

**Order of the
Inter-American Court of Human Rights
of July 7, 2004
Provisional Measures regarding Brazil
Matter of Urso Branco Prison**

HAVING SEEN:

1. The June 18, 2002 Order of the Inter-American Court of Human Rights (hereinafter "the Court") wherein it called upon the Federal Republic of Brazil (hereinafter "Brazil" or "the State") to: adopt all necessary measures to protect the lives and personal safety of all the inmates at the José Mario Alves Detention Center –known as the "Urso Branco Prison" – (hereinafter "the Urso Branco Prison" or "the prison"); investigate the facts that necessitated the adoption of these provisional measures; report to the Court on the measures adopted, and submit a complete list of all persons detained at Urso Branco Prison. It also requested that the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submit its observations on those reports.

2. The August 29, 2002 Order of the Court wherein it called upon the State to: continue adopting all measures required to protect the life and personal safety of all persons incarcerated at the Urso Branco Prison; submit information on the serious events that occurred Urso Branco Prison, to the detriment of the inmates and despite the fact that the Court had already ordered the adoption of provisional measures of protection in its June 18, 2002 Order; as the Inter-American Commission requested, report to it the name of all corrections officers and military police who were at the Urso Branco Prison on July 16, 2002, and the names of those who are currently working at that public institution; adjust conditions at this prison to conform to the applicable international standards for the protection of human rights; when it submits the complete list of all persons incarcerated at the Urso Branco Prison, state the number and names of the inmates who have been convicted and those who are detained without a conviction; and, furthermore, indicate whether convicted inmates are segregated from those who have not been convicted. The Court also requested the State and the Inter-American Commission to take the necessary steps to establish an appropriate mechanism to coordinate and oversee compliance with the provisional measures ordered by the Court.

3. The State's reports of September 11, 2002 and December 3, 2002, and the briefs of October 3, 2002 and February 7, 2003, wherein it made reference to the provisional measures it had adopted and to the investigation into the facts that necessitated the provisional measures.

4. The Commission's comments on the State's reports, presented in briefs dated November 13, 2002 and February 10, 2003. As appendices, the Commission submitted the petitioners' briefs and requested that the account of the facts therein contained be regarded as an integral part of the Commission's comments.

5. The February 5, 2003 note of the Secretariat of the Court (hereinafter "the Secretariat") wherein it requested that the State transmit the report on compliance with the provisional measures since the deadline given in operative paragraph four of the June 18, 2002 Order (supra '*Having Seen*' 1) had already expired.

6. The March 6, 2003 note from the Secretariat where, acting on the Court's instructions, it indicated that from its examination of the reports and briefs presented by the State and by the Commission subsequent to the Court's August 29, 2002 Order, the Court was troubled by the allegations of serious incidents (such as deaths, beatings, assaults, torture, threats, electric shocks) at the Urso Branco Prison, as well as problems of various kinds (among them the communication between the inmates and the authorities and the organizations charged with verifying compliance with the measures; the inmates' fear of providing information; the fact that convicted and unconvicted inmates shared the same space; the nature of the inspections to which visitors to the prison are subjected; the progress made in the investigation into the facts that necessitated adoption of provisional measures in the instant case, in order to identify those responsible and punish them accordingly, etc.). In order to be able to do a thorough examination of the provisional measures ordered by the Court, the latter requested that the State include in its next report, due by April 3, 2003 at the latest, a detailed description of the steps taken to comply with the provisional measures ordered by the Court, and the State's own comments on the facts and problems alleged in the Commission's comments. The Court also indicated that once this report was received from the State, the Inter-American Commission would be given a period of time in which to file its comments.

7. The Secretariat's note of May 1, 2003, in which it requested that, given the seriousness of the events alleged to have occurred in Urso Branco Prison, the State submit the detailed report requested in the previous note of March 6, 2003, which was to have been submitted by April 3, 2003.

8. The State's August 14, 2003 brief presenting its fourth report on the measures adopted, with attachments. The State made no mention of any investigation into the facts that necessitated adoption of provisional measures. On instructions from the President, the Inter-American Commission was given two months in which to submit its comments on that report.

9. The Commission's October 14, 2003 brief and attachments, wherein it presented its comments on the State's fourth report. One of the attachments was the petitioners' brief; the Commission requested that the account of the facts contained in the petitioners' brief be regarded as an integral part of the Commission's comments.

10. The Secretariat's January 7, 2004 note which, on instructions from the Court *en banc*, addressed the issue of compliance with these provisional measures. In this note, the Secretariat stated that having examined the information supplied by the Commission and by the State (particularly in the attachments to the State's fourth report), the Court had noted with concern that, as both parties had alleged, serious incidents had occurred at Urso Branco Prison and that a variety of problems persisted such as: new murders of inmates and unsafe conditions created by overpopulation of the prison facility; new complaints of torture; the fact that in February of this year, many inmates were forced to spend two days and one night nude in the prison yard and were also beaten; unconvicted inmates were incarcerated alongside convicted inmates; medical care was poor, and disciplinary

measures such as suspension of visits had been applied. The Secretariat also informed the State that the Inter-American Commission had alleged other serious incidents not mentioned by the State in its fourth report. The Commission had also reported information related to compliance with operative paragraph three of the Court's August 29, 2002 Order (*supra* 'Having Seen' 2). Although the Court was recently informed that the Justice and Peace Commission had been allowed to visit the prison, the Court had not received any information regarding the establishment of a suitable mechanism to coordinate and oversee compliance with the provisional measures it had ordered. The Court also reminded the State that the reports the latter is to file every two months are to include updated lists of all inmates at Urso Branco Prison so as to enable the Court to keep track of the names of those released and the names of incoming prisoners; the lists are also to show the number and names of the inmates who are serving sentences and the number and names of those who have not yet been convicted, pursuant to operative paragraph four of the Court's June 18, 2002 Order (*supra* 'Having Seen' 1) and operative paragraph seven of its August 29, 2002 Order (*supra* 'Having Seen' 2). To continue its examination of compliance with the provisional measures it had ordered, the Court asked the State to submit its fifth report by no later than February 16, 2004 (the deadline for which had expired on October 14, 2003). That report was to have detailed compliance with the terms of the Court's two orders and the events and problems described in the Commission's comments on the State's fourth report but which Brazil had not mentioned in that report.

11. The February 20, 2004 brief whereby the State presented its fifth report on compliance with the provisional measures. The Secretariat was awaiting the attachments to that brief, one of which was to have been the updated list of inmates at Urso Branco Prison (the State indicated that the list in question would be sent to the Court "within ten days"). In keeping with operative paragraph four of the June 18, 2002 Order (*supra* 'Having Seen' 1), the Secretariat indicated that the Commission had until May 9, 2004 to present its comments on the State's fifth report. It gave the petitioners four weeks to submit any comments they deemed pertinent on the State's report; in other words, until April 6, 2004.

12. The March 11, 2004 brief whereby Brazil presented the attachments to its fifth report. The Secretariat noted that the State did not file all the documents listed as attachments and therefore asked the State to provide them forthwith. It reminded the State that:

- a) under the terms of operative paragraph two of the Court's June 18, 2002 Order and operative paragraph four of its August 29, 2002 Order, when it submits its reports the State must give a detailed accounting of the investigation into the facts that necessitated the adoption of these provisional measures, in order to identify those responsible and punish them accordingly. This includes the investigation into the serious events that transpired at the Urso Branco Prison even after the Court issued the June 18, 2002 Order; and
- b) pursuant to operative paragraph four of the Court's June 18, 2002 Order and operative paragraph seven of its August 29, 2002 Order, when the State submits its reports it is to present an updated list of all the inmates at the Urso Branco Prison, so that released and incoming inmates can be identified; it must also show the number and name of the inmates serving sentences and of unconvicted inmates.

13. The April 7, 2004 brief and its attachments, where the petitioners filed their comments on the State's fifth report (*supra* 'Having Seen' 11).

14. The April 20, 2004 brief and its attachments, whereby the Commission reported that “the extremely grave situation at the Urso Branco Prison has deteriorated even more.” The Commission presented a brief from the petitioners as an attachment to its own brief, and pointed out that “as reported in that communication, in recent days a number of inmates at Urso Branco Prison have been murdered, some of them publicly; bodies have been mutilated and body parts have been thrown at authorities and other people present at the scene; apparently there are over 170 people being held as hostages at the prison, all in connection with a riot alleged to have occurred there.” Given the foregoing, the Commission requested that the Court “adopt all urgent measures it deems appropriate to hasten compliance with the provisional measures [...]”. Furthermore, the petitioners’ brief, which appears as an attachment to the Commission’s brief, states that on Sunday, April 18, 2004, there was a riot at the prison; it was visiting day, but inmates “did not allow relatives to leave when visiting hours were over.”

