ORDER OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS[*]
OF SEPTEMBER 30, 2006

REQUEST FOR PROVISIONAL MEASURES SUBMITTED BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REGARDING THE FEDERAL REPUBLIC OF BRAZIL

MATTER OF THE PERSONS IMPRISONED IN THE *"DR. SEBASTIÃO MARTINS SILVEIRA"* PENITENTIARY IN ARARAQUARA, SÃO PAULO

HAVING SEEN:

1. The brief filed by the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") on July 25, 2006 and Appendixes thereto, which brief was filed before the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court",) pursuant to Article 63(2) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), Article 25 of the Rules of Procedure of the Court, and Article 74 of the Rules of Procedure of the Commission, in order to request Provisional Measures regarding the Federal Republic or Brazil (hereinafter "the State" or "Brazil",) to protect, among other things, the lives and physical integrity of all inmates that are detained in the *Penitenciaría "Dr. Sebastião Martins Silveira"* ("Dr. Sebastião Martins Silveira Penitentiary",) located in Araraquara, State of San Paulo (hereinafter the "Araraquara Penitentiary" or the "Penitentiary"), as well as to protect the lives and physical integrity of all the persons that may be admitted to such penitentiary in the future as prisoners or detainees.

2. The allegations of the Commission to substantiate its request for provisional measures, in which it stated the following, to wit:

> a) the urgency of the facts alleged, which urgency is required pursuant to Article 63(2) of the American Convention, is shown by the lack of protection by the State, by the failure to separate inmates according to different categories, as well as by the deficient sanitary physical and medical

[*] Judge Oliver Jackman has not taken part in the deliberation and has not signed this Order since he informed the court that, for reasons beyond his control, he could not attend the Seventy-second Regular Session of the Court. Judge Cecilia Medina and Judge García–Sayán informed the Court that, for reasons beyond their control, they could not participate in the deliberation and signing of the instant Order.

conditions that inmates have to endure, the overcrowding, and the manner in which food services are provided. All the preceding conditions represent a risk to their lives and physical integrity, and the same may lead to a violent situation among inmates, and may also represent a risk for their health, since they are exposed to get serious illnesses (there are over one hundred inmates that suffer from HIV/AIDS, tuberculosis and pneumonia); thus, the intervention of the Court is necessary to prevent serious and irreparable damage;

b) the measures adopted by the State have been insufficient. On July 14, 2006, the Court of Justice of the State of San Paulo, based on the information submitted by the *Secretaría de Administración Penitenciaria* ("Secretariat of Penitentiary Administration",) endorsed the arguments of the Executive Power of the State in the sense that it would be impossible to transfer inmates immediately; it also stated that the schedule fixed by such Secretariat should be followed, transferring 100 inmates per week. This scheme would cause a delay of approximately 14 weeks in order to get the situation solved;

c) the fact that persons under the custody of the State have to remain in the Araraquara Penitentiary in the precarious conditions prevailing in such Penitentiary illustrates the negligence by the State in the fulfillment of the obligations to care that it assumed when depriving such persons of their liberty, and

d) overcrowding was mitigated with the assignment of additional wings in the *Centro de Detención Provisional* ("Provisional Detention Center") to be used by inmates. However, the detention conditions of such inmates are unacceptable and the priority in this case would be to adopt any measures that may be necessary to prevent violence to arise among those persons who have been deprived of their freedom, with the purpose of avoiding irreparable harm caused to inmates. Likewise, the precarious detention and safety conditions in the Araraquara Penitentiary should be immediately addressed and relieved.

3. The request filed by the Inter-American Commission in order for the Court to request the State, on the basis of Article 63(2) of the American Convention, to adopt a series of measures to protect the lives and the physical integrity of those persons deprived of their liberty that are in the Araraquara Penitentiary.

4. The Order issued by the President of the Court (hereinafter "the President") on July 28, 2006, upon referral to the Court Judges, by means of which, the Court decided, *inter alia,* the following:

> 1. To request the State to forthwith adopt any measures that may be necessary to protect the lives and physical integrity of all persons deprived of their liberty that are detained in the *Penitenciaría "Dr. Sebastião Martins Silveira"* ("Dr. Sebastião Martins Silveira Penitentiary") in Araraquara, State of San Paulo, Brazil; as well as to protect the lives and physical integrity of all the persons that may be admitted to such penitentiary in the future as inmates or detainees. For that purpose the State shall have to adopt any measures that may be necessary, strictly respecting the human rights of those persons that have been deprived of their liberty, specially the right to life and the right to humane treatment, and care, in order to prevent unduly violent acts by its agents, so that they may regain control and reinstate order in the Araraquara Penitentiary.

> 2. To request the State that, once control is regained pursuant to the preceding paragraph, the following measures be adopted forthwith, to wit: a) allow medical staff to access the premises to provide the necessary medical attention, and to relocate, whenever necessary, all those persons that suffer from contagious diseases so that they may receive the adequate medical treatments, and if pertinent, to avoid dissemination of the disease amongst the inmates, and b) provide inmates, both in terms of quantity and quality, all the food, clothes and products for their hygiene that may be necessary.
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> 3. To request the State to adopt, immediately afterwards, the following measures, to wit: a) to reduce substantially the overcrowding in the Araraquara Penitentiary and guarantee decent detention conditions; b) to divide inmates into different categories, pursuant to international standards applicable in this matter; and c) to allow inmates to be visited by their next of kin.
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> 4. To request the State to forward to the Inter- American Court, within 30 days after service of notice of the Order, an updated list of all persons deprived of their liberty that are detained in the Araraquara Penitentiary, and also to state with accuracy the following: a) data relating to the identity of the inmates, and b) admission date, possible referrals and release, as well as any possible variations that may arise regarding the inmates population, in order to identify those persons that may be covered by these provisional measures.
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> 5. To request the State to investigate the facts that have given rise to the adoption of the urgent measures, and if the case may be, to identify those who are responsible therefor and to provide for the corresponding punishment, including administrative and disciplinary sanctions.
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> 6. To request the State to inform the Inter-American Court of Human Rights, within ten days following service of notice of the instant Order, about any urgent measures that the State has adopted in compliance with such Order.
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> 7. To request the representatives of the beneficiaries of these measures to submit their objections within a term of ten days running from the date of service of notice of the report filed by the State.
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> 8. To request the Inter-American Commission on Human Rights to submit any objections within a term of fourteen days running from the date of notice of the report by the State.
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> 9. To summon the State, the Inter-American Commission on Human Rights and the representatives of the beneficiaries of the instant measures to a public hearing, to be held during the next Regular Period of Sessions of the Inter-American Court.
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5. The notice served by the Secretariat of the Court dated August 1, 2006, informing the State, the Commission and the representatives of the beneficiaries of such measures (hereinafter "the representatives of the beneficiaries" or "the representatives") that the public hearing convened by the President would be held on September 28, 2006 at 03:00 p.m. in the seat of the Court, with the purpose of dealing with the allegations regarding the facts and the circumstances that led to the adoption of the Order of July 28, 2006.

6. The brief filed by the State on August 24, 2006, after an extension had been granted for its submission, which brief stated, regarding the provisions of the Order of the President (*supra* Having Seen clause No. 4), *inter alia*, the following, to wit:

a) regarding the first issue to be resolved (to protect the lives and physical integrity of all the persons that are deprived of their liberty and are detained in the Araraquara Penitentiary, as well as to protect the lives and physical integrity of those persons that may be admitted in the future as prisoners or detainees, and to regain the control over such penitentiary:)

i. the doors accessing the cellblocks were welded because the locks had been destroyed. This decision was taken in order to avoid a massive runaway of inmates;
ii. the military police acted on a few occasions in the Araraquara Penitentiary, and every intervention was conducted following the rules and professional standards, with absolute respect for human rights. Some interventions were made in order to provide assistance to ill persons and to transfer detainees, and some others were performed to keep order;

b) regarding the second issue to be resolved (to allow access to medical staff, to relocate those who suffer from contagious diseases and to provide both in terms of quantity and quality, all the food, clothes and products for personal hygiene that may be necessary:)

i. the penitentiary has doctors, two dentists, one nurse, one nursing technician and one nursing assistant who deliver the prescribed medicine to those inmates that need the same, on a daily basis, twice a day in the morning and at night;
ii. after the riot, all ill inmates were transferred, and during the interventions of the military police, inmates were taken in order to be assisted by the health services;
iii. the kitchen of the Penitentiary has not been damaged. Those inmates that have a semi-open detention regime, who had not taken part in the riot, prepare the food. Food is distributed in pots using as wheelbarrow; it is not thrown over prison walls as informed by the press. All inmates have their own plastic dish, spoon and jar;
iv. clothes and products for personal hygiene are, and have always been, available;

c) regarding the third issue to be resolved (to substantially reduce the overcrowding, to divide inmates into different categories and to allow inmates to be visited by their next of kin:)

i. in May 2006 simultaneous riots occurred in different penitentiaries in the state of San Paulo, thus, many of those penitentiaries were left in a situation which led to a lack of necessary conditions to lodge prisoners. This prevented an immediate referral.
ii. taking into account the impossibility of an immediate referral of all detainees, referrals are gradually being completed at a rate of one hundred inmates per week. Up to the date of submission of the report by the state, 434 detainees had been transferred to other penitentiaries;
iii. those detainees that remain in the Araraquara Penitentiary have been redistributed into three sectors, to wit: Rayo I: 290 persons; Rayo II: 339 persons, and Rayo III: 307 persons. Furthermore, 34 people are isolated in the infirmary to be subject to criminological examinations; in the inclusion sector there are 3 persons; in the hospital center there is one person in transit, and in the semi-open detention regime sector there are 46 persons;
iv. there are only 156 detainees that have not been convicted. They are going to be transferred to another cellblock;
v. After the riot, those inmates that were suffering from medical conditions were transferred. Next, those who had not taken part in the riot were transferred. The inmates that had been involved in the riot would be

transferred last in order not to affect the administrative investigation conducted to identify and sanction those responsible for the riot.

d) *regarding the fourth issue to be resolved (submit an updated list of all inmates, stating data regarding their identity and admission date, possible referral and release, as well as any changes that may occur in the inmates population,)* the State submitted a list of all inmates subject to a closed detention regime, a list of those having a semi-open regime and those who are provisionally detained; and

e) lastly, the State informed that an administrative investigation was commenced in order to identify and punish those persons that were involved in the riots.

