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

PROVISIONAL MEASURES
IN THE MATTER OF MENDOZA PRISONS

HAVING SEEN:

1. The submission dated October 14, 2004, and its Appendixes, whereby the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") filed with the Inter-American Court of Human Rights (hereinafter "the Court", "the Inter-American Court," or "the Tribunal") a petition for provisional measures, pursuant to the provisions of Article 63(2) of the American Convention on Human Rights (hereinafter "the Convention" or "the Inter-American Convention"), Article 25 of the Court's Rules of Procedure (hereinafter "the Rules of Procedure") and Article 74 of the Commission's Rules of Procedure, seeking *inter alia* that the Argentine Government (hereinafter, the "State" or "Argentina") protect the life and personal integrity of "the persons held in custody in the Mendoza Provincial Prison, those in custody in the Gustavo André Unit, located at *Lavalle*, and all persons hereinafter imprisoned in such units, and the employees and officials rendering services on the said premises."

2. The letter of the President of the Inter-American Court of Human Rights (hereinafter "the President") dated November 5, 2004, whereby the President acknowledged the position taken by the State of Argentina (hereinafter "the State" or "Argentina") concerning the petition for provisional measures as well as other several measures that had been implemented in connection with the facts under review and as a response to the precautionary measures requested by the Inter-American Commission. In turn, the President was concerned to notice that over a period of seven months a number of untried prisoners and inmates as well as several penitentiary guards had been injured or killed in the Mendoza Provincial Prison and in the Gustavo André penitentiary unit, located at *Lavalle*. Particularly, the President considered it a serious matter that after the submission of the petition for provisional measures and during the effectiveness of the precautionary measures requested by the Commission, one person was killed and another was injured as they were held in custody in the Mendoza Provincial Prison. In this regard, the President expressed he was convinced that the State would abide by the precautionary measures requested

[*] Judge Cecilia Medina Quiroga informed the Court that for reasons beyond her control she could not take part in the deliberations on this Order or affix her name thereto.

by the Commission pending the Court's decision on the petition for provisional measures, which the President decided to submit to the consideration of the full Court. Finally, the President urged that the State should take all necessary steps to protect the life and personal integrity of the persons in favor of whom the provisional measures were requested.

3. The Order of the Inter-American Court of Human Rights (hereinafter, the "Court" or "the Inter-American Court") of November 22, 2004, wherein the Court resolved:

> 1. to request that the State immediately adopt all necessary measures to protect the life and personal integrity of all detainees and inmates of the Mendoza Provincial Prison and of the Gustavo André Unit, located at *Lavalle*, as well as all other persons found within the premises.
>
> 2. to request that, as a protective measure adequate to the present situation, the State investigate the facts that gave rise to the adoption of these provisional measures in order to identify the persons to be held liable for said events and punish them accordingly.
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> […]

4. The Order of the President of the Court of March 18, 2005, whereby the President resolved to summon the Inter-American Commission, the representatives of the beneficiaries of the provisional measures and the State, to a public hearing to be held in Asunción, Paraguay, at the seat of the Supreme Court of Justice of such country, as from May 11, 2005, so that the Court would hear the arguments on the facts and circumstances relating to the implementation of said measures.

4. The public hearing on the provisional measures held in Asunción, Paraguay, at the seat of the Supreme Court of Justice of said country, on May 11, 2005.

5. The record signed by the representatives of the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission), the representatives of the beneficiaries of the provisional measures (hereinafter "the representatives") and the State, submitted on May 11, 2005, to the Court during said public hearing, in which they expressed their agreement on keeping the provisional measures in full force, and further agreed to "remit to the consideration of the […] Inter-American Court […] the following set of measures so that the Court could evaluate the possibility of specifying the content of the Order dated November 22, 2004, with a view to safeguarding the life and physical integrity of the beneficiaries to said order:"

> 1. Regarding the penitentiary staff, to adopt measures:
>
> a. In the short-term, to increase the number of penitentiary staff to safeguard the security of the institutions,;
> b. To introduce changes in the surveillance pattern in a manner such that it assures adequate control and the actual presence of personnel in the cellblocks;
> c. In the mid-term, to carry out a purge of the penitentiary corps in order to assure adequate service provision;
> d. As a permanent measure, to assure the recruitment and continuous training of penitentiary staff; and
> e. to request that the authorities of the General Security Council of the Province report the outcome of investigations on the individuals directly responsible for

the dead and injured in the Mendoza Prison and the Gustavo André Unit during 2004/2005, and to describe the status of administrative proceedings in course.

2. Separation of prisoners by categories:

a. In the short-term, to adopt necessary measures to segregate untried prisoners from convicted prisoners, and juvenile adults from adults; and
b. As a progressive measure, to develop a classification mechanism taking into consideration at least the criteria established in Article 8 of the UN Standard Minimum Rules for the Treatment of Prisoners.

3. Measures to avoid the entrance of weapons to the institutions:

To take actions to sequestrate weapons of all kinds that could be found within the institutions, and to set up adequate surveillance —with the involvement and under the control of the judiciary— in order to guarantee the legality of said measures. Furthermore, to adopt necessary measures to bar the clandestine entrance of weapons, including surveillance over the spaces designed for the use by penitentiary agents.

4. Disciplinary Actions:

a. In the short-term, adoption of all measures necessary to notify —as soon as practicable— the defense of any person subjected to administrative investigations for the imposition of sanctions so that said person’s right to defense is safeguarded; and
b. In the mid-term, adoption of legislative or any other type of measures needed to set up a disciplinary action scheme in keeping with the terms of the American Convention on Human Rights and other applicable international instruments on human rights.

5. Increasing Improvement on Detention Conditions:

a. A survey on the individuals held in custody under the Province penitentiary system, which shall be conducted by the Ministry of Justice and Security of Mendoza; access to showers and sanitary units in working conditions; weekly provision of hygiene gear; guaranteed access to sufficient drinking water; adoption of necessary measures so that all areas of the institution are well-lit; barring of prolonged cell confinement, repression groups of hooded individuals and restriction of visitation; barring of access of personnel with dogs to cellblocks and to areas for the use by visitors;
b. In the mid-term, expansion of the registry of prisoners, in accordance with the guidelines of the Inter-American Court of Human Rights in the Case of *Bulacio*, paragraph 132;
c. A bimonthly report on the outcome of the survey on prisoners’ health condition identifying the clinical charts prepared, treatment prescribed and ensuring that medicine and food are provided as prescribed;
d. In the mid-term, psychological, psychiatric, dental and ophthalmologic assistance will be provided;
e. Prisoners’ equitable access to work, recreational, formal and non-formal educational programs will be guaranteed, and other programs related to reinstatement will be created;
f. Actions to diminish overcrowding by means of reducing the amount of persons held in custody under pretrial detention (in accordance with the criteria established in a recent decision of the Supreme Court of Justice on prisons in Buenos Aires); this will call for mechanisms other than pretrial detention such as programs for provisional release on parole; and
g. Concerning overcrowding, full compliance with sentencing guidelines for progressive computation must be guaranteed.

6. Involvement of the Judicial System:

a. Full compliance with the terms of duration of judicial proceedings, in accordance with the standards laid out in the Pact of San Jose, Costa Rica, and in the Mendoza Code of Criminal Procedure;

b. Investigations on the incidents of violence that took place in the Mendoza Prison and Gustavo André penitentiary unit; and
c. Full compliance with the obligation on the part of Judges, Prosecutors and Official Defense Attorneys to visit —on a periodic basis— prisons with untried or convicted prisoners the responsibility for whom vests with the judiciary body under the charge of said officials.

7. Creation of an *Ad Hoc* Investigation Committee:

a. The Committee shall be in charge of investigating the incidents of violence and death that took place in the prisons located in the Province of Mendoza from January 2004 to date;
b. The Committee shall be created as a special, independent and impartial unit; it shall carry on activities within the framework of principles of efficient prevention and investigation of extralegal, arbitrary or summary executions, as per recommendations stated in resolution 1989/65 of United Nations Economic and Social Council, dated May 24, 1989; and
c. The Committee shall be composed by members appointed by the national government and the provincial government pursuant to the foregoing guidelines.

8. Reinforcement of the Follow-up Committee:

The number of members of the follow-up committee created in November 2004, composed by the national government, the government of Mendoza, Senator Marita Perceval, the Supreme Court of Justice in and for the Province and the petitioners, shall be increased in order to broaden the committee's operating horizons, assessing the possibility to appoint to the committee the National Ministry of the Interior, the Cabinet Chief Office and the Secretariat of Justice reporting to the National Ministry of Justice and Human Rights.

9. Assistance and Cooperation:

The National Government undertakes to provide the Province of Mendoza with assistance and resources needed to implement the measures established in this document.

6. Order of the Court of June 18, 2005, wherein the Court resolved:

1. to request once again that the State keep in full force and effect the provisional measures adopted by virtue of the Order of the Inter-American Court of Human Rights dated November 22, 2004, and that the State order forthwith those measures needed to efficiently protect the life and integrity of all persons held in custody in the Mendoza Provincial Prison and the Gustavo André Unit, located in *Lavalle*, as well as all other persons found within the premises. Among the measures to be adopted by the State are the ones described in the agreement signed by the Inter-American Commission, the representatives of the beneficiaries of the measures and the State [(*supra* Having Seen Clause No. 5)].

2. To request that the State continue informing the Inter-American Court of Human Rights —every two month next following its latest report— on the actions taken in compliance with all issues ordered by the Inter-American Court, and request the representatives of the beneficiaries of the provisional measures ordered and the Inter-American Commission on Human Rights to submit their comments to said State's reports within a term of four weeks and six weeks, respectively, next following receipt of the referenced State's reports.

7. The submission dated June 21, 2005, wherein the representatives filed a document entitled "report on the visit of June 13, 2005, to the Mendoza Prison and request for a visit of the Inter-American Commission to said penitentiary."

8. The submission dated June 22, 2005, in which the representatives reported the alleged death of the inmate Ricardo David Videla.

9. The note of June 23, 2005, whereby the Secretariat requested that the State and the Commission present relevant comments to the submission made on June 22, 2005 (*supra* Having Seen Clause No. 8).

10. The submissions made on June 22 and 23, 2005, wherein the representatives filed three news articles in connection with the alleged suicide of Ricardo David Videla-Fernandez, a young man who allegedly died on June 21, 2005, as well as another document whereby "the young man's defense attorney reported this incident [to the Inter-American Court]."

11. The submission of June 23, 2005, in which the State reported the "unfortunate death of inmate Ricardo Videla-Fernandez [who had allegedly] committed suicide while confined in his cell."

12. The submission of June 28, 2005, wherein Argentina filed a copy of the "report of the Follow-up Commission on the conditions of the Mendoza Provincial Prison," in which *inter alia* Argentina reported that no cellblock lacks proper lighting devises; that some inmates reported that prolonged confinement is still being used; that there are no juvenile adults living together with adult prisoners; that the main issues affecting education are lack of space and lack of resources; and that access of prisoners to workshops is limited. Furthermore "the Follow-up Commission prepared a bill modifying the Mendoza Code of Criminal Procedure providing for a second instance in matters of execution before the Court of Appeals for cases where the decisions passed by the jail oversight judge bring about a substantive alteration of the sentence imposed."

