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Decided by: President: Florentin Melendez;
First Vice-President: Paolo Carozza;
Second Vice-President: Victor Abramovich;
Commissioners: Evelio Fernandez Arevalos, Sir Clare K. Roberts, Freddy Gutierrez.
Dated: 15 October 2007
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Represented by: APPLICANT: the Corporacion Servicios Profesionales Comunitarios “Sembrar”
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I. SUMMARY

1. On May 14, 2001, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition filed by the Corporación Servicios Profesionales Comunitarios “Sembrar” (hereinafter “the petitioners”) alleging the responsibility of agents of the Republic of Colombia (hereinafter “the State,” “the Colombian State,” or “Colombia”) in the forced disappearance of Edgar Quiroga and Gildardo Fuentes, beneficiaries of precautionary measures issued by the IACHR, which occurred on November 28, 1999, in the district (corregimiento) of Cerro Azul, jurisdiction of San Pablo, in the south of the department of Bolívar.

2. The petitioners argued that the State was responsible for violating the rights of Edgar Quiroga and Gildardo Fuentes to life, humane treatment, personal liberty, judicial protection, and a fair trial, enshrined in Articles 4, 5, 7, 8, and 25 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) to the detriment of the victims and their next-of-kin, as well as the generic obligation to respect and ensure the human rights in the Convention, provided for at Article 1(1). The State argued that the petitioner’s claims were inadmissible considering that it failed to satisfy the requirement of prior exhaustion of domestic remedies set forth in Article 46(1)(a) of the American Convention.

3. After analyzing the parties’ positions and compliance with the requirements set forth in Articles 46 and 47 of the American Convention, the Commission decided to find the case admissible for the purpose of examining the alleged violation of Articles 3, 4(1), 5(1), 5(2), 7,

8(1), and 25, in conjunction with Article 1(1) of the American Convention, and Articles 1(b) of the Convention on Forced Disappearance of Persons and 3 of the American Convention, in application of the *iura novit curia* principle. In addition, it decided to notify the parties of the report and order its publication.

II. PROCESSING BEFORE THE COMMISSION

4. The IACHR registered the petition under number P319-01 and on May 17, 2001, it proceeded to transmit a copy of the pertinent parts to the State, which was given two months to submit information, in keeping with Article 30(2) of the Regulations.

5. On November 29, 1999, the IACHR issued precautionary measures to determine the whereabouts of Edgar Quiroga and Gildardo Fuentes and to protect their lives and physical integrity and the security of the inhabitants of the village of La Placita. The State submitted information to the IACHR on January 31, 2000, which was transmitted to the petitioner on February 14, 2000, for observations. The petitioners sent in their observations on March 10, 2000, which were forwarded to the State on March 14 for its observations. The precautionary measures were subsequently expanded and continue in force in favor of the Asociación Campesina del Valle del Río Cimitarra.[FN1]

[FN1] According to the information received, on November 28, 1999, Messrs. Edgar Quiroga and Gildardo Fuentes were intercepted by units of the 45th Battalion “Héroes de Majagual” in the village of La Placita, district of Cerro Azul, municipality of San Pablo. According to information provided by eyewitnesses, the detainees were tied to a tree, after which they were retained by the Autodefensas, who public acknowledged their participation in the matter. The Commission also asked that measures be adopted to ensure the security of the inhabitants of the village of La Placita who witnessed and denounced the acts of torture. Annual Report of the IACHR 1999. Chapter III para. 23.

6. The State submitted information on July 17, 2001, which was transmitted to the petitioners on July 19, 2001, for their observations within 30 days. On August 16, 2001, the petitioners requested an extension, which was granted by the IACHR. The petitioners sent in their observations on September 17, 2001, which were transmitted to the State on October 4, 2001, for its observations, which it was to provide within 30 days.

7. On December 26, 2001, the State sent its response, which was forwarded to the petitioners for their observations on January 10, 2002. The petitioners submitted their response on February 27, 2002, which was forwarded to the State for its observations on March 5, 2002. On May 3, 2002, the State requested a 30-day extension to submit its observations, which was granted by the IACHR. On June 18, 2002, the State submitted its response, which was sent to the petitioners on July 9, 2002; they were given 30 days to submit their observations. The petitioners submitted their response on June 24, 2003, which was transmitted to the State on August 27, 2004, for its additional observations.

8. On September 27, 2004, the State requested an extension to submit its response, and on October 6, 2004, the State requested a second extension, which was granted by the IACHR. On November 9, 2004, the State requested a third extension from the IACHR, which it was granted once again and expired without the State submitting its response. On June 22, 2006, the IACHR reiterated its request for observations to the State, and requested of the petitioners information on the issue of the possible application of exceptions to the requirement of exhaustion of domestic remedies and the responsibility of state agents in the facts alleged. The State submitted its response on July 5, 2006, which was transmitted to the petitioners on July 7, 2006, for observations.