7. The brief submitted by the representatives of the beneficiaries on September 11, 2006, after an extension had been granted for its submission, informing that the report submitted by the State is insufficient and incomplete and does not make reference to all the requests made by the President in the Order of July 28, 2006. Representatives alleged, *inter alia*, the following:

a) regarding the first issue to be resolved (to protect the lives and physical integrity of all the persons that are deprived of their liberty and are detained in the Araraquara Penitentiary, as well as to protect the lives and physical integrity of those persons that may be admitted in the future as prisoners or detainees, and to regain the control over such penitentiary:)

i. the situation that led to the adoption of the Order for urgent measures of July 28, 2006 has remained the same since June 16, 2006, date on which the doors were locked and welded; therefore, over 1,300 persons are unprotected, isolated from the outer world, not having any contact, not even with the Penitentiary agents;
ii. there are denunciations stating that inmates have been beaten, physically punished and that their rights have been restricted, for example, the failure to receive letters sent from their next of kin;
iii. the State has not confirmed or proved that it regained control over the Penitentiary. Furthermore, the State failed to inform about the actions taken to remedy the situation of isolation of inmates. Neither did the State justify the delay in the completion of the improvements that would allow the reparation of the traditional locking mechanisms, the opening of the facilities doors and the restatement of contact between the inmates and the penitentiary agents;
iv. the military police task force entered the Penitentiary using large caliber weapons, dogs and shields. There were shootings aimed at the detainees that would have been made by the security forces that wore masks and were stationed at the observation tower of the Penitentiary, who have been called "ninjas" by the inmates. The actions of the military police task force and the shootings by the masked security forces have increased the tense atmosphere among the detainees, thus, the hypothesis of a new riot cannot be disregarded;
v. several inmates were shot with rubber bullets and show the respective marks on their bodies, that is why the representatives request the competent authorities that the said inmates be examined and that the existence of such marks be officially registered;

vi. the number of Penitentiary agents in actual service is small and inadequate. The representatives alleged that the agents complained about bad working conditions and low salaries; and further, that they feel unsafe and are scared due to the threats by criminal gangs in the Penitentiary. All this would be an obstacle for the restatement of order and respect for the human rights of the beneficiaries;

b) regarding the second issue to be resolved (to allow access to medical staff, to relocate those who suffer from contagious diseases and to provide both in terms of quantity and quality, all the food, clothes and products for personal hygiene that may be necessary:)

i. there is no medical assistance for the ill inmates, many of them suffer illnesses or medical conditions that are severe, such as hepatitis B and C, ulcers, HIV/AIDS, umbilical hernia, auricular infections, eye infections and severe hemorrhoids. The inmates themselves provide the medication to those ill inmates.

ii. the food is prepared by inmates in another section of the Penitentiary and is sent to the beneficiaries through the same channel used for transporting waste. Pieces of glass and have been found in the food and roaches wings in the water. Beneficiaries do not have basic materials for their hygiene, the number of toilets is well below the adequate, taking into account the number of detainees; and a great number of inmates have to sleep on the floor and in the open air;

c) regarding the third issue to be resolved (to substantially reduce the overcrowding, to divide inmates into different categories and to allow inmates to be visited by their next of kin:) and the fourth issue to be resolved (submit an updated list of all inmates, stating data regarding their identity and admission date, possible referral and release, as well as any changes that may occur in the inmates population,):

i. in the list sent, the State failed to inform about the inmates that were transferred or released after the Order of the President of July 28, 2006. This information is important because other detention centers are in the same conditions as the Araraquara Penitentiary, thus, a mere referral of the inmates to those facilities does not solve the situation;

ii. a significant number of inmates subject to a semi-open detention regime are detained under a closed regime;

iii. the State has made it difficult for the representatives to access the Penitentiary and did not allow their visit at all on September 8, 2006;

iv. visits from next of kin are prohibited since the last riot, and no information is available regarding the restatement of such visits. The inmates do not have contact with their defense attorneys either; and

d) *regarding the fifth issue to be resolved (investigate the facts that have given rise to the adoption of the measures,)* the representatives informed that the State did not make any reference to the proceedings that might have been commenced in order to determine those responsible for the conditions to which the beneficiaries are subjected, and made a mere reference to the investigation commenced in order to punish those inmates that had taken part in the riot occurred on June 16, 2006.

8. The brief of the Commission submitted on September 12, 2006, by means of which it considered that the information submitted in the report filed by the State did

not comply with the minimum standards that would allow an adequate follow-up of the protective measures that had been ordered. This being so because there is no information regarding the urgent and immediate actions that the State had to adopt, and also because the information submitted regarding the current situation of the beneficiaries of these measures is superficial and not detailed and is not duly supported by evidence. All the foregoing prevents the Commission from making any objections in such respect. The Commission further stated, *inter alia*, the following:

a) regarding the first issue to be resolved (to protect the lives and physical integrity of all the persons that are deprived of their liberty and are detained in the Araraquara Penitentiary, as well as to protect the lives and physical integrity of those persons that may be admitted in the future as prisoners or detainees, and to regain the control over such penitentiary:)

i. the State acknowledges that the unit where hundreds of beneficiaries are deprived of their liberty does not have the minimum decent conditions and that the State does not provide security nor control over the open yards in the Araraquara Penitentiary;

ii. in spite of the fact that the State has affirmed that the interventions of the military police are being performed respecting the individual rights of the inmates, the Commission stated that there are contradictory versions regarding the violence used in said interventions. There also exist several records evidencing the abusive use of force, including massacres perpetrated during the intervention of said task force in detention centers in the state of San Paulo;

iii. the State has not complied with its obligation to open the doors at the place where the beneficiaries are detained so that the security agents may have access. Neither has the State complied with the immediate and effective adoption of all measures that are necessary to protect the rights to life and to physical, psychological and moral integrity of the beneficiaries so that they may enjoy decent detention conditions. There are still unacceptable detention conditions in the Araraquara Penitentiary, there are no state agents and there is an impending risk to suffer serious and irreparable damage;

iv. regarding the referrals made by the State, the criterion adopted of transferring first those inmates that had not been involved in the riot, and then subsequently transfer those who had indeed participated in the event, might indicate that keeping the latter under such inhumane detention conditions would be a retaliation for their participation in the riots that have occurred. Likewise, in case the schedule that the State informed is completed, it would take almost ten weeks or two and a half months to solve the situation at the Penitentiary, without any parallel immediate actions being taken in order to regain control and guarantee the safety of the beneficiaries.

b) regarding the second issue to be resolved (to allow access to medical staff, to relocate those who suffer from contagious diseases and to provide both in terms of quantity and quality, all the food, clothes and products for personal hygiene that may be necessary:) the medical staff assigned to the Penitentiary does not have direct access to the beneficiaries. Furthermore, in spite of the fact that the State has informed about the delivery of medicines for the inmates, this does not constitute a sufficient degree of medical attention to protect life and integrity;

c) regarding the third issue to be resolved (to substantially reduce the overcrowding, to divide inmates into different categories and to allow inmates to be

visited by their next of kin:) there was a decrease in the total number of detainees and an increase of physical space occupied by the beneficiaries after 434 inmates have been transferred and a third block has been opened in the *Centro de Detención Provisional* ("Provisional Detention Center") at the Araraquara Penitentiary. However, there are approximately 1,000 beneficiaries of the present measures divided into three cellblocks, and

d) *regarding the fifth issue to be resolved (investigate the facts that have given rise to the adoption of the measures:)* the State has mentioned that there would be an administrative investigation pending in order to investigate the responsibilities related to the riot of June 16, 2006, but it has not stated which proceedings, if any, are related to the investigation of those responsible for the injuries that are alleged to have been caused to some beneficiaries on July 10, 2006, nor any information was stated regarding the permanent detention conditions that the beneficiaries have had to endure at the Araraquara Penitentiary.

9. The Order of the Court issued on September 27, 2006, by means of which the following was decided:

> 1. To commission the President, Judge Sergio García-Ramirez; the Vice-President, Judges Antônio A. Cançado Trindade and Manuel E. Ventura-Robles, to attend to a public hearing that has been convened for September 28, 2006 in the seat of this Court and to adopt the decision that they may deem pertinent.
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10. The public hearing regarding the request for provisional measures, which hearing was held on September 28, 2006, where the following persons were present, to wit: by the Inter-American Commission: a) Florentín Meléndez, Delegate; Ariel Dulitzky, Assistant Executive Secretary; and Leonardo Jun Ferreira-Hidaka, legal counsel; b) by the representatives of the beneficiaries: Helio Pereira-Bicudo, from the *Fundación Interamericana de Defensa de los Derechos Humanos* ("Inter-American Foundation for the Defense of Human Rights",) and Carlos Eduardo Gaio, from *Justicia Global* ("Global Justice";) and c) by the representatives of the State: Renata Lúcia de Toledo-Pelizon, International Advisor of the *Secretaría Especial de Derechos Humanos* ("Human Rights Special Secretariat";) Marcia Adorno Cavalcanti-Ramos, Chief of the *División de Derechos Humanos* ("Human Rights Division") of the *Ministerio de Relaciones Exteriores* ("Ministry of Foreign Affairs";) Mauricio Keuhne, General Director of the *Departamento Penitenciario Nacional* ("National Penitentiaries Department";) Carla Polaina-Leite, Fabrício Vierira, Public Prosecutor of the *Departamento Penitenciario Nacional* ("National Penitentiaries Department";) Sérgio Ramos-Brito, representative of the *Abogacía General de la Unión* ("General Advocacy Office of the Unión",) and Elival da Silva-Ramos, *Procurador General* ("Attorney General") of the state of San Paulo.

11. The allegations and documents submitted by the State at the public hearing before the Court, by means of which it informed, in brief, the following, to wit:

> a) the Araraquara Penitentiary was a model detention center before the riots that took place at the beginning of 2006, moment at which most of such Penitentiary was destroyed. In such Penitentiary, 727 of the total number of detainees had the possibility of developing certain activities such as carpentry, cooking;
> b) on September 20, 2006, all inmates detained at the Araraquara Penitentiary were transferred to other 35 penitentiaries, in order to complete

the reconstruction of the said Penitentiary. All centers that were in conditions to receive the detainees were identified and the referrals commenced. Priority was given to those persons suffering from medical conditions;

c) at the Araraquara Penitentiary, there were 537 provisional detainees, 73 convicts serving sentence under a semi-open regime, and 986 convicts serving sentence under a closed regime. The State submitted a list to the Court identifying each of those persons and stating when and where they were transferred;

d) the referrals were made in the presence and under the supervision of the members of the Judicial Power;

e) the State submitted a list to the Court containing the names of all detainees that have received medical assistance;

f) in spite of the seriousness of the events, there were no detainees dead or injured. In these two months there has been an attempt to runaway. For this reason, the state agents shot rubber bullets, causing some minor injuries to some of the detainees, but this situation is comprised within the international standards for contention;

g) the provision of products for personal hygiene and the legal advice services to detainees have not been interrupted by the State, in spite of the unfavorable circumstances surrounding the case;

h) there is a criminal gang that acts within the Brazilian penitentiaries that is being currently investigated in order to identify and punish their leaders, specially for the damages caused to several penitentiary officers that had been present at the moment the riots took place;

i) furthermore, the State has adopted provisional measures in order to avoid new riots similar to those that have already occurred. Such measures involve the creation of a *Gabinete de Gestión Integrada* ("Mixed Management Board") integrated by members of the Judicial Power, officers from the *Área de Seguridad Pública* ("Public Safety Area",) officers from the *Ministerio Público* ("Public Ministry") and from the *Fiscalía General del Estado* ("State Public Prosecutor's Office",)

j) the representatives were prevented from accessing the facilities once by safety reasons, but the State does not object that they may have access to the beneficiaries of the measures; and

k) as a consequence of the referrals made by the State, which is the main objective of the provisional measures ordered by the President, the said measures have been widely complied with. However, the State shall voluntarily provide, for the term that the Court may deem convenient, all the information that may be necessary regarding the situation of those detainees that have been referred to other penitentiaries.