13. The submission of July 1, 2005, wherein the representatives filed a "criminal report [allegedly] presented by the petitioners to the Director of Prisons in Mendoza, Sergio Miranda, so that officials would investigate the [alleged] crimes of torture, harsh treatment, unlawful harassment or coercion, breach of duties inherent in public officials, disobedience [and] abuse of authority."

14. The submission of July 4, 2005, wherein the representatives produced a news article stating that "the prisoners [allegedly held in custody in the maximum security units] were sewing up their mouths because they had been confined in individual cells for 23 hours."

15. The submission of July 5, 2005, whereby the representatives requested that the present case "be treated in the next following term of Court […], as the national and provincial authorities showed great commitment to the issue but in fact the Asunción Agreement and the Order of the Inter-American Court of June 18, 2005, were not being complied with. Furthermore, the alleged suicide of Videla-Fernández —the young man sentenced to life imprisonment— in cellblock 11 of the local penitentiary, after 22-hour confinement periods, makes this an issue worth being tried before the Inter-American Court [as the petition regarding Mr. Videla-Fernández] is pending before the Inter-American Commission."

16. The submission of July 15, 2005, wherein the representatives remitted the order passed on July 14, 2005, by the Jail Oversight Judge in and for the Province of Mendoza resolving to compel the Executive of the Province of Mendoza to take actions so that the Complex *Boulonge Sur Mer*, *inter alia*, will offer minimum hygiene conditions, provide prisoners with mattresses and adequate and necessary bedding,

extend prisoners' recreational time schedules, provide water to cell-blocks, repair electric installations, refurnish gas connections, repair existing sanitary installations and build new ones as necessary, and refurbish existing facilities and create new lodging sectors.

17. The submission of July 18, 2005, wherein the Inter-American Commission filed its observations to the third and fourth State's report, claiming *inter alia* that although it valued the State's willingness to comply with mid-term and long-term measures, the Commission was worried about the current status of compliance with said measures as there had been no concrete changes, and prison overcrowding, absence of segregation of untried prisoners from convicted prisoners, lack of adequate control and security as well as of basic services of hygiene and health care, were still being an issue. Furthermore, the Commission remitted order of July 14, 2005, passed by the Jail Oversight Judge in and for the Province of Mendoza (*supra*, Having Seen Clause No. 16).

18. The submission of July 28, 2005, wherein the representatives forwarded information about alleged actions of "repression carried out [by the State] during the last riot".

19. The submission of August 5, 2005, wherein the representatives presented its "comments on the observations made by the Inter-American Commission on Human Rights on July 18, 2005" (*supra* Having Seen Clause No. 17). In this regard, the Secretariat understood that said submission corresponded with the representative's observation to the fourth State's report.

20. The submission of August 8, 2005, whereby the State requested an extension for an additional ten days for the State to submit its fifth State's report, which was granted.

21. The submission of August 12, 2005, wherein the Inter-American Commission "express[ed] its profound concern […] for the status of implementation of provisional measures […] and commitments undertaken by the State at the public hearing held in Asunción, Paraguay, on May 11, 2005, as well as for a series of recent incidents uncovering security pitfalls in both correctional institutions […]." In this regard, the Commission made particular reference to two riots and to the alleged "deployment of forces in order to quell these riots."

22. The submission of August 15, 2005, whereby the representatives reported on "[…] a new questionable death of an inmate at the Mendoza Prison […] who had allegedly electrocuted as he was handling a clandestine connection".

23. The submission of August 26, 2005, wherein Argentina presented its fifth State's report describing *inter alia* the measures adopted in order to protect the penitentiary personnel; the procedures to compile a complete registry of inmate data; to segregate prison population; to sequester weapons; to notify defense attorneys of any sanction imposed on inmates; to make surveys on prison crowding conditions; to improve sanitary, lighting, and the general condition of the correctional institutions. Furthermore, the State claimed that it "is strongly committed to complying with the provisional measures in full." On September 23, 2005, Argentina submitted the original report along with its exhibits.

24. The submission of August 29, 2005, wherein the representatives filed its observations to the third and fourth State's reports pointing out —among other things— the existence of impunity, overcrowding, uncleanliness, cohabitation of untried prisoners and convicted prisoners, poor conditions of cleanliness and labor security, unsafeness and repression. This creates a "tense environment exclusively created from the [alleged] inoperativeness of provincial authorities working without a Plan of Penitentiary Policy that should —in order of priority— be based on international commitments."

25. The submission of September 21, 2005, wherein the representatives remitted a "note drafted by the UNC on [the alleged repression and abuses committed] in the Mendoza Prison."

26. The submission of October 20, 2005, whereby the Inter-American Commission filed its observations to the fifth State's report point out —among other things— its concern for the status of compliance with the provisional measures ordered, as their implementation "has been deficient". Therefore, compliance with the order of the Court calls for "an immediate improvement on safety conditions."

27. The submission of November 3, 2005, wherein Argentina requested an extension for an additional 30-day period within which to submit its sixth report.

28. The note of November 7, 2005, wherein the Secretariat informed the State that the request for extension of terms had been disallowed owing to the fact that the term for submission of the State's report had expired on October 26, 2005. Consequently, the Secretariat requested that the State send its report as soon as practicable.

29. The submission of November 23, 2005, wherein the representatives requested that a memorandum by Amnesty International addressed to the Governor of the Province of Mendoza, lodged on the website of said organization, be added to the file. Furthermore, they reported that Mr. Alfredo Ramón-Guevara had died, and therefore he was no longer a representative of the beneficiaries.

30. The submission of December 5, 2005, wherein the representatives reported on the alleged offences to their law firm.

31. The submission of December 6, 2005, wherein the representatives reported that a week before "Sebastian Pablo Matías Esquivel had been injured by stabbing […] and that inmate Antonio Gil Caballero [had died]."

32. The note of December 9, 2005, wherein the Secretariat, following the instructions of the President, requested that Argentina report not later than December 19, 2005, on the alleged incidents described in the submissions made by the representatives on December 6, 2005 (*supra* Having Seen Clause No. 31).

33. The submission of December 12, 2005, wherein the representatives filed information "[on the judicial proceedings instituted against on the penitentiary guards of the penal farm Gustavo André in connection with the death of five inmates in 2004.]" Furthermore, they reported that "inmate […] Ángel Bernardo Flores suffered minor injuries in the said Mendoza Prison."

34. The submission of December 16, 2005, wherein the Inter-American Commission made reference to the implementation of provisional measures and to the State's failure to submit its sixth report, which Argentina should have submitted on October 26, 2005 (*supra* Having Seen Clause No. 28).

35. The submission of December 16, 2005, whereby the representatives reported on the alleged intimidation and threats sustained by Pablo Salinas, one of the representatives.

36. The note of December 19, 2005, wherein the Secretariat, following instructions of its President, requested that Argentina comment —in its next report— on the information filed by the representatives on December 12, 2005 (*supra* Having Seen Clause No. 33).

37. The submission of December 19, 2005, in which Argentina made reference to the information submitted by the representatives that "Sebastian Pablo Matías Esquivel was injured by stabbing […] and that inmate Antonio Gil Caballero [had died]," as requested from the Government by way of Secretariat's note of December 9, 2005, (*supra* Having Seen Clause No. 32). In this regard, Argentina claimed that the death of inmate Antonio Gil-Caballero was due to "natural causes" and that there were no evidences whatsoever of the injuries reported in connection with inmate Sebastián Pablo Matías-Esquivel.

38. The submission of December 19, 2005, wherein the representatives filed a document concerning a decision of Amnesty International in connection with the alleged threats reported by the representatives, particularly in connection with Mr. Pablo Salinas.

39. The note of December 20, 2005, wherein the Secretariat requested once again the submission of the sixth State's report, as it had not been filed by its due date. Consequently, following instructions of the President of the Court, Argentina was requested to enlarge on the implementation of provisional measures, as well as on the presumed intimidation suffered by Mr. Pablo Salinas, in the report Argentina had to submit on December 26, 2005. Furthermore, the Inter-American Commission was requested to include comments on said information among its observations to the sixth State's report.

40. The Secretariat's note of January 9, 2006, requesting the State to submit its sixth and seventh reports, as the terms had expired on October 26, 2005, and December 26, 2005, respectively, and these reports had not been received. Furthermore, as part of those reports, the State was required to include comments as requested by way of Secretariat's note of December 20, 2005 (*supra* Having Seen Clause No. 39).

41. The submission of January 11, 2006, whereby the State filed its sixth and seventh State's reports, describing inter alia the state of investigations, the condition of the criminal juvenile adult population, as well as the actions taken in order to set off the quantity imbalance between inmates and penitentiary staff members, and to train penitentiary personnel. Furthermore, the State stated once again its willingness to comply with the provisional measures ordered. Moreover, the State made reference to the information requested by way of Secretariat's note of December 20, 2005, on the presumed intimidations sustained by Mr. Pablo Salinas, one of the representatives of the beneficiaries. In this regard, the State claimed that it had

"requested from competent authorities […] all the information […] concerning such incidents, as well as […] information on the measures actually taken to both safeguard the safety and physical integrity of [Mr.] Salinas, and […] to investigate the said reported threats." On January 20, 2006, the State submitted the original report along with its exhibits.

42. The submission of January 24, 2006, wherein the Inter-American Commission stated that "owing to the importance of the Exhibit [that was missing in the State's report] for a correct assessment of the progress on the implementation process of [said] provisional measures, the Commission understands that the term within which the Commission must file its observations shall commence on the date said exhibit is forwarded." On January 25, 2006, following the instructions of its President, the Secretariat informed the representative and the Commission of a 10-day extension next following the date of expiration of the original terms of four and six weeks, respectively, for them to file their observations to said Sate reports.

43. The submission of February 1, 2006, wherein the State reported the death of inmate Federico Alberto Minatti. On the same day, the representatives reported said death and submitted information about the implementation of provisional measures.

44. The submission of February 1, 2006, wherein the State reported "the incidents of violence that had taken place at Units No. 4 on […] December 12, 2005," in respect of which the State informed of the measures and actions taken by the Penitentiary Board. Furthermore, the State referred to "the situation associated with the threats sustained by Pablo Salinas, María Angélica Escayola and Alfredo Guevara," in respect of which the State claimed that "both [Mr.] Pablo Salinas and his colleagues have been awarded adequate protection by the authorities and immediate and useful actions were taken so as to identify the aggressors."

45. The Order of the Court of February 7, 2006, summoning the Inter-American Commission, the representatives of the beneficiaries of the provisional measures and the State to a public hearing to be held in the city of Brasilia, Brazil, at the seat of the Superior Tribunal of Justice of said country, on March 30, 2006, so that the Court could hear their arguments on the facts and circumstances relating to the implementation of said measures.

