusive interference in the matter.

c. **In any event, Right to Privacy must be balanced with the right to freedom of expression.**

The right to freedom of expression has to be balanced against the right of privacy as "privacy law should not inhibit investigation and dissemination of information of public interest"[69].

The public's right to information, supported by freedom of expression, can prevail over individuals' right to respect for one's privacy in cases where public interest is concerned. [70]To determine whether private information can be disseminated, the court in *Fontevecchia and D'amico v. Argentina*[71] held that there are two relevant criteria that are taken into account. The

[68] Human Rights Committee, General Comment 16 (1988).
[69] Principle 10 of the Declaration of Principles on Freedom of Expression.
[70] Case *Aubry v. Duclos*, [58]
[71] Case *Fontevecchia and D'amico v. Argentina*, [59]

first is a) the different threshold of protection for public figures, and b) the public interest in the actions taken.

Firstly, a "public figure" was defined in the US Supreme Court case of *Gertz v Robert Welch*[72] as an individual who has assumed roles of special prominence in the affairs of a society or thrust themselves into the forefront of particular public controversies to influence the resolution of the issues involved. This definition should be adopted as it takes into account the realities of public figures who enjoy prominence but are not necessarily involved in politics such as celebrities. The court should apply a higher threshold of protection to statements involving public figures as individuals who have an influence on matters of public interest have voluntarily exposed themselves to more intense public scrutiny and therefore, are subject to a higher risk of being criticized, because their activities go beyond the private sphere and belong to the realm of public debate[73]. Moreover, public figures have easy access to the mass media allowing them to respond to attacks on their honor and personal reputation, is also a reason to provide for a lower level of legal protection of their honor[74].

Luciano was a prominent figure with 80,000 fans on his LuloNetwork and was well-known, especially in the city of Rio del Este. He rose to this prominence as he was a strong advocate against certain matters of public controversies, such as the building of a large industrial complex for the production of hardware components on the outskirts of Rio del Este by Holding Eye. Thus, Luciano is a public figure and statements regarding him should have a higher threshold of protection.

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[72] Elmer Gertz, Petitioner, V. Robert Welch, Inc. 418 U.S. 323. US is a signatory to the ACHR
[73] I/A Court H. R., Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. para. 129.
[74] Supra, note 60, [44]

Secondly, it was held in the Supreme Court judgment of Canada in *Aubry v. Éditions Vice-Versa inc.* that certain aspects of the private life of a person who is engaged in a public activity or has acquired a certain notoriety can become matters of public interest. In Memoli v Argentina, the court held that there is public interest involved when expressions involve public figures or officials or relate to the functioning of State institutions. Following this definition, the expression in the article is clearly of public interest. Even if the dissenting opinion's definition of public interest was adopted, the contents of the article will fall under public interest. The dissenting opinion held that public interest is involved when a considerable proportion of the town's population has an interest in the information. The integrity of Luciano is a matter of interest to a considerable proportion of the capital's and his hometown's interest due to status as an opinion leader there[75].

Therefore, since there is a higher threshold of protection over Federica's article and the subject of her article was concerning public interest, the right to freedom of expression and thought should prevail over Luciano's right to privacy.

Another reason why the freedom of expression and thought should prevail is that journalists play a crucial role in society and allowing the de-indexing of the article would be a violation of Federica's freedom of speech.

It is essential that journalists working in the media enjoy the protection and independence necessary to fully carry out their functions, since they are the ones who keep society informed[76]. Civil sanctions should only apply where false information has been produced with "actual

[75] Hypo, [25]

[76] Case of Moya Chacón v. Costa Rica, [69]

malice"[77]. It must be proven that in disseminating the news, (1) the person communicating this information had the specific intent to inflict harm, (2) was fully aware that false news was disseminated or acted with gross negligence in efforts to determine the truth or falsity of such news. In this case, it can be inferred that Federica had not disseminated the news with a specific intent to inflict harm as she met the requirements of impartiality [78]and contacted Luciano to give the opportunity to dispute the contents of the article. Moreover, the news she had disseminated was true, and she had not acted with gross negligence when determining the truth of the statements. She had taken the information to a systems engineer, who verified the information to be accurate and unmodified. She had also confirmed with other sources and even attempted to confirm with Luciano himself. Thus, any civil sanction imposed on her would be a violation of her freedom of thought and expression, a right that should be upheld due to the importance of her role as a journalist.