9. On August 8, 2006, the petitioners submitted their observations, which were transmitted to the State on August 15, 2006, and their attachments on August 17, 2006; the State was given one month to submit observations. That term lapsed without the State submitting a response. On August 8, 2007, the State submitted its final observations.

III. THE PARTIES' POSITIONS

A. The petitioners' position

10. By way of background the petitioners note that in September 1996 the peasant farmers of the middle Magdalena region staged a massive protest to denounce human rights violations. In addition, they informed the State of their concern vis-à-vis the announcement by the Autodefensas Unidas de Colombia (hereinafter "AUC") that they would enter southern Bolívar and they requested its protection. As a result of the mobilization, the State signed an agreement with the peasant farmers of the zone, which included the State's commitment to provide them protection. The petitioners indicate that subsequent to the agreement signed with President Ernesto Samper, there was an increase in human rights violations, as at least 150 peasant farmers in southern Bolívar were assassinated.

11. They note that in May 1998 paramilitary chief Carlos Castaño Gil announced an offensive against the population in southern Bolívar that in effect began on July 11 with a paramilitary incursion in the district (corregimiento) of Cerro de Burgos, municipality of Simití.[FN2] They indicate that during the incursions the paramilitaries were supported by land, air, and water by National Army troops.[FN3]

[FN2] The petitioners indicate that this incursion moved to the district of Carmen del Cocú, municipality of San Pablo, and that in tandem an onslaught was being launched against the communities of Morales, Arenal, Tiquiso, Montecristi, and Achí. Original petition received at the IACHR on May 14, 2001, pp. 12 and 13.

[FN3] The petitioners note that this information appears in reports presented by the population to the Office of the Procurator General of the Nation. Original petition received at the IACHR on May 14, 2001, p. 13.

12. They note that prior to these threats hundreds of residents were forced to displace to the municipality of San Pablo, where they requested that the Government establish a roundtable working group and that a high-level commission visit the zone in August 1998.[FN4] They argue that in the second half of 1998 there was an exodus of peasant farmers in the middle Magdalena region that included the participation of more than 10,000 peasant farmers. Edgar Quiroga, the most representative local leader in the negotiations in the middle Magdalena region, served as a spokesperson for that exodus. They indicate that finally an agreement was signed with the State on October 4, 1998, by which the State undertook to guarantee the life, integrity, and personal liberty of the peasant farmers who participated in it, and of their spokespersons, and the peasant farmers returned to their hamlets. In addition, they note that as part of that agreement the State determined that the peasant farmers of southern Bolívar and the Cimitarra Valley should be included in the Ministry of Interior's program for the protection of social leaders, trade unionists, and human rights defenders, given the risk to their lives and personal integrity.[FN5]

[FN4] Letter from the displaced peasant farmers to President Andrés Pastrana of August 10, 1998. The petitioners indicate that the negotiation forum was installed on August 20 and 21, 1998. Original petition received at the IACHR on May 14, 2001, p. 14.

[FN5] The petitioners indicate that in May 1999 Edgar Quiroga and other spokespersons of the peasant exodus received a "celubiper" (cell phone/pager) from the Ministry of Interior. Original petition received at the IACHR on May 14, 2001, p. 2.

13. The petitioners note that on October 8, 1999, Gildardo Fuentes (19), a key witness in investigations before the Office of the Attorney General and the Office of the Procurator General, was the victim of an assassination attempt that was reported to the Technical Investigations Corps (Cuerpo Técnico de Investigaciones) of the Office of the Attorney General (hereinafter "CTI") and the Office of the Procurator General, and that Mr. Fuentes sought their protection.[FN6] In addition, they note that on November 23, 1999, Edgar Quiroga went to the Office of the Attorney General and the Office of the Inspector General to denounce "the strategies developed by the Army and National Police in the region of southern Bolívar in a close relationship with paramilitary groups." [FN7]

[FN6] They indicate that he told the Office of the Attorney General: "I would add that the Office of the Attorney General should do something in San Pablo, since many assassinations occur there similar to my case, I also want to ask for protection for myself and my family, and I hope that no more massacres are committed in San Pablo and that something be done against those paramilitaries." Petitioners' observations brief, received at the IACHR on August 15, 2006, p. 7.

[FN7] The petitioners cite: "... Three thousand five hundred campesinos from the rural zones of the municipalities of San Pablo and Simití, two thousand five hundred of whom are minors, have since last October 16 been moving towards the center of the mountain. The fear of entering the municipal seats after several attacks by the army and the paramilitaries forced them to go into the mountains." Document submitted to the authorities by Edgar Quiroga. Original petition received at the IACHR on May 14, 2001, pp. 2 and 3.

