

**Order of the
Inter-American Court of Human Rights
of July 15, 2009
Request for Provisional Measures
regarding Brazil
Matter of Gomes Lund *et al.* (*Guerrilla do Araguaia*)**

HAVING SEEN:

1. The brief of June 26, 2009 and its appendixes, through which the *Centro por la Justicia y el Derecho Internacional* [Center for Justice and Internacional Law], the *Grupo Tortura Nunca Más* [Torture Never Again Group] and the *Comisión de Familiares de Muertos y Desaparecidos Políticos* [Commission of the Next of Kin of Murdered and Disappeared by Politics], representatives of the alleged victims in the Matter of Gomes Lund *et al.* (hereinafter "the representatives"), submitted to the Inter-American Court of Human Rights (hereinafter "the Inter-American Court", "the Court" or "the Tribunal") a request for provisional measures, in conformity with Articles 63(2) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and 26 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), with the purpose that the State of Brazil (hereinafter "the State" or "Brazil") adopts, without further delay, all the necessary measures to suspend the execution of the Order 567/MD of April 29, 2009 emitted by the Ministry of Defense, as well as the activities of the Work Group referred in said Order.

2. The alleged facts in which the request for provisional measures presented by the representatives are founded, to wit:

a) on April 29, 2009, the Ministry of Defense emitted the Order 567/MD, that came into effect the next day. The purpose of this administrative Order is the creation of a Work Group, which main task is "to coordinate, according to scientific methodology, the necessary activities to locate, collect and identify the corpses of guerrilleros and military killed in the episode known as *Guerrilha do Araguaia*";

b) the Work Group, in conformity with Article 2 of the Order 567/MD, is conformed by the representatives of the next bodies: i) Army Command; ii) Government of the State of Pará; iii) Government of the Distrito Federal, and iv) another bodies and organizations, chose by the Ministry of Defense. The Army Command coordinates the work and sets the procedures and goals of the Work Group, which does not include members or representatives of the Public Ministry or the Judicial Power with responsibilities in the decision making and, therefore, not under the direction or rigorous control of a judicial authority. The activities of the Work Group can be followed by special observers invited by the Ministry of Defense; representatives of the Association of Federal

Judges of Brazil, a former member of the Parliament and member of the Communist Party of Brazil, were incorporated in such way. Likewise, the technical body of the group is formed by some expert witnesses of the Civil Police Department of the Distrito Federal and the Federal Police Department, and anthropologists vinculated with the Ministry of Science and Technology;

c) the next of kin of the disappeared persons were also invited to participate as observers. However, they pointed out that after a meeting with the Ministry of Defense, and the purely military character of the Work Group proved, "the next of kin [...] rejected any participation in the project and expressed their straightforward rejection to the Ministry's initiative that puts under military control all investigation activities and identification of [the] bodies." According to the *Comisión de Familiares de Muertos y Desaparecidos Políticos* [Commission of the Next of Kin of Murdered and Disappeared by Politics]: i) the initiatives for the location, collecting and identification of the mortal remains will be conducted by the Special Commission created by Law No 9.140/95, which legal and ethical competence is unquestionable; ii) the Army must be restricted to provide information only to that Special Commission; iii) the presence of military in the region where the events happened "will reopen old wounds [in the local population], and it will also scared and drive away possible civilian volunteers", and iv) the commanding of the operation will be in charge of a general of brigade affirmed the press, regarding to what happened on March 31, 1964, when the Brazilian Army "attended the people's [...] contributing substantially and positively, preventing the conversion of Brazil into Communism", and

d) according to a press brief of the Ministry of Defense, the Order 567/MD has the purpose to comply with the judgment dictated in Act No. 82.00.24682-5, which was hand over by the next of kin of some of the alleged victims against the Federal Union and goes before the First Federal Court of the Judicial Section of the Distrito Federal (hereinafter "First Federal Court"). However, the execution of the judgment has not started despite the fact that eighteen months have passed since the decision was taken, with the documents on the hands of the Abogacía General de la Unión (Attorney General of the Republic). Likewise, the judicial decision Orders only to perform a thorough investigation in the Army to build a detailed and precise chart about the performed operations, which include to receive statements from the militia that would have participated in activities against the *guerrilla*, disregarding their rank at the time. On the other hand, the beginning of the activities of the group is imminent. As soon as the first stage of work is completed, which consists in the definition of the members of the group, the second stage of the activities will begin, corresponding to the "identification of areas where the location of the remains will take place." After that, the third stage will consist on the excavations and investigations in the places where the mortal remains of the disappeared persons would be buried; and after, the fourth stage will consist on lab work.