46. The submissions of February 14 and 16, 2006, wherein the representatives filed information about inmate Ricardo Vilca, who "was found [severely] injured within the same cellblock where a few days before [inmate Federico Alberto] Minatti had been found dead."

47. The submission of February 21, 2006, wherein the State requested an extension of time for the submission of its eighth State's report. The extension due date was set for March 17, 2006.

48. The submissions of February 27, 2006, in which the representatives filed a "copy of the [alleged] *habeas corpus* filed owing to the incidents that had taken place in the cellblock for juvenile adults" of the *De Boulonge Sur Mer* Correctional Institution, as well as copy of the "Order [passed by the jail oversight judge] in the proceedings identified with No. 8732 – Habeas Corpus – Cellblock No.2, Mendoza Provincial Prison."

49. The submission of March 6, 2006, wherein the Inter-American Commission submitted its observations to the sixth and seventh State's reports.

50. The public hearing on provisional measures held on the date hereof in Brasilia, Brazil, at the seat of the Superior Tribunal of Justice of that country, with the presence of:

by the Inter-American Commission:

Florentín Meléndez, Commissioner;
Santiago Canton, Secretary;
Víctor H. Madrigal-Borloz, Advisor;
Elizabeth Abi-Mershed, Advisor;
Juan Pablo Albán, Advisor, and
Manuela Cuvi, Advisor;

by of the representatives:

Carlos Eduardo Varela Álvarez, y
Pablo Gabriel Salinas;

by the State:

Jorge Nelson Cardozo, advisor to the Cabinet of Foreign Office;
Alejandro Acosta, Deputy Secretary of Justice of the Province of Mendoza;
Alberto Javier Salgado, from the Human Rights Division of the Foreign Office;
Andrea Gualde, from the Ministry of Justice;
Ciro Annichiaricco, from the Ministry of Justice, and
Pilar Mayoral, from the Ministry of Justice.

51. The arguments presented by the Commission at the referenced public meeting. Among other issues, the Commission stated as follows:

a. The Commission stated once again its concern for the exposure of persons within prisons to a position of risk of extremely gravity and urgent nature threatening their lives and personal integrity. The position of risk has not changed substantially, and violence is still in place as it may be evidenced —among other instances— by injured prisoners, questionable deaths, riots, hanger strikes, fights, escapes and sequestration of weapons;

b. Some progress has been made in the implementation of provisional measures, such as the appointment of new penitentiary agents, the creation of a new jail oversight criminal court and the office for the defense of inmates' human rights. Furthermore, the Commission values both the projection of measures in the long term on the part of the State and the political willingness of the national government and of the provincial government, and the talks between the parties. However, progress has been inadequate and misdirected as concrete substantive measures have not been implemented in order to overcome the crisis;

c. Security controls are deficient and management of prisons is erratic in the hands of the custody bodies as the incidents that have taken place inside the cellblocks have passed unnoticed to the authorities. Furthermore, the use of force to quell riots has been excessive;

d. Judicial authorities have allowed two petitions for habeas corpus presented by the representatives and several inmates and their families, in connection with prolonged periods of confinement and sanitary and health care issues;

e. The severity of the situation has been acknowledged by the highest Argentine authorities;

f. It is necessary to take measures as part of an integral reform, such as more skilled personnel, proper cellblock lighting, actions against overcrowding, segregation of convicted prisoners from untried detainees, sanitary measures for the provision of proper toilets and drinking water for the use by the inmates, and barring of entrance of weapons to the facility;

g. Overcrowding is not fought against by building new cellblocks but also by providing for measures as an alternative to pretrial detention;

h. The agreed-upon short-term commitments as per the record signed in Asunción have not been met. In this regard:

    i. the Commission acknowledges the recruitment of new penitentiary agents, but the profile and training status of said new employees are unknown;

    ii. Investigations are not carried out effectively or impartially, and the system does not provide for legal, criminal penalties, it only provides for disciplinary actions. Furthermore, the legislative and governmental provincial authorities have taken a fairly passive stance when compared to judicial authorities' involvement;

    iii. Follow-up Commission entrusted with provisional measures is inactive;

    iv. In spite of the fact that the Commission acknowledges that the number of deaths has decreased, the severe risk of violent death has not been eradicated;

i. The Commission requests that the Court make use of all its conventional power to enforce the provisional measures, and force the State's both national and provincial governments to assume their responsibility,

j. This case is not about determining who should be held internationally responsible when dealing with a federal State, as this issue has already been dealt with in the Convention and previous court decisions;

k. It is necessary to implement a political compliance strategy considering:

   i. the effective implementation of provisional measures in the provincial scenario;
   ii. federal government's assumption of direct responsibility as part of the process;
   iii. the existence of effective and transparent coordination of process of compliance between the federal government and the provincial government;
   iv. a call for consultations among the political sectors of the Province of Mendoza that do not acknowledge the provisional measures or the need for said measures or transparency, in order to have them involved in the process of implementation and compliance; and
   v. involvement of other governmental agencies in addition to the Foreign Office and the Government of the Province of Mendoza, who may provide technical advise, resources, and concrete short-term solutions to overcome the current scenario of violence.

l. There is a need for a concrete State commitment to immediate action the results of which could be verified in the short term, and for the Court to be informed, in within a month, by way of the State's ninth report, of the implementation of the commitments undertaken as per the Record of Asunción, including:

   i. Change in security patterns so that guards will make rounds on a regular basis in the facilities and not outside.
   ii. Immediate reactivation of the Ad Hoc Investigation Commission and the Follow-up Commission; and
   iii. Barring of prolonged periods of confinement, completion of lighting works in all cells and a reactivation meeting as soon as practicable.

52. The arguments posed by the representatives at such public hearing, in agreement with the ones presented by the Commission, including further:

a. Their dissent with the Commission concerning the alleged political willingness on the part of the federal government and the provincial government, and the alleged improvement on the conditions prevailing in the prisons involved in this case. Although the representatives were aware of the personal efforts of many governmental agents, the actions taken do not suffice to argue that provisional measures have been complied with.
b. Discontinuance of the work of the Follow-up Commission or the Ad Hoc Commission entrusted with investigating the deaths occurred, which favors impunity;
c. Uncertainty about the conditions under which the office of the defense of the rights of inmates works;
d. The federal judicial authorities are responsible for lodging over 60% of untried prisoners in the penitentiaries located in Mendoza, while the

provincial judicial authorities are responsible for lodging 45% of said inmates;

e. In spite of the fact that judicial authorities have allowed several submissions for habeas corpus, prolonged periods of confinement and torture are still used inside the cellblocks;

f. Regarding education and resocialization, only four young prisoners take lessons in a small classroom. Furthermore, when they turn 21 years old, they are relocated with the other adult prisoners, and the authorities no longer provides them with education;

g. Penitentiary guards are under pressure to work without rest;

h. In spite of the precautionary and provisional measures, and a recent decision of the Argentine Supreme Court, the rate of persons detained in the Province of Mendoza has increased, while penitentiary conditions and facilities are still the same;

i. The Sate must prepare a plan to comply with the commitments undertaken in Paraguay, providing for a budget and readily access to information, means of control of compliance with provisional measures, as well as the involvement of the highest national and provincial authorities; and

j. A request to the Court seeking that provisional measures are detailed and kept in force.

53. The arguments presented by the State in connection with the public hearing, including *inter alia*:

a. The need to take into account the social context calling for a hand of iron on inmates, as well as more severe penalties and fewer possibilities to apply for releases;

b. As a special measure, state agents have met with the investigation judge to "convince him of the measure that should be taken" in order to grant beneficiaries to inmates, as well as with federal and provincial authorities. However, progress in this area at the judicial level is slow;

c. An assessment of the persons who are in the condition to obtain provisional release from prison by way of the benefit of discharge;

d. At present, there are no inmates subjected to prolonged periods of confinement;

e. Regarding the Follow-up Commission, it is difficult for the members who compose it to meet owing to the distances between Buenos Aires and the Province of Mendoza;

f. The national government has not provided an answer to the provincial government in connection with the issues affecting the penitentiaries located in said province;

g. Out of the inmates imprisoned in the penitentiaries located in Mendoza, 300 places are used by the federal government, and the Province provides the necessary funding for those places;

h. The judiciary of the Province of Mendoza keeps 44% of its prisoners in custody way over the due date set for trials, without any prospects for trial commencement;

i. The Federal Government is willing to work together with the parties, the Inter-American Court and the province of Mendoza so as to try and find a solution to the problem affecting the case and Argentina;

j. Although it admits that the issue of overcrowding is severe, the State makes a point of the fact that there has been an improvement on this issue;
k. Argentina has prepared a declaration concerning the prisoners held in custody, which is "ready" to be presented before the General Assembly of the OAS, and has ratified the Optional Protocol to the UN Convention against Torture;
l. In the case pending before the Commission, an amicable solution was proposed in that the State creates a trust fund destined to the implementation of the provisional measures relating to the penitentiaries located in Mendoza and administered by the Follow-up Commission; and
m. The State shares some of the proposals made by the Inter-American Commission such as the barring of prolonged periods of confinement and the reactivation of the Follow-up Commission, and welcomes new proposals for their consideration. Furthermore, the State made it clear that it is not avoiding responsibility for the present case.

CONSIDERING:

1. That Argentina has been a State Party to the American Convention from September 5, 1984, and that pursuant to Article 62 of said Convention, Argentina has accepted the contentious jurisdiction of the Court upon ratifying said instrument;

2. That Article 63(2) of the American Convention sets forth that "[I]n 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, in the terms of Article 25 of the Court's Rules of Procedure,

> [...]
> 2. With respect to matters not yet submitted to it, the Court may act at the request of the Commission.
>
> 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 of Human Rights shall present observations to the State's report and to the observations of the beneficiaries or their representatives.
> [...]

4. That International Law on Human Rights considers that provisional measures are not only of a precautionary nature in that they preserve a juridical situation, but fundamentally of a shielding nature as they protect human rights. As long as the basic requirements of extreme gravity and urgency and the necessity to avoid irreparable damage to persons are met, provisional measures become a true jurisdictional guarantee of a preventive nature.

5. That the merits of the case in connection with which these provisional measures were granted are not being tried before this Court, and that the adoption of provisional measures do not amount to passing judgment on the merits of the

dispute between the petitioners and the State.[1] That in adopting provisional measures, the Court is only fulfilling its mandate in conformity with the terms of the Convention, in cases of extreme gravity and urgency calling for protective measures in order to avoid irreparable damage to persons.