14. They note that on November 26, 1999, there were repeated bombings and strafing from a helicopter in the hills bounding the district of Cerro Azul, forcing the peasant farmers to suspend their work.[FN8] They indicate that on November 27, 1999, the district was occupied by approximately 300 heavily armed men wearing military insignia who set up a roadblock and occupied several dwellings, the health post, and the school, from which they stole property.[FN9]

[FN8] The petitioners indicate that the helicopter was white with red and green lines and registration number HK-44. Original petition received at the IACHR on May 14, 2001, p. 3. See Informe presentado por la Comisión de búsqueda realizada el 1 de diciembre de 1999, cited by the petitioners. Petitioners' observations brief of September 17, 2001.

[FN9] The petitioners indicate that this armed group communicated to the residents of the hamlet that they were part of a group of reservists who had been requested by the Fifth Brigade of the National Army, based in the city of Bucaramanga. Original petition received at the IACHR on May 14, 2001, p. 3. They also indicate that the commander of this group was a man who they called "Cabo" (Corporal). In this respect, they note that Edgar Quiroga had filed a document with the Office of the Procurator General containing a summary of the facts that occurred as of April 1999 in the municipalities of San Pablo and Simití in which it indicated that during the incursion of the "Héroes de Majagual" Battalion in May 1999 the Army passed themselves off as paramilitaries: "... in hours of the afternoon and by order of the Major or Colonel J.M. Martínez, the person who the day before identified himself as the commander of the Grupo Ciclón and who was wearing a balaclava with the insignia of the autodefensas, who the Colonel or Major called 'corporal', appeared and was forced to return some belongings they had robbed from the community as paramilitaries, more or less half of the money and jewels...." Petitioners' observations brief received at the IACHR on August 15, 2006, p. 9.

15. The petitioners make reference to the so-called "Operation Anaconda," a military operation carried out from April to June 1999 in the municipalities of San Pablo and Simití by the counter guerrilla commandos and companies under the Fifth Brigade of the National Army. They argue that such an operation is representative of the presence of the National Army in the southern Bolívar region, its covert actions as paramilitaries in civilian dress and confusing the population, as well as the abuse of authority, unlawful taking of the property of others, and other human rights violations against the members of the communities.[FN10]

[FN10] Original petition received at the IACHR on May 14, 2001, pp. 19-26 and petitioners' observations brief of September 17, 2001.

16. As for the facts, the petitioners indicate that on November 28, 1999, Edgar Quiroga and Gildardo Fuentes reached the district of Cerro Azul at approximately 8:00 am. They allege that they were deprived of liberty and taken to a public establishment, where they were questioned.[FN11] In addition, they indicate that Messrs. Quiroga and Fuentes explained to their

captures the legality and legitimacy of their actions in the zone, of which the National Government had full knowledge, through the Ministry of Interior.[FN12]

[FN11] Original petition received at the IACHR on May 14, 2001, p. 4. The petitioners indicate that the search commission that traveled to Cerro Azul said that according to the testimony of some residents, “as he was going through the roadblock the paramilitaries had, Mr. Quiroga was recognized by a young man by the last name of Pareja who was with the armed group.” Petitioners’ observations brief received at the IACHR on August 15, 2006, p. 3.

[FN12] Original petition received at the IACHR on May 14, 2001, p. 4.

17. They indicate that at approximately 4:00 pm Edgar Quiroga and Gildardo Fuentes were forced to board a helicopter – the same one that bombed the zone on November 26, 1999[FN13] -- where they were bound at their feet and hands and beaten with kicks and blows from the butt of a rifle. They indicate that Mr. Quiroga took one blow in the face that broke his mouth and nose, and his eyeglasses.[FN14]

[FN13] See Informe presentado por la Comisión de búsqueda realizada el 1 de diciembre de 1999, cited by the petitioners. Petitioners’ observation brief of September 17, 2001.

[FN14] Informe presentado por la Comisión de búsqueda realizada el 1 de diciembre de 1999, cited by the petitioners, attached to the petitioners’ observations brief of September 17, 2007.

18. On November 29, 1999, the IACHR issued precautionary measures for the purpose of protecting the life and personal integrity of Edgar Quiroga and Gildardo Fuentes. The petitioners indicate that on December 1, 1999, two humanitarian commissions traveled, one to San Blas to inquire into the whereabouts of Messrs. Quiroga and Fuentes[FN15], and another to Cerro Azul, to look into the accounts of the facts of November 28, 1999.[FN16] They indicate that the first engaged in dialogue with the commander of the AUC in southern Bolívar, who assured them that on November 28, 1999, they were in Cerro Azul, but did not engage in combat and did not take Mr. Quiroga or Mr. Fuentes. Nonetheless, they note that on December 4, 1999, the high command of the AUC sent a communication in which it recognized that it was holding Mr. Edgar Quiroga, and stated it was not willing to provide any kind of information; it made no comment about Gildardo Fuentes.[FN17]

[FN15] The petitioners note that this commission was made up of representatives of the Ministry of Interior, the Office of the Human Rights Ombudsperson, the Program for Peace and Development in the Middle Magdalena, and the Church. Original petition received at the IACHR on May 14, 2001, p. 4.