15. The April 20, 2004 brief and its attachments, where the petitioners provided information on, *inter alia*, the murders of inmates and the inmate riot that occurred recently at the prison. This communication contains the same information that the Inter-American Commission submitted as an attachment to its April 20, 2004 brief (*supra* ‘Having Seen’ 14).

16. The Court’s April 22, 2004 Order, wherein it resolved:

1. To call upon the State to:
 - a) adopt all measures necessary to effectively protect the life and personal safety of all inmates at the prison¹ and of all persons who enter the prison, including visitors;
 - b) adjust conditions at that prison to conform to the applicable international standards for protection of human rights;²
 - c) submit to the Court an updated list of all persons incarcerated at the Urso Branco Prison, giving the names of released and incoming inmates and showing the number and names of the inmates who are serving sentences and those who have not been convicted, and report whether convicted inmates and unconvicted inmates are kept in separate sections;³
 - d) investigate the facts that necessitated adoption of these provisional measures, so as to identify those responsible and punish them accordingly; this includes the investigation of the egregious events that occurred at the Urso Branco Prison after the Court issued its Orders of June 18 and August 29, 2002;⁴
 - e) submit to the Court, by no later than May 3, 2004, a report on:
 - i) compliance with and implementation of the measures indicated in the preceding subsections of this operative paragraph;
 - ii) the events and problems reported in the Commission’s April 20, 2004 brief and attachments thereto, particularly on the serious uprising now gripping the prison, and whether any of the supposed

¹ Cf. Operative paragraph one of the June 18, 2002 Order and operative paragraph one of the August 29, 2002 Order.

² Cf. ‘Considering’ ten and operative paragraph six of the August 29, 2002 Order.

³ Cf. Operative paragraph four of the June 18, 2002 Order and operative paragraph seven of the August 29, 2002 Order.

⁴ Cf. Operative paragraph two of the June 18, 2002 Order and operative paragraph four of the August 29, 2002 Order.

"170 people being held as hostages in that prison" are not inmates;
and
iii) the measures taken to correct the current inmate uprising.

2. To reiterate to the State and to the Inter-American Commission on Human Rights its request that the necessary steps be taken to coordinate and oversee compliance with the provisional measures ordered by the Court, in accordance with operative paragraph three of the August 29, 2002 Order. Also, the State and the Inter-American Commission are to report the results of the measures taken.
 3. To request the Inter-American Commission on Human Rights and the petitioners to submit their comments on the respondent State's report within 10 days of receiving it.
 4. To summon the Inter-American Commission on Human Rights, the petitioners and the State to a public hearing, which will be held at the seat of the Court on June 28, 2004, starting at 3:30 p.m., to hear their arguments on compliance with the provisional measures ordered in the instant case.
17. The May 4, 2004 brief and its attachments, wherein the State filed its sixth report on compliance with the provisional measures that the Court required of it in its previous Order. Summarizing, in that report the State informed the Court that:
- a) concerning the uprising that occurred in April 2004, routine at the prison was disrupted when on April 16, 2004 two inmates were "murdered by rivals"; in the wake of those two killings, a prison uprising broke out on Sunday April 18, 2004, and relatives "refused to leave the prison." The victims were identified as Jailson Quintino de Lima and Israel Márcio Soares, who were serving their sentences in separate cells. Concerning the measures taken in response to the uprising, the State reported that by the time it received notification of the Court's April 22, 2004 Order, it had already taken all the measures necessary to bring the uprising to an end. During the riot, some 160 prisoners threatened with death were removed from the "safe" area and taken to an administrative area beyond reach of the rioting inmates, so as to protect their lives and physical safety. All the deaths that happened in the prison during the riot were caused by blows inflicted by "rivals" wielding "hand-made weapons." The riot ended on April 22, 2004, and at around 4:00 p.m. a negotiations document was drawn up and signed by the "new cabinet" and a commission composed of five inmates and three visitors (the State attached a copy of this document). At 8:00 p.m. on April 22, 2004, all visitors were allowed to leave. As agreed in the negotiations document, that same night 30 inmates were transferred from the Urso Branco Prison to Porto Velho's Eighth Police Precinct. The following day the Director of the National Prisons Department (DEPEN) went to the prison to continue with verification of the damage caused and with the military police investigation. The State also supplied a list, prepared by the Office of the Superintendent for Prison Affairs of the State of Rondônia, of the inmates who died as a result of the riot;⁵
 - b) it recognized the seriousness of the situation at the Urso Branco Prison and was taking all measures to ensure the rights of the inmates;
 - c) as for other measures taken, an agreement was signed between the Federal Union and the State of Rondônia to provide a social service to monitor performance of the inmates' sentences, so as to reduce the overcrowding in

⁵ The list names 14 inmates who died, the cell where 12 of them were housed, and the date on which 9 of them died.

the prison. This service began on February 11, 2004 and was to continue until June 2004. Public defenders were also appointed to track the sentences being served by inmates in the capital city of Porto Velho, so that inmates might be promptly granted the benefits to which they are entitled; a new national database is being developed to establish the profile of the prison population and to modernize the graduated system of serving sentences;

d) as for the updated list of inmates, the State provided, as an attachment, a list of the inmates who were at Urso Branco Prison as of April 28, 2004. This list was prepared by the Office of the Superintendent of Prison Affairs of the State of Rondônia. It shows that the prison has a total population of 864 inmates; of these 335 have been convicted and 529 are in preventive detention. However, the State did not report whether the convicted inmates are housed in separate sections, apart from those who have not yet been convicted; and

e) the State did not provide any information concerning the investigation of the facts that necessitated adoption of the provisional measures so as to identify those responsible and punish them accordingly, including the investigation into the serious events that occurred subsequent to the Court's June 18 and August 29, 2002 orders.

18. The briefs of May 17 and 18, 2004, where the Commission presented its comments on the fifth and six reports filed by the State on compliance with the provisional measures (*supra* 'Having Seen' 11 and 17). In those briefs the Commission observed that:

a) with regard to the adoption of the measures necessary to effectively protect life and personal safety, the State confined itself to reporting that an agreement had been signed between the Federal Union and the State of Rondônia concerning monitoring of sentences and the easing of prison overpopulation, and that public defenders had been appointed to monitor the sentences served by prisoners in the capital city of Porto Velho. Although the State had reported some advances, the provisional measures ordered by the Court "have not been effectively carried out." The Commission indicated that protection of life and personal safety requires the adoption of immediate measures enabling the State to regain control of the prison and effectively guarantee such fundamental rights. Furthermore, the State is charged with protecting those rights, so that no inmate need feel obliged to look out for his own personal safety or feel that his fate is "at the mercy of rivalries between inmates at that prison";

b) concerning the State's adjustment of conditions at Urso Branco Prison to bring them in line with the applicable international standards for the protection of human rights, the State needs to present a plan with immediate, short-, medium-, and long-term goals to raise the material conditions of incarceration at the prison up to the existing standards on the subject, among them those contained in such instruments as the American Convention and the Standard Minimum Rules for the Treatment of Prisoners;

c) as for the requirement associated with the updated list of all the inmates, the State did not answer the Court's question as to whether the

convicted inmates were housed separately from those who had not been convicted; and

d) with regard to the investigation into the facts that necessitated adoption of the provisional measures so as to identify those responsible and punish them accordingly, which includes the investigation into the serious events that occurred subsequent to the Court's issuance of its June 18 and August 29, 2002 orders and more than two years after the deaths that occurred in 2002, the State merely reported that it has again requested the Prosecutor's Office to investigate those deaths; however, "it does not report whether any investigation has been instituted or what the current status of the requested investigation is";