6. That Article 1(1) of the Convention provides for the State Parties' general obligation to respect the rights and freedoms contained therein, and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms. In furtherance of this obligation, any State Party has the *erga omnes* obligation of protecting all the persons subject to their jurisdiction. This Court has held that said general obligation is imposed in connection not only with the power of the State, but also with the acts and conduct of private third parties.[2]

7. That this Court has held that every State has a special role as guarantor in respect of the persons held in custody in penitentiary institutions or detention units, as penitentiary authorities exert control over these persons.[3] Furthermore, "[o]ne of the obligations that a State must unavoidably assume in its role as guarantor —in order to protect and guarantee the right to life and personal integrity of the inmates— is to [provide] them with minimum conditions compatible with their dignity while they remain in said detention units."[4]

8. That, during the effective term of these provisional measures —according to the information submitted by the Commission, the representatives and the State— the inmates of the Mendoza Provincial Prison and those in custody in the André

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[1] *Cfr. 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. 7*; Matter of the Mendoza Prisons.* Provisional Measures. Order of the Inter-American Court of Human Rights of June 18, 2005, Considering Clause No. 5; and *Matter of* Peace *Community of San José de Apartadó*. Provisional Measures. Order of the Inter-American Court of Human Rights of March 15, 2005, Considering Clause No.5.

[2] *Cfr.,* by virtue of its contentious function, *Case of the Pueblo Bello Massacre.* Judgment of January 31, 2006. Series C. No. 140, paras. 113 and 114; *Case of the Mapiripán Massacre*. Judgment of September 15, 2005. Series C. No. 134, paras. 111 and 112; *Case of the Moiwana Community*. Judgment of June 15, 2005, Series C. No. 124, para. 211; *Case of Tibi*. Judgment of September 7, 2004. Series C. No. 114, para. 108; *Case of the Gómez-Paquiyauri Brothers.* Judgment of July 8, 2004. Series C. No. 110, para. 91; *Case of 19 Tradesmen.* Judgment of July 5, 2004. Series C No. 109, para. 183; *Case of Maritza Urrutia.* Judgment of November 27, 2003. Series C No. 103, para. 71; *Case of Bulacio*. Judgment of September 18, 2003. Series C No. 100, para. 111; and *Case of Juan Humberto Sánchez.* Judgment of June 7, 2003. Series C No. 99, para. 81. See also, by virtue of its advisory powers, *cfr. Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03, para. 140. Furthermore, upon ordering provisional measures, *cfr. Matter of Monagas Judicial Confinement Center ("La Pica")*, supra note 1, Considering Clause No. 16; *Matter of Children Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM*. Provisional Measures. Order of the Inter-American Court of Human Rights of November 30, 2005, Considering Clause No. 14; *Matter of Mendoza Prisons*. Provisional Measures. Order of June 18, 2005; *Matter of Pueblo Indígena de Sarayaku.* Provisional Measures. Order of July 6, 2004; *Case of the Pueblo Indígena de Kankuamo.* Provisional Measures. Order of July 5, 2005; *Matter of the Communities of Jiguamiandó and Curbaradó*. Provisional Measures. Order of March 6, 2003, page 169; *Matter of* Peace *Community of San José de Apartadó* . Provisional Measures. Order of June 18, 2002, page 141, and *Matter of Urso Branco Prison.* Provisional Measures. Order of June 18, 2002, page 53.

[3] *Cfr*. *Matter of Monagas Judicial Confinement Center ("La Pica"),* supra note 1, Considering Clause No. 11; *Matter of Children Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM, supra* note 2, Considering Clause No. 17; and *Matter of Mendoza Prison.* Order of the Inter-American Court of Human Rights of June 18, 2005, considering No. 11.

[4] *Cfr. Matter of Mendoza Prisons.* Provisional Measures. Order of the Inter-American Court of Human Rights of June 18, 2005, Considering Clause No. 7, and *Case of the "Juvenile Reeducation Institute"*. Judgment of September 2, 2004. Series C No. 112, para. 159.

Gustavo Unit, located in Lavalle, as well as the person found within these facilities, are still exposed to a situation that puts —or has directly put— their life and personal integrity at stake. Particularly, from the information forwarded by the parties, it can be concluded that —in spite of the good faith and the endeavors taken by State authorities throughout 2005 and up to date— serious acts of violence have taken place, and four persons have died in the former penitentiary center under circumstances not yet fully clear; there were two riots in which the force used to subdue them has been excessive and in which a number of inmates have been injured and/or received different harsh treatments; and that generally, the state of overcrowding and the deterioration levels inside such centers have not undergone any change at all. As emphasized by the Commission, the risk of violent death has not been eradicated; investigations made have not yielded any actual outcome; and deficient conditions of security and internal control are still the same, including lack of segregation of inmates and detainees by categories, and that entry and possession of weapons inside the penitentiary centers is still an issue. These incidents are still happening at present in spite of the effective term of the provisional measures previously ordered by the Court, despite the fact that they have been addressed expressly at the public hearing held on the date hereof in Brasilia (*supra*, Having Seen Clause No. 50), and although some of them had been noticed by the Jail Oversight Court in determining a number of petitions for *habeas corpus*.

9. That the Court has already established that the international responsibility of the States within the framework of the American Convention arises from the commission of violations to general *erga omnes* obligations to respect and caused to be respected and guarantee rules of protections and ensure the efficacy of the rights contemplated therein in all circumstances and in respect of any person, pursuant to Articles 1(1) and (2) of said treaty.[5] These general obligations create special duties that may be determined in accordance with the particular needs of protection of any law-abiding subject, whether due to their personal capabilities or to the specific situation they are in. In fact, Article 1(1) of the Convention imposes on every State Party fundamental rights of respect and guarantee of rights, in a manner such that any detriment to human rights acknowledged by the Convention that may be attributed, as per the rules of International Law, to the actions or act of omissions of governmental authorities, amounts to an act attributable to any such State and therefore the State's international responsibility is compromised pursuant to the terms of the Convention itself and the general provisions of International Law.[6]

10. That the provision established in Article 63(2) of the Convention makes it compulsory for any State to adopt the provisional measures that may be ordered by this Court, insofar as the States must meet their conventional obligations in good faith in accordance with the basic law principle of international responsibility of the States, which is supported by international case law *(pacta sunt servanda)*. Any breach to the order of enforcement of provisional measures passed by the Court in proceedings before the Commission and the Court may trigger international responsibility of the States.[7]

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[5] *Cfr. Case of the Pueblo Bello Massacre, supra* note 2, para. 111; *Case of Mapiripán Massacre, supra* note 2, para. 111; and *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 140.

[6] *Cfr.Case of the Pueblo Bello Massacre,* supra note 2, para. 111; *Case of Mapiripán Massacre, supra* note 2, para. 108; *Case of the Gómez-Paquiyauri Brothers, supra* note 2, para. 72.

11. That this Court is aware of the fact that the correction of and solution to the situation affecting the Mendoza Prisons is a process with short-, mid-, and long-term goals; that this takes a set of actions on the part of federal and provincial authorities, with of administrative, judicial or even legislative powers, to cure the conditions of defective confinement and detention. However, given the order of this Court to adopt provisional measures, the subject-matter of which is the protection of life and integrity of the persons held in custody in said penitentiary units and of those found within such facilities, the State cannot assert defenses based on the State's domestic law to avoid taking firm, concrete, and effective action in compliance with the measures ordered so that no further deaths occur. Nor can the State rely on the defense of lack of coordination between federal and provincial authorities in order to prevent the deaths and acts of violence that have taken place during the effective term of these provisional measures. Regardless of the unitary or federal structure of government of any State Party to the Convention, in the international jurisdiction scenario it is the State as such that is to be held accountable to the oversight bodies created in said treaty and it is the only State that is obliged to adopt such measures. Failure of the State to adopt said provisional measures triggers such State's international responsibility.

12. That under the circumstances of this case, the measures adopted by the State must include those directly designed to protect the right to life and integrity of the beneficiaries, considering the relationship both among them and with penitentiary and governmental authorities. Particularly, and in light of the allegations made by the parties at the public hearing held on the date hereof in Brasilia (*supra* Having Seen Clause No. 50), it is essential for the State to adopt —in an immediate and inexcusable fashion— effective and necessary measures to actually eradicate the risk of violent death and serious assaults to personal integrity, especially in connection with the deficient conditions of security and internal control affecting confinement centers. The measures to implement, notwithstanding the adoption of others referred to elsewhere herein (*supra* Having Seen Clause No. 5) and others that may be deemed pertinent, are described below:

- An increase in the number of penitentiary personnel in order to guarantee security in the institutions;
- Elimination of weapons within the facilities;
- Changes in surveillance pattern in such a manner that they ensure adequate control and actual presence of penitentiary personnel inside the facilities;
- Those actions identified as measures of immediate implementation for the "progressive improvement in detention conditions" (*supra* Having Seen Clause No. 5); and
- Immediate reactivation of the so-called "follow-up commission" (*supra* Having Seen Clauses No. 5 and 12).

13. That, to these effects, the Court deems it of paramount importance that the measures are implemented in effective and transparent joint efforts of provincial and

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[7] *Cfr. Matter of the Communities of Jiguamiandó and Curbaradó*. Provisional Measures. Order of the Inter-American Court of Human Rights of February 7, 2006, considering No. 7; *Case of Hilaire, Constantine, Benjamin et. al.* Judgment of June 21, 2002. Series C No. 94, paras. 196-200. See also, *Matter of James et al.* Provisional Measures. Order of May 25, 1999. Series E No. 2, Operative Clause 2(b); Orders of June 14, 1998, of August 29, 1998, and of May 25, 1999; Order of August 16, 2000. Series E No. 3, Having Seen Clauses No. 1 and 4; and Order of November 24, 2000. Series E No. 3, Having Seen Clause No. 3.

federal authorities, with the involvement of bodies with the capability of providing the technical criterion to determine the immediate measures designed to overcome the situation that has been the basis for the petition of said provisional measures.

14. That the duty to report to the Court on the implementation of measures is twofold in that compliance with said duty requires the formal submission of a document within the term set as well as the specific, true, current and detailed material reference to the issues that fall within the scope of said obligation.[8] Any breach to this State's duty is particularly serious because of the juridical nature of these measures.[9] Even though the State has submitted —when and as required— most of its reports, it is necessary that the State keep on reporting to the Court specifically and concretely on the results obtained from the implementation of the measures. It is paramount that the priority measures referred to in Considering Clause No. 12 get reflected in the State's reports describing the means, actions and goals set by the State in agreement with the specific needs of protection of the beneficiaries thereof, in such a manner that they give real sense and provide a continuum in those reports. In this sense, the role of the Inter-American Commission is particularly important so as to adequately and effectively follow up the implementation of the measures so ordered.

15. That, based on the foregoing, it is relevant to keep the provisional measures in force, by virtue of which the State has the obligation to protect the life and integrity of all the persons held in custody in the Mendoza Provincial Prison and those in the Gustavo André Unit, located in Lavalle, as well as any person found within said facilities, especially by means of the measures described both in the previous and in this present Order, among others (*supra* Having Seen Clauses No. 3 and 6). In this regard, the Court highlights the fact that at the hearing held on the date hereof in Brasilia (*supra* Having Seen Clause No. 50) the representatives, the Commission and the State agreed on the fact that the conditions of the referenced confinement centers have not undergone tangible improvement and on the need to keep said measures in full force and effect.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

by virtue of the authority granted by Article 63(2) of the American Convention on Human Rights and Article 25 and 29 of its Rules of Procedure,

DECIDES:

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[8] *Cfr., inter alia, Matter of the Communities of Jiguamiandó and Curbaradó, supra* note 7, Considering Clause No. 16; *Matter of Luisiana Ríos et al. (Radio Caracas Televisión – RCTC).* Provisional Measures. Order of the Inter-American Court of Human Rights of September 12, 2005, Considering Clause No.17; and *Matter of Luis Uzcátegui.* Provisional Measures. Order of the Inter-American Court of Human Rights of December 2, 2003, Considering Clause No. 12.