3. The arguments of the representatives to set their request for provisional measures, among which they pointed out:

a) a judicial investigation, independent, impartial, and effective, with the participation of the next of kin of the alleged victims in the request, also the location, identification and deliver of the mortal remains of the alleged victims

to their next of kin, constitute the central part of the present case and potential content of the reparations that eventually Orders the Court. In this manner, any event that obstructs or stops its future fulfillment is a threat to the effective compliance of the Judgment;

b) the investigation of the Brazilian Army that may result in evidence on the judicial responsibility of the members of said institution, is strongly incompatible with the requirement of "investigation *ex officio*, with no delay, serious, impartial and effective." In consequence, the application of the Order 567/MD constitutes also a imminent threat to the effective compliance of the possible judgment on Merits, a possible overstepping of the procedural guarantees that have to be followed in all legal investigations, and a serious risk to the effective instruction of the judicial process against the alleged responsible of the perpetrated violations, endangering the integrity and conservation of extremely important probatory elements and, therefore, the protection of the rights of the victims and their next of kin, and

c) in summary, the request for provisional measures is based on: i) fear that the Army, which controls the Work Group in charge of locating and identifying the mortal remains, may hide or destroy essential evidence for the investigation and punishment of the responsible of the alleged violations in the case before the Court; ii) the impossibility that the mortal remains of the victim will be delivered to their next of kin; iii) fear that procedural guarantees and access to justice, that must be present in all judicial investigations, will be violated; and iv) the impossibility of the effective compliance with the reparations that the Court may Order when rendering the judgment on the case.

4. The request of the representatives, for the Court, according to Article 63(2) of the American Convention, to require the State:

a) to adopt without delay the necessary measures to suspend the execution of the Order 567/MD of April 29, 2009, with the activities of the Work Group set therein, and

b) to report about the actions taken with this purpose.

5. The brief of June 29, 2009, through which the Secretariat of the Inter-American Court (hereinafter "the Secretariat"), following instructions of the Court, according to Article 26(5) of the Rules of Procedure, requested Brazil and the Inter-American Commission of Human Rights (hereinafter "the Inter-American Commission" or "The Commission") to submit, no later than July 3, 2009, the observations that they consider pertinent in regard to the request of provisional measures.

6. The brief of July 2, 2009, through which the Inter-American Commission presented their observation to the brief of the representatives.

7. The brief of July 2, 2009, through which the State request to the Court an extension up until July 7, 2009 to present the requested observations. (*supra* Having Seen 5).

8. The brief of July 3, 2009, through which the Secretariat, following instructions of the Court, granted the State the request extension.

9. The two briefs of July 3, 2009 and the brief of July 6, 2009, as well as their appendixes, through which the representatives annexed newspapers clippings and other documents that, at their judgment, confirm: i) the urgency and gravity of the situation with the imminent beginning of the activities of the Work Group; ii) the concern and manifestations of several groups of the Brazilian society, among others, the intervention of the Federal Public Ministry in the frame of Act. No. 82.00.24682-5, in regard to the way of conducting the activities set in Order 567/MD, and iii) that the coordination of work is still in hands of the Brazilian Army, without the participation of the Public Ministry or the competent judicial authorities. Likewise, the representatives requested the Court to clarify to the State that the granting of the requested extension (*supra* Having Seen 8) meant the suspension of the beginning of the activities of the Work Group until the Court pronounces about this request for provisional measures.

10. The brief of July 7, 2009, through which the State sent their observations to the request for provisional measures.

11. The brief of July 20, 2009, through which the Inter-American Court requested the State to submit complementary information to the sent observations (*supra* Having Seen 10), no later than July 13, 2009, about: a) the members and work of the commission for civilian supervision of the Work Group; b) the mechanisms and modes of supervision of the activities of the Work Group, particularly of the field work and physical accompaniment to said group; and c) all other information related to the safe keeping and conservation by the State of evidence that, eventually, during the process of location and excavation, will be found in relation to this case.

12. The brief of July 13, 2009 and its appendix, through which the State submitted the complementary information in response to what was requested by the Court.

CONSIDERING:

1. That Brazil is a State Party to the Convention since September 25, 1992, and that according to Article 62 of the Convention, recognized the competence of the Court on December 10, 1998.

2. That Article 63(2) of the American Convention sets that, “[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to the persons, the Court, in the matters that is acknowledging, may take the provisional measures that considers pertinent [...]”.

3. That in terms of Article 26 of the Rules of Procedures of the Court:

1. At any stage of the proceedings involving cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court may, at the request of a party or on its own motion, Order such provisional measures as it deems pertinent, pursuant to Article 63(2) of the Convention.

[...]

3. In contentious cases already submitted to the Court, the victims or alleged victims or their duly accredited representatives, may present a request for provisional measures in relation to the cases directly to the Court.

[...]