12. The arguments of the Commission presented at the public hearing held before the Court, wherein, in brief, the following was informed, to wit:

a) the referrals constituted a great step on the part of the State towards solving the situation;

b) during an on-site visit made on September 20 to 22, 2006, which the Commission decided to make in view of the extreme seriousness of the situation and of the insufficiency of the measures that had initially been adopted at domestic level, the members of the Commission visited the Penitentiary of Serra Azul, where some of the detainees had been transferred to. At that time, they interviewed 10 persons that had been detained in the Araraquara Penitentiary. Such persons confirmed that they were not suffering

any retaliation as a consequence of the riot that had occurred in the Araraquara Penitentiary. They further stated that they were receiving the same treatment as that given to the persons that were originally detained in Serra Azul;

c) furthermore, during the on-site visit, state authorities declared, in interviews with the members of the Commission, that the events occurred within the penitentiary system of the state of San Paulo were "extremely chaotic," and that the said events were characterized by the lack of supervision and control and a deficient administration;

d) the members of the Commission heard the stories told by the detainees about the excessive and unnecessary use of force by the military police task force after control had been regained and rioters had surrendered; they also heard about abuses by the masked security agents who monitored the detainees from the observation tower of the Araraquara Penitentiary, such as the shooting of rubber and, sometimes, lead bullets;

e) there are at least one hundred persons, previously detained in the Araraquara Penitentiary, that suffer from HIV/AIDS, some of them are terminal patients suffering from pneumonia and tuberculosis;

f) the investigations that the State must carry out have to be focused on determining those responsible for the actions taken by the State agents (abusive and unnecessary use of force) to repress the riot;

g) the next of kin were not officially notified about the new location to which the detainees had been referred. The list containing such information was posted on one of the Penitentiary's walls after the request had been made by the Commission in that respect;

h) it is necessary that the State provide detailed and updated information about the following:

i. the situation of the beneficiaries in each of the 35 penitentiaries whereto they had been transferred, particularly if they had suffered retaliation by the security officers;

ii. the situation of the more than 100 detainees who are ill or injured as well as the medical treatment administered in each case;

iii. the manner in which the next of kin and the representatives of the beneficiaries shall be secured access to the detainees;

iv. the manner in which the coordination between the federal and the state governments shall be secured so that the measures stated by the Order by fulfilled.

13. The arguments and the documents submitted by the representatives at the public hearing held before the Court, wherein they stated, in brief, the following:

a) there had been restrictions for the representatives to access the Araraquara Penitentiary, in spite of the contacts that had previously been made with state authorities in order to guarantee access to the detainees;

b) the referrals were made to penitentiaries that were already overpopulated, exceeding their capacity over 50 %, as is the case of the Mirandópolis Penitentiary and the *Penitenciaría II de Presidente Venceslau* ("II Penitentiary of President Venceslau".) Therefore, the State must inform about the detention conditions that the beneficiaries are currently subject to;

c) there were acts of retaliation addressed to the inmates when they were still detained in the Araraquara Penitentiary. During the referrals, the beneficiaries were compelled to walk on pieces of glass and materials that had been destroyed during the riots. They were also beaten;

d) at the moment of making the referrals, priority was not given to those inmates that were ill, nor to the victims of the violent acts;
e) the investigations that the State has to conduct must bring some light as to the violence used against the beneficiaries and not merely identify those responsible for the riots. There is an investigation aimed at determining the circumstances in which 80 rubber bullets were shot against the detainees,
f) the referrals do not amount to a strict fulfillment of the protection measures. The beneficiaries of such measures are inmates that had been detained in the Araraquara Penitentiary until they were referred. Thus, it is necessary to ensure that they are not in the same detention conditions as they were in such Penitentiary, now that they have been relocated in other penitentiaries.

CONSIDERING:

1. That Brazil has been a State Party of the American Convention from September 25, 1992, and pursuant to Article 62 of the Convention, it accepted the contentious jurisdiction of the Court on December 10, 1998.

2. That Article 63(2) of the American Convention states that, "in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission."

3. That according to Article 25 of the Rules of Procedure of the Court,

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> 2. With respect to matters not yet submitted to it, the Court may act at the request of the Commission.
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> 5. If the Court is not sitting, the President, in consultation with the Permanent Commission and, if possible, with the other judges, shall call upon the government concerned to adopt such urgent measures as may be necessary to ensure the effectiveness of any provisional measures that may be ordered by the Court at its next session.
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> 6. The beneficiaries of provisional measures or urgent measures ordered by the President may address their comments on the report made by the State directly to the Court. The Inter-American Commission on Human Rights shall present observations to the State's report and to the observations of the beneficiaries or their representatives.
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4. That the purpose of the provisional measures, in the national judicial systems (domestic procedural law) is, in general, to protect the rights of the parties to a controversy, securing that the execution of the judgment on the merits is not prevented or hindered by the acts of the said parties *pendente lite*.

5. That in International Human Rights Law, the provisional measures are not only precautionary, in the sense that they preserve a legal status, but they are also protective in nature, since they protect human rights. Provided that the basic

requirements of extreme seriousness and urgency and prevention of irreparable damage to persons are met, the provisional measures become an actual jurisdictional guarantee of a preventive nature.

6. That Article 1(1) of the Convention enshrines the duty of the States Party to respect the rights and freedoms acknowledged in such treaty, and to guarantee the free and complete exercise of the same to all persons submitted to their jurisdiction.

7. That the case giving rise to the request for the instant provisional measures is not pending before the Court as to its merits, and that the adoption of such measures does not amount to a decision about the merits of the controversy existing between the petitioners and the State. Upon adopting provisional measures, the Court is merely exercising its powers pursuant to the Convention in cases of extreme urgency and seriousness that demand protective measures to prevent causing irreparable damage to persons.

8. That the Inter-American Commission requested this Court to issue an order to protect the lives and the physical integrity of those persons that have been deprived or their liberty that are detained in the Araraquara Penitentiary (*supra* Having Seen clause No. 1.) On some other occasions, the Court has ordered the protection of a plurality of persons that had not previously been identified, but who were identifiable and determinable and were facing an impending dangerous situation due to the fact they belonged to a group or community,[1] such as the persons deprived of their liberty at a detention center.[2]

9. That the active participation of the State, of the Commission and of the representatives at the public hearing that has been held regarding the instant case constitutes an advance for the development of the implementation of the instant provisional measures.

10. That in the instant case, urgent protective measures have been ordered for the benefit of the persons that were detained in the Araraquara Penitentiary as well as for those persons that might be admitted to such penitentiary as prisoners or detainees (*supra* Having Seen clause No. 4.) At the public hearing held on September, 2006, the State informed that it had referred to other penitentiary centers those persons that had been previously detained in the Araraquara Penitentiary. Despite the aforesaid, the beneficiaries of the measures are identifiable and are those persons detained at the Araraquara Penitentiary for whose benefit the adoption of the protective measures was ordered on July 28, 2006, without regard to the fact that they have been referred to some other penitentiary, since the State is still responsible for their custody.

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[1] *Cf., inter alia, Matter of Pueblo Indígena de Sarayaku*. Provisional Measures. Order of the Inter-American Court of Human Rights of July 6, 2004, Considering clause No. 9; *Matter of Pueblo Indígena Kankuamo*. Provisional Measures. Order of the Inter-American Court of Human Rights of July 5, 2004, Considering clause No. 9; and *Matter of the Communities of Jiguamiandó and Curbaradó.* Provisional Measures. Order of the Inter-American Court of Human Rights of March 6, 2003, Considering clause No. 9.

[2] *Cf. Matter of Children Deprived of Liberty in the "Complexo do Tatuapé" of* FEBEM. Provisional Measures *supra* note 2, Considering clause No. 7; *Matter of Urso Branco Prison*, Provisional Measures. Order of the Inter-American Court of Human Rights of September 30, 2005, Considering clause No. 6; and *Matter of the Mendoza Prisons*, Provisional Measures. Order of the Inter-American Court of Human Rights of November 22, 2004, Considering clause No. 13; and *Matter of Urso Branco Prison*. Provisional Measures. Order of the Inter-American Court of Human Rights of June 18, 2002, Considering clause No. 6.

11. That regarding the responsibility of the State for the adoption of security measures in order to protect those persons subject to its jurisdiction, the Court has already established that this duty is more evident since these persons are detained in the state detention centers, and under such circumstances the State plays a special role as guarantor of the rights of the persons that remain under its custody.[3] Furthermore, "one of the unavoidable obligations that the State has to assume in its capacity as guarantor, with the purpose of protecting and securing the right to life and physical integrity of the persons that have been deprived of their liberty, is that of providing such persons with the minimum decent conditions while they remain in the detention centers".[4]

12. That the State informed that, after the riot, those inmates that were ill or injured were referred to other penitentiary centers. Next, those that had not taken part in the riot were transferred. Those inmates that had been involved in the riot would be transferred in the last place in order not to hinder de advance of the administrative investigation seeking to identify and punish those responsible for the riot. The State further informed that the military police forces entered the Araraquara Penitentiary to provide assistance to ill inmates, transfer detainees and keep order. It further stated that the Penitentiary has medical staff, two dentists, one nurse, one nursing technician and one nursing assistant, who delivered prescribed medicines to the inmates that needed them twice a day, in the mornings and at night; it also added that there had not been a shortage of food, clothes or products for personal hygiene. The State also informed that, as of the date of submission of its report, 434 inmates had been referred to other penitentiaries and that the detainees remaining in the Araraquara Penitentiary had been relocated in three separate sectors.

13. That the Commission and the representatives, in their objections to the report filed by the State, pointed out that, even after the Order of the President dated July 28, 2006, and while they were at the Araraquara Penitentiary, the beneficiaries remained in an open yard without the presence of any State officers to keep order. Many of them suffered from serious illnesses and medical conditions such as hepatitis B and C, ulcers, HIV/AIDS, umbilical hernia, auricular infections, eye infections and severe hemorrhoids and were not receiving adequate medical assistance. They further stated that food provided was not enough or adequate since the inmates themselves had to prepare it and that the water available might be contaminated by the presence of glass pieces and roaches wings. The minimum conditions for a decent life were not being protected, there were no appropriate places for the inmates to sleep and there were not enough products for their personal hygiene. The beneficiaries were not allowed to contact their next of kin or their attorneys. No administrative or judicial investigation was conducted in order to determine those responsible for the generation and maintenance of the detention conditions that the beneficiaries had to endure. There was only an administrative

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[3] *Cf. Matter of Children Deprived of Liberty in the "Complexo do Tatuapé" of* FEBEM. Provisional Measures *supra* note 2, Considering clause No. 7; *Matter of Urso Branco Prison*, Provisional Measures. Order of the Inter-American Court of Human Rights of September 21, 2005, Considering clause No. 6; and *Matter of the Mendoza Prisons*, Provisional Measures. Order of the Inter-American Court of Human Rights of June 18, 2005, Considering clause No. 6.

[4] *Cf. Matter of the Mendoza Prisons*, Provisional Measures. Order of the Inter-American Court of Human Rights dated March 30, 2006, Considering clause No. 7; and *Case of the "Juvenile Reeducation Institute" v. Paraguay.* Judgment of September 2, 2004. Series C No. 112, para. 159.

investigation commenced in order to identify and punish those detainees that had been involved in the riot of June 16, 2006.

14. That, at the public hearing held before the Court, the State submitted lists stating the new relocation of the detainees that had been referred from the Araraquara Penitentiary, and also information regarding the medical assistance provided to some of them. In that respect, the Commission and the representatives considered that the referral of the inmates made by the State was a positive measure, but they stated that they do not have any details about the current conditions of those persons that had been previously detained in the Araraquara Penitentiary since many detention centers to which they were referred were already overcrowded and did not offer adequate detention conditions. Consequently, the Commission and the representatives pointed out the need that the State inform, with accuracy, the current detention condition of those inmates that had previously been detained in Araraquara Penitentiary.

15. That the Court considers that the detention conditions which inmates had to endure at the Araraquara Penitentiary (supra Considering clause No. 13) are unacceptable. Likewise, the Court notices that as a consequence of its positive obligation to protect the right to life and physical integrity, the State has the duty to prevent that individuals under its custody be subject to conditions such as overcrowding, and to such precarious detention conditions as aforesaid described; furthermore, the State has the duty to divide inmates into different categories. All these circumstances may give rise to violent events such as that occurred in the Araraquara Penitentiary on June 16, 2006 and might cause an immediate loss of lives and generalized attacks affecting the inmates' personal integrity.