[9] Cfr., *inter alia*, *Matter of the Communities of Jiguamiandó and Curbaradó*, supra note 7, Considering Clause No. 16; *Matter of Peace Community of San José de Apartadó*, supra note 1, Considering Clause 12; and *Matter of the Communities of Jiguamiandó and Curbaradó*. Provisional Measures. Order of the Inter-American Court of Human Rights of March 15, 2005, Considering Clause 11.

1. To order the State to adopt —in an immediate and inexcusable manner— the effective and necessary provisional measures to efficiently protect the life and integrity of all the persons held in custody in the Mendoza Provincial Prison and those in the Gustavo André Unit of Lavalle, as well as every person found within those facilities, especially to eradicate the risk of violent death and the deficient conditions of security and internal control in confinement centers, pursuant to the provisions set out in Considering Clauses 11 and 12 of this Order.

2. To order the State to implement of the provisional measures ordered in effective and transparent coordination with federal and provincial authorities, pursuant to the provisions of Considering Clauses No. 11 and 13 of this Order, in order to ensure the effectiveness of such measures.

3. To order the State to report to the Inter-American Court every two months next following its latest report concretely and specifically on the actions taken in compliance with the orders of this Court. Especially, it is essential that the adoption of the priority measures described in this Order get reflected in reports containing concrete results in terms of the specific needs of protection for the beneficiaries of such measures, pursuant to the provisions set out in Considering Clause No. 14 of this Order. In this regard, the oversight role of the Inter-American Commission is radical for an adequate and effective follow-up on the implementation of the measures so ordered.

4. To order the representatives of the beneficiaries and the Inter-American Commission to submit their observations to the State's reports within a term of four and six weeks, respectively, next following receipt of the referenced State's reports.

5. To notify this Order to the Inter-American Commission, the representatives and the State.

Judges García Ramírez and Cançado Trindade informed the Court of their Separate Opinions and Judge García-Sayán informed the Court of its Concurring Opinion, which are attached to this Order.

Sergio García-Ramírez
President

Alirio Abreu Burelli

Oliver Jackman

Antônio A. Cançado-Trindade

Manuel E. Ventura-Robles

Diego García-Sayán

Pablo Saavedra-Alessandri
Secretary

So oredered,

Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary

**SEPARATE OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ
IN THE ORDER OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS
MARCH 30, 2006,
ON PROVISIONAL MEASURES
IN THE MATTER OF MENDOZA PRISONS**

1. Once again the Inter-American Court is called upon to decide a case, brought to it by way of a petition —a repeated and maybe a still expectant petition—, over the extremely serious issues affecting prisons in many countries. Once again, the case under review involves the Mendoza confinement centers, but in the past (what will the future hold?) identical questions have been raised in connection with many Latinamerican confinement centers and their unfortunate population. The Court will soon address this issue again at a public hearing —during the XXVIII Extraordinary Session to be held in Buenos Aires— in the *Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela,* as part of a contentious case.

2. The profile of the topics brought to the jurisdiction of the Court, either as contentious cases or petitions for provisional measure, reveals the presence and the spread of the dilemma of confinement, which often translates in unbearable, uncontrolled violations to the human rights of those who are held in custody, and even of other persons who live and suffer for those in the neighborhood of the "houses of the dead." It is not possible to set aside, minimize or disregard this ambit of current or potential violations. It is true that they all call for urgent attention but in this hypothetical the urgency seems to have a special, characteristic component that grows and exceeds the projects designed to cope with and provide a solution to such urgent issue. It affects hundreds or thousands of human beings, whose rights are in permanent risk or sustain continuous impairment.

3. Based on the foregoing, the Report I submitted on March 10 this year on behalf of the Inter-American Court of Human Rights to the Commission of Juridical and Political Affairs of the Organization of American States includes a specific and exceptional paragraph meant to call the attention of the distinguished delegates —i.e. the delegates of the States represented thereat— on the issue under review. In that Report, I stated that "several cases have shown there is a true crisis in the system of incarceration of adults and juveniles. This crisis translates in extreme violence and creates the referenced continuous risks. The Court has passed a number of orders on provisional measures containing several remarks in this respect, and urged the authorities to revise their confinement systems in depth. It seems crucial that the Organization and the States devote special attention to the examination of this issue and provide either immediate or progressive solutions to it, as the circumstances may require." When dealing with this topic, I pointed out the issues that supported my concern —in 2005, the Court granted provisional measures in several cases concerning confinement centers: *Mendoza Prisons* (Argentina) and *Complexo do Tatuapé de FEBEM* (Brazil). In 2006, the Court ordered provisional measures in the *Matter of La Pica* (Venezuela).

4. A few days after the submission of said Report, new incidents took place in the Mendoza confinement centers —or else, these were a repetition of old incidents of extreme gravity and urgency or risk of irreparable dame to persons— that served

as grounds for the hearing held at the XXVII Extraordinary Session of the Inter-American Court in Brasilia, that runs along the lines of the memorable hearing on the same subject held as part of the Extraordinary Sessions of Asunción, Paraguay, approximately a year ago.

5. On this point, I think it convenient to identify the categories of persons held in custody and the problems affecting them. Firstly, regard must be had to detainees, who are subject to investigation of actual or alleged crimes; secondly, untried prisoners, subject to pretrial detention —known as "prisoners awaiting sentencing", with numbers far exceeding in proportion other categories of persons held in custody—; and finally, prisoners that have been convicted by judicial authorities and are therefore subject to "punitive imprisonment," not as a merely precautionary or preventive measure. I set aside other categories of persons subject to confinement for other reasons, such as the mentally ill, and minors who are —whether rationally or not — subjected to institutional confinement.

6. This large set of persons is on the verge of danger, in a twilight zone where the human being and the State meet —and crash against each other, more often than not. These two contenders have too different strengths and titles, which immediately seem to disqualify one and support the other, in many an aspect. The former is seen as the "social enemy", a "dangerous subject", a "punished" or "segregated" individual, whose rights and powers have been restricted, subject to control and suspicion; the latter is seen as the defender of institutions and administrator of the law and punishment, who works in the name of society and warrants the use of force. Then, we are in the presence of what I have come to call the "critical zone" of human rights, where they run great risk, and where —in the end— the human being may be doomed.

7. In this present case, I do not address the issues of investigation that violates people's rights, to which the Court has made reference in a number of decisions; instead, I address "life in prison": the events during captivity at the time of proceedings or execution of sentence. This is in a way a massive and chronic affection of rights, as opposed to most of the infringements that take place elsewhere, which affect only one or a few individuals and which are committed and perfected over a short period of time. Those taking place within confinement centers are of a collective and never-ending nature. Obviously, life in prison is not exempt of the operation of law —as if it were no-one's land; a space for the exclusion of rights and corresponding duties. Once again, I must quote Carnelutti's admirable work *Las miserias del proceso penal* [The Miseries of Criminal Procedure], "the penitentiary —together with the court— is comprised within the palace of justice." However, is it true, beyond the spirited declaration of the eminent jurist?

8. At the public hearing on the Mendoza prisons —in which no statement in support of their conditions was made, and news, comments, criticism and proposal were discussed— both the parties and the Court —including myself, at my own initiative and at the request of one of parties— made certain contributions to nurture our reflections, but above all, to impel the execution of urgent measures on the part of relevant authorities.

9. In this as in similar cases, I drew my attention to some data in the 'natural' history, as it were, of a State's concern for prisons. In the end, prisons have emerged from the darkness where they had been deliberately placed, and are now exposed for everyone to see —to a lesser or greater extent— their horrors,

paradoxes, pitfalls; the concentration of correctional powers, which at times amount to overwhelming abuses; the deficiency of facilities and guards —in contrast with the apparent kindness of many norms— and the repeated commission of crimes and offenses by both authority agents charged with the custody and "treatment" of prisoners and co-prisoners whose violence should be prevented, faced and restrained by the State.

10. The duty of custody vests in the State, by virtue of its special role as guarantor of the rights of inmates, and this duty is twofold in that protection should be awarded against the State itself and against third parties, as public obligations comprise all conducts that could impair the rights of inmates, i.e. they are enforceable *erga omnes.* At any rate, if the State does not provide for this general protection, who can provide it to those who have been deprived of their freedom and are no longer capable of defending themselves? Whose duty is it to protect the rights of inmates who have been *de jure* and *de facto* delivered unto the hands of prison guards, i.e. under the political, ethical and juridical responsibility of public power who confines them and meticulously controls their existence?

11. In the darkest hour of life in prison, incarceration dilemmas did not call the attention of the courts, as long as they did not call for the commencement of new proceedings against inmates on the grounds of the alleged commission of new crimes within prison facilities. But this did not amount to "penitentiary judicial assistance" proper. It began to be penitentiary judicial assistance when inmates were no longer considered —either in theory or in fact— "a thing of the administration" and the principle of legality made headway in issues of custody and execution of sentence, as it had made headway long before in connection with both the description of punishable conducts and the associated legal consequences, and the setting up of courts and the rules of criminal procedure. Executive legality joined the lines, though feebly —very feebly— of criminal and procedural legality. This principle was eventually heralded by the jail oversight court, a rule-of-law body that protects the rights of inmates.

12. Data on prison, that go against constitutional mandates and defy the values and principles adopted by fundamental laws —which make no exception for anyone: neither criminals nor prisoners— triggered the application of constitutional jurisdiction to this ambit. It is not that constitutional courts should administer prisons —as it has once been erroneously criticized. They key issue is that the Rule of Law proclaimed by the supreme law should also prevail within prisons, and that the values of a democratic society are preserved notwithstanding the punitive power of the State, which must be exercised with control, legitimacy, humanness, efficiency and transparency. There have been many setbacks in this healthy road. At any rate, it is clear that constitutional control over the acts and conduct of authorities does not vanish against prison walls, cell bars or executors' discretion.

13. Later on, prison issues reached the international courts of human rights. We are now at this stage, which does not exclude the others. Like in other contexts, these courts perform the function typical of international jurisdiction with respect to national jurisdiction: a subordinate and supplementary function. The American Convention on Human Rights contains provisions concerning prisoners, whether under arrest, pretrial detention or punitive imprisonment, and based on those provisions —as in the present case— the intervention of the Inter-American Court is requested.