19. The May 18, 2004 brief in which the petitioners presented their observations on the State's sixth report of May 4, 2004 (*supra* 'Having Seen' 17). Summarizing, the petitioners pointed out that:

a) the State did not act with due diligence when the April 2004 riot broke out. It was not until 24 hours after the start of the uprising that the Government of the State of Rondônia designated a coordinator for the Crisis Management Team. This shows that the local government is not prepared to take the lead in dealing with a riot about which it was warned by the petitioners several months earlier, and then by the press and relatives of the inmates. According to the petitioners, the presence of the Director of the DEPEN was essential in bringing about an end to the riot. However, "the help came very late; 14 inmates had [already] been executed and more than half the area under construction at Urso Branco Prison had been destroyed." Concerning the hostages, when the riot ended, representatives of the Justice and Peace Commission spoke with the women who had been taken hostage. According to the petitioners, "[m]any of them" said they were not hostages; instead, they were collaborating with the inmates, as they did not approve of the treatment the inmates were given; "[o]ther women" stated that they were threatened that if they left the prison their relatives would be the first to die;

b) the measures Brazil has taken "are not an energetic and effective solution" to the very grave situation at Urso Branco prison, as they cannot provide immediate and effective protection for the lives and personal safety of the prisoners and other persons inside the prison, such as prison guards and visitors. The petitioners allege that no concrete measures are being taken to reduce the extreme tension between the inmates and the State agents working in the prison; the petitioners cannot identify any effective measures being taken to adjust conditions at the prison to conform to the relevant international standards for the protection of human rights;

c) as for the situation at the prison in the wake of the riot, a number of inmates were transferred to other prisons and 30 inmates were selected by the other inmates to form "free cells," working outside the cells on cleaning. The prisoners designated as "free cells" were the very same prisoners who led the riot. According to the petitioners, between April 23 and May 4, 2004, not a single military police officer or prison guard entered the cellblock area, which remained under the control of the inmates. Effective April 28, 2004, the number of military police was reduced from 100 to 30, thereby making it even more difficult for any prison personnel operating inside the cellblocks to

do their job. The petitioners noted that on May 4, 2004, there was an "occupation" of the prison by 300 military police, after which the Justice and Peace Commission received calls from a number of relatives of the inmates to report that a number of prisoners had been wounded. However, the press and human rights organizations were not permitted inside Urso Branco Prison until May 11, 2004, where they observed the poor hygienic conditions, confirmed that there was no evidence that reconstruction of the prison had gotten underway, found that many inmates had been assaulted and that tensions among inmates, police and prison agents were running very high;

d) the list of inmates that the State supplied reported each one's legal situation; however, it did not report whether convicted and unconvicted inmates are being housed in separate quarters. According to the petitioners, the inmates (convicted and unconvicted alike) are mixed together in the same cells, which was one of the causes of the "slaughter" that happened in 2002, and caused the death of another five provisional inmates during the April 2004 riot. As for the State's report to the effect that prisoners had been transferred and the overpopulation at the Urso Branco Prison eased, the petitioners pointed out that during the April 2004 riot, much of the cellblocks was destroyed, which considerably reduced the prison's physical capacity. Furthermore, 830 prisoners are confined in two cellblocks and two "churches", as that is the only space that was not destroyed. Therefore, each cell is holding approximately 30 prisoners, and

e) as for the investigation into the facts that necessitated the adoption of provisional measures, only the deaths that occurred during the slaughter of 27 inmates in 2002 are being effectively investigated by the Prosecutor's Office; investigation of the other homicides is just getting underway with the special delegations. The petitioners also noted that although the investigation into the 2002 "slaughter" was concluded, the Office of the Attorney General had still not decided whether to prefer charges against the State authorities involved in the matter, despite the fact that the investigations found "each and every one culpable."

20. The *amicus curiae* brief filed via e-mail on June 24, 2004 by the *Clínica de Direitos Humanos SUR –Rede Universitária de Direitos Humanos y Conectas Direitos Humanos*, in regard to these provisional measures. The original of this brief was submitted on June 29, 2004.

21. The Court's June 28, 2004 Order wherein it resolved:

1. To commission the President, Judge Sergio García-Ramírez; Judge Antônio A. Cançado-Trindade and Judge Manuel E. Ventura-Robles to conduct the public hearing convoked for June 28, 2004 at the seat of the Court.

2. To report this [...] Order to the Inter-American Commission on Human Rights, the petitioners requesting the provisional measures and the State.

22. The public hearing on the present provisional measures, held at the seat of the Inter-American Court on June 28, 2004, where the following appeared:

for the Inter-American Commission on Human Rights:

Florentín Meléndez, Delegate;

Ignacio J. Álvarez, legal advisor, and
Juan Pablo Albán, legal advisor.

for the petitioners seeking the provisional measures:

Andressa Caldas, Global Justice Legal Director, Global Justice Center;
Estrela Dalva Campos Amoedo, Coordinator of the *Comissão Justiça e Paz da Arquidiocese de Porto Velho*;
James Louis Cavallaro, Director of International Relations, Co-Director of the Global Justice Center; and
Paulo Tadeu Barausse, Coordinator of the *Justice and Peace Commission of the Archdiocese of Porto Velho*.

for the State of Brazil:

Tadeu Valadares, Ambassador, Director General of the Department of Human Rights and Social Issues of the Ministry of Foreign Affairs of Brazil;
Francisco Soares Alvim-Neto, Ambassador of Brazil in Costa Rica;
María Cristina Pereira da Silva, Secretary, Diplomat with the Brazilian Embassy in Costa Rica;
André Saboia Martins, Secretary, Interim Chief of the Human Rights Division;
Clayton Nunes, Director of the Prison Policy Department of the Ministry of Justice;
Danielle Aleixo, Attorney with the International Legal Department of the Office of the Attorney General of the Union/ *Advocacia – Geral da União*; and
Carolina de Campos Melo, International Advisory of the Special Secretariat on Human Rights with the Office of the President of the Republic.

23. The allegations made by the Commission at that public hearing, which are summarized below:

a) the State has not adopted the measures necessary to protect the lives and personal safety of the inmates at Urso Branco Prison, as at least 24 inmates have died at that prison and dozens more have been injured during the time the provisional measures ordered by the Court have been in effect. Brazil has to implement immediate measures and adopt policies to prevent crises and further acts of violence at the prison. The risk that new violent events might break out is ever-present;

b) the general situation at the prison has deteriorated and the State's "loss of control" is the same, which points up a certain "inertia on the State's part in being able to regain control and ensure [the] basic rights to all persons in danger of being murdered";

c) at Urso Branco Prison, the safety of inmates and guards alike is not being guaranteed; there are too few guards watching the prisoners. Moreover, after 6:00 p.m., all guard personnel leave the interior of the prison, enabling acts of violence and guaranteeing the impunity of the perpetrators of such acts. The conditions under which inmates are incarcerated are contrary to the dignity of the human person and do not conform to the minimum international rules on the subject. These conditions have caused tension and suffering;

d) the Commission believes that certain measures need to be taken by the State, the following among them: make a proper selection and immediately hire guard personnel who are duly trained and in sufficient numbers to guarantee the inmates' lives and personal safety; provide training to the prison personnel and officials of Rondônia state; immediately segregate the "safe" prisoners from the prison's general population and place them in cells sufficiently removed from the general prison population and with the space and sanitation facilities required under the applicable international standards; refrain from admitting new inmates into Urso Branco Prison until the overpopulation and overcrowding are resolved; install an early warning system to prevent and avoid new prison crises that have irreversible and irreparable effects; allow the petitioners full access to the prison, both to its physical facilities and to the inmates and prison officials; and establish a suitable mechanism for filing direct, individual complaints;

e) the State must conduct serious, impartial, thorough and prompt investigations, both criminal and administrative, into the acts of violence that have occurred at Urso Branco Prison since January 1, 2002, and must determine who the responsible parties are, whether they be private citizens, civil servants or public officials, and give them the punishment that the law prescribes; and

f) on the morning of June 28, 2004, the Inter-American Commission, the petitioners and the State met and arrived at a number of preliminary agreements, not yet formalized," mainly regarding the mechanism for coordinating and overseeing compliance with the measures, specifically the composition, competence and authority of the Commission to coordinate and oversee compliance with the provisional measures. At this meeting the State showed a number of documents "illustrating the progress" made in the area of investigation and punishment. On July 14, 2004, a second meeting will be held in Brasilia, and then another in the state of Rondônia on the subject of the measures' implementation.