16. That the obligation of the State to protect the lives and the physical integrity of those persons under its custody implies that the State has a duty to protect such persons from any violence as a consequence of the acts of state officers or third parties. The Court notices that the acts of the state security officers, specially those aimed at keeping order, or the possible referrals, must be carried out strictly respecting the human rights of the prisoners and preventing unduly violent acts. The State also has the duty to control the acts of third parties.[5] Given the characteristics of the detention centers, the State must protect prisoners from violent acts which, if there is no State control, might take place among the detainees.

17 That the State must comply with its duty to protect and guarantee the human rights of prisoners, taking into consideration, at the same time, its duty to preserve public safety and to protect the rights of all persons under its jurisdiction.

18. That the Court has established that the international responsibility of states, within the scope of the American Convention, arises upon the violation of *erga omnes* general obligations to respect and secure the protective measures and to secure the enforcement for all persons of the rights embodied in Articles 1(1) and 2

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[5] *Cf. Matter of Yare I y Yare II Capital Region Penitentiary Center*. Provisional Measures. Order of the Inter-American Court of Human Rights of March 30, 2006, Considering clause No. 14; *Matter of Monagas Judicial Confinement Center ("La Pica").* Provisional Measures. Order of the Inter-American Court of Human Rights of February 9, 2006, Considering clause No. 16; and *Matter of Children Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM.* Provisional Measures, *supra* note 2, Considering clause No. 14.

of such Convention.[6] Special duties arise from these general obligations, which duties are determinable in view of the particular needs for protection of the legal persons, whether as to their personal conditions or due to the specific situation that they have to endure. Article 1(1) of the convention imposes on the States Party the fundamental obligations to respect and protect rights. Hence, any violation to those human rights recognized in the Convention which, according to International Law rules, can be attributable to an act or omission of any public authority, constitutes an act attributable to the State, which becomes internationally responsible to the extent prescribed in the said Convention.[7]

19. That the provisions embodied in Article 63(2) of the Convention generate an obligation for the State to adopt the provisional measures that this Court may order. This being so, since according to a basic principle of the international responsibility of the States, supported by international case-law, the States must comply with their conventional obligations in good faith *(pacta sunt servanda.)* The failure to comply with an order to adopt provisional measures issued by the Court may give rise to the international responsibility of the State.[8]

20. That after having examined the facts and the circumstances that led to the Order issued on July 28, 2006 by the President in consultation with the Judges of the Court, which order provided for the adoption of urgent measures in favor of those persons deprived of their liberty in the *Penitenciaría "Dr. Sebastião Martins Silveira"* (*"Dr. Sebastião Martins Silveira"* Penitentiary*,)* in Araraquara, state of San Paulo, Brazil, and which order further provided for the protection of the lives and physical integrity of all the persons that may be admitted to such penitentiary in the future as inmates or detainees (*supra* Having Seen clause No. 4;) and after having examined the allegations that the State, the Commission and the representatives presented at the public hearing, (*supra* Having Seen clauses No. 11, 12 and 13,) and in view of the lack of specific information regarding the current situation of the beneficiaries, and considering the prior circumstances that they had to endure (*supra* Considering clause No. 13,) the Court cannot avoid exercising its power to guarantee the human rights of those persons that are deprived of their liberty, since the said beneficiaries are, *prima facie*, still suffering a situation of extreme gravity and urgency; and therefore, the adoption of provisional measures in their favor becomes necessary. The *prima facie* standards applied to a case and the assumptions made about the need for protection have led the Court to order measures on several occasions.[9]

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6 *Cf. Matter of the Mendoza Prisons*, Provisional Measures, *supra* note 4 Considering clause No. 6; *Case of the Pueblo Bello Massacre*, *supra* note 6 para. 111; and *Case of the "Mapiripán Massacre"* Order of the Inter-American Court of Human Rights of September 2, 2005, para. 111.

7 Cf. *Matter of the Mendoza Prisons*, Provisional Measures, supra note 4 Considering clause No. 9; *Case of the Pueblo Bello Massacre*, supra note 6 para. 111; and *Case of the "Mapiripán Massacre"* note 6, para. 108.

8 *Cf. Matter of the Mendoza Prisons*, Provisional Measures, *supra* note 4 Considering clause No. 10; *Matter of the Communities of Jiguamiandó and Curbaradó*. Provisional Measures. Order of the Inter-American Court of Human Rights of February 7, 2006, Considering clause No. 7.

9 *Cf. Matter of Millacura Llaipén et al.* Provisional Measures. Order of the Inter-American Court of Human Rights of July 6, 2006, Considering clause No. 9. *Case of 19 Tradesmen*. Provisional Measures. Order of the Inter-American Court of Human Rights of July 4, 2006, Considering clause No. 13. and *Matter of the Forensic Anthropology Foundation*. Provisional Measures. Order of the Inter-American Court of Human Rights of April 21, 2006, Considering clause No. 10.

21. That, even though the Court considers the referral of the beneficiaries that the State has made (*supra* Having Seen clause No. 11) as something positive, it is necessary for the State to specifically inform the Court about the conditions under which such referrals were made. The State must also inform about the conditions of the penitentiary centers to which the beneficiaries have been referred, as well as the conditions of their installations and their total population. The State must further inform about the security of the beneficiaries, their access to adequate medical assistance and food and about the situation of those persons that are allegedly seriously ill, injured or those that have allegedly been shot as a consequence of the use of means of contention. The aforesaid must be accompanied by supporting medical-legal examinations. Likewise, the State must inform about the division of the inmates into different categories such as convicted prisoners and detainees pending criminal trial, and about the access to their next of kin and representatives.

22. That the State has the duty to immediately and officially inform next of kin about the referrals and relocation in other penitentiary centers of those persons deprived of their liberty that are beneficiaries of the instant measures.

23. That the State must immediately and effectively adopt all measures necessary to secure to those persons for whose benefit on July 28, 2006 the adoption of protection measures was ordered while they were detained in the Araraquara Penitentiary in order to protect their right to life, physical, mental and moral integrity and their right to enjoy decent detention conditions irrespective of the detention center where they are currently detained. The aforesaid must contemplate the management and treatment of persons deprived of their liberty with a strict respect for human rights, avoiding unduly violent acts by the state officers, particularly during possible referrals, and providing access to medical staff to give the necessary assistance, particularly to those suffering from contagious diseases or those who are suffering from a serious medical condition; and further, detention must be without overcrowding, respecting the division of inmates into two categories: convicted prisoners and detainees pending criminal trial, and respecting the right to have access to the next of kin and defense attorneys.

24. That the Court appreciates the statements submitted by the State in the sense that it does not object that representatives may have access to the beneficiaries of the measures (*supra* Having Seen clause No. 11.) In that respect, the Court considers that the State has to provide the necessary means so that the human rights advocates, who are the representatives of the beneficiaries of the instant measures, may freely do their job, since the same constitutes a positive contribution that supplements the efforts by the State in order to protect the rights of the persons under its jurisdiction.[10]

25. That the State informed about the existence of an on-going administrative investigation in order to determine the responsibilities related to the riot of June 16, 2006, and the damage caused to the state officers that were present in the Araraquara Penitentiary during such riot. In that respect, in view of the duty of the

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[10] *Cf. Matter of Monagas Judicial Confinement Center ("La Pica").* Provisional Measures, *supra* note 5, Considering clause No. 14; *Matter of Mery Naranjo et al.* Provisional Measures. Order of the Inter-American Court of Human Rights of July 5, 2006, Considering clause No. 8; and *Matter of the Forensic Anthropology Foundation*. Provisional Measures, *supra* note 9, Considering clause No. 19.

State to investigate the facts that have given rise to the adoption of the provisional measures, the Court considers that the State must investigate, identify those responsible therefor and, as the case may be, impose the corresponding sanctions whether these be administrative or judicial.

26. That in view of the aforesaid, it is pertinent to ratify in full extent the Order of the President (*supra* Having Seen clause No. 4) and to request the state to keep the measures that have already been adopted, and to adopt immediately those measures that may be necessary in order to protect the lives and personal integrity of those persons for whose benefit the adoption of protective measures was ordered on July 28, 2006 while they were detained in the Araraquara Penitentiary.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

exercising its powers granted pursuant to Article 63(2) of the American Convention on Human Rights, and pursuant to Articles 25 and 29 of the Rules of Procedure

ORDERS THE FOLLOWING:

1. To ratify in all its terms the Order of the President of the Inter-American Court of Human Rights, and therefore, to request the State to keep the measures that have already been adopted, and to adopt immediately those measures that may be necessary in order to protect the lives and personal integrity of those persons for whose benefit the adoption of protective measures was ordered on July 28, 2006 while they were detained in the Araraquara Penitentiary.

2. To request the State to adopt any measures that may be necessary to secure that the management and treatment of the beneficiaries of the instant measures be carried out with a strict respect for human rights, and preventing unduly violent acts by state officers, pursuant to Considering clause No. 16.

3. To request the State to keep and adopt any measures that may be necessary in order to provide decent detention conditions in the penitentiary centers where the beneficiaries of the instant measures are detained. The said measures must include: a) necessary medical assistance, particularly to those who suffer from contagious diseases or those who suffer a serious medical condition; b) provision of sufficient amounts of food, clothes and products for personal hygiene; c) detention avoiding overcrowding; d) division of inmates into different categories according to international standards; e) visits of the next of kin for the beneficiaries of the instant measures; f) access and communication of the defense attorneys to the detainees, and g) access of the representatives to the beneficiaries of the instant provisional measures.

4. To request the State to immediately and officially inform next of kin about the referrals and relocation in other penitentiary centers of those persons deprived of their liberty that are beneficiaries of the instant measures, pursuant to Considering clause No. 22.

5. To request the State to specifically inform the Court about the current situation of the beneficiaries of the instant measures who were detained at the Araraquara Penitentiary on July 28, 2006.

6. To request the State to investigate the facts that have given rise to the adoption of the provisional measures, identify those responsible therefor, and as the case may be, impose the pertinent sanctions.

7. To request the State to inform the Inter-American Court of Human Rights, within thirty days from service of notice of the instant Order, about any provisional measures that it has adopted in compliance of this Order, including the information requested in the fourth and fifth issues to be resolved.

8. To request the representatives of the beneficiaries of these measures to submit their objections within a term of fifteen days from service of notice of the report submitted by the State.

9. To request the Inter-American Commission on Human Rights to submit its objections within a term of twenty days from the service of notice of the report submitted by the State.

10. To request the State, after the submission of the report as stated in paragraph 7 above, to file with the Inter-American Court of Human Rights a detailed report every two months informing about the provisional measures that have been adopted. And further, to request the beneficiaries of these measures or their representatives and the Inter-American Commission on Human Rights, to submit their objections within a term of four to six weeks, respectively, from the service of notice of the reports submitted by the State.

11. To request the Secretariat to serve notice of this Order upon the State, the Inter-American Commission on Human Rights and the representatives of the beneficiaries of the instant measures.

Judge Antônio A. Cançado Trindade rendered his separate opinion to the Court, which opinion accompanies the instant Order.

Sergio García-Ramírez
President

Alirio Abreu-Burelli

Antônio A. Cançado Trindade

Manuel E. Ventura-Robles

Pablo Saavedra-Alessandri
Secretary

So ordered,

Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary

SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. In voting in favor of the adoption, by the Inter-American Court of Human Rights, of this Order on Provisional Measures of Protection in the matter of the Penitentiary in *Araraquara* regarding Brazil, I also feel obliged to include some personal reflections to support my position on the issues considered by the Court. I will do this, again, under severe time constraints, taking into account the fruitful public hearing held the day before yesterday, i.e. September 28, 2006, before the Court. In the very little time I have to explain my position - as I always try to do - in this Opinion, I set myself to focus my brief reflections on seven fundamental issues, to wit: a) the protective rather than precautionary nature of provisional measures of protection; b) the *autonomous* international responsibility regarding to provisional measures of protection under the American Convention; c) the interrelation of the general protection obligations contained in Articles 1(1) and 2 of the American Convention; d) the provisional measures of the Inter-American Court and *erga omnes* protection obligations; e) the broad scope of *erga omnes* protection obligations: their vertical and horizontal dimensions; f) the autonomous legal framework of the provisional measures of the Inter-American Court; and g) problems derived from the coexistence of precautionary measures and Provisional Measures of Protection in light of the need for individuals' direct access to international courts.