14. The solution to the problems arising from life in prison —life against nature, full of paradoxes and threatened by the demolishing criticism of new currents on social control— is neither easy nor immediate as a matter of course; this solution calls for the concurrence of several instruments —as varied as legal and financial resources— gathered and administered by a strong will. At the hearing held in Brasilia on the Mendoza Prisons, an inquiry was made on the means to solve —once and for all— the problem affecting these confinement centers. What is said about them may be said about many others, in either central or federal countries: energetic, coordinated, immediate and sustained action. Quick-fix actions will never suffice. Absence of coordination —which cannot be justified in any case, not even under federal organizational schemes, as governments have constitutional and institutional means to establish common fronts in this field, as in others— puts many obstacles on the way and leaves big empty spaces which are filled with violence. The deferral of measures and a recess in progress lead to dreadful results: multiplication of violations.

15. At the hearing held a year ago in the city of Asunción, the participants signed a productive agreement. Certainly, the rights accruing to some and the duties imposed on the others do not arise from that agreement, executed in good faith, at the initiative of the Inter-American Court. Those rights and duties arise from domestic constitutional law and provisions of international law on human rights, which have been made part of the Order of the Court on provisional measures, and which cannot be waived by agreement between the parties. However, I deem it pertinent —on a personal note— to highlight the importance of this agreement as it showed the positive juridical willingness and encouraged communication between those with colliding interests. Mutual understanding contributes to the efficacy of the law, it achieves more, much more on certain occasions, than the solemn directive of a rule or judicial judgment. Therefore, I would like to revive the spirit of that agreement, its moral and juridical component, its intrinsic value. Keeping it will contribute to resolving the conflict, disregarding it will not be a contribution whatsoever. I believe we should continue building new stages of this solution on the foundations still given by commitment and good will.

16. At the hearing held in Brasilia, which led to the order of the provisional measures to which I attach this Opinion, reference was made to the need of examining and implementing measures of different nature, some of them being highly complex and obviously relevant, calling for constitutional reforms, review of the structure of procedures, and considerable expenditure. Of course, I do not deny the convenience of analyzing everything worth being analyzed and reforming everything that needs reforming in order to improve administration of justice and execution of judicial decisions. May that be done. However, I insist on the need to distinguish between what can be postponed —as part of conscientious actions, that is— and what cannot be delayed. Withdrawing attention from critical problems until structural questions and other great-scale issues are solved would mean jeopardizing the immediate protection of valuable rights —that is, inmates' life and integrity.

17. During the hearing held in Brasilia, I allowed myself to resort to certain old experiences that criminal institutions in my country, Mexico, had been through. When the Federal Constitution was discussed back and forth, between 1856 and 1857, at a constitutional assembly, the representatives had to deal with the issue of punishment, in a panorama of crime and public security, which was certainly serious in those years of the XIX century. During the debate, the supporters of capital punishment crashed —energetically, I must admit— against the proclaimers of

immediate and absolute abolitionism. Although the conviction that capital punishment should be suppressed prevailed amongst the members of Congress, they always feared to abolish it, as the republic did not have any other substitute devise to rely on —they were just witnessing the beginnings of the penitentiary system.

18. Somehow as a compromise, the congressmen decided to adopt capital punishment and to entrust the Executive with creating a penitentiary system with a view to abolishing capital punishment as desired by all. Consequently, Article 23 of the newly-created Constitution was careful to state only that "[I]n order to abolish capital punishment, the administrative branch shall be responsible for creating the penitentiary system as soon as practicable." Capital punishment was eventually abrogated from the Constitution in 2005 —one hundred and fifty years after the congress debate of 1857. It has always seemed regrettable to me to condition the implementation of necessary, warranted and accessible measures on the attainment of goals that are nearer or further in time, thus deferring fulfillment of certain duties that cannot be postponed.

19. This should not happen in cases of prisons the population of which —now desperately— awaits that the State will ensure protection of their most valuable rights, effective immediately. However, this is not only inmates' expectations; it is the expectation of a greater part of —a now upset— society. How could anyone argue that a constitution must first be amended so that the obligation of the Federation will be in alignment with the duties inherent in its provinces, or that before all, certain principles of the accusatory procedure must be reviewed to encourage diligence in proceedings, or that before avoiding the entry of weapons to prisons, or reasonably classifying prison population or establishing order in prison life, a fiscal reform must first take place so as to generate greater resources with which to modernize prisons?

20. I am in favor of debates on constitutional guidelines of the Law and of criminal procedure. In fact, a major debate on this topic has been unleashed throughout Latin-America. Nonetheless, no debate however relevant or intense it may be, no deliberation however important and necessary it may be, nor measure for penitentiary changes —either in work places, education, segregation, health care, etc.— however indispensable they may be deemed, should halt not even for a second the adoption of serious and adequate measures to ensure life and integrity of inmates. If provisional measures have been ordered, the rationale behind this legal devise and the demands of a subverted reality, above all, call for these measures to be devoid of conditions or preambles, notwithstanding any refection or the immediate implementation of any other measure that could lead to a great-scale penitentiary reform.

21. This is why I should once again argue for the stance I took in *Opinion* on the provisional measures adopted by the Inter-American Court in connection with the Urso Branco prisons, Rondônia, Brazil, on July 7, 2004, which I restated in my *Opinion* on the measures for the *Mendoza Prisons*, on June 18, 2005: "Whether a penitentiary reform takes place, new legislation is passed on the topic, segregation of inmates is implemented, penitentiary institutions are modernized, officials in charge of custody and execution of sentences are carefully recruited, adequate substitutes for the imprisonment are provided for, obstacles are cleared for visitation of prisoners under dignifying conditions, medical assistance is available for the preservation of inmates' health conditions, educational centers, workshops and units are established, all this, and even more, is absolutely indispensable, because it

reflects current standards of incarceration, which —either as a preventive or punitive action— raise too many questions nowadays. But none of these actions, which should be carried out as soon as practicable, may replace the immediate adoption of measures necessary to avoid the occurrence of a single more death in the Urso Branco Prison."

22. In conclusion —I added in my *Opinion* of June 18, 2005— "no more deaths, no more injuries, not a single one. This obligation is immediate and final. It does not admit any excuse or delay. Others obligations may be fulfilled in the future, acting with diligence through successive actions; they will yield gradual, increasing results. I conclude this from the characteristics of these other obligations. But there can be no delay in protecting inmates' life and integrity. This duty does not admit progressive compliance."

Sergio García Ramírez
Judge

Pablo Saavedra Alessandri
Secretary

SEPARATE OPINION OF JUDGE A. A. CANÇADO TRINDADE

1. In concurring with the passage of this Order of the Inter-American Court of Human Rights in this city of Brasilia, in which the Court has ordered new Provisional Measures for the Protection of all the persons held in custody in the *Mendoza Prisons* in Argentina, I am under the obligation to retake two personal arguments on the building up of which I have been working for some time now from within this Court. The first one refers to the *erga omnes* obligation of protection under the provisions of the American Convention (taking into account the need to contain and prevent prison chronic violence). These obligations have been the subject-matter of many Opinions I have in the past rendered as a member of the Court[10]; and the second one relates to what I call, if I may, the *autonomous responsibility* of a State in connection with provisional measures of protection pursuant to the provisions of the American Convention on Human Rights. The lines herein will be mainly devoted to the presentation of the lessons that I will extract, if I may, from the public hearing before the Inter-American Court in Brasilia, which has just been closed, and the conclusions of this present Separate Opinion.

2. As it is my custom, I write this Opinion under the merciless and wearing pressure of time, few hours after the closing of the public hearings on the date hereof (March 30, 2006) before the Inter-American Court, in the city of Brasilia, Brazil, relating to this present matter of the *Mendoza Prisons* in Argentina, amidst the working conditions typical of the Organization of American States (OAS) —marked with many discourses but few resources— little adequate for meditation. Fortunately, during the Court public hearings in Brasilia, I managed to meet silence, a faithful companion, during the intervals and protocolary events, so as to reflect —in the so-much needed and comforting solitude— on how to make headway in the present realm of protection in the matter of provisional measures, in favor of the imprisoned.

I. *Erga Omnes Obligations under the American Convention and the Drittwirkung*

3. In my Separate Opinion in the matter of *the Peace Community of San José de Apartadó* (Order of June 18, 2002), I allowed myself to point out that the a State's

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[10]. For example, my Separate Opinions in Orders for Provisional Measures for Protection passed by the Court in the *Matter of the Peace Community of San José de Apartadó . Provisional Measure regarding Colombia* (June 18, 2002 and March 15, 2003), *Matter of the Communities of Jiguamiandó and Curbaradó. Provisional Measure regarding Colombia* (March 3, 2006, and March 15, 2005), *Matter of the Pueblo Indígena Kankuamo. Provisional Measure regarding Colombia* (July 5, 2004); *Matter of the Pueblo Indígena de Sarayaku. Provisional Measure regarding Ecuador* (July 6, 2004, and June 17, 2005), and *Matter of Urso Branco. Provisional Measure regarding Brazil* (July 7, 2004)*, Matter of 'Globovision' Television Station. Provisional Measure regarding Venezuela* (September 4, 2004)*, Matter of the Mendoza Prisons. Provisional Measure regarding Argentina* (June 16, 2005), *Matter of the Children Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM . Provisional Measure regarding Brazil* (November 30, 2005). Cfr. further, on the same topic of *erga omnes* measures of protection, my previous Separate Opinions on Judgment on the merits, January 24, 1998, and on reparations, January 22, 1999, in the case of *Blake v. Guatemala*; and mi Separate Opinion in the Case of *Las Palmeras v. Colombia* (Judgment on preliminary objections, February 4, 2000). And cfr., more recent material, on the same topic, my Separate Opinions in the case of the *Mapiripán Massacre v. Colombia* (Judgment of September 15, 2005), and Case of the *Pueblo Bello Massacre v. Colombia* (Judgment of January 31, 2006), as well as my extensive Concurrent Opinion in the Advisory Opinion No. 18 on the *Juridical Condition and Rights of Undocumented Migrants* (September 17, 2003); among others.

protection obligation extends not only to the relationship between said State and the persons subject to its jurisdiction but also to —under certain circumstance— to the relationships among private individuals; this is a true *erga omnes* obligation of protection in favor of, in the present case, all persons held in custody in the *Mendoza Prison*. As I stated it in that Opinion, as well as in the Concurrent Opinion in the prior Order of the Court (June 18, 2005) in this present case of the *Mendoza Prison,* I will argue again in this Opinion that, at any rate, this is the case of a State's *erga omnes* protection obligation towards all the persons subject to such State's jurisdiction.

4. The importance of this obligation increases in the face of permanent violence and insecurity (a situation on which the debate at the public hearing of March 30, 2006, laid an emphasis), as was the case of the matter of the *Mendoza Prison*, and which clearly requires the recognition of the effects of the American Convention *vis-à-vis* third parties (the *Drittwirkung*), without which the conventional obligations of protection would be reduced to little more than dead letter. As I see it, may I repeat, the rationale built on the thesis of *objective* responsibility of the State is ineluctable, particularly in a case of provisional measures of protection —as is the case here— in favor of the prisoners in the custody of the State.