[FN16] The petitioners argue that this other commission was made up of representatives of the Office of the Human Rights Ombudsperson, the Social Solidarity Network, the High Commissioner for Peace, the Ministry of Interior, and several human rights NGOs. Original petition received at the IACHR on May 14, 2001, p. 5.

[FN17] Communication directed to Father Francisco de Roux on December 4, 1999. Original petition received at the IACHR on May 14, 2001, p. 5. See also petitioners' observations brief received at the IACHR on August 15, 2006, p. 5.

19. The petitioners note that on June 4, 2000, the daily newspaper El Espectador published an article reporting that Mr. Quiroga's corpse had been left in La Gabarra, Norte de Santander. In addition, they state that in the context of the precautionary measures issued by the IACHR, the State reported that a commission[FN18] had met with the chief of the AUC, Carlos Castaño Gil, who informed them that Edgar Quiroga "was dead and that his corpse was to be found in some place in La Gabarra, in the Catatumbo region in Norte de Santander." [FN19]

[FN18] The commission was constituted by Monsignor Jaime Prieto, Bishop of the city of Barrancabermeja; Father Francisco de Roux and Myriam Villegas of the Program of Peace and Development in the Middle Magdalena region; Mr. Nelson Caicedo, Secretary General of the Office of the Human Rights Ombudsperson; and the Human Rights Ombudsperson, Mr. José Fernando Castro Caicedo. Original petition received at the IACHR on May 14, 2001, pp. 5 and 6.

[FN19] Petitioners' observations brief received at the IACHR on August 15, 2006, p. 5.

20. The petitioners argue that as stated by witnesses to the facts, Messrs. Quiroga and Fuentes were arbitrarily deprived of their liberty, with no arrest warrant, by members of the National Army, and were ultimately handed over by them to members of paramilitary groups.[FN20] In this connection, they allege that Edgar Quiroga and Gildardo Fuentes were detained by state agents and private persons who operated with their tolerance, collaboration, and acquiescence. They allege that Messrs. Quiroga and Fuentes were not brought before any judicial authority. Therefore, they consider that the State is responsible for violating the right to personal liberty of Edgar Quiroga and Gildardo Fuentes, enshrined in Article 7 of the American Convention.[FN21]

[FN20] In addition, they indicate that on November 26, 1999, Mr. Fuentes had filed a complaint with the Office of the Procurator General of the Nation, alleging violations of human rights committed by the 45th Battalion "Héroes de Majagual" and on its operations carried out with paramilitaries, among them Ancizar Pareja, who according to the testimony of witnesses was the one who handed them over to the armed group that was in Cerro Azul. The complaint indicated: "...the first group of the army took some civilians who are from the Monterrey area and who have worked in Aguaslindas, they were coca harvesters [raspachines], there are [sic] they took them as uniformed soldiers, the name of one of the is Mono ("light-skinned") Parejas, and his name is Ancizar Pareja, in other words the army has him..." Petitioners' observations brief received at the IACHR on August 15, 2006, p. 8.

[FN21] Original petition received at the IACHR on May 14, 2001, p. 26.

21. In addition, they allege that the regime of isolation and prolonged incommunicado detention to which Messrs. Quiroga and Fuentes were subjected, as well as the total absence of news as to their whereabouts, constitutes cruel, inhuman, and degrading treatment for the alleged victims and their family members; accordingly, they consider the State responsible for violating Article 5(1) and 5(2) of the Convention.[FN22]

[FN22] Original petition received at the IACHR on May 14, 2001, p. 27 and petitioners' observations brief received at the IACHR on August 15, 2006, p. 34.

22. The petitioners argue that considering the prolonged passing of time without news as to the whereabouts of Messrs. Quiroga and Fuentes, the context in which the events occurred, as well as the information given by the Commander of the AUC to the authorities, it is foreseeable that Edgar Quiroga and Gildardo Fuentes have been extrajudicially executed, in violation of Article 4(1) of the American Convention.[FN23]

[FN23] Original petition received at the IACHR on May 14, 2001, p. 27.

23. They argue that there was an "intimate connection"[FN24] between the National Army and Police and the paramilitary groups in the region of southern Bolívar, of which the authorities had been duly informed. They allege that despite that, the State did not take actions to break those ties or stop their course of action, indeed having publicly recognized that connection.[FN25] In addition, the petitioners allege that the national government was fully aware of the advance of paramilitarism in southern Bolívar and that it recognized that the judicial and disciplinary mechanisms had been inoperative in terms of bringing a halt to this situation.[FN26] They argue that the State knew the grave danger to the life of Edgar Quiroga, given that as the spokesperson for the mobilization he was included in the program for the protection of social, trade union, and human rights leaders. They allege that said program did not have effective measures of protection, as illustrated by the forced disappearance of Mr. Quiroga.[FN27] Accordingly, they consider that the State has breached its duty to take reasonable measures to prevent human rights violations.[FN28]

[FN24] The petitioners cite Report No. 7/00 of the IACHR, Case 10,337 Amparo Tordecilla, of February 24 2000. Original petition received at the IACHR on May 14, 2001, p. 7.