I. The Protective rather than Precautionary Nature of Provisional Measures of Protection

2. The relevance and increasing use of Provisional Measures of Protection by this Court require more and more attention, especially in situations of extreme vulnerability (of effective protection of individuals deprived of liberty in inhumane conditions of detention). From a historical perspective, the transposition of precautionary measures from the domestic legal system (as they have been interpreted by legal authors especially in Civil Procedure Law, following the valuable contribution made by Italian legal authors) to the international legal system - specifically, in interstate contentious matters-, does not seem to have caused, in this sense, a fundamental change in the *object* of these measures. This change has only taken place as a result of the most recent transposition of the provisional measures from the international legal system - in the traditional contentious matters between States - to International Human Rights Law, with its own specificity.

3. In the conceptual universe of International Human Rights Law -as I have pointed out in several Opinions as a member of this Court as well as in different studies - provisional measures of protection have come to safeguard the fundamental rights of individuals, rather than the efficacy of the judicial function, thus becoming truly *protective* in nature, rather than *precautionary*.[11] So far, the case law established

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[11]. For an analysis of this evolution*, cf.* A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. II, Porto Alegre, S.A. Fabris Ed., 2003, pp. 80-83; A.A. Cançado Trindade, "Provisional Measures of Protection in the Evolving Case-Law of the Inter-American Court of Human Rights (1987-2001)", *in El Derecho Internacional en los Albores del Siglo XXI - Homenaje al Prof. J.M. Castro-Rial Canosa* (ed. F.M. Mariño Menéndez), Madrid, Publ. Trotta, 2002, pp. 61-74; A.A. Cançado Trindade, "*Les Mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme*", 4 *Revista do Instituto Brasileiro de Direitos Humanos* (2003) pp. 13-25; A.A. Cançado Trindade, "The Evolution of Provisional Measures of Protection under the Case-Law of the Inter-American Court of Human Rights (1987-2002)", 24 *Human Rights Law Journal* - Strasbourg/Kehl (2003), n. 5-8, pp. 162-168.

by the Inter-American Court of Human Rights on this subject has significantly contributed to this, more than any other international court's case law. The Court's interpretation in this respect, endowed with a conventional basis, is truly exemplary, unparalleled -in terms of scope - in contemporary international case law as a result of having duly exploited the great protection potential -though prevention - that arises from the provisions of Article 63(2) of the American Convention on Human Rights. Despite the progress accomplished by the Court to the present day, there is still a long way to go (*infra*).

II. The *Autonomous* International Responsibility regarding to Provisional Measures of Protection under the American Convention

4. Endowed with truly protective efficacy, Provisional Measures of Protection under the American Convention entail -as I have pointed out in many Opinions as a member of this Court - *autonomous* responsibility for compliance, which adds to the initial responsibility for the safeguarding of the protected rights. The implementation of such provisional measures has expanded (currently protecting, in Latin America and the Caribbean, almost 12,000 persons, and even the members of whole communities),[12] and they have become a true preventive judicial guarantee.[13] This is the origin of the autonomous nature of international responsibility, duly recognized in this Order of the Court in the matter of the *Penitentiary in Araraquara* regarding Brazil (*Considering clause* No. 19).

5. This means, as I stated in my recent Separate Opinion in the *Matter of the Mendoza Prisons* regarding Argentina (Order on Provisional Measures of Protection of March 30, 2006) as well as in other Opinions as a member of this Court, that:

> "despite the merits of the respective cases, *the notion of victim also emerges within the new context of Provisional Measures of Protection.* (...) Furthermore, the notion of victims as the central focus[14] has been also affirmed in this present context of prevention of irreparable damage to human beings.
>
> Provisional Measures of Protection create conventional obligations for the States involved, which differ from the obligations arising out of the Judgments on the merits of the cases, respectively. Some obligations effectively originate in Provisional Measures of Protection *per se.* They are entirely different from the obligations, if any, created by

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12. In the *Matter of Pueblo indígena de Kankuamo regarding Colombia* only, there are approximately 6,000 beneficiaries of the measures; in the *Matter of the Peace Community of San José de Apartadó regarding Colombia*, the beneficiaries are over 1,200; in the *Matter of the Communities of Jiguamiandó and Curbaradó regarding Colombia*, the beneficiaries are over 2,000; in the *Matter of Urso Branco Prison regarding Brazil*, almost 900 inmates benefit from such measures; in the *Matter of Pueblo indígena de Sarayaku regarding Ecuador*, there are approximately 1,200 beneficiaries; among several others.

13. For an analysis of this evolution*, cf.* A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. II, Porto Alegre, S.A. Fabris Ed., 2003, pp. 80-83; A.A. Cançado Trindade, "*Les Mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme*", *in Mesures conservatoires et droits fondamentaux* (publ. G. Cohen Jonathan and J.-F. Flauss), Bruxelles, Bruylant/Nemesis, 2005, pp. 145-163; A.A. Cançado Trindade, "*Les Mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme*", 4 *Revista do Instituto Brasileiro de Direitos Humanos* (2003) pp. 13-25; A.A. Cançado Trindade, "The Evolution of Provisional Measures of Protection under the Case-Law of the Inter-American Court of Human Rights (1987-2002)", 24 *Human Rights Law Journal* - Strasbourg/Kehl (2003), n. 5-8, pp. 162-168.

14. *Cf.* A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos* (Direct Access of Individuals to International Human Rights Courts), Bilbao, Universidad de Deusto, 2001, pp. 9-104.

Judgments on the merits (and, eventually, by reparations) of the cases under review. This means that Provisional Measures of Protection amount to a legal mechanism that, in turn, reveal the utmost relevance of the *preventive* dimension of international protection of human rights.

This is so much so that, under the American Convention (Article 63(2)), the international responsibility of any State may be triggered by breach of Provisional Measures of Protection ordered by the Court, without the need for the case on the merits to have been submitted to the Court (but rather, to the Inter-American Commission on Human Rights. This reinforces my view —which I will advance in this Concurring Opinion, if I may— that Provisional Measures of Protection, endowed with autonomy, are governed by their own legal rules; their breach triggers the responsibility of any such State —with legal consequences— and identifies the central role of the victim (of said breach), notwithstanding the examination and determination of the concrete case upon its merits.

In addition to the conventional basis of Article 63(2) of the American Convention, Provisional Measures under said convention are reinforced by the general duty of the States Party, pursuant to Article 1(1) of the Convention, to respect and ensure the respect, without discrimination, of protected rights, in favor of all the persons subject to their respective jurisdictions.[15] I have the feeling that, in spite of all the Court had done in favor of the evolution of Provisional Measures of Protection —more than any other contemporary international court, I may insist— there is still a long way to go. The already considerable legacy of said measures under the American Convention must be saved.

The legal rules governing said measures has to be strengthened conceptually, for the benefit of all the persons protected and of the victims of their breaches (regardless of the merits of the case, as may be). This is even more so required in repeated cases of (…) which reveal a growing pattern of intimidation and violence. This is urgently required in this dehumanized world empty of values we live in." (Paras. 10-14)

III. The Interrelation of the General Protection Obligations Contained in Articles 1(1) and 2 of the American Convention

6. In this Order in the matter of the *Penitentiary in Araraquara*, the Court specifically mentioned the constructive and cooperative spirit shown by the parties in relation to the proceedings during the public hearing held the day before yesterday (September 28, 2005) before the Court. Later, the Court asserted once again its position regarding the interrelation between the general obligations -*erga omnes* in nature- to respect and to ensure respect for the rights enshrined in the American Convention and to harmonize domestic law with the international norms of protection of the American Convention, as set forth in Articles 1(1) and 2 thereof (*Considering clause* No. 18).

7. In fact, since my early years in this Court, I have consistently pointed out the interrelation of the general obligations contained in Articles 1(1) and 2 of the American Convention, for instance, in my Dissenting Opinion (paras. 2-11) in the *Case of El Amparo versus Venezuela*, Judgment on reparations of September 14, 1996. In another Dissenting Opinion in the same *Case of El Amparo* (Order of April 16, 1997 on Interpretation of the Judgment), I also asserted the objective or "strict" liability of the State for failure to comply with its *legislative* obligations under the American Convention to harmonize its domestic law with the obligations undertaken under the Convention (paras. 12-14 and 21-26). A few days ago, four days to be precise, I took up this issue again in my Separate Opinion (paras. 24-25) in the *Case of Almonacid-*

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[15]. The broad scope of this general protection obligation, which also encompasses the provisional measures of protection, is analyzed in my recent Separate Opinion (paras. 15-21) in the Judgment of the Court in the *Case of the girls Jean and Bosico v. República Dominicana* (September 8, 2005), Separate Opinion (paras. 2-7 and 17-29) in the Judgment of the Court in the *Case of the "Mapiripán Massacre" v. Colombia* (September 15, 2005), and Separate Opinion (paras. 2-13) in the *Case of the Pueblo Bello Massacre v. Colombia* (January 31, 2006). The aforesaid Article 1(1) also provides the conventional basis for the obligations *erga omnes partes* under the Convention.

Arellano et al. v. Chile (Judgment of September 26, 2006) in relation to the utter incompatibility of the 1978 self-amnesty executive order issued by the Pinochet regime with the American Convention.

8. Moreover, and turning to the past decade, in my Dissenting Opinion in the *Case of Caballero-Delgado and Santana v. Colombia* (Judgment on reparations of January 29, 1997), I stated, regarding to the interrelation between the general duties to respect and to ensure respect for the protected rights and to harmonize the domestic legal order with the international norms of protection of the American Convention (para. 6), that:

> "In fact, those two general obligations, - which are added to the other specific conventional obligations concerning each of the protected rights, - are incumbent upon the States Parties by the application of International Law itself, of a general principle (*pacta sunt servanda*) whose source is metajuridical, in seeking to be based, beyond the individual consent of each State, on considerations concerning the binding character of the duties derived from international treaties. In the present domain of protection, the States Parties have the general obligation, arising from a general principle of International Law, to take all measures of domestic law *to guarantee* the effective protection (*effet utile*) of the recognized rights.
>
> The two general obligations enshrined in the American Convention - that of respecting and guaranteeing the protected rights (Article 1(1)) and that of harmonizing domestic law with the international norms of protection (Article 2) - appear to me to be ineluctably intertwined. (…) As those conventional norms bind the States Parties - and not only their governments, - in addition to the Executive, the Legislative and the Judicial Powers are also under the obligation to take the necessary measures to give effectiveness to the American Convention at domestic law level. Non-compliance with the conventional obligations, as known, engages the international responsibility of the State, for acts or omissions, either of the Executive Power, or of Legislative, or of the Judiciary. In sum, the international obligations of protection, which in their wide scope are incumbent upon all the powers of the State (…)." (Paras. 8-10).