d. Varaná's refusal to de-index the news article is consistent with/does not violate Luciano's right to reply under Article 14.

i. Luciano was able to exercise his right to reply

Since Luciano was able to and had exercised his right to reply to Federica's article, the Varaná's refusal to de-index the news article did not violate his Article 14 rights.. It was suggested in advisory opinion on Art 14[79] the right is not violated when it fulfils the following conditions: (1)

[77] AO OC-5-85, [74]-[76]
[78] Hypo, [45]
[79] ADVISORY OPINION OC-7/85 OF AUGUST 29, 1986, [37]

published free of charge, (2) as soon as possible, (3) in a location and with an emphasis comparable to that which caused the injury, and (4)without a commentary which would impair its value. [37]

On the facts, one day after Luciano had published his statement on LuloNetwork to deny the assumption that arose from his article on 10 December 2014, Federica added a sentence to her original article. She had pointed out that Luciano presented his version of the story on his social media and provided the link for it. Therefore, the right to reply of Luciano was published free of charge, a mere one day after he had issued his correction in a location with emphasis comparable as it was published in the same article. This reply was also not accompanied by any commentary which would impair its value. Therefore, Luciano's right to reply had not been infringed upon.

Additionally, allowing Luciano the right of reply is "a particularly appropriate remedy in the online environment due to the possibility of instant correction of contested information and the technical ease with which replies can be attached to it[80]". It was highlighted in Moya Chacon v Costa Rica that more burdensome measures should not be adopted when the dissemination of inaccurate information could be remedied in a more expeditious and effective manner through the right of reply. Therefore, in upholding Feredica's right to freedom of expression, Varaná was justified in not imposing more burdensome measures such as the de-indexing of her article when the appropriate remedy of the right of reply was available and exercised by Luciano.

[80] Council of Europe Recommendation on the right of reply in the new media environment, pg 6

(vi) Varaná's refusal to acknowledge that Lulook was also responsible for the violation of Luciano Benitez's human rights had complied with Article 25.

As established above, the State's duty under Article 25 only arises where there has been a violation of human rights. Since there has been no violation of Luciano's right to privacy, no judicial recourse was warranted.

In the alternative where a violation of Luciano's right to privacy was found under Article 11, the duty to find Lulook responsible still does not arise under Article 25(1). This is because the publishing of the second installment can be regarded as a prompt and simple recourse that has already rectified the infringement.

On the facts, one remedy was available to the accused and was carried out, albeit not directly administered and enforced by the Court: having Federica publish a second installment with the information Luciano provided. This recourse was a simple and prompt one.

As for simplicity, there has been no ruling describing it in the terms of Article 25. However, the act of publishing a follow up blog post with the content to be provided by Luciano only requires a reasonably competent journalist a few hours' time, which is arguably simple enough.

Regarding the promptness of the remedy, the Court frequently analyzes it in connection with the determinants of reasonable time as established in Article 8 of the Convention[81]. On the facts, Luciano and his son started looking for legal action on August 8, 2015, after which they approached journalist Federica. The second installment was published by the journalist on August 28, 2015, meaning that the time taken to carry out the remedy was 20 days. This is significantly

[81] Case of Ivcher Bronstein v. Peru, para. 140.

shorter than time taken for a trial, such as the “very efficient” progress of the criminal case related to hacking which took more than half a year to convict the criminals[82]. As such, the remedy should be deemed simple and prompt.

Since a simple and prompt remedy was available, there is nothing else that the State was obliged to do under Article 25 regarding Luciano’s claim. In any event, the State acknowledging the responsibility of LuLook does not address the negative public reactions received by Luciano. Therefore, the State’s refusal to find Lulook responsible, which in itself is a proper decision by a normally functioning of a competent, impartial, and independent court, does not violate Article 25.