24. The allegations that the petitioners made at the public hearing in question, which are summarized below:

a) the State has not taken the measures needed to protect the lives and personal safety of the inmates, which has caused the deaths of more than 20 inmates. Too few prison guards and police were guarding the inmates at the time of the April 2004 riot; the number is still too low. After 6:00 p.m. no guards or police enter the cellblocks where the inmates are held. Highly dangerous inmates are still being incarcerated in the same sector as those who pose little danger. At the present time, 240 inmates are inside the "church," although security there is not what it should be and the guards have difficulty getting in. The "safe" inmates, who number around 180, are housed in 4 cells, each of which is met to accommodate 10 inmates. In order to ensure the safety and lives of the inmates, the weapons they carry must be confiscated, a difficult task given the overpopulation in the prison and the insufficient number of guards and police. Inside the prison, there are conflicts among various groups of inmates, prison guards and police. While on a number of occasions agreements have been signed spelling out the inmates' grievances, those agreements have not been honored, to the point that the petitioners themselves have lost face with the inmates. The situation inside

the prison is a "state of war." The petitioners receive many telephone calls from inmates' relatives who are concerned for their safety now that they can no longer visit them;

b) some 40% of the prison's installations were destroyed in the most recent riot in April 2004. Conditions at the prison have become even more deplorable, inhuman and foul. The petitioners contend that certain measures must be taken immediately, among them the following: segregation of inmates in preventive detention from those who have already been convicted; an immediate reduction in the number of inmates; and an increase in the number of prison guards to a minimum of 15 per shift. As for the use of discipline and punishment, a number of stories reveal that assaults, torture, electric shock sessions and reprisals continue to follow on the heels of the visits by agencies and organizations and that the "*tampão*" cell was in use even before the riot;

c) they fear that another riot may break out; according to what they have been told informally, a guard, police officer, journalist or one of the petitioners seeking the provisional measures would be taken as a hostage. Even the prison police and guards contact the petitioners to tell them of their fear of being taken hostage;

d) the list of inmates submitted by the State does indicate those that have been convicted and those who are in preventive detention; so that the list could be used to separate the inmates, not just on paper but physically as well. The State did not mention whether that segregation is planned and if so, whether it will be effected immediately. The petitioners also requested the creation of a disciplinary committee so that qualified persons might monitor the situation in the prison close-up;

e) the State has not fully complied with the measure involving the obligation to investigate the facts so as to identify those responsible and punish them accordingly. Only one person has been convicted for the death of an inmate and only two inquiries or proceedings implicate public officials as either directly or indirectly culpable in the 76 deaths that occurred in the prison between May 2001 and April 2004. Furthermore, although the police investigation phase should last no more than three months, the police inquiry prior to the complaint brought by the Office of the Rondônia State's Attorney concerning the 27 deaths that occurred in January 2002, lasted 30 months; and

f) concerning verification of compliance with the measures, only the Justice and Peace Commission does on-site visits to the prison; it sends the information collected during the visits to the State, even though the latter formed a special commission for that purpose. The petitioners argue that the Inter-American Commission should make a visit *in loco*; that the Court should convoke another public hearing to examine compliance with the provisional measures and that Brazil must be asked to deploy a task force to check compliance with the measures. The petitioners argue that because the situation at the Urso Branco Prison is so dangerous, it is not enough to simply establish and maintain the Special Commission of the Council for the Defense of Human Rights. The petitioners believe the federal government should

intervene to ensure compliance with the provisional measures since the Rondônia state authorities are not well versed in such measures.

25. The arguments made by the State at that public hearing, where it reiterated its "steadfast intention to collaborate" in the implementation of these measures. Those arguments are summarized below:

a) the State acknowledged that despite government efforts, the goal of reversing the unacceptable situation at the prison has not been achieved. Representatives of the judicial branch of government, of the Public Prosecutor's Office, and of the Ombudsman's Office have visited the prison and periodic inspections are done there under the supervision of the Public Prosecutor's Office and the Brazilian Bar Association. The Director of the National Prisons Department (DEPEN) has made visits to the prison. Also, meetings have been held with high-ranking local authorities. With those authorities, more than 50 inmates have been interviewed. During the visit made by the Director of the National Prisons Department (DEPEN) on April 21 and 22, 2004, the uprising was settled and subsequent operations were monitored. New cells have been built and "safe" inmates have been transferred to protect their lives. The federal intervention that the petitioners seek is regarded as a measure of last resort;

b) the Federal Union and the state of Rondônia recently signed agreements for creation of two prison facilities; tenders have been put out for the two facilities. Construction of one prison unit is planned for the first quarter of 2005, which will open up 200 new vacancies;

c) some measures that the petitioners mentioned are being implemented. Recently, conversations were held with the Inter-American Commission and the petitioners with a view to enhancing the Special Commission of the Council for the Defense of Human Rights, which was established in January 2003. Moreover, the National Prisons Department (DEPEN), working in partnership with the state of Rondônia, has promoted a social service to monitor performance of the inmates' sentences;

d) a number of projects are underway to benefit the prison population, drawing upon the assistance of ministries and other offices. In May 2004, 264 prison guards received training and will be placed in various units throughout the state of Rondônia. Brazil also made reference to a number of legislative reforms and advances that it expects to implement; and

e) the Rondônia State Attorney's Office is endeavoring to establish the identity of those responsible for the events that transpired in 2002, and has filed a complaint concerning the deaths that occurred in January 2002. That Office was slow to bring the complaint because meticulous work had to be done in order for the complaint to satisfy the evidentiary requirements as to authorship and materiality.

26. The documentation that the petitioners presented during that public hearing, which consists of photographs taken at Urso Branco Prison after the April 2004 uprising.

27. The State's briefs and the attachments thereto, presented during that public hearing and after its conclusion, concerning compliance with these provisional measures. In these briefs, Brazil stated, *inter alia*, the following:

- a) the inmate population at Urso Branco Prison was registered. The Director of the National Prisons Department from the Ministry of Justice has been very attentive to the prison system in the state of Rondônia and has been an important interlocutor of the federal government in its dealings with the state government. He has also been the government's spokesman vis-à-vis the inmates. The State also made reference to certain legislative reforms and advances that it is expecting to implement. It pointed out that the visiting system had been improved. It also mentioned the social service for monitoring the serving of sentences and spoke of a project to promote human rights in the Rondônia prison system which it also expects to implement;
- b) on June 21, 2004, the "Mobile Court" was established within Urso Branco Prison, whereby the judge for enforcement of sentence and his team visit the prison and there examine the status of the cases;
- c) a rigorous investigation is being conducted into the facts that necessitated the adoption of the provisional measures. The State submitted a copy of the complaint brought by the Office of the Rondônia State's Attorney on June 24, 2004, before the "Jury Trial Judge of the 2nd Jurisdiction" against 49 persons for the murder of 27 inmates at Urso Branco Prison in the uprising in January 2002; and
- d) it has kept up contact with the Inter-American Commission and the petitioners to improve the mechanism for coordination and verification of the provisional measures.

CONSIDERING THAT:

1. Brazil has been a State Party to the American Convention since September 25, 1992 and, pursuant to Article 62 of the Convention, recognized the binding jurisdiction of the Court on December 10, 1998.

2. Article 63(2) of the American Convention provides that in "cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons," the Court may, in matters not yet submitted to the Court, upon a request from the Commission order such provisional measures as it deems pertinent.

3. In this regard, Article 25 of the Rules of Procedure of the Court establishes that:

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

2. With respect to matters not yet submitted to it, the Court may act at the request of the Commission.

[...]

4. Under the International Law of Human Rights, urgent and provisional measures serve a further purpose, which is to protect fundamental human rights, thereby avoiding irreparable harm to persons. When the basic requirements of extreme gravity and urgency and avoidance of irreparable harm to persons are met, provisional measures become a genuine jurisdictional guarantee of a preventive nature.⁶

5. Article 1(1) of the Convention sets forth the general obligation of the States Party to respect the rights and freedoms embodied in that Convention and to ensure the free and full exercise of those rights and freedoms to all persons subject to their jurisdiction, which carries with it the duty to adopt security measures necessary for their protection. These obligations become even more self-evident in connection with those who are involved in proceedings before the oversight bodies of the American Convention.⁷

6. In light of the responsibility of the State to adopt security measures to protect persons who are under its jurisdiction, the Court deems that this duty is all the more compelling with respect to persons incarcerated in a State detention center, in which case the State's responsibility for what happens to those who are in its custody must be presumed.⁸

7. Under the terms of the Court's Orders (*supra* 'Having Seen 1, 2 and 16'), the State must adopt measures to protect the lives and personal safety of all inmates at the Urso Branco Prison, and of all persons who enter there, which includes visitors. One such measure is confiscation of the weapons that the inmates have in their possession. It must also investigate the facts that necessitated the adoption of provisional measures so as to identify the responsible parties and punish them accordingly.

8. The Court has noted with concern that while these provisional measures were in effect, more people have died at the Urso Branco Prison, even though the fundamental purpose to be served with adoption of these measures is to effectively protect the lives and personal safety of all persons incarcerated in the prison and those who enter it.

⁶ Cf. *Matters of: Lilliana Ortega et al., Luisiana Rios et al., Luis Uzcátegui, Marta Colomina and Lilliana Velásquez*, Provisional Measures. Order of the Inter-American Court of Human Rights of May 4, 2004, 'Considering' five; *Matter of the Urso Branco Prison*, Provisional Measures. Order of the Inter-American Court of Human Rights of April 22, 2004, 'Considering' four; and *Matter of Miguel Agustín Pro Juárez Human Rights Center et al.*, Provisional Measures. Order of the Inter-American Court of Human Rights of April 20, 2004, 'Considering' four.