IV. The Provisional Measures of Protection of the Inter-American Court and *Erga Omnes* Protection Obligations

9. I shall now turn to the next point in my brief reflections in this Matter of the *Penitentiary in Araraquara*. In my Concurring Opinion in the *Matter of the Peace Community of San José de Apartadó* (Order on Provisional Measures of protection of June 18, 2002), I allowed myself to point out that the protection obligation of a State extends not only to the relationship between said State and the persons subject to its jurisdiction but also, under certain circumstances, to the relationships among private individuals; this is a true *erga omnes* protection obligation. As I stated in the aforesaid Opinion, we stand, in short, before a State's *erga omnes* protection obligation towards all persons subject to its jurisdiction, which becomes increasingly important in the face of chronic violence and insecurity -as is the case in this Matter of the *Penitentiary in Araraquara* -, which, as I explained in my Concurring Opinion in the *Matter of Urso Branco Prison* (Order on Provisional Measures of Protection Regarding Brazil of July 7, 2004) - and restate here-

> "(…) clearly requires the recognition of the effects of the American Convention *vis-à-vis* third parties (the *Drittwirkung*), without which conventional obligations of protection would be reduced to little more than dead letter.
>
> In my view, the rationale built on the thesis of *objective* responsibility of the State is - if I may state this again- ineluctable, particularly in the case of provisional measures of protection, as is in this case. The aim, here, is to prevent irreparable damage to members of a community (...), in situations of extreme gravity and urgency, which involve the action (…) of military and police bodies and agents." (paras. 14-15)

10. As I see it, this argument becomes particularly compelling when the circumstances involve individuals that are in the custody of the State, and even more so when these individuals are children and adolescents (minors). Subsequently, in another case that encompassed both an individual and a collective dimension, in my Concurring Opinion in the *Matter of the Communities of Jiguamiandó and Curbaradó* regarding Colombia (Order on Provisional Measures of Protection of March 6, 2003), I allowed myself to insist on the need for the "recognition of the effects of the American Convention vis-à-vis third parties (the Drittwirkung)," —inherent in *erga omnes* obligations— "without which conventional obligations of protection would be reduced to little more than dead letter" (paras. 2–3). And I added that, from the circumstances surrounding the case, it was clear that:

> "the protection of human rights determined by the American Convention, to be effective, comprises not only the relations between the individuals and the public power, but also their relations with third parties (…). This reveals the new dimensions of the international protection of human rights, as well as the great potential of the existing mechanisms of protection, such as that of the American Convention, set in motion in order to protect collectively the members of a whole community,[16] even though the basis of action is the breach —or the probability or imminence of breach— of individual rights." (Para. 4).

11. It is clear from this Order that the obligation of a State to protect all persons within its jurisdiction encompasses the obligation to monitor the conduct of third-party individuals, which is an *erga omnes* obligation (*Considering clauses* No. 18 and 16). In fact, I have been working from within this Court on the conceptual and case law development of *erga omnes* protection obligations under the American Convention for a long time now. It is not my intention here to embark on a detailed discussion of the ideas I have already developed regarding this issue, particularly in my Concurring Opinions in the Orders on Provisional Measures of Protection adopted by the Court in the above-mentioned *Matters of the Peace Community of San José de Apartadó* (June 18, 2002), *the Communities of Jiguamiandó and Curbaradó* (March 6, 2003) and *Urso Branco Prison* (July 7, 2004) as well as in the *Matters of Pueblo indígena de Kankuamo* regarding Colombia (July 5, 2004), *Pueblo indígena de Sarayaku* regarding Ecuador (July 6, 2004), *"Globovisión" Television Station* regarding Venezuela (September 4, 2004) and *Mendoza Prisons* regarding Argentina (June 18, 2005), but to mention, albeit briefly, the key aspects of my views in this regard in order to ensure effective human rights protection in complex situations such as the one existing in this matter of the *Penitentiary in Araraquara*.

12. In truth, way before these cases were brought to this Court, I had already warned of the pressing need to promote the development of case law and jurisprudence on the legal framework of *erga omnes* obligations to protect human rights (e.g., in my Separate Opinions in the Judgment on the merits of January 24, 1998, para. 28, and the Judgment on reparations of January 22, 1999, para. 40, in the *Case of Blake v. Guatemala*). And in my Separate Opinion in the *Case of Las Palmeras v. Colombia* (Judgment on preliminary objections of February 4, 2000) I pointed out that a proper understanding of the broad scope of the general obligation to protect the rights enshrined in the American Convention, as set forth in Article 1(1) thereof, may contribute to the development of *erga omnes* protection obligations (paras. 2 and 6-7).

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[16]. Suggesting a similarity to class actions.

13. Said general protection obligation,[17] - as I added in the referenced Opinion in the *Case of Las Palmeras-,* is imposed upon each State Party individually as well as upon all of them jointly (obligation *erga omnes partes* - paras. 11-12). Therefore,

> "there could hardly be better examples of mechanism for application of the obligations *erga omnes* of protection (…) than the methods of supervision foreseen *in the human rights treaties themselves*, for the exercise of the collective guarantee of the protected rights. (…) The mechanisms for application of the obligations *erga omnes partes* of protection already exist, and what is urgently need[ed] is to develop their legal regime, with special attention to the *positive obligations* and the *juridical consequences* of the violations of such obligations" (para. 14).

In this line of thought, in this Order in the matter of the Penitentiary in *Araraquara*, when the Court defends the thesis of the positive obligations of the State, it refers precisely to the general obligation of the States set forth in Article 1(1) of the American Convention, which is ineluctably interrelated with the general obligation contained in Article 2 thereof (*cf. supra*).

V. The Broad Scope of *Erga Omnes* Protection Obligations: Their Vertical and Horizontal Dimensions

14. Moving on to the question of what I call the broad scope of the *erga omnes* obligations of protection,[18] in my Concurring Opinion in the Advisory Opinion No. 18 of the Inter-American Court on the *Juridical Condition and Rights of the Undocumented Migrants* (of September 17, 2003), I stated that such *erga omnes* obligations, characterized by *jus cogens* (from which they derive)[19] as being endowed with a necessarily *objective* character, encompass all the addressees of the legal norms (*omnes*), not only those who serve in State organs but also private individuals (para. 76). And I further stated, in pursuance of my objective of developing jurisprudence on the broad scope of *erga omnes* protection obligations:

> "(...) In a vertical dimension, the obligations *erga omnes* of protection bind both the organs and agents of (State) public power, and the individuals themselves (in the inter-individual relations).
>
> (...) as to the vertical dimension, the general obligation, set forth in Article 1(1) of the American Convention, to respect and to ensure respect for the free exercise of the rights protected by it, generates effects *erga omnes*, encompassing the relations of the individual both with the public (State) power as well as with other individuals."[20] (Paras. 77-78).

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[17]. Indeed, the general protection obligation encompasses the application of the provisional measures of protection under the American Convention. In my Concurring Opinion in the *Matter of Haitians and Dominicans of Haitian-origin in the Dominican Republic* (Order of August 18, 2000), I pointed out the change in both the *rationale* itself and the object of the provisional measures of protection (which progressed, in their historical development, from Civil Procedure Law to Public International Law) as a result of their implementation in International Human Rights Law (paras. 17 and 23).

[18]. *Cf*. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. II, Porto Alegre, S.A. Fabris Ed., 1999, pp. 412-420.

[19]. In the aforesaid Opinion, I specified that "by definition, all the norms of *jus cogens* generate necessarily obligations *erga omnes*. While *jus cogens* is a concept of material law, the obligations *erga omnes* refer to the structure of their performance on the part of all the entities and all the individuals bound by them. In their turn, not all the obligations *erga omnes* necessarily refer to norms of *jus cogens"* (para. 80).

[20]. *Cf.*, in this regard, in general, the resolution adopted by the *Institut de Droit International* (I.D.I.) at the session held in Santiago de Compostela in 1989 (Article 1), *in*: I.D.I., 63 *Annuaire de l'Institut de Droit International* (1989)-II, pp. 286 and 288-289.

15. In a display of short-sightedness, contemporary legal authors, in discussing *erga omnes* obligations, have focused almost exclusively on the *horizontal* dimension (obligations to the international community as a whole), failing to distinguish it from the vertical dimension and completely overlooking the latter, which is so important for International Human Rights Law. It is imperative to give more attention to what I call the *vertical* dimension of *erga omnes* obligations of protection.

16. I will continue to insist on this issue, both from within the Inter-American Court and the *Institut de Droit International.* In the latter, I have done so both in my writings[21] and in its debates. A little more than a year ago, precisely in its last debates on the subject in its last session in the Polish city of Krakow, I allowed myself to point out, in my speech of August 25, 2005, that:

> "(...) Precisely because obligations *erga omnes* incorporate fundamental values shared by the international community as a whole, compliance with them appears to me required not only of States, but also of other subjects of international law (including international organizations as well as peoples and individuals). Related to *jus cogens*, such obligations bind everyone.
>
> After all, the beneficiaries of the compliance with, and due performance of, obligations *erga omnes* are all human beings (rather than States). I am thus concerned (...) that an essentially inter-State outlook (...) does not sufficiently reflect this important point. Moreover, the purely inter-State dimension of international law has long been surpassed, and seems insufficient, if not inadequate, to address obligations and rights *erga omnes*. To me, it is impossible here not to take into account the other subjects of international law, including the human person. (...)
>
> Furthermore, the obligation to *respect*, and to *ensure respect* of, the protected rights, in all circumstances, - set forth in humanitarian and human rights treaties, - that is to say, the exercise of the collective guarantee, - is akin to the nature and substance of *erga omnes* obligations, and can effectively assist in the vindication of compliance with those obligations. *Jus cogens*, in generating obligations *erga omnes*, endows them with a necessarily objective character, encompassing all the addressees of the legal norms (*omnes*), - States, peoples and individuals. In sum, it seems to me that the rights and duties of all subjects of international law (including human beings, the ultimate beneficiaries of compliance with *erga omnes* obligations) should be taken into account in the determination of the legal regime of obligations *erga omnes*, and in particular of the juridical consequences of violations of such obligations.
>
> Last but not least, I support the reference (...) to the qualification of "grave" breaches of *erga omnes* obligations, as they affect fundamental values shared by the international community as a whole and are owed to this latter, which, in my view, comprises all States as well as other subjects of international law. All of us who have accumulated experience in the resolution of human rights cases know for sure that rather often we have been faced with situations which have disclosed an unfortunate diversification of the sources of grave violations of the rights of the human person (such as systematic practices of torture, of forced disappearance of persons, of summary or extra-legal executions, of traffic of persons and contemporary forms of slave work, of gross violations of the fundamental principle of equality and non-discrimination) - on the part of State as well as of non-State agents (such as clandestine groups, unidentified agents, death squads, paramilitary, and the like). This has required a clear recognition of the effects of the conventional obligations of protection also *vis-à-vis* third parties (the *Drittwirkung*), including individuals (identified and unidentified ones).
>
> I feel that we cannot adequately approach *erga omnes* obligations, - compliance with which benefits ultimately the human person, - from a strictly inter-State perspective or dimension, which would no longer reflect the complexity of the contemporary international legal order. Obligations *erga omnes* have a *horizontal* dimension, in the sense that they are owed to the international community as a whole, to all subjects of international law, but they also have also a *vertical* dimension, in the sense that they bind

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[21]. Cf. A. A. Cançado Trindade, "Reply [- Obligations and Rights *Erga Omnes* in International Law]", *in* 71 *Annuaire de l'Institut de Droit International* - Session de Cracovie (2005) n. 1, pp. 153-156 and 208-211.