[82] Hypothetical, [63]

(vii) Varaná complied with Luciano's rights under Article 11, 13, 15,16 and 23 when prohibiting individuals to create anonymous social media profiles

a. Prohibiting anonymity is not a 'arbitrary', 'abusive' or unlawful argument under Article 11(2)

i. Prohibiting anonymity is not arbitrary nor abusive.

Interference that is arbitrary or abusive is one involving an act meant to act unreasonably where reasonable behavior was required or one that involves abuse of power by public bodies[83]. The decision of the state to ban anonymity online was a deliberate and justified measure, not an arbitrary or abusive interference. It was implemented to curb unreasonable behavior and abuse of power, aligning with constitutional principles of free expression and press freedom. By mandating users to link their accounts to their national identity documents, the state established a system of accountability, deterring harmful actions like defamation and the spread of false information. This move fosters transparency and trust in online interactions, as individuals are more likely to engage constructively when their identities are known. While concerns about privacy may arise, the legislation provides avenues for pseudonymous expression through public usernames, ensuring a balance between anonymity and accountability. Overall, the decision to ban anonymity serves to protect constitutional freedoms while promoting responsible behavior in the digital sphere.

ii. Prohibiting anonymity is not unlawful.

In the current case, Article 13 of the Constitution of Republic of Varaná explicitly states that "Anonymity is prohibited". When interpreted in the context of creating a social media account,

[83] Human Rights Committee, General Comment 16 (1988).

such a provision means that no anonymous account can be registered, which is a lawful interception.

b. Varaná complied with the freedom of thought and expression, right of assembly and freedom of association under Article 13,15 and 16 despite prohibiting anonymity

i. No restriction of rights under Art 13, 15 and 16

Technology is integral to the exercise of the right to freedom of assembly, association and expression both as a means to facilitate the exercise of the rights online and offline and as additional virtual and digitally mediated spaces where these rights can be actively exercised[84]. It is submitted that the prohibition of anonymity on social media has not negatively impacted either of the functions.

As elaborate above in paragraph_, an indirect restriction on the freedom of thought and expression is found when victims were deprived of their freedom to impart or receive information. A restriction on the freedom of assembly and association has been found when individuals have faced recourse from the state for exercising their rights. This can be seen in the case of *Women Victims of Sexual Torture in Atenco v. Mexico* where eleven women were arrested in the context of a public demonstration. Similarly, in *López Lone and others Vs. Honduras*, restrictions were found when individuals faced detention, the filing of criminal complaints or disciplinary proceedings against them. Since Luciano has not faced any recourse from the state for exercising his rights to assemble and associate both online or offline. Even though Luciano was not able to create an anonymous social media account, he was still able to use his social media account to publicize events and

[84] Joint Declaration on Freedom of Peaceful Assembly and of Association and Misuse of Digital Technologies Pg 2

facts[85]. Therefore, it is clear that he is still able to facilitate the exercise of these rights online and offline, as well as exercise them in digital space.

In any event, prohibition of anonymity would fulfill the test on restrictions

For restrictions on anonymity, the test outlined in paragraph 6 should apply under Art 13(2), Art 15 and Art 16(2). Firstly, the restriction on anonymity was clearly established in advance and restrictively in Article 10 of Law 22 of 2009. Secondly, the restriction would be in response to both the reputation of others under Art 13(2) and protection of national security, public order or public health or morals under all 3 articles. Anonymous communications often make it difficult to investigate financial crimes, illicit drugs, child pornography and terrorism. Moreover, anonymity facilitates harassment and cyberbullying of individuals by bullies and criminals[86]. Lastly, the last requirement is "necessary in a democratic society" as it is a suitable way to achieve both purposes. Weighing against other methods to achieve this purpose, the least restrictive way to achieve the goal.