⁷ Cf. *Matter of the Gómez-Paquiyaui Brothers*, Provisional Measures. Order of the Inter-American Court of Human Rights of May 7, 2004, 'Considering' six; *Matter of Urso Branco Prison*, Provisional Measures. Order of the Inter-American Court of Human Rights of April 22, 2004, 'Considering' five; and *Matter of Urso Branco Prison*, Provisional Measures. Order of the Inter-American Court of Human Rights of August 29, 2002, 'Considering' five.

⁸ Cf. *Matter of the Gómez-Paquiyaui Brothers*, Provisional Measures. Order of the Inter-American Court of Human Rights of May 7, 2004, 'Considering' thirteen; *Matter of Urso Branco Prison*, Provisional Measures. Order of the Inter-American Court of Human Rights of April 22, 2004, 'Considering' six; and *Matter of Urso Branco Prison*, Provisional Measures. Order of the Inter-American Court of Human Rights of August 29, 2002, 'Considering' six.

9. Although the prison riot was brought to an end in late April 2004, the Inter-American Commission, the petitioners and the State all agree that the situation at the prison is unacceptable. The Inter-American Commission and the petitioners have stressed the point that security, infrastructure, conditions of incarceration, and health and hygiene are all unsatisfactory at the facility and could trigger another inmate riot, and more murders and acts of violence.

10. The information recently provided by the Inter-American Commission, the petitioners and the State, and their statements during the public hearing held on June 28, 2004, demonstrate that the prevailing situation at Urso Branco Prison is one of extreme gravity and urgency to the point that the lives and personal safety of the inmates at the prison and all those who enter there, including visitors and security personnel who work there, are in serious peril and highly vulnerable.

11. Given the gravity of the situation at the Urso Branco Prison, the State must immediately adopt all measures necessary to ensure that the rights to life and to the integrity of one's person are preserved, independently of whatever other measures are gradually adopted in the area of prison policy. Consequently, the State must again be called upon to adopt forthwith the provisional measures necessary to preserve the life and personal safety of all the inmates at that prison and of all persons who enter there, including visitors and corrections officers who work there. The State must also keep the Court informed of the adoption of those measures, so that the Court might examine compliance.

12. The State must adopt forthwith the measures necessary to ensure that no one in Urso Branco Prison is either killed or injured. These measures include steps to prevent riots or other situations that upset order in that prison from developing again. In correcting disruptions to public law and order of the kind that happened in the instant case, the State must adhere to and apply domestic laws in its efforts to restore law and order, provided those domestic laws and the actions taken in application thereof are in compliance with the relevant international human rights norms on the matter.⁹ As it has previously held, this Court recognizes "the existence of the authority, and even obligation, of the State to 'guarantee its security and to maintain public order'." Nevertheless, the power of the State in this matter is not unlimited; the State must conduct its actions "within limits and according to procedures that preserve both public safety and the fundamental rights of the human person."¹⁰ Accordingly, the Court considers that the conduct of the State in matters of prison security and safety is subject to certain limits, such that "[d]iscipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life."¹¹

⁹ Cf. *Matter of Urso Branco Prison*, Provisional Measures. Order of the Inter-American Court of Human Rights of April 22, 2004, *considering* ten; *Case of Caracazo. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of August 29, 2002. Series C No. 95, par. 127; *Case of Hilaire, Constantine, Benjamin et al.*. Judgment of June 21, 2002. Series C No. 94, par. 217; and *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, par. 67.

¹⁰ Cf. *Case of Urso Branco Prison*. Provisional Measures. Order of the Inter-American Court of Human Rights of April 22, 2004, *'Considering'* ten; *Case of Bulacio*. Judgment of September 18, 2003. Series C No. 100, par. 124; and *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99, par. 86.

¹¹ United Nations, Office of the High Commissioner for Human Rights. *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held in Geneva in 1955, and approved by the Economic and Social Council in its

13. As part of its international obligation to ensure to all persons the full exercise of their human rights, the State must devise and apply a prison policy that prevents crisis situations such as those that necessitated these provisional measures.

14. At the public hearing held on June 28, 2004, the Court was informed that the Inter-American Commission, the petitioners and the State had met that same day and had arrived at "a number of preliminary agreements, not yet formalized," mainly regarding the mechanism for coordinating and overseeing compliance with the measures and that a second meeting was scheduled to be held in Brasilia on July 14, 2004, concerning implementation of the measures.

15. It is essential that the State continue to include, in all its reports, an updated list of all inmates at Urso Branco Prison, those who have been released and those who are incoming, and indicate the number and name of the inmates who are serving sentences and those being held but not yet convicted; it is also to continue to report whether the convicted inmates are physically segregated from unconvicted inmates and kept in separate sections. The State has not included the list in all its reports and, although its May 4, 2004 report did include a list indicating the total of inmates and specifying which had been convicted and which had not, the State never reported whether the convicted inmates and the unconvicted inmates are being held in separate sections.

16. Failure to comply with the State's duty to inform the Court of all the provisional measures adopted in compliance with the Court's Orders is especially serious, given that these are Court-ordered measures whose purpose is to prevent irreparable harm to persons who are in a situation of extreme gravity and urgency.¹²

NOW, THEREFORE,

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

in exercise of its authorities under Article 63(2) of the American Convention on Human Rights and Article 25 of its Rules of Procedure,

DECIDES:

1. To call upon the State to:
 - a) immediately adopt all measures necessary to effectively protect the lives and personal safety of all inmates at Urso Branco Prison,¹³ and all

resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977, rule number 27de 13 de mayo de 1977, rule number 27; and *Matter of Urso Branco Prison*, Provisional Measures. Order of the Inter-American Court of Human Rights of April 22, 2004, 'Considering' ten.

¹² Cf. *Matter of Urso Branco Prison*, Provisional Measures. Order of the Inter-American Court of Human Rights of April 22, 2004, 'Considering' fourteen; *Matter of Marta Colomina and Lilliana Velásquez*, Provisional Measures. Order of the Inter-American Court of Human Rights of September 8, 2003, 'Considering' eleven.

¹³ Cf. operative paragraph one of the Court's Order of April 22, 2004; operative paragraph one of the Court's Order of August 29, 2002; and operative paragraph one of the Court's Order of June 18, 2002.

- persons who enter there,¹⁴ including the visitors and the corrections officers who work there;
- b) bring conditions at that prison into compliance with the relevant international norms for the protection of human rights;¹⁵
 - c) send to the Court an updated list of all persons who are inmates at the prison and clearly indicate:
 - 1) the persons who have been released;
 - 2) incoming inmates;
 - 3) the number and name of the inmates serving sentences;
 - 4) the number and name of the inmates who have not been convicted and sentenced, and
 - 5) whether convicted inmates are located in sections separate from those who have not been convicted and sentenced;¹⁶
 - d) investigate the facts that necessitated adoption of these provisional measures, so as to identify those responsible and punish them accordingly; this includes investigation of the serious events that occurred at the prison subsequent to the Court's June 18 and August 29, 2002 orders;¹⁷ and
 - e) submit to the Court, by no later than July 23, 2004, a report on compliance with the provisional measures specified in the preceding subparagraphs of this operative paragraph and in operative paragraphs two and three, particularly the measures it adopts immediately so as to avoid loss of life and attacks upon the safety of the inmates at the prison and of anyone who enters there, for whatever reason.

2. To reiterate to the State and to the Inter-American Commission on Human Rights its request that the necessary steps be taken to coordinate and oversee compliance with the provisional measures ordered by the Court, pursuant to the provisions of operative paragraph three of the Court's Order of August 29, 2002 and operative paragraph two of the Court's Order of April 22, 2004. Both the State and the Inter-American Commission are to report on compliance with those measures.

3. To request the State, the Inter-American Commission on Human Rights and the petitioners seeking the provisional measures to report to the Court on the follow-up and the results obtained from the agreements initiated prior to the public hearing of June 28, 2004, and that they informed the Court they would continue with in July of the present year.

4. To request the Inter-American Commission on Human Rights and the petitioners seeking the provisional measures to submit their comments on the respondent State's report within 10 days of receiving it.

¹⁴ Cf. operative paragraph one of the Court's Order of April 22, 2004.

¹⁵ Cf. operative paragraph one of the Court's Order of April 22, 2004; and "Considering" ten and operative paragraph six of the Court's Order of August 29, 2002.