5. This is a situation of extreme gravity and urgency which relates to both actions taken by public power bodies and agents and the relationships among individuals within prison facilities. As I had warned in my Concurrent Opinion in the matter of the *Communities of Jiguamiandó and Curbaradó* (Order of March 6, 2003), provisional measures regarding Colombia, there is a pungent need to "recognize the effects of the American Convention *vis-à-vis* third parties (the *Drittwirkung*)," which is a feature of the *erga omnes* obligations, as both in that matter and in the present case—

> "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, even though the basis of action is the breach —or the probability or imminence of breach— of individual rights." (para. 4).

6. In this Order, the Court has expressly acknowledged the *erga omnes* obligation of protection pursuant to the American Convention, whereby any State Party must safeguard protected rights in light of the relationships of all the persons subject to any such State's jurisdiction, not only *vis-à-vis* with public power but also *vis-à-vis* the acts and conduct of third parties (Considering Clause No. 6). In addition, the Court has remind us that the general obligations set out in Articles 1(1) and 2 of the Convention translate in specific duties that take into consideration both the personal conditions of and the circumstantial situations affecting individuals, as subjects under both domestic and international law systems (Considering Clause No. 9); and, as I see it, the Court relies on both conventional provisions and rules of general international law correctly (Considering Clause No. 9).[11]

[11]. On this last topic in particular, cf. A.A. Cançado Trindade, "La Convention Américaine relative aux Droits de l'Homme et le droit international général", *in Droit international, droits de l'homme et juridictions internationales* (eds. G. Cohen-Jonathan y J.-F. Flauss), Bruxelles, Bruylant, 2004, pp. 59-71.

II. Autonomous International Responsibility in cases of Provisional Measures of Protection under the American Convention

7. At present, in Latin-America and the Caribbean, there are almost twelve thousand persons (including members of entire communities) who are under the protection of provisional measures ordered by this Court.[12] Provisional measures have expanded and gained considerable importance over the last decade, and have become a true jurisdictional guarantee of a preventive nature.[13] And the Inter-American Court, more than any other contemporary international tribunal, has significantly contributed to their development as part of both the International Law of Human Rights and contemporary Public International Law.

8. This being the case, I am but profoundly worried to notice that such a remarkable legal devise, that has saved many lives avoiding the occurrence of irreparable damage to persons —whose rights are protected under the American Convention on Human Rights— has started to prove insufficient on certain borderline cases. I am profoundly worried about the fact that over the last five years, as a direct consequence of the increasingly violent and dehumanized world we live in, some people who were under the protection of provisional measures ordered by this Court, have, however, been arbitrarily deprived of their lives.[14] This requires a reaction on the part of the Law, with a view to protecting threatened and defenseless individuals.

9. Where this has been the case, there has been a clear-cut breach of Provisional Measures of Protection ordered by the Court, which have been conferred a true *protective* nature, rather than a precautionary one. Regardless of the merits of the referenced cases (the alleged or presumed original violations of the American Convention), violation therein has been committed to protective measure, of an

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[12]. Only in the *Matter of the Pueblo Ingídena Kankuamo, provisional measures regarding Colombia,* there are 6,000 beneficiaries of these measures; in the *Matter of the Community of San José de Apartadó, provisional measure regarding Colombia,* the number of beneficiaries is over 1,200; in the *Matter of the Communities of Jiguamiandó and Curbaradó, provisional measures regarding Colombia,* the number of beneficiaries exceed 2,000; in the *Matter of Urso Branco, provisional measures regarding Brazil,* almost 900 inmates are the beneficiaries of these measures; in the *Matter of the Pueblo Indígena Sarayaku, provisional measures regarding Ecuador,* the number of beneficiaries amount to approximately 1,200; among several other cases.

[13]. For a study on this evolution, cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre/Brazil, 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* (eds. G. Cohen Jonathan y 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]. This has taken place —paradoxically *pari passu* with the extraordinary expansion of Provisional Measures of Protection under the American Convention— not only in this present *Matter of Mendoza Prisons, provisional measures regarding Argentina (2005-2006)*, but also, for example, in the *Matter of the Community of San José de Apartadó, provisional measures regarding Colombia,* in the matter of *Eloisa Barrio et al., provisional measures regarding Venezuela (2005),* in the *Matter of Urso Branco Prison, provisional measure regarding Brazil (2004-2006),* in the *Matter of the Communities Jiguamiandó and Curbaradó, provisional measures regarding Colombia (2003-2006),* in the *Matter of the Children Deprived of Liberty in the 'Complexo do Tatuapé' of the FEBEM, provisional measures regarding Brazil (2005-2006),* and in the *Matter of James et al., provisional measures regarding Trinidad y Tobago (2000-2002)*.

essentially preventative nature, which effectively protect fundamental rights —most of the times, ineluctable rights, such as the right to life— to the extent that they seek to avoid the occurrence of irreparable damage to human beings as subjects of International Law on Human Rights and contemporary Public International Law.

10. This means that —and this is the basic point on which I would like to lay the emphasis in this Separate Opinion, as I have also done in my other Opinions in this sense— despite the merits of the respective cases, *the notion of victim also emerges within the new context of Provisional Measures of Protection.* There is no setting this topic aside —a topic which raises both my concern and unease. Furthermore, the notion of victims as the central focus has been also affirmed in this present context of prevention of irreparable damage to human beings.

11. Provisional Measures of Protection create conventional obligations for the States involved, which differ from the obligations arising out of the Judgment 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 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.

12. 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 Concurrent 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.

13. 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.

14. 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

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[15]. The ample scope of this general duty of guarantee —which also embraces provisional measures of protection— has been analyzed in my recent Separate Votes (paras. 15-21) in the Judgment of the Court in the *Case of the Girls Yean and Bosico v. the Dominican Republic* (September 8, 2005), Separate Opinion (paras. 2.7 and 17-29) in the Judgment of the *Case of the Mapiripán Massacre v. Colombia* (September 15, 2005), and Separate Opinion (paras. 2-13), in Judgment of the *Case of Pueblo Bello Massacre v. Colombia* (January 31, 2006). The referenced Article 1(1) sets out the conventional basis for the *erga omnes* obligations of the parties to the Convention.

(regardless of the merits of the case, as may be). This is even more so required in repeated cases of acts of harassment and aggression (and even death) —as in the matter of the *Community of San José de Apartadó, provisional measures regarding Colombia*— of individuals protected by Provisional Measures of Protection ordered by this Court. This is urgently required in this dehumanized world empty of values we live in.

III. Lessons learnt at the Public Hearing held in Brasilia before the Inter-American Commissions, on March 30, 2006

15. At the above public hearing before this Court held on the date hereof (March 30, 2006), a few hours ago, in the city of Brasilia, in response to some questions I allowed myself to ask to the Delegations of the Representative of the Beneficiaries of the Measures, to the Delegation of the Inter-American Commission on Human Rights and the Delegation of the State —which showed a spirit of encouraging procedural cooperation throughout the hearing— the procedural parties involved agreed on the fact that conventional obligations in matters of provisional measures of protection under the American Convention have *erga omnes* effects. Hence, the need — admitted to by the parties— of ensuring the personal security of inmates inside the cellblocks (and not only by means of external surveillance of such cellblocks).

16. The participants also agreed on the need of a clear and firm order of the Court (as it was even expressly requested by the State itself) —occasion on which I expressed I was skeptical to look for a "negotiation" or "conciliation" between the "parties" in a summary proceeding in connection with the extreme gravity and urgency as is the case of provisional measures of protection. The Inter-American Court is not a "conciliation body", and must act as the international court it is, with even more power in cases of provisional measures of protection. This was so requested by the three parties appearing at the public hearing today before the Court.

17. I heard their allegation with special care and attention, as they agreed with my view on the topic under review. In fact, I have never been convinced by the recent attempts of the Court to foster a "negotiated" solution, or a solution emerging from "conciliation" between the "parties", with respect to provisional measures of protection, especially in connection with persons held in custody in prisons. The Court must order said measures *tout court*. The distinctions between conciliation and judicial solution are widely known, and judicial solution[16] has been acknowledged as the most developed and perfected means of dispute resolution.

18. This takes me to the third and last lesson I will extract, if I may, from the hearing held in Brasilia. It relates to the admission by the appearing parties of the need to recognize the *autonomous nature* of international responsibility of the State, pursuant to the provisions of Articles 63(2) and 1(1) of the American Convention —a view which I have strongly supported from within the Court. This is manifest —and raises great concern, at least for me— where a breach of provisional measures of protection ordered by the Court brings along —as in the present case, among others— other violations of *ineluctable* rights, such as the fundamental right to life.

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[16]. *Cf.* A.A. Cançado Trindade, "Peaceful Settlement of International Disputes: Current State and Perspectives," 31 *Course in International Law organized by the Inter-American Juridical Committee* - OAS (2004-2005) pp. 1-46; A.A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Ed. Renovar, 2002, pp. 749-789.

19. Thus, given a violation of provisional measures of protection ordered by this Court, said violation adds to the alleged violations that have given rise to the concrete case on the merits. The cases of provisional measures of protection —brought before this Court— in favor of persons deprived of their liberty, in which successive violations of the right to life of persons protected by said measures have taken place (for example, mater of *Mendoza Prisons*, *Urso Branco Prison, Children Deprived of Liberty in the* Complexo del Tatuapé *of the FEBEM*, among others) confirm the inadequacy and uselessness of the search for a "negotiated solution" or "conciliation" in the present context, as well as the urgent need to address the issue of provisional measures of protection from the stance of *international responsibility of the State*, and —I should add, If I may— of *autonomous* responsibility in connection with the *merits* of any such case.

IV. Conclusion

20. However, Provisional Measures of Protection, the up-to-date development of which under the American Convention amounts to a true conquest of the Law, are still —as I see it— at their early stages, in the beginning of their evolution, and they will grow and strengthen even more to the extent universal juridical conscience awakes to acknowledge the need for their conceptual refinement in all of their aspects. International Law of Human Rights have transformed the very conception of said measures —from precautionary to protective— revealing the current historic process of humanization of Public International Law in this specific domain as well; although this process is still in course of development.

21. This is the road ahead. As a next step, it is paramount nowadays to develop both their *legal governing rules,* and —within this context— the *legal consequences* of breach or violations of Provisional Measures of Protection, endowed with their own autonomy. I believe *victims* have a truly central role both in the present context of prevention as in the resolution of the case upon its merits (and eventual reparations) relating to a contentious case, as they are the subjects of International Law of Human Rights and of contemporary Public International Law, with international juridical-procedural capacity.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra Alessandri
Secretary

CONCURRENT OPINION OF JUDGE DIEGO GARCÍA-SAYÁN

1. This is a case with importance in itself given the serious events that gave rise to the provisional measures ordered by the Inter-American Court of Human Rights to project the life and physical integrity of the persons held in custody in the Mendoza Provincial Prison and in the Gustavo André Unit, located in Lavalle, as well as those found within said facilities.