[FN25] The petitioners cite: "The national government reiterates its political will to prevent and combat the criminal association between some state agents and the paramilitary groups." Public statement by the national government on October 4, 1998, in the context of the agreements between the government and the Regional Roundtable of the Middle Magdalena Region of Permanent Work for Peace. Original petition received at the IACHR on May 14, 2001, p. 8.

[FN26] Original petition received at the IACHR on May 14, 2001, p. 9.

[FN27] Petitioners' observations brief of September 17, 2001, p. 1.

[FN28] See petitioners' observations brief received at the IACHR on August 15, 2006, pp. 24-34.

24. The petitioners allege that the criminal investigation that was opened has been ineffective given that it has not included the responsibility of state agents for the disappearances, arrest warrants have been issued to no avail[FN29], and there is an unwarranted delay. In addition, they consider that the investigation is ineffective, based on the treatment given the declaration by Yesid Fernando Lemus Guzmán, who was a soldier assigned to the Nueva Granada Battalion at the time of the disappearance of the alleged victims, and who said he had participated in the operation that was ordered to disappear Edgar Quiroga and Gildardo Fuentes, indicating that the "Condor" counter guerrilla unit also participated in that operation.[FN30] They indicate that subsequently the prosecutor refrained from issuing an order to detain soldier Lemus, since he retracted what he had said in his statement.[FN31]

[FN29] The petitioners alleged, in February 2002, that the arrest warrant issued for Carlos Castaño did not offer any prospect of effectiveness in terms of justice and reparation, for it was one of 50 outstanding arrest warrants for the paramilitary leader. Petitioners' observations brief received at the IACHR on February 27, 2002 and petitioners' observations brief received at the IACHR on August 15, 2006, p. 13. Carlos Castaño died in 2004.

[FN30] The petitioners also indicate that aspects such as the establishment of battle orders, operations zones, the command responsibility for the "Córdoba" counter guerrilla unit, as well as the possible use of the helicopter of the Nueva Granada Battalion for the transport of Edgar Quiroga and Gildardo Fuentes, have been set aside in the investigation. Petitioners' observations brief received at the IACHR on February 27, 2002.

[FN31] The petitioners indicate, moreover, that as of January 24, 2003, it was learned that Ancizar Pareja Ramírez alias "Mono Pareja," who is related to the investigation as an alleged participant in the disappearance, was detained, and that even though it had been asked that he be linked to the proceeding, he was released. Petitioners' observations brief of June 24, 2003, and petitioners' observations brief received at the IACHR on August 15, 2006, p. 15.

25. With respect to the State's argument regarding the peasant mobilizations in 1996 and 1998, they are not among the facts in the instant case, but are presented for context (infra III B); the petitioners argue that this context is directly and closely related to the reasons for the forced disappearance of Messrs. Quiroga and Fuentes. They consider that they cannot be considered to be isolated from the crime committed, especially mindful that the State learned of those events in timely fashion and did not take any actions to investigate or punish the persons responsible, thereby encouraging the continuation of crimes such as this in that region of Colombia.[FN32]

[FN32] Petitioners' observations brief of September 17, 2007, p. 1.

26. In response to the State's argument that as of the date Messrs. Quiroga and Fuentes were detained there were no movements of the Army in the zone (infra III B), the petitioners counter that it appears in official communications that the Fifth Brigade does have jurisdiction in the municipality of San Pablo and environs, and that from November 23 to December 4, 1999, Company C undertook operations in the municipality of Canta Gallo and San Pablo and company B in Santa Rosa and Simití.[FN33]

[FN33] Communication of December 9, 1999, by official note No. 2052/BR5 B3-375 from the Military Forces of Colombia, National Army, and signed by Brigadier General Martín Orlando Carreño, Commander, Fifth Brigade, sections 4 and 5, cited by the petitioners in their observations brief of September 17, 2007.

27. As for the State's argument regarding the failure of the petitioners to collaborate in the investigations (infra III B), they argue that the burden of proof cannot be assigned to the victims or their family members. They allege that this argument of the State involves affirming that the investigation is not carried out as a legal duty of its own, but as a matter of private interests that depends on the procedural initiative of the victim or his or her family members, or the private production of evidence.[FN34]

[FN34] The petitioners indicate that the elements on the facts of November 28, 1999, have been forwarded to the different government offices in due course. They express their concern that the investigation might be sought to be structured around the testimony of the victims, who didn't see anything, nor were they at the place of the events. Petitioners' observations brief received at the IACHR on February 27, 2002.