¹⁶ Cf. operative paragraph one of the Court's Order of April 22, 2004; operative paragraph seven of the Court's Order of August 29, 2002, and operative paragraph four of the Court's Order of June 18, 2002.

¹⁷ Cf. operative paragraph one of the Court's Order of April 22, 2004; operative paragraph four of the Court's Order of August 29, 2002, and operative paragraph two of the Court's Order of June 18, 2002.

5. To call upon the State to continue to report to the Inter-American Court of Human Rights every two months, on compliance with and implementation of the measures indicated in operative paragraphs one and two of the present Order.

6. To call upon the petitioners seeking provisional measures to submit their comments on the report that the State is to submit every two months, and to do so within four weeks of receiving said report; to call upon the Inter-American Commission on Human Rights to submit its comments on the State's reports within two months of receiving them.

Judges García-Ramírez and Cançado-Trindade informed the Court of their Concurring Opinions, which are attached to the present Order.

Done in Spanish and Portuguese, the Spanish being the authentic version, in San José, Costa Rica, on July 7, 2004.

Sergio García-Ramírez
President

Alirio Abreu-Burelli

Oliver Jackman

Antônio A. Cançado-Trindade

Cecilia Medina-Quiroga

Manuel E. Ventura-Robles

Diego García-Sayán

Pablo Saavedra-Alessandri
Secretary

So ordered,

Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary

CONCURRING OPINION OF JUDGE SERGIO GARCÍA-RAMÍREZ ON THE ORDER OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS ADOPTING PROVISIONAL MEASURES IN THE MATTER OF URSO BRANCO PRISON, OF JULY 7, 2004

Reacting to the grave situation of the inmates and other persons at the José Mario Alves Detention Center, known as the Urso Branco Prison in the city of Porto Velho, Rondônia state, Brazil, the Inter-American Court of Human Rights, at the request of the Inter-American Commission on Human Rights, adopted a number of provisional measures in Orders of June 18, 2002, August 29, 2002, and April 22, 2004, in addition to letters that the Court sent to the State on March 6, 2003, May 1, 2003 and January 7, 2004.

In the Court's first Order adopting provisional measures in this case, it considered, among other serious situations requiring immediate attention, the frequency with which people had been murdered at that prison and the way in which those murders happened. The deaths in question occurred amidst terrible violence, and the prison authorities had lost any semblance of control over the situation. It was for that reason that the Court felt provisional measures had to be ordered, above all to save the lives and protect the personal safety of the inmates in Urso Branco Prison.

Despite repeated urgings from the Inter-American Court, conditions at the prison have not changed. The most recent reports are that the acts of violence continue, with fatal consequences: murders and other extremely serious acts continue to be committed. Apparently, these have been the conditions for more than two years now, a period during which the Court issued its orders calling for provisional measures, after the Inter-American Commission had already requested precautionary measures.

Given these events, the Court held a hearing at the seat of the Court in San José, Costa Rica, on June 28, 2004, to listen to reports from the representatives of the Urso Branco inmates, who have acted as the petitioners, and from the Inter-American Commission on Human Rights and the State.

What the members of the Court learned during that hearing made it incumbent upon us to remain vigilant as to the certain and obvious danger that these kinds of events will continue inside the prison. The Court was also advised of the measures that the federal government is either adopting or plans to adopt in its area of competence, and the measures that the local prison authorities are taking, bearing in mind that under Brazil's laws, local government –not the federal authorities- are in charge of the administration of prisons.

At that same hearing, over which I presided, I pointed out that the judges had listened with interest to the plans to be implemented or already being implemented to change prison life. I noted that those initiatives and the proposals for coordination between authorities and petitioners, with other sectors participating, to move prison reform forward, were laudable. At the same time, I stressed the point – as did the participants in the hearing –even the State's own representatives– that the prevailing situation at Urso Branco Prison was utterly unacceptable. After having called for provisional measures yet again in the Order to which this Concurring Opinion is affixed, the truly good news the Court would like to hear would be that the

killing and injuries have stopped altogether. No other information matters as much, since that news would go directly to the issue of most concern to the Inter-American Court and that dictated the need for provisional measures and the reason why they were ordered.

It is all well and good that there should be prison reform, that new prison laws should be enacted, that inmates should be classified, prison facilities modernized, prison guards and corrections officers recruited carefully, suitable alternatives to a sentence of imprisonment found, visiting under decent conditions permitted, medical services provided to safeguard the inmates' health, and schools, workshops and work units created. All this, and even more, is absolutely essential, because it reflects modern standards on the subject of deprivation of liberty, either for preventive purposes or by sentence, a measure called into serious question at the present time.

But none of that, which has to be done as soon as possible, can substitute for the immediate adoption of the measures necessary to prevent even one more death at Urso Branco Prison. I said as much at the conclusion of the hearing in question, and I say so again in this Concurring Opinion, which I announced at the conclusion of that session. That immediate and concrete result is precisely what the Court had in mind when it issued this Order for provisional measures, the latest in a series adopted over the past two years. Obviously, while other reforms or advances may be a question of gradually achieving certain goals, what is required here is immediate action, using every legitimate means to the fullest extent to preserve the life of each and every inmate at Urso Branco -and the lives of the other people whose lives and safety are at risk- regardless of their juridical situation.

The Court's Order is premised upon the State's specific obligations when it comes to persons deprived of liberty and in the State's exclusive custody. As the Court has held in various orders, the State must serve as guarantor of the rights of those it has in its custody. These people are entirely subject to the State's immediate authority and to the active or negligent conduct of its agents. They have no real capacity to provide for their own safety and defense and, because of that, too frequently find themselves up against devastating circumstances. As guarantor, the State is entirely and exclusively responsible for preserving their rights. The peculiar helplessness of the inmates creates special obligations that must be fulfilled promptly, as their welfare and even their very lives depend upon it. This is what happens in adult prisons, juvenile detention centers, institutions for the mentally ill and other institutions in which, in one way or another and under various labels, liberty is deprived and the persons in them are under the complete control of the public authorities.

It is self-evident that the State has, vis-à-vis all persons subject to its jurisdiction, a duty to recognize, respect, protect and guarantee the human being's fundamental rights. This obligation of the State takes on added emphasis when the individuals are completely and directly dependent on and subordinate to the State's agents, as is clearly the case in the hypothetical situations to which I made reference and in which there is a legal and material relationship between the authority and the private person that does not exist in most cases, at least not with the same characteristics.

Hence, the State's role as guarantor of rights is heightened, as is its responsibility vis-à-vis those within its custody. For this very reason, one could say that the State has an "aggravated" responsibility vis-à-vis such persons. Elsewhere I have alluded to this heightened responsibility and the consequent reparations owed by virtue of

the particularly egregious nature of the violations given the circumstances under which they occurred, the manner in which they were committed, the characteristics of the victims and other data that might reasonably qualify them as victims. This concept can also be analyzed as a function of the special relationship that exists between the public authority and the individual, as happens in the instant case.

Regrettably, the situation I have described here is not found in prisons alone. This is far from being an exceptional case. This state of affairs, found in many different places and in many different countries, has been discussed at length, deplored and censured but never corrected. The norms and rhetoric about prisons routinely clashes with the reality of prisons. There is an enormous job that remains to be done, which is to reclaim human rights in these institutions, virtually everywhere. Such deplorable conditions are not only inimical to fundamental rights, but also throw the criminal justice system as a whole into a crisis, since one of that system's most dramatic statements -but certainly not the only one- is to deprive someone of his liberty. Deprivation of liberty places the person at the mercy of the circumstances -that in some cases could best be described as chaos- unless the State intervenes to prevent it and to organize prison life. Prison rhetoric and prison laws collide with the brutal facts about many of our prisons. This has to change and the change has to be fast and radical.

Since the instant case is only for provisional measures involving a local prison, this Order can go no further. And it is not my place to do so in a Concurring opinion attached to a court order of that nature. I will confine myself here, as I did at the June 28, 2004 hearing, to expressing profound concern over the fate of persons whose lives depend upon the will, the resolve and the effectiveness of the authorities whose responsibility, under the American Convention on Human Rights and, of course, domestic law, is to ensure the protection of the principal rights of the inmates, who cannot do it for themselves.