2. In its first Order of Provisional Measures in this matter, passed in November 2004, the Court left record of the fact that the Inter-American Commission on Human Rights had described *"[…] a situation at the Mendoza Provincial Prison and Gustavo André penitentiary unit, located in Lavalle, in which during a period of seven months, several persons held in custody, as well as penitentiary guards, died or were injured after fires, fights between inmates, and under some circumstances which have not yet been clarified."*[17] In the same Order, the Court stated that *"[…] the State has adopted or is in the course of adopting several measures, in observance of the precautionary measures of requested by the Commission, with which the State has expressed its agreement and willingness to adopt them […] However, both the Commission and the State agree that a complex plan of action with both short-, mid- and long-term goals is required in order to solve the current situation."* [18]

3. In the second Order of Provisional Measures passed by this Court, on June 18, 2005, the Court expressed that *"[…] the situation still continues, which constitutes extreme gravity and urgency and possible irreparability of damage to rights of life and personal integrity of the beneficiaries of said measures. Particularly, acts of violence are still occurring in a manner such that they have caused injuries or death to several inmates and penitentiary guards; conditions of detention are still precarious and security conditions are insufficient; criminal prosecution of inmates are subject to excessive delays, and this has a negative impact on prison overcrowding and difficulties to segregate prisoners by categories."* [19]

4. Generally, the Court has verified, in the course of these proceedings, the agreement between the Commission, the representatives of the beneficiaries and the State on the need to keep said provisional measures in force. Furthermore, it has been verified that in spite of that, incidents of violence are still taking place with serious consequences such as the loss of life of inmates, which shows the insufficiency of the actions taken by the authorities of the Mendoza Provincial Prison and the Gustavo André unit of Lavalle.

5. However, and regardless of the specific case, it should be noted that the situations of risk and impairment of life and physical integrity of persons held in custody are recurrent in many countries of the region. Thus, extensive and persistent are the situations in which overcrowding, slowness and

[17] Order for Provisional Measures, November 22, 2004. Considering Clause No. 7.

[18] Order for Provisional Measures, November 22, 2004. Considering Clause No. 9.

[19] Order of provisional measures of June 18, 2005, Considering Clause No. 8.

inoperativeness of administration of justice, deficiencies in preservation of internal order and precarious material conditions enter the scenario as ingredients of the persistent impairment of the right to life of prisoners and personnel who works in penitentiary facilities.

6. The penitentiary dilemma is of a structural nature and its solution is far beyond an adequate management of a specific penitentiary center. Usually, the issue relates to a problem that may only be solved gradually as part of a process calling for the involvement of "… a set of actions […] of an administrative, judicial and even legislative nature." [20]

7. In accordance with the provisions of Article 63(2) of the Convention, the purpose of provisional measures is strictly to avoid the occurrence of irreparable damage to persons, in cases of extreme gravity and urgency. Therefore, the Court was right to establish in its Order that, even though s State's non-compliance with an order of provisional measures "*may trigger the international responsibility"* of any such State,[21] the purpose of provisional measures is not to determine (or not) the international responsibility of the State, as the jurisdiction of the Court to that effect is exercised in contentious cases brought to the Court. Therefore, based on the provisions set out in Article 63(2), the jurisdiction of the Court in matters of provisional measures has to specifically determine the gravity and urgency of a situation and its objective must be to avoid irreparable damage to persons.

8. In confronting an *ad pedem lítterae* interpretation of the language of Article 63(2) with the situation prevailing in the penitentiary system of the region, it could be concluded that, in principle, the great majority of penitentiary centers are going through a situation of "gravity" and "urgency" in which the life and integrity of both prisoners and penitentiary personnel may be at stake. In this context, it is convenient to specify the sense and orientation of provisional measures in the face of a penitentiary complexity packed with structural problems that cannot be solved by measures that, in themselves, are provisional or with a short period of effectiveness. The penitentiary system of the region is still awaiting a penitentiary reform in depth, which cannot be replaced with provisional measures.

9. If provisional measures ordered for this type of situations are not understood in a restricted perspective and dimension, one could be running the risk of trying to understand —through such measures— a comprehensive issue that could only be successfully solved by way of a process with mid- and long-term goals, and as a result of the interaction of a set of decisions and policies dealing with administrative, judicial, legislative and budgetary aspects. Therefore, the "*extreme gravity"* and "*urgency*" have to refer to issues that can be subjected to an order of the Court so as to obtain immediate and tangible results that can be overseen by the Court. The set of political decisions that the State must adopt with respect to penitentiary matters is a structural and relevant issue falling without the specific scope of provisional measures governed by Article 63(2) of the Convention.

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[20] Order of provisional measures, March 30, 2006. Considering Clause No. 11.

[21] Order of provisional measures, March 30, 2006. Considering Clause No. 10.

10. In order for the Court to order provisional measures, Article 63(2) of the Convention requires the existence of three components: first, "*extreme gravity;"* second, the "*urgency*" in the situation; and third, the purpose should be "*to avoid irreparable damage"*. From the language of said Article, it can be concluded that these measures have to be implemented forthwith, which in turn shows that provisional measures must be implemented to create tangible results in the short-term. This bears relationship with the process of oversight by the Court and with the reports to be presented by the State because —as stated in the present Order of March 30, 2006— the State not only must comply with the submission of its reports when and as required by the rule, but also, essentially, to forward information "*on the results obtained by implementing the measures"*[22] ordered, which presupposes that the results must be tangible, concrete and directly in alignment with the purpose of any such provisional measure.

11. "*Extreme gravity"* —as a classification— obviously refers not only to the gravity of the threat but also to its extreme nature. Therefore, the threat should not refer to just any risk; this risk must be *extreme* and *of gravity*, and the ordinary tools of apparatus of the State should not suffice to cope with such threat. The special nature of a penitentiary facility recreates —for obvious reasons— not the ordinary characteristics of quality of life which can and must be attained by persons who have not been deprived of their freedom, but a situation in which one of its basic characteristics is the deprivation of rights, especially the right to personal freedom and the right to move, as well as the restriction of freedom to communicate with others.

12. In this setting of deprivation of certain rights, there are other rights which, in fact, the penitentiary population should still keep, and that the State is bound to guarantee. The gravity of the threat to such rights and its qualification as "*extreme"* have to be assessed on a per-case basis taking into account each specific context, but it is evident that if fundamental rights to life and physical integrity are exposed to such a threat, then, in principle, this calls for considering the issuance of provisional measures.

13. The "*urgency*" component conveys special imperativeness to such extreme gravity, as it refers to special and exceptional situations which require and justify an immediate response action to fight against the threat. It is true that the threat should not necessarily be new threats or citations; such threats should be those which *per se* create an imminent risk. To arrive at this conclusion one should start by analysing the current factual context and precedents. The "urgent" nature of any such threat calls for a remedy action as a response to it. Above all, this action should be immediate, and, in principle, provisional in order to cope with such urgent situation, given that lack of a response would *per se* create a risk.

14. The purpose of "*avoiding irreparable damage"* usually relates to the nature and context of the rights under threat. It is evident that irreparability should logically follow a threat —of extreme gravity and urgent nature— to rights such as the right to life and physical integrity. Certainly, it might be urgent to fight off threats "*of extreme gravity"* to other types of rights. On a per-case

[22] Order of Provisional Measures of, March 30, 2006. Considering Clause No. 14.

basis, possible resulting damage should be analysed in order to assess the irreparability to which the term "*irreparable"* —as used in the language of Article 63(2)— refers, as not just any threatened or affected right necessary creates such situation.

15. Therefore, what is generally required for the Court to order the issuance of provisional measures are "extreme gravity" and "urgency" as components of a threat, and the "*irreparability*" of the damage that could be occasioned marks the specific and exceptional nature of provisional measures, as this is the jurisprudential and conceptual framework designed to strictly and specifically produce concrete results with which to fight against the detected threat. This means that, in the specific context of a penitentiary center, the restrictive framework of rights which, by definition, is in effect generally attributes said circumstances to threats against life and physical integrity. No provisional measure could be required or be oriented to produce results in ambits that do not have a bearing on the exceptionality and imminent nature of certain threats as well as on the possible "*irreparable damage*" that could result from said threats.

16. The factual conditions of the penitentiary system in the region, such as overcrowding, high proportion of untried prisoners, lack of material resources and deficiencies in food or heath care assistance, are some of the many structural characteristics of the system. In addition, they constitute the framework and the context of specific threats "*of extreme gravity*" and "*urgency*" that may cause "*irreparable damage".* In the specific case of persons deprived of their freedom, this general duty puts the State in a special position as guarantor because it is the authority that exercises control, as stated in the Order. Said structural deficiencies could amount to elements from which the international responsibility of the State could be inferred —in concrete contentious cases— upon the State's breach of the general duty to guarantee full enjoyment of rights by all the persons subject to its jurisdiction.

17. In this order of ideas, the provisional measures adopted by the Court by Order of March 30, 2006, have established "[t]hat *under the circumstances of this case, the measures adopted by the State must include those directly designed to protect the right to life and integrity of the beneficiaries, considering the relationship both among them and with penitentiary and governmental authorities. Particularly, and in light of the allegations made by the parties at the public hearing held on the date hereof in Brasilia (supra Having Seen Clause No. 50), it is essential for the State to adopt —in an immediate and inexcusable fashion— effective and necessary measures to actually eradicate risk of violent death and serious assaults to personal integrity, especially in connection with the deficient conditions of security and internal control affecting confinement centers.*[23]

18. It is of particular importance that the State itself has expressed —at the hearing held in Brasilia— that it was not arguing for or requesting the suppression of the provisional measures ordered, as the State agrees with petitioners on the fact that the situation prevailing in the Mendoza Provincial

[23] Order of provisional measures of March 30, Considering Clause No. 12.

Prison and the Gustavo André Unit of Lavalle call for exceptional measures and attention. In agreeing with the assessment of the gravity of the situation, the State expressed a favorable willingness to find and apply response actions to avoid the occurrence of further deaths in the abovementioned penitentiary centers. Taking all these elements into consideration, the Court has emphasized the fact that priority measures for the avoidance of new impairment of the right to life and physical integrity must translate in *"means, actions and goals set by the State,"* which must be understood as goals which gradually translate into concrete results. The favorable willingness of the State becomes meaningful to the extent that they gradually produce tangible results that may be, in turn, assessed as such and overseen by the Court.

19. Based on the foregoing, the factual circumstances leading to the restatement of provisional measures under Order of March 30, 2006, have helped the Court to precise the purpose and exceptional sense of provisional measures as an immediate response and tangible and concrete solutions to factual situations which necessarily have to be of extreme gravity, of an urgent nature, and to threaten to cause irreparable damage. This Order helps describe the factual circumstances in which the Court may order provisional measures and prescribe that these will become meaningful to the extent that they generate immediate and tangible effects in order to cope with the exceptional circumstances which meet all the requirements referred to in Article 63(2) of the Convention.

Diego García-Sayán
Judge

Pablo Saavedra Alessandri
Secretary