> everyone, - both the organs and agents of the State, of public power, as well as the individuals themselves (including in inter-individual relations, where grave breaches also do occur)".[22]

17. In effect, in its *jurisprudence constante,* the Inter-American Court has mentioned that the State, being responsible for detention facilities, is the guarantee of the rights of detainees under its custody.[23] Thus, the State has the inescapable *erga omnes* obligation to protect all individuals under its custody, even in inter-individual relations. In this regard, the Inter-American Court has ruled that "every person deprived of her or his liberty has the right to live in detention conditions compatible with her or his personal dignity, and the State must guarantee to that person the right to life and to humane treatment."[24] Therefore, as the Court added, the State's power to keep public order is "not unlimited", because it has the obligation, at all times, to apply procedures that are in accordance with the law and to respect the fundamental rights of each individual in its jurisdiction (...)".[25]

18. In sum, as is evident from my above considerations, and from the cited case law, in any and all circumstances the State has a *due diligence* obligation aimed at preventing irreparable damage to persons under its jurisdiction and custody. Provisional protection measures such as those adopted by the Inter-American Court in this Order regarding the matter of the *Penitentiary in Araraquara* contribute to *continuously monitoring* a situation of extreme gravity and urgency that may infringe irreparable harm upon human beings*,* in accordance with a provision of a human rights treaty such as the American Convention (Article 63(2)).

19. As if in anticipation of this Court's Order, such continuous monitoring was agreed upon by the three parties that took part in the fruitful public hearing concerning this case, held the day before yesterday, September 28, 2006, at the Court's seat in San José de Costa Rica. Thus, I dare nurture the confidence that the Brazilian State (represented in the hearing both by federal Government authorities and by State authorities from São Paulo), will comply with the provisional protection measures set forth in this Order, in keeping with the valuable and respectable Brazilian legal tradition.

20. The *erga omnes* nature of Provisional Measures ordered by the Court becomes more evident and relevant in a context such as that of this case concerning the *Penitentiary in Araraquara*, which is tainted by a high level of chronic violence, as acknowledged and highlighted in the hearing the day before yesterday. In reply to one of my questions, the State's agent pointed out that, only in São Paulo, the total number of prisoners adds up to 150 thousand, reaching close to 380 thousand overall

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[22]. A. A. Cançado Trindade's speech at the Krakov (August 2005), still unpublished (due to be published in the next volume of the *Annuaire* of the above-mentioned *Institut*).

[23]. Inter-American Court of Human Rights, *Case of Bulacio v. Argentina,* Judgment of September 18, 2003, Series C, No. 100, paras. 126–127 and 138): Inter-American Court of Human Rights, *Case of Hilaire, Constantine and Benjamine et al. v. Trinidad y Tobago,* Judgment of June 21, 2002, Series C, No. 94, para. 165; Inter-American Court of Human Rights, *Case of Bámaca-Velásquez v. Guatemala,* Judgment of November 25, 2000, Series C, No. 70, para. 171; *Case of Neira-Alegría et al. v. Peru,* Judgment of January 19, 1994, Series C, No. 20, para. 60.

[24]. IACHR, *Case of Castillo-Petruzzi et al. v. Peru,* Judgment of May 30, 1999, Series C, No. 52, para. 195.

[25]. IACHR, *Case of J. H. Sanchez v. Honduras,* Judgment of June 7, 2003, Series C, No. 99, para. 111.

in Brazil. That is, in proportion, there are a "much larger number of prisoners in São Paulo" than in the "rest of Brazil".[26] This is yet worsened by the fight against *organized crime,* aggravated by the authorities' lack of control over detainees, who are abandoned to their own fate, which is reflected by the numerous mutinies that took place simultaneously in the state of São Paulo in May 2006 (as this Order recalls in Having Seen clause No. 6).

21. Such lack of control gives rise to organized crime within the detention facilities, affecting their population as a whole, leading to high levels of chronic violence and significantly increasing the number of potential victims. It is the entire social fabric that is threatened by this state of societal decomposition, highlighting the truly *erga omnes* character of a State's obligation to protect all individuals under its jurisdiction. In a context like that of this case, it is not just the rights of persons deprived of liberty that are at stake but, ultimately, the rights of all persons under the State's jurisdiction. Thus, the wide scope of such *erga omnes* protection obligations becomes of utmost importance, all the more so in a situation of compelling urgency such as this.

VI. The Inter-American Court's *Autonomous* Legal Framework Governing Provisional Measures

22. As regards the beneficiaries of the Provisional Measures of protection adopted by this Court in the instant case, by complying with such measures, the State shall be redeeming a minimal part of its onerous social debt, inasmuch as it will be granting protection to the detainees in the Araraquara penitentiary who were transferred to other detention facilities, where they are now living, or surviving, in a complete state of vulnerability. In the public hearing held before this Court the day before yesterday, the representatives of the beneficiaries of these Provisional Measures of protection called attention to the lack of a true criminal justice, inasmuch as the detainees' recovery is currently being replaced by a distorted policy of confinement in inhuman conditions.[27]

23. In effect, this problem affects detainees in all of Latin-America and the World as well as in Brazil. This long-standing problem is regretfully chronic, and its reversion represents a permanent challenge for the international protection of human rights. In this regard, the remarkable writer F. M. Dostoyevsky has left, as early as mid-nineteenth century, the legacy of his *Memoirs from the House of the Dead* (1862).[28] The ingenuous supporters of the "progress" of civilizations have nothing to boast about regarding to the treatment —that is, the indescribable sacrifices— afforded

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[26]. IACHR, *Transcript of the Public Hearing, op. cit. infra* No. (17), p. 37 (internal circulation).

[27]. IACHR, Transcript of Public Hearing of September 28, 2006 on the Inter-American Commission on Human Rights' Request for Provisional Measures of Protection in Favor of Persons Imprisoned in the Penitentiary "Dr. Sebastião Martins Silveira" in Araraquara, San Pablo, San José de Costa Rica, IACHR, 2006, p. 35 (internal circulation).

[28]. F. Dostoyevsky, *Souvenirs de la maison des morts,* Paris, Gallimard, 1997 [reed.], pp. 41-443.

to —or inflicted upon— the prisoners over the years.[29] Not surprisingly, today we are looking for a "new understanding" of the purposes and boundaries of criminal law.[30]

24. Moreover, also in this context of prevention of irreparable damage to the human being, the central importance of the human person, though victimized, is affirmed.[31] I have addressed this specific issue in my two Separate Concurring Opinions in the recent Matter of *Eloísa Barrios et al.* regarding *Venezuela* (orders of June 25, 2005 and September 22, 2005), with a view to building up a theory of what I call the *autonomous legal framework of provisional measures of protection.* In effect, these give rise *per se* to obligations for the States, and are distinguished from the obligations arising out of the respective Judgments on the merits (and reparations, where applicable) of the respective cases. This means that provisional measures of protection constitute an *autonomous* legal remedy; they actually have their own *legal framework*, which in turn, reveals the importance of the *preventive* dimension of the international protection of human rights.

25. So much so that, under the American Convention (Article 63(2)), a State's international liability may arise from failure to comply with Provisional Measures of Protection ordered by the Court, even if the respective merits of the case are not pending before the Court (but rather before the Inter-American Commission on Human Rights). This confirms my thesis, that Provisional Measures of Protection, in light of their conventional force, are *autonomous,* and thus have their own legal framework, and failure to comply with them results in liability of the State. It has legal consequences, in addition to underscoring the central role of the victim (of such non-compliance), notwithstanding the consideration and decision of the specific case at issue upon its merits. This, in turn, reveals the great significance of the *preventive* dimension of the international protection of human rights, in its broad sense (*supra*).

26. In addition to the conventional basis provided by Article 63(2) of the American Convention, provisional measures are further reinforced by the general obligation of the States Parties, under Article 1(1) thereof, to respect and to ensure respect for the protected rights, without discrimination, of all persons under their respective jurisdiction. As stated elsewhere, there is a long way to go in order to strengthen the autonomous legal framework (as I envision it) of the Court's provisional measures, for the benefit of protected persons and to ensure the States' due and timely compliance with the measures ordered by the Court.

27. As I pointed out in my two Concurring Opinions cited above, in the Orders of this Court of June 9, 2005 (paras. 10–11 of my Opinion) and of September 22, 2005 (para. 9 of my Opinion) in the *Matter of Eloisa Barrios et al.,* and which I am obliged to repeat herein, provisional measures of protection, the development of which under the American Convention to date has been a true victory of Law, are, however, in my opinion, still very much in their infancy, at an early stage of evolution, and they will

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[29]. Cf., e.g., inter alia, R. Wright, *Breve historia del progreso – ¿Hemos aprendido por fin las lecciones del pasado?* (A Short History of Progress: Have We Learnt At Last the Lessons of the Past?), Barcelona, Ed. Urano, 2006, p. 88.

[30]. *Cf.,* e.g., reflections in C. Barros Leal, *Prisão: Crepúsculo de uma Era* (Prison: Twilight of an Era), Belo Horizonte, Del Rey Publishing, 1998, pp. 31-220.

[31]. *Cf.* A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos* (Direct Access of Individuals to International Human Rights Courts), Bilbao, Universidad de Deusto, 2001, pp. 9-104.

grow and strengthen even more as the universal juridical conscience awakens towards their complete conceptual refinement. As I explained at the beginning of this Opinion, International Human Rights Law has transformed the *conception* itself of these measures[32] —from precautionary to protective—, thus revealing the current historical process of *humanization* of Public International Law[33] also in this specific field. However, this process is still in progress.

28. It is necessary to proceed resolutely in this direction. It is imperative, in these days, that the next step be the development of their *legal framework*, and, within such framework, of the *legal consequences* of non-compliance with or violation of provisional measures of protection, as autonomous remedies. In my view, the *victims* occupy, both in this context of prevention as well as in the decision on the merits (and possible reparations) of the cases, a truly central position, as subjects of International Human Rights Law and contemporary Public International Law with international legal standing.[34]

VII. Problems Derived from the Coexistence of Precautionary Measures and Provisional Measures of Protection in Light of the Imperative of Individuals' Direct Access to International Justice

29. I will now address the last issue of my reflections, which I state in this Separate Opinion, constrained under the merciless pressure of time in the current insanely fast paced work environment of this Court: I am making reference to the problems derived from the coexistence of the Inter-American Commission's precautionary measures and the Inter-American Court's Provisional Measures, in light of the imperative of individuals' direct access to international justice. I have addressed this issue (which reflects one of the current gaps of the Inter-American human rights system) in more detail in my recent Separate Opinions in the Court's Orders concerning Provisional Measures of protection in the Matters of *Mery Naranjo et al.* regarding Colombia (of September 22, 2006) and of *Gloria Giralt de García Prieto et al.* regarding *El Salvador* (of September 26, 2006).

30. In my Separate Opinions in these two recent matters, I repeated what I have pointed out both in recent joint meetings between the Inter-American Court and the Inter-American Commission, and in several public hearing held before this Court, and in the Court's deliberations, that in situations of extreme gravity and urgency, it is best to refer requests for Provisional Measures of protection *directly* to the Court, without

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[32]. A.A. Cançado Trindade, "Address by the President of the Inter-American Court of Human Rights", in *Compendium of Provisional Measures* (June 2001-July 2003), Volume No. 4, Series E, San José de Costa Rica, Inter-American Court of Human Rights, 2003, pp. V-XXII.

[33]. *Cf*. A.A. Cançado Trindade, "*La Humanización del Derecho Internacional y los Límites de la Razón de Estado*" (The Humanization of Internacional Law and the Limits of the Reason of the State), 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* - Belo Horizonte/Brazil (2001) pp. ; A.A. Cançado Trindade, "General Course on Public International Law - International Law for Humankind: Towards a New *Jus Gentium*", *Recueil des Cours de l'Académie de Droit International de La Haye* (2005), (in print).