Sergio García-Ramírez
Judge

Pablo Saavedra-Alessandri
Secretary

CONCURRING OPINION OF JUDGE A. A. CANÇADO-TRINDADE

1. I am voting in favor of adoption of these provisional measures through which the Inter-American Court of Human Rights is ordering that protection be extended to all the inmates at the *Urso Branco Prison* in Brazil. Still, I feel obliged to revisit the conceptual construct that I have been advocating in the Inter-American Court, which concerns obligations *erga omnes* of protection under the American Convention. I have no intention of repeating, in detail, everything I have thus far said on the subject, particularly in my other Concurring Opinions on the Orders for Provisional Measures adopted by the Court in the case of the *Peace Community of San José de Apartadó* (of June 18, 2002), the *Communities of the Jiguamiandó and of the Curbaradó* (of March 6, 2003), the *Kankuamo Indigenous Community* (of July 5, 2004) and the *Indigenous Community of Sarayaku Indigenous People* (July 6, 2004). Instead, I prefer to summarize some of the central points I made on the subject, with a view to effective protection of human rights in a complex situation such as that of the inmates at the *Urso Branco Prison*.

2. Indeed, well before these cases were brought to this Court's attention, I had already warned of the pressing need to develop doctrine and jurisprudence on the legal regime of obligations *erga omnes* of protection of the rights of the human being ((for example, in my Concurring Opinions in *Blake v. Guatemala*, Judgment on the Merits, January 24, 1998, par. 28, and Judgment on Reparations, January 22, 1999, par. 40). In my Concurring Opinion in the *Las Palmeras vs. Colombia* case, Judgment on Preliminary Objections, February 4, 2000, I suggested that a proper understanding of the broad scope of the general obligation to *ensure* the rights recognized in the American Convention, provided for in Article 1(1) thereof, could be instrumental in developing the obligations *erga omnes* of protection (paragraphs 2 and 6-7).

3. The general obligation to ensure –I added in my Concurring Opinion in the *Las Palmeras* case- is incumbent upon each State Party individually and on all of them collectively (obligation *erga omnes partes* - pars. 11-12). I wrote that

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

4. The general obligation to ensure includes the application of provisional measures of protection under the American Convention. In my concurring opinion in the case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (Order of August 18, 2000), I took the liberty of pointing out the change that had occurred in both the *rationale* and object of provisional measures of protection (which historically moved from civil procedural law to public international law), resulting from the impact of their application within the framework of the International Law of Human Rights (paragraphs 17 and 23): with their introduction into the conceptual universe of the International Law of Human Rights, provisional measures undergo a transition where, rather than safeguarding the efficacy of the functions of courts, they protect the most fundamental rights of the human person.

With the transition from civil procedural law into international human rights law, they move out of the strictly *precautionary* realm and into the sphere of *protection*.¹⁸

5. The jurisprudence of the Inter-American Court of Human Rights has made a decisive contribution to this subject, perhaps more than any other international tribunal to date. Its jurisprudence on the subject traces its roots to a convention and, in terms of the breadth of its scope, is unparalleled in contemporary international jurisprudence. In recent years, and right up to the present, it has tapped all the potential for protection –through prevention- that can be drawn from the language of Article 63(2) of the American Convention.

6. In my Concurring Opinion in the *Matter of the Peace Community of San José de Apartadó* (Order of June 18, 2002), I pointed out that the State's obligation to protect is not confined to the State's relations to persons under its jurisdiction; in certain circumstances that obligation also applies to relations between third parties; it is, then, a genuine obligation *erga omnes* of protection, which in the instant case is an obligation vis-à-vis all persons incarcerated in *Urso Branco Prison*. As I wrote in that Concurring Opinion –and do so in relation to the present case as well -- in the final analysis what we have here is the State's obligation *erga omnes* to protect all persons subject to its jurisdiction, an obligation that becomes all the more important in a situation of constant violence and insecurity like the one at *Urso Branco Prison* and that

"(...) requires clearly 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 a dead letter.

The reasoning as from the thesis of the *objective* responsibility of the State is, in my view, ineluctable, particularly in a case of provisional measures of protection as the present. The intention here is to avoid irreparable harm to the members of a community and to the persons who render services to this latter, in a situation of extreme gravity and urgency, which encompasses actions, armed and otherwise, of paramilitary and clandestine groups, along with the actions of organs and agents of the public forces. (paragraphs 14-15).

7. Later, in my Concurring Opinion in the case of the *Communities of the Jiguamiandó and of the Curbaradó* (Order of March 6, 2003), a case that also involved individual and collective dimensions, I took the liberty of once again insisting that the response to acts of violence committed by armed irregulars of any kind must be recognition of the third-party effects of the American Convention "(the *Drittwirkung*)," – inherent in obligations *erga omnes*, - "without which the conventional obligations of protection would be reduced to little more than a dead letter." (pars. 2-3). I added that given the circumstances of that case –and of the present case as well- it is clear that

the protection of human rights determined by the American Convention, to be effective, comprises not only the relations between the individuals and the public power, but also their relations with third parties (...). This reveals the new dimensions of the international protection of human rights, as well as the great potential of the existing mechanisms of protection, - such as that of the American Convention, - set in motion in

¹⁸. For a study of this evolution, cf. A.A. Cançado-Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre, S.A. Fabris Ed., 2003, pp. 80-83; A.A. Cançado-Trindade, "Provisional Measures of Protection in the Evolving Case-Law of the Inter-American Court of Human Rights (1987-2001)", in *El Derecho Internacional en los Albores del Siglo XXI - Homenaje al Prof. J.M. Castro-Rial Canosa* (ed. F.M. Mariño Menéndez), Madrid, Ed. Trotta, 2002, pp. 61-74; A.A. Cançado-Trindade, "Les mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", 4 *Revista do Instituto Brasileiro de Direitos Humanos* (2003) pp. 13-25.

order to protect collectively the members of a whole community,¹⁹ even though the basis of action is the breach - or the probability or imminence of breach - of individual rights. (par. 4).

8. As for the broad scope of the obligations *erga omnes* of protection, in my Concurring Opinion in the Inter-American Court's Advisory Opinion OC-18 on the *Juridical Condition and Rights of Undocumented Migrants* (of September 17, 2003), I noted that the *jus cogens* (from whence the obligations *erga omnes* emanate)²⁰ characterizes them as being objective of necessity. They thus encompass all the parties for whom the legal norms were intended (*omnes*), whether they be members of public organs of the State or private persons (par. 76). I went on to write the following:

(...) In a vertical dimension, the obligations *erga omnes* of protection bind both the organs and agents of (State) public power, and the individuals themselves (in the inter-individual relations).

(...) as to the vertical dimension, the general obligation, set forth in Article 1(1) of the American Convention, to respect and to ensure respect for the free exercise of the rights protected by it, generates effects *erga omnes*, encompassing the relations of the individual both with the public (State) power as well as with other individuals (*particuliers*).²¹ (pars. 77-78).

9. Thus, given the circumstances of the present *Matter of the Urso Branco Prison*, as narrated in the Court's order, the State cannot disclaim responsibility for the human rights violations (the rights to life and to humane treatment) that occurred in that prison merely because the acts of violence that resulted in those violations were committed by some inmates at the prison against other inmates. The State's responsibility is immediately engaged, from the moment those violations occurred,²² regardless of pending legislative reforms or administrative measures (some of which have been pending for a long time). The State has an ineluctable duty of protection *erga omnes*, even in relations between individuals, inasmuch as victims and perpetrators alike were in the State's custody.

10. It is true that throughout the public hearing this Court held on June 28, 2004, the parties demonstrated a spirit of procedural cooperation, which this Court has viewed in a positive light. Nevertheless, the answers given to the various questions that I asked of the parties (the petitioners seeking provisional measures, the Inter-American Commission and the Brazilian State) during that hearing made it clear that the situation at the *Urso Branco Prison* is still one of *extreme gravity and urgency*, in

². Suggesting an affinity with the *class actions*.

²⁰. In this same Opinion I wrote the following: "By definition, all the norms of *jus cogens* generate necessarily obligations *erga omnes*. While *jus cogens* is a concept of material law, the obligations *erga omnes* refer to the structure of their performance on the part of all the entities and all the individuals bound by them. In their turn, not all the obligations *erga omnes* necessarily refer to norms of *jus cogens*." (par. 80).

²¹. Cf., in this respect, in general, the resolution adopted by the *Institut de Droit International* (I.D.I.) at the 1989 Santiago de Compostela session (Article 1), in: I.D.I., 63 *Annuaire de l'Institut de Droit International* (1989)-II, pp. 286 and 288-289.

²². Concerning the finding that the State's international responsibility was engaged, cf. my opinion (which I presented to this Court today) in the case of the *Gómez Paquiyauri Brothers vs. Peru* (Judgment of July 8, 2004), paragraphs 11-18. And for a study on this subject, cf. A.A. Cançado-Trindade, "A Determinação do Surgimento da Responsabilidade Internacional dos Estados", 26 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais - Belo Horizonte* (1978) pp. 158-199; A.A. Cançado-Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Ed. Renovar, 2002, pp. 371-408.

the language of Article 63(2) of the American Convention. Hence the Inter-American Court's adoption of these provisional measures.