28. In addition, the petitioners controvert the State's argument to the effect that all the authorities were alerted to find the disappeared, arguing that through the report of the Departamento Administrativo de Seguridad (DAS) issued two years after the disappearances, it was indicated that they don't have any record or information on the disappearance of Edgar Quiroga and Gildardo Fuentes, which makes one wonder about the effectiveness of the actions taken to guarantee the lives of the disappeared and determine their whereabouts.[FN35] They also allege that judicial activity has been deployed basically to receive testimony from military personnel and public officials, who level serious accusations against the victims.[FN36] They also allege that the investigation has failed to establish the identity of any of the other 300 members of the paramilitary structure related to the facts that are the subject matter of the petition, nor have they been linked to the investigation.[FN37] In this sense, the petitioners argue that the disappearances of Messrs. Quiroga and Fuentes remain in impunity and consider the State responsible for the violation of rights provided for in Articles 8(1), 25(1) and 25(2) of the American Convention.[FN38] In addition, the petitioners allege that the State has breached the obligation to ensure effective observance of the rights and liberties of Edgar Quiroga and Gildardo Fuentes, as well as to clear up the facts of their forced disappearance and establish their

whereabouts; accordingly, they consider the State responsible for violating Article 1(1) of the Convention.[FN39]

[FN35] Official note issued by the DAS on November 16, 2001, attached to the petitioners' observations brief received at the IACHR on February 27, 2002.

[FN36] "... in addition they are inciting the civilian population to join the march, I suppose that Mr. Edgar Quiroga and Gildardo Fuentes ...are the ones responsible for organizing and inciting this march, destabilizing the government and creating social chaos..." Statement given in proceeding 650 of December 3, 1999 by Lt. Col. Jesús María Clavijo Clavijo, in reference to the peasant exodus of Barrancabermeja in 1998. Petitioners' observations brief received at the IACHR on August 15, 2006, p. 18.

[FN37] They allege that in December 1999, Isabel Cristina Bolaños, who intelligence reports described as a person of trust of Carlos Castaño, was arrested by the DAS. They note that in his statement Father Francisco de Roux indicates that he met with Isabel Bolaños in December 1999 and asked her to "use her good offices to save the lives of Gildardo Fuentes and Edgar Quiroga," to which she answered that she "was going to collaborate within her possibilities in the release of those persons, but that the matter was in the hands of Carlos Castaño." They indicate that the Office of the Attorney General never ordered that she give a statement in the proceeding. Petitioners' observations brief received at the IACHR on August 15, 2006, p. 14.

[FN38] Original petition received at the IACHR on May 14, 2001, pp. 27-29. See also petitioners' observations brief of June 24, 2003, and petitioners' observations brief received at the IACHR on August 15, 2006, p. 34.

[FN39] Original petition received at the IACHR on May 14, 2001, p. 30, petitioners' observations brief of September 17, 2001, and petitioners' observations brief received at the IACHR on February 27, 2002.

29. On exhaustion of domestic remedies, the petitioners indicate that on November 29, 1999, Noraida Quiroga, Edgar Quiroga's sister, filed a writ of habeas corpus on behalf of Edgar Quiroga and Gildardo Fuentes before the First Criminal Court of the Barrancabermeja circuit, which was denied on December 2, 1999, arguing that the place of detention was not known. They indicate that the prosecutor merely issued his decision based on the format response given by the commanders, without making visits or searches of military barracks, verifying orders for operations, or other steps to collect evidence.[FN40] In this regard, they consider that the right to an effective remedy, in the terms established in the American Convention, was violated.[FN41]

[FN40] Petitioners' observations brief received at the IACHR on August 15, 2006, p. 23.

[FN41] Writ of habeas corpus attached to the petitioners' observations brief of September 17, 2007. See also petitioners' observations brief received at the IACHR on February 27, 2002, and petitioners' observations brief received at the IACHR on August 15, 2006, p. 18.

30. The petitioners also alleged that on September 29, 2000, an acción de búsqueda (search action) was filed before the Constitutional Court, pursuant to the Law on Forced Disappearance,

which thus far has been ineffective.[FN42] In addition, they indicate that a complaint was lodged with the Office of the Procurator General for the forced disappearance of Edgar Quiroga and Gildardo Fuentes, which was processed under file No. 008-42615-2000 and was archived on April 6, 2001, by the Office of the Procurator General for the Defense of Human Rights.[FN43]

[FN42] Search Action (Acción de Búsqueda) attached to the petitioners' observations brief of September 17, 2001. See also the petitioners' observations brief received at the IACHR on February 27, 2002, and petitioners' observations brief received at the IACHR on August 15, 2006, p. 23.

[FN43] Petitioners' observations brief received at the IACHR on August 15, 2006, pp. 22 and 23.