4. That in International Human Rights Law, provisional measures have not only a preventive character, in the sense that they preserve a juridical situation, but also a tutelary character, for they protect Human Rights, seek to prevent irreparable damage. The measures apply as long as the basic requirements of extreme gravity and urgency, and the prevention of irreparable damage to persons exists. In this manner, provisional measures mean a true preventive juridical guarantee.¹

5. That the disposition established in Article 63(2) of the Convention confers a mandatory character to the adoption, by the State, of the provisional measures Ordered by this Tribunal, since the basic principle of law of the State responsibility, endorsed by international law, has pointed out that the States must comply with their obligations *pacta sunt servanda*.²

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6. That the representatives expressed their concern as to the rendering by the Ministry of Defense of Order 567/MD, that sets the creation of a Work Group to locate and identify the mortal remains of the persons that would have died in the *Guerrilha do Araguaia*. Likewise, they expressed their fear about the fact that the said Work Group will be coordinated by the Army Command, and it will not include members or representatives of the Public Ministry or the Judicial Power in the decision making, which may affect the compliance of a possible reparation measure of investigating the facts that this Court may Order in the present case.

7. That the Commission considered that Order 567/MD might influence the case and implementation of the Judgment that the Court will eventually Order. Likewise, it estimated that it might be relevant that the Court requested information "in the corresponding procedural opportunity" about: i) the relation between the Work Group created by Order 567/MD and the *Comisión Especial sobre Muertos y Desaparecidos Políticos* [Special Commission on the Murdered and Disappeared by Politics]; ii) the reasons why the coordination of the Work Group was assigned to the Army Command; iii) the definition of the activities and work methods adopted by the Work Group, and iv) the adopted measures to give transparency to the activities of the Work Group.

8. That among other aspects, the State informed that "only the operational coordination of the work will be in charge of the Army Command and that, according to with was broadly informed by the Brazilian press [...] the President of the State himself coordinates, at this moment, actions addressed to create a Commission for

¹ Cf. *Case of Herrera Ulloa*. Provisional Measures regarding Costa Rica. Order of the Inter-American Court of Human Rights of September 7, 2001, Considering No. 4; *Matter of James et al.* Provisional Measures regarding Trinidad and Tobago. Order of the Inter-American Court of Human Rights of April 3, 2009, Considering No. 6; and *Matter of Fernández Ortega et al.* Provisional Measures regarding México. Order of the Inter-American Court of Human Rights of April 30, 2009, Considering No. 5.

² Cf. *Matter of James et al.* Provisional Measures regarding Trinidad and Tobago. Order of the Inter-American Court of Human Rights of June 14, 1998, Considering No. 6; *Matter of Pueblo Indígena Kankuamo*. Provisional Measures regarding Colombia. Order of the Inter-American Court of Human Rights of April 3, 2009, Considering No. 5; and *Matter of Fernández Ortega et al.*, *supra* note 1, Considering No. 5.

the supervision of the activities of the Work Group, to be integrated by civilians, with a special seat for the Special Secretariat of Human Rights of the Presidency of the Republic [hereinafter "the SEDH"] and mainly, for the *Comisión Especial sobre Muertos y Desaparecidos Políticos* [Special Commission on the Murdered and Disappeared by Politics] (Act 9.140/1995), which includes, among its members, representatives of the next of kin of the murdered and disappeared; and for the Federal Public Ministry, which has among its constitutional functions to inspect the acts of the Executive Power." Likewise, it pointed out that according to "what was informed by the Ministry of Defense [...] the participation of the Army in the activities will be restricted to the logistics support in the search of locations, guaranteeing technical resources for the location and [exhume] of the bodies. The activities of location and excavation will be carried out by expert professionals in the area of forensic anthropology, members of the [Work Group]."

9. That, additionally, in response to the request for complementary information by the Inter-American Court, the State informed:

i) the alteration of the coordination of the Work Group; which will be in charge of the Juridical Consultant of the Ministry of Defense determining also, the role of the Army Command. The State submitted a copy of the Orders in which these changes are stated;

ii) the plans for the creation of an Inter-Institutional Supervision Committee (hereinafter "the Committee"), which composition is being evaluated by the SEDH and the Ministry of Defense, with the supervision of the President of the Republic. The committee must be integrated by representatives of State bodies, like the SEDH, and civilians, and it will function during the time the Work Group does its activities. As for the assignments of the Committee: a) it should monitor the work of the Work Group, supervising the excavations and recovery of the mortal remains; b) it may receive information and statements that will help in the location of the bodies; c) it might, depending on the circumstances, podrá, dependiendo de la circunstancias, opt to propose judicial measures to deepen the searches and collecting of information, such as precautionary request of collecting of documents and others; d) it should examine the reports of the Work Group and demand results; and e) it will submit complementary advice, suggesting places to search, and it will elaborate its own report;

iii) that the excavations should begin on August, and it repeated that the technicians who integrate the Work Group (anthropologists, geologists, etc.) shall be responsible for the location, collecting and preparing of the civilians' mortal remains;

iv) that while the Committee is not set up, "the supervision of the collection of information has been and will continue to be in charge of the Judicial Power, executing the judgment rendered by the First Federal Court";

v) the activities and composition of the Work Group, as well as the creation of the Committee, have been object of wide discussion, among others by the Ministry of Defense, the SEDH, the Federal Public Ministry, the Judicial and