11. In effect, in this Order of July 7, 2004, the Court has expressed its "concern" over the fact that

"(...) while these provisional measures were in effect, more people have died at the Urso Branco Prison, even though the fundamental purpose to be served with adoption of these measures is to effectively protect the lives and personal safety of all persons incarcerated in the prison and those who enter it.

(...)Although the prison riot was brought to an end in late April 2004, the Inter-American Commission, the petitioners and the State all agree that the situation at the prison is unacceptable. (...)

(...)The information recently provided by the Inter-American Commission, the petitioners and the State, and their statements during the public hearing held on June 28, 2004, demonstrate that the prevailing situation at Urso Branco Prison is one of extreme gravity and urgency (...).

(...) Given the gravity of the situation at the Urso Branco Prison, the State must immediately adopt all measures necessary to ensure that the rights to life and to the integrity of one's person are preserve, independently of whatever other measures are gradually adopted in the area of prison policy. (...)

(...)The State must adopt forthwith the measures necessary to ensure that no one in the Urso Branco Prison is either killed or injured.(...)²³

12. It seems self-evident to me that the fundamental principle of respect for human dignity applies to all human beings, no matter what their circumstance. That includes those deprived of their liberty. This is the direction that the international jurisprudence on the subject of human rights protection has taken. Indeed, the *jurisprudence constante* of the Inter-American Court has been to remind the State that because it is in charge of prison institutions, it is the guarantor of the rights of the detainees who are in its custody.²⁴

13. The Inter-American Court has held that "every person deprived of her or his liberty has the right to live in detention conditions compatible with her or his personal dignity, and the State must guarantee to that person the right to life and to humane treatment."²⁵ That being the case, the Court added, the State's "power is not unlimited, as it has the duty, at all times, of applying procedures that are in accordance with the Law and that respect the fundamental rights of all individuals under its jurisdiction (...) [I]f a person was detained in good health conditions and subsequently died, the State has the obligation to provide (...) information and evidence pertaining to what happened to the detainee."²⁶

14. The European Court of Human Rights has followed the same line of reasoning, having repeatedly held that "Detained persons are in a vulnerable position and the

²³. Considering 8, 9, 10, 11 and 12 of the present Order.

²⁴. Inter-American Court of Human Rights (IACtHR), *Case of Bulacio v. Argentina*, Judgment of September 18, 2003, Series C, No.100, pars. 126-127 and 138); IACtHR, *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment of June 21, 2002, Series C, No. 94, par. 165; IACtHR, *Case of Bámaca Velásquez v. Guatemala*, Judgment of November 25, 2000, Series C, No. 70, par. 171; *Case of Neira Alegria et al. v. Peru*, Judgment of January 1, 1995, Series C, No.20, par. 60.

²⁵. IACtHR, *Case of Castillo Petruzzi et al. v. Peru*, Judgment of May 30, 1999, Series C, No. 52, par. 195.

²⁶. IACtHR, *Case of Juan Humberto Sánchez v. Honduras*, Judgment of June 7, 2003, Series C, No. 99, pars. 86 and 111.

authorities are under a duty to protect them."²⁷ Concerning persons in custody, time and time again the European Court has made the point that

"it is incumbent on the State to account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies."²⁸

The Court has also held that "there should be some form of effective official investigation when individuals have been killed as a result of the use of force."²⁹ The State's due diligence obligation also covers relations between or among individuals, as the European Court held in *Osman v. United Kingdom* (1998), by noting that in certain circumstances it may well imply a "positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."³⁰

15. In the present *Matter of Urso Branco Prison*, the State cannot disclaim international responsibility for human rights violations (the inmates' rights to life and to humane treatment) for reasons of internal order having to do with its federal structure. In its August 27, 1998 judgment on reparations in the *Case of Garrido and Baigorria v. Argentina*, the Inter-American Court invoked "case law, which has stood unchanged for more than a century," which holds that "a State cannot plead its federal structure to avoid complying with an international obligation" (par. 46). And its famous Advisory Opinion OC-16 (October 1, 1999) on *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the Due Process of Law*, - a truly groundbreaking and historic decision that has been a source of inspiration to international jurisprudence *in statu nascendi* on the subject- the Inter-American Court held, on this very point, that States must comply with their obligations under conventions, "regardless of whether theirs is a federal or unitary structure." (par. 140 and operative paragraph 8).

16. In short, as the above-cited case law illustrates, no matter what the circumstance, the State has a *due diligence* obligation to prevent irreparable harm to persons under its jurisdiction and in its custody. Provisional measures of protection such as those that the Inter-American Court just adopted in the present Order on the *Matter of Urso Branco Prison*, serve to establish continual monitoring of a situation of extreme gravity and urgency, based on a provision of a human rights treaty like the American Convention (Article 63(2)). As I had already anticipated in my Concurring Opinion in the *Matter of The Communities of the Jiguamiandó and Curbaradó* (pars. 6-8), such measures also contribute to the gradual establishment of a genuine *right to humanitarian assistance*.

^{27.} Cf., *inter alia*, European Court of Human Rights (ECtHR), *Orhan v. Turkey*, Judgment of June 18, 2002, Series A, No. 3645, par. 326; and ECtHR, *Case of Aksoy v. Turkey*, Judgment of November 26, 1996, paragraph 61; ECtHR, *Case of Anguelova v. Bulgaria*, Judgment of May 23, 2002, par. 110.

^{28.} ECtHR, *Case of Paul and Audrey Edwards v. United Kingdom*, Judgment of March 14, 2002, Series A, No. 3449, par. 56; ECtHR, *Case of Avsar v. Turkey*, Judgment of July 10, 2001, Series A, No. 2637, par. 391; ECtHR, *Case of Keenan v. United Kingdom*, Judgment of April 3, 2001, Series A, No. 2421, par. 91.

^{29.} ECtHR, *Case of Cakici v. Turkey*, Judgment of July 8, 1999, Series A, No. 1090, par. 86.

^{30.} ECtHR, *Case of Osman v. United Kingdom*, Judgment of October 28, 1998, Series A, No. 1050, par. 115.

17. They illustrate that in situations of this kind, it is possible and viable to act *strictly within the framework of the Law*,³¹ thereby reaffirming the primacy of the law over the indiscriminate use of force. They testify to the current process of *humanization* of international law (moving toward a new *jus gentium*) in the area of provisional measures of protection as well. All this points up the fact that the human conscience (the ultimate source of all Law) has awakened to the need to protect the human person from violations of his rights by both the State and third parties.

18. At the *Institut de Droit International*, I have maintained that in the exercise of the emerging right to humanitarian assistance, the emphasis must be on the persons of the beneficiaries of the humanitarian assistance, and not on the potential for action of the agents materially trained to provide that humanitarian assistance. The ultimate basis for the exercise of that right lies in the inherent dignity of the human person: human beings are, in effect, the *titulaires* of the protected rights and of the right to humanitarian assistance. Their defenselessness and suffering (in prison) – especially in situations of poverty, economic exploitation, social marginalization and perhaps brutalization-merely underscore the need for obligations *erga omnes* to protect the rights that are inherent in the human person.

19. As I see it, those obligations *erga omnes* must be developed and complied with in order to put an end to violence within prisons, impunity and institutionalized injustice. Moreover, the *titulaires* of the protected rights (or their legal representatives) are those best qualified to identify their basic humanitarian relief needs, which constitutes a response, informed by the Law, to the new needs for human protection. If the human person's international legal personality and standing ultimately materialize, then the right to humanitarian assistance may gradually become justiciable.³²

20. Furthermore, as recent cases before this Court involving members of human collectivities have made clear, the current expansion of international juridical personality and standing³³ is a response to a pressing need of the international community in our times. The development of the doctrine and jurisprudence on obligations *erga omnes* of protection of the human person, in any and all situations or circumstances, will certainly be a contribution toward the formation of a true international *ordre public* based on respect for and observance of human rights, capable of ensuring greater cohesiveness in the organized international community (the *civitas maxima gentium*), centered around the human person as the subject of international law.

Antônio Augusto Cançado-Trindade
Judge

Pablo Saavedra-Alessandri
Secretary

³¹. Without having to resort to the unconvincing and unfounded rhetoric of so-called "humanitarian intervention."

³². Cf. A.A. Cançado-Trindade, "Reply [- Assistance Humanitaire]", *70 Annuaire de l'Institut de Droit International* - Session de Bruges (2002-2003) n. 1, pp. 536-540.

³³. Cf. A.A. Cançado-Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104.