31. It appears from the petition that Gildardo Fuentes's mother, Victoria Delgado (52), who was to give her testimony to the Office of the Attorney General, was kidnapped for several hours by paramilitary forces in May 2000, who said that "nothing was going to happen to her, that they were only taking her to explain to her clearly all they had done for the disappearance of Gildardo." It is mentioned that the next day her corpse was found along the highway. It should be noted that these facts are the subject matter of petition 699-03, currently being processed before the IACHR.[FN44] In addition, it is mentioned in the petition that Gildardo Fuentes's step-father, Naysir Benítez, who was also to give testimony to the prosecutorial authorities, was assassinated on October 29, 2000, by paramilitaries, and that his brothers were displaced by the paramilitaries who continue operating in the region.[FN45] Accordingly, the petitioners argue that they have been kept from exhausting domestic remedies.[FN46]

[FN44].Petitioners' observations brief received at the IACHR on August 15, 2006, p. 18.

[FN45] Petitioners' observations brief received at the IACHR on February 27, 2002, and petitioners' observations brief received at the IACHR on August 15, 2006, p. 18.

[FN46] Petitioners' observations brief received at the IACHR on August 15, 2006, pp. 18-22.

32. Therefore, based in the ineffectiveness of the investigation and the passing of time, the petitioners consider that the remedies in Colombia have not been adequate or effective in the instant case, accordingly they allege that the exception to the requirement of exhaustion of domestic remedies provided for at Article 46(2)(a), (b) and (c) of the American Convention applies.[FN47] The petitioners argue that without prejudice to this, despite fitting within the exception to the prior exhaustion requirement, they fulfilled that requirement by filing the writ of habeas corpus, which is the suitable remedy for locating disappeared persons.[FN48]

[FN47] Original petition received at the IACHR on May 14, 2001, pp. 30 and 31. See also petitioners' observations brief received at the IACHR on February 27, 2002, and petitioners' observations brief of June 24, 2003.

[FN48] Petitioners' observations brief of September 17, 2001. See also petitioners' observations brief received at the IACHR on February 27, 2002.

B. The State's position

33. The State considers that the facts stated in this petition relate only to the disappearance of Edgar Quiroga and Gildardo Fuentes, and that all other events that refer to the peasant mobilizations of 1996 and 1998 included in the petition were added only as background, to illustrate the context.[FN49]

[FN49] Note EE 46678 of the Ministry of Foreign Relations of Colombia, of December 21, 2001.

34. As for the facts, the State argues that on November 28, 1999, Messrs. Quiroga and Fuentes were kidnapped and taken in helicopter by alleged illegal groups known as autodefensas and that on December 4, 1999, the illegal armed group AUC, by communiqué sent to the Program for Development and Peace of the Middle Magdalena (Programa de Desarrollo y Paz del Magdalena Medio) took credit for the kidnapping Mr. Quiroga.[FN50]

[FN50] Note DDH.GOI/36671/1913 from the Ministry of Foreign Relations of Colombia, of June 30, 2006.

35. In response to the petitioners' claim, the State argues failure to exhaust domestic remedies, considering that there is still an investigation pending that was carried out with due diligence by the authorities, and it counters the petitioners' argument on unwarranted delay alleging that the mere passage of time does not allow one to conclude that one is in the presence of the situation addressed at Article 46(2)(c). In addition, it considers that one cannot argue that the alleged victims have encountered obstacles to accessing domestic remedies, since they have become a civil party[FN51] and have all the powers of a party (procedural subject) in criminal proceedings.[FN52]

[FN51] The State indicates that Mr. Quiroga's mother filed a civil party action accepted by resolution of October 18, 2001. Note DDH.GOI/36671/1913 from the Ministry of Foreign Relations of Colombia, June 30, 2006.

[FN52] Note DDH.GOI/36671/1913 from the Ministry of Foreign Relations of Colombia, June 30, 2006.

36. The State alleges that the delay in the investigation is within the criteria of reasonableness established by the Inter-American Court, which take into account the complexity of the matter,

the procedural activity of the interested party, and the activity of the judicial authorities. In this respect, the State indicates that it took many initiatives to move the investigations forward, and it notes the petitioners' lack of cooperation in the investigations.[FN53] As regards the complexity of the matter, the State notes that the zone in which the facts occurred is characterized by the intensity of the violence, as it is a zone continually disputed by the Ejército de Liberación Nacional (ELN) and the illegal armed groups known as autodefensas, which has made it difficult for the officials in charge of the investigations to move about.[FN54]

[FN53] Note EE 46678 from the Ministry of Foreign Relations of Colombia, of December 21, 2001. The State indicates that as soon as it learned that they were being held, a prosecutor from the Human Rights Unit of the Office of the Attorney General was designated, inquiries were begun, testimony was taken, and inspections were performed. Note DDH.GOI/36671/1913 of the Ministry of Foreign Relations of Colombia, June 30, 2006.

[FN54] Note DDH.GOI/36671/1913 from the Ministry of Foreign Relations of Colombia, June 30, 2006.