Legislative Power, civilians and press. In this manner, the Federal Public Ministry presented a judicial questioning against the Ministry of Defense, requestion clarification on the actions of the Work Group. Likewise, on July 9, 2009, the Ministry of Defense rendered a statement before the Chamber of Representatives about the activities of said group, and

vi) that the suspension of the activities of the Work Group might risk the compliance of the judgment rendered by the First Federal Court, which is favorable for the next of kin of the murdered and disappeared in the *Guerrilha do Araguaia*.

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10. That the Court confirms that the search and delivery of the mortal remains comes from a judicial decision through which the Federal State, the respondent in the case before the domestic venues, was ordered to adopt said measures. As a matter of fact, the judgment of June 30, 2003 of the First Federal Court, in the frame of Act No. 82.00.24682-5, "deemed appropriate the request to determine: [...] 2. [to the] respondent that, in no later than 120 (one hundred and twenty) days, it will inform to this court where the bodies of the next of kin of the petitioners are, the ones murdered in the *Guerrilha do Araguaia*, and it shall proceed to the transfer of the mortal remains and burial in the place indicated by the [next of kin who requested the proceeding], providing also, the information necessary for the elaboration of the death certificates."³ In attention to this, the Court confirms that the search for the mortal remains was ordered in the frame of a judicial process, therefore, it is under the supervision of the judge that ordered the measure, to whom all information must be delivered.

11. That, on the other hand, the Court appreciates the fact that changes have been made in regards to what originalle was set for the Work Group. The State informed that, according to Order 993/MD, published on the Oficial Gazette of the Union of July 13, 2009, the Order 567/MD was modified, setting that the responsibility of the Army Command will be "to coordinate the logisitcs supporting work." Likewise, according to Order 995/MD of July 13, 2009, the general coordination of said group was attributed to the Juridical Consultant of the Ministry of Defense. The Juridical Consultant is a member of the Attorney General's Office of the Republic, which role is to collaborate with the Secretary of Defense, and to protect the legality of the ministry's acts. Also, the State informed that in the integration of the Work Group are independent observers, among which there is a federal judge, and that the excavations, exhumation and identification of the mortal remains are in charge of civilian technicians.

12. That, additionally, the State informed that an Inter-Institutional Supervision Committee is being formed, integrated by representatives of civilians' organizations and State bodies, such as the Special Secretariat of Human Rights of the Presidency, which, among others, will physically accompany and supervise *in situ* the activities of

³ *Matter of Gomes Lund et al. v. Brazil*. Judgment of the First Federal Court of the Judicial Section of the Distrito Federal of June 30, 2003, in the framewirk of Action No. 82.00.24682-5 (File of appendixes to the request, Tome I, Appendix 21, page 179).

the Work Group when excavating, locating and identifying the mortal remains. Finally, the Court was informed that the excavation will begin in August.

13. That with regards to the above, the Court understands and assumes that the excavation and exhumation of the bodies will begin once the Inter-Institutional Supervision Committee of the Work Group is conformed and functioning, particularly regarding to the supervision during the excavations and, eventually, in the identification of the bodies.

14. That at this moment, considering the elements abovementioned, the Court considers that the requisites of extreme gravity and urgency, and avoidance of irreparable that will justify the adoption of provisional measures requested in this case, do not exist.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

in exercise of its attributions set forth in Article 63(2) of the American Convention on Human Rights and the Articles 26 and 30 of the Rules of Procedure of the Court,⁴

DECIDES:

1. To desestimate the request for provisional measures presented by the representatives of the alleged victims of the Matter of Gomes Lund *et al.* (*Guerrilha do Araguaia*).

2. To request to the Secretariat of the Court to notify this Order to the State, the Inter-American Commission of Human Rights, and the representatives of the alleged victims.

Done in Spanish, Portuguese and English, the Spanish text being authentic, in La Paz, Bolivia, on July 15, 2009.

Diego García-Sayán
President in exercise

⁴ Rules of Procedure approved by the Court in its XLIX Ordinary Periodo of Sessions, celebrated on November 16 to 25, 2000, and partially reformed during the LXXXII Ordinary Period of Sessions, celebrated on January 19 to 30, 2009, in conformity with Articles 71 and 72 thereof.

Sergio García Ramírez

Leonardo A. Franco

Margarette May Macaulay

Rhadys Abreu Blondet

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President in exercise

Pablo Saavedra Alessandri
Secretary