[34]. A.A. Cançado Trindade, "The Procedural Capacity of the Individual as Subject of International Human Rights Law: Recent Developments", *in K. Vasak Amicorum Liber - Les droits de l'homme à l'aube du XXIe siècle*, Bruxelles, Bruylant, 1999, pp. 521-544; A.A. Cançado Trindade, "A Consolidação da Personalidade e da Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", 16 *Anuario del Instituto Hispano-Luso-Americano de Derecho Internacional* - Madrid (2003) pp. 237-288.

the Commission insisting in previously adopting its precautionary measures (which lack conventional force). This is even more necessary when the matter is being heard (regarding to the merits) by the Commission and has not yet been submitted to the Court. And I put forward the following arguments to support my position:[35]

> First, in my opinion, the requirement of the prior exhaustion of domestic remedies is not applicable in requests to the Court for provisional protection measures. This requirement is a condition for the admissibility of petitions to the Commission as regards the merits (and possible reparations) of a specific case. Moreover, the provisional protection measures have a brief procedure, in keeping with the nature of this preventive and protective juridical mechanism, and because it in no way prejudges the merits of the case.
>
> Second, I consider that there is no requirement for the Commission's precautionary measures to be exhausted before recourse can be had to the Inter-American Court to request provisional protection measures and I expressly indicated this in my concurring opinion to a recent Order of the Court on provisional protection measures.[36] Moreover, the Commission's precautionary measures are based on Rules of Procedure rather than on the Convention and cannot delay – at times indefinitely – the application of the Court's provisional protection measures, which are Convention-based.
>
> As I added in the above-mentioned concurring opinion, "in all circumstances, the imperatives of protection should have primacy over apparent institutional rivalries," particularly in the midst of situations of "chronic violence."[37] The Commission's insistence in its practice with regard to prior precautionary measures may, in some case, have negative consequences for the potential victims and create one more obstacle for them. In certain cases, it can constitute a denial of justice at the international level.
>
> Third, in cases in which the Commission denies precautionary measures, this decision should be duly justified. The decisions of the Commission and the Court concerning both precautionary and provisional measures, respectively, should always be motivated, as a guarantee of respect for the adversary principle – which is a general principle of law – so that the petitioners have certainty that the matter they submitted has been duly and carefully considered by the international instance, and so that the meaning of the decision taken by the latter is clear[38] (especially, in an alleged situation of extreme gravity and urgency with the presumed probability of irreparable damage to persons).
>
> A decision by the Commission that denies precautionary measures must necessarily be duly justified always. Moreover, an additional negative by the Commission to request the Court to order provisional measures, also without justification, legitimizes the potential victims, as subjects of international human rights law, to resort to the Court to seek the granting of these provisional measures; otherwise, there could be a denial of justice at the international level.
>
> Fourth, if the individual petitioner in question, faced by the double negative of the Commission, resorts to the Court and the latter abstains from taking any measures, owing to the alleged lack of basis in the Convention (because the case is pending before the Commission and not before the Court) and in the Rules of Procedure – even to fill this apparent legal vacuum and change the actual situation (based on considerations of equity *praeter legem*) – there could be a denial of justice at the international level. In two recent cases, I cautioned the Court in this regard.[39]

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35. Paragraphs 5–11 of my Separate Opinion in the *Matter of Mery Naranjo et al.,* and paragraphs 7–13 of my Separate Opinion in the *Matter of Gloria Giralt de García-Prieto et al.*

36. *Cf.* ICourtHR, Order of November 17, 2005, in the *Matter of the Children Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM* Regarding Brasil, Concurring Opinion of Judge A. A. Cançado Trindade, par. 3.

37. *Ibid*., para. 5.

38. *Cf*. [Several authors] *Le principe du contradictoire devant les juridictions internationales* (eds. H. Ruiz Fabri and J.-M. Sorel), Paris, Pédone, 2004, pp. 14, 33, 81, 86, 118 and 168.

39. *Cf.* IACHR, *Matter of the Brothers Dante, Jorge and José Peirano Basso* regarding Uruguay, letter of July 7, 2006 from Judges A. A. Cançado Trindade and M. E. Ventura-Robles to the President of the Court, doc. CDH-S/1181, pp. 1–2; *Matter of Loretta Ortiz Ahlf and Other Mexican Citizens* regarding Mexico, letter of September 19, 2006 from Judge A. A. Cançado Trindade to the acting President of the Court, doc. Corte IDH/1641, p. 1.

> At the present time, I do not detect any receptiveness on the part of either the Commission or the Court to make this qualitative leap that I am proposing. I consider that, if the current lack of receptiveness (on this specific point) that I detect in the two organs of supervision of the American Convention had prevailed in 2000, we might not have achieved some of the regulatory changes that strengthened the direct access of individuals to the international instances of the American Convention; in other words, their access to international justice."

31. In view of the current and unnecessary paralysis in which the Inter-American system of human rights is in this regard (to the detriment of potential victims), I allowed myself to extend, in the above-mentioned Separate Opinions, my considerations *lex lata* to the *lege ferenda* level.[40]

> Therefore – and, like Ionesco's rhinoceros, je ne capitule pas – in this separate opinion, I wish to insist on my line of reasoning – as I have recently within the Court – in favor of the individual's full access to international justice within the framework of the American Convention. Allow me to refer here to the draft protocol to the American Convention on Human Rights to strengthen its protection mechanism, which I drafted (as the Court's rapporteur) and submitted (as President of the Court) to the Organization of American States (OAS) in May 2001,[41] and which has invariably appeared on the agenda of the OAS General Assembly (for example, the Assemblies of San José, Costa Rica, in 2001, Bridgetown, Barbados, in 2002, Santiago, Chile, in 2003, and Quito, Ecuador, in 2004), and remains present in OAS documents for the biennium 2005-2006.[42] I hope that, in the near future, it will have concrete results.
>
> In this document, I proposed, inter alia, that Article 77 of the Convention should, in my opinion, be amended so that not only any State Party and the Commission, but also the Court, can present draft additional protocols to the American Convention – as naturally corresponds to the highest-ranking organ of supervision of the Convention – in order to expand the list of rights protected by the Convention and strengthen the protection mechanism established in the Convention.[43]
>
> Furthermore, always recalling the status of the individual as a subject of international human rights law (and, in my opinion, of public international law also), I maintain that Article 61(1) of the Convention should, significantly, be amended as follows:
>
> - "The State Parties, the Commission *and the alleged victims* shall have the right to submit a case to the Court".[44]

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[40]. Paragraphs 12-15 of my Separate Opinion in the matter of *Mery Naranjo et al.,* and paragraphs 14-17 of my Separate Opinion in the matter of *Gloria Giralt de García Prieto et al.*

[41]. *Cf*. A.A. Cançado Trindade, *Bases for a Draft Protocol to the American Convention on Human Rights to Strengthen Its Mechanism for Protection - Volume* II, 2nd. ed., San José de Costa Rica, Inter-American Court of Human Rights, 2003, pp. 1-1015.

[42]. OAS, document AG/RES.2129 (XXXV-0/050) of June 6, 2005, pp. 1–3; OAS, document CP/CAJP-2311/05/Rev.2 of February 27, 2006, pp. 1-3.

[43]. In addition, I stated that the Statute of the Inter-American Court (1979) also requires a series of amendments (which I indicated in the said document). I added that Articles 24(3) and 28 of the Statute needed to be amended: in Article 24(3), the words "shall be delivered in public session" should be eliminated so that the first sentence of the article reads "The decisions, judgments and opinions of he Court shall be notified to the parties in writing"; and in Article 28, the words "as a party" should also be eliminated.

[44]. In its actual and original wording, Article 61(1) of the American Convention establishes that only the States Parties and the Commission shall have the right to "submit a case" to the Court. But the Convention, when referring to reparations, also refers to "the injured party" (Article 63(1)), i.e., the victims and not the Commission. Today, at the beginning of the twenty-first century, the historical reasons that led to denying this *locus standi* to the victims have been overcome; in the European and inter-American human rights systems, practice revealed the inadequacies, shortcomings and biases of the paternalist mechanism of the Commission's intermediation between the individual and the Court. Cf. A. A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos* (Individuals' Direct Access to

> And, following the same line of thought, I would like to add in this separate opinion, the supplementary proposal to the effect that Article 63(2) of the American Convention should, in an equally significant manner, be amended as follows:
>
> "In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. Regarding to a case not yet submitted to its consideration, it may act at the request of the Commission or of the alleged potential victims."
>
> In the protection mechanism of the American Convention, the right of individual petition will attain its maximum expression when it can be exercised by the petitioners directly before the Inter-American Court of Human Rights. Hence this proposal to amend Article 61(1) of the Convention, extended also to Article 63(2), in certain circumstances, with regard to provisional protection measures. I consider that this is fully justified, particularly in the case of alleged situations of extreme gravity and urgency, with the alleged probability of irreparable damage to persons."

32. In this matter of the *Araraquara penitentiary,* the Commission correctly requested the Court to adopt Provisional Measures of protection, as soon as the gravity of the situation became evident (cf. *supra*), and did not try to previously adopt its precautionary measures. In doing so, it was wise enough to avoid repeating the mistake it made in the previous *Matter of Children Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM* regarding Brazil —which mistake I pointed out in my Separate Concurring Opinion in the Court's Order of November 17, 2005—, of unsuccessfully attempting to previously adopt its precautionary measures for years, even in the face of the successive reports of fatal victims (which did not occur in this case). I am satisfied to learn that the Commission heard my warnings.

33. In effect, in the public hearing held before this Court the day before yesterday, September 28, 2006, the Commission's representative himself (Mr. Florentín Meléndez), confirmed so in replying my question, admitting my argument (*supra*) that "definitely, there are no legal grounds that support the view that precautionary measures must be exhausted before recourse may be had to the Court seeking Provisional Measures" of Protection.[45] Likewise, the representative of the beneficiaries of these Measures and former President of the Commission (Mr. Hélio Bicudo), held the same view in responding to another of my questions, pointing out that "precautionary measures have not the same force as Provisional Measures: precautionary measures are recommendations made to the State, whereas Provisional Measures are imposed on it."[46]

34. Indeed, it is necessary to seek and apply the legal remedies with conventional force that assure the most effective protection to those needing it, all the more so in situations of emergency. It is no coincidence that, when I approached —from the beginning— the *temporal* dimension of International Law in my recent *General Course on Public International Law,* which I delivered at the Hague Academy of International Law (2005), I lay particular stress on Provisional Measures of protection, and specifically those ordered by the contemporary international court that has contributed

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Internacional Courts of Human Rights), Bilbao, Universidad de Deusto, 2001, pp. 9–104; A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos* (A Treatise on International Human Rights Law), volume III, Porto Alegre, S.A. Fabris Ed., 2003, pp. 447-497.

45. IACHR, *Transcript of the Public Hearing…, op. cit. infra* No. (17), p. 39 (internal circulation).

46. IACHR, *Transcript of the Public Hearing…, op. cit. supra* No. (17), p. 41 (internal circulation).

the most to improving their legal framework, i.e., precisely the Inter-American Court of Human Rights.[47]

35. It is rewarding for me to witness that, as described earlier herein, the provisions of the American Convention have gradually been given *effet utile* also in this regard —i.e., in the field of Provisional Measures of protection—, where a gap in the Inter-American human rights system persists and must be filled with haste, and which, in my opinion, could —and should— have already been filled some time ago. I will not cease to insist that the potential victims' direct access to international justice (to which I have devoted myself so much in the past decades) is an imperative also in the realm of Provisional Measures of protection. This matter of the *Araraquara* penitentiary represents, from the perspective of the application of the relevant provisions of the American Convention on the subject, a small but encouraging step forward in that direction.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary

[47]. *Cf*. A.A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium*", General Course on Public International Law", *Recueil des Cours de l'Académie de Droit International de La Haye* (2005), (in print).