37. As for the petitioners' arguments to the effect that Messrs. Quiroga and Fuentes were detained by members of the National Army, the State indicated that this has not been established by documentary or testimonial evidence.[FN55] In this respect, it indicates that the orders and reports of operations of battalions that had jurisdiction in the zone at the time of the facts have been included in the file and that judicial inspections were carried out at the civil aeronautical authority, without finding any information regarding the activities in the area at that time. It states that as to the participation of state agents in the facts, all that appears in the file is hearsay testimony that the detentions of Messrs. Quiroga and Fuentes were carried out by military personnel.[FN56]

[FN55] The State notes that the orders and reports of Army operations in the area indicate that at the time of the events there was no movement of troops to the place where Messrs. Quiroga and Fuentes were taken. In addition, it notes that as regards that argument, there is only one statement by one person who says he was informed by unidentified persons that the taking of the persons was done by military personnel and uniformed persons in Cerro Azul. Note EE.25548 from the Ministry of Foreign Relations, July 17, 2001, pp. 3 and 4.

[FN56] Note DDH.GOI/36671/1913 from the Ministry of Foreign Relations of Colombia, June 30, 2006.

38. The State considers that its action was diligent and that efforts were made within its reach to attain the release of Mr. Quiroga and determine the whereabouts of Mr. Fuentes. It cites the creation of two commissions: one to establish the circumstances of the facts and the other to secure their release. In addition, it notes that contacts were made with the International Committee of the Red Cross (ICRC) and there was permanent contact with the military commanders of the zone to corroborate the initial version regarding the detention by military personnel. In this vein, it argues that the conduct of the State is not responsible because of its due

diligence, thus it considers that there is no responsibility for act or omission of its agents in the facts of the instant case.[FN57]

[FN57] The State also notes that on December 9, the Vice-President of the Republic, Gustavo Bell Lemus, met with Edgar Quiroga's mother and issued a public communiqué rejecting the kidnapping of Messrs. Fuentes and Quiroga. Note DDH.GOI/36671/1913 from the Ministry of Foreign Relations of Colombia, June 30, 2006.

39. As for the criminal proceeding into the kidnappings of Edgar Quiroga Rojas and Gildardo Fuentes, the State indicated that the Human Rights Unit of the Office of the Attorney General handed down a resolution for the preliminary opening of an investigation on November 30, 1999, that on July 10, 2000, it opened the investigation, ordering the linkage in absentia, as determinant person, and the arrest of Carlos Castaño, and on July 17, 2006, an indictment was handed down against him as the alleged determinant person in the crime of aggravated kidnapping with extortion (secuestro extorsivo agravado).[FN58] In addition, it indicated that on August 15, 2001, Yesid Fernando Lemus Guzmán was linked to the proceeding. The State also indicates that two disciplinary investigations were begun, which were joined, and which were archived for lack of merit on April 6, 2001.[FN59] In this respect, the State considers that it has assumed the duty to investigate as its own legal duty in the instant case.[FN60]

[FN58] Annex to petitioners' observation received at the IACHR on August 15, 2006, of August 9, 2006.

[FN59] Note DDH.GOI/36671/1913 of the Ministry of Foreign Relations of Colombia of June 30, 2006.

[FN60] Note DDH.GOI/36671/1913 of the Ministry of Foreign Relations of Colombia of June 30, 2006.

40. With respect to the location of Edgar Quiroga's body, the State indicated that despite the work orders and the searching done, it has not been possible to verify the information about the possible location of Mr. Quiroga's corpse in the region of La Gabarra, in Norte de Santander.[FN61]

[FN61] Note EE 46678 of the Ministry of Foreign Relations of Colombia of December 21, 2001, p. 2.

41. As regards the petitioners' dual argument that they exhausted domestic remedies and on application of the exceptions set forth at Article 46(2) of the Convention, the State notes that it is legally impossible to argue that one has complied with the prior exhaustion requirement provided for Article 46(1) and at the same time invoke the exceptions provided for at Article 46(2).[FN62] In view of all the foregoing, the State asks the IACHR to find the petition inadmissible.[FN63]

[FN62] Note DDH.GOI/36671/1913 of the Ministry of Foreign Relations of Colombia of July 26, 2007, pp. 2 and 3.

[FN63] Note DDH.GOI/36671/1913 of the Ministry of Foreign Relations of Colombia of July 26, 2007, and Note DDH.GOI/36671/1913 of the Ministry of Foreign Relations of Colombia of June 30, 2006.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

42. The petitioners are authorized, in principle, by Article 44 of the American Convention to submit petitions to the Commission. The petition notes as the alleged victims individual persons with respect to whom the Colombian State has undertaken to respect and ensure the rights enshrined in the American Convention. As regards the State, the Commission notes that Colombia has been a state party to the American Convention since July 31, 1973, when it deposited its instrument of ratification. Therefore, the Commission is competent *ratione personae* to examine the petition.

43. In addition, the Commission is competent