Even though individuals must provide platforms with accurate and sufficient information to identify all active users, it was possible to create a public username and an "@" [87]that does not match the name on the national ID card. Thus, this is less restrictive than other methods such as the one adopted in Vietnam[88] where the use of pseudonyms was outlawed and individuals were forced to publicly list their real name and address[89]. Although one might argue that allowing one's mobile number to be linked to their account instead of their national identity document may be a less restrictive method, it is submitted that this is equally restrictive. This is because through the

[85] Hypo, [58]
[86] A/HRC/29/32,[2]
[87] Referring to the displayed username on social media accounts
[88] Vietnam is signatory to ICCPR and highlight Arts. 19 and 21 ICCPR.
[89] A/HRC/29/32,[49]

registered mobile number, one is able to obtain the national identity of an individual. Therefore, they are equally restrictive as they both result in the revealing of one's identity.

Thus, concerns that certain groups such as young people exploring their gender or sexual identity, whistleblowers, journalists' sources and victims of abuse would not be protected as they could still use social media to explore their sexuality, whistleblow and reach out to others without their name on show[90]. Other countries who are signatories and have ratified the ACHR have also prohibited anonymity such as the Constitution of Brazil (art. 5) prohibits anonymous speech. The Constitution of the Bolivarian Republic of Venezuela (art. 57) similarly prohibits anonymity[91].

Additionally, the prohibition of anonymity is not only a justified restriction, but also encourages the exercise of the rights. It is submitted that the greater impediment on the freedom of expression is not the lack of anonymity online, but instead the fear of getting rape or death threat by people hiding behind the veil of anonymity in response to expressions online[92]. Moreover, hate speech not only affects the directly targeted individuals but also the whole group,[93] undermining the right of assembly and freedom of association. Although without the prohibition of anonymity, online users can be identified and prosecuted. However, with the anonymity of social media, it takes much longer and makes it more difficult for law enforcement to identify the person. An example raised by the motion to bring the Social Media Platforms (Identity Verification) bill is that when a woman received threats from an anonymous troll to "bleach" her, it took a couple of years for him to be found and then no action was taken. Thus, the restriction is further justified by its promotion

[90] Social Media Platforms (Identity Verification) Volume 704: debated on Wednesday 24 November 2021,Column 382
[91] A/HRC/29/32,[49]
[92] Supra, note 89
[93] Joint Declaration on Freedom of Peaceful Assembly and of Association and Misuse of Digital Technologies Pg 3

of the rights under Art 13,14 ,15 and the interest of getting legal recourse for threats to the right of reputation of others and protection of national security, public order or public health or morals.

Varaná's prohibition of the creation of anonymous social media profiles does not restrict Luciano's right to participate in Government under Article 23

Since Art 25 of the ICCPR is similar to Art 23 ACHR, a similar approach as the General Comments[94] on Art 25 should be adopted. Under paragraph 1(a), citizens have the right to take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves[95]. To ensure the full enjoyment of rights protected under Art 23, the rights to freedom of expression, association and the right to assembly has to be safeguarded to ensure the freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas[96]. Technology should also provide real opportunities to influence decision-making processes, for example with regard to submitting, and commenting and voting on, legislative and policy proposals[97].

Despite the ban on anonymity, Luciano is still able to take part in the conduct of public affairs using technology[98].The ability for him to continue spreading his view under a pseudonym further reinforces his ability to exert influence through public debates, engage with others like-minded individuals and to advertise his political ideas without fear of harassment from other as they would

[94] General Comment Adopted By The Human Rights Committee Under Article 40, Paragraph 4, Of The International Covenant On Civil And Political Rights Addendum General Comment No. 25 (57)
[95] Ibid, 8
[96] Ibid, 25
[97] Draft guidelines for States on the effective implementation of the right to participate in public affairs Report of the Office of the United Nations High Commissioner for Human Rights, [90]
[98] Hypo, [58]

not know his identity. Therefore, no restriction has been placed on Luciano's right to participate in Government.

REQUEST FOR RELIEF

For the foregoing reasons, the Respondent State of Varaná respectfully requests this Court to:

1. Adjudge that Varaná has not infringed Petitioner's rights enshrined in Articles 5, 8, 11, 13, 14, 15, 16, 22, 23, and 25 of the ACHR, in conjunction with Articles 1.1 and 2 thereof.

2. Declare that Varaná has fulfilled its obligations under the Convention.

Respectfully,

The Respondent State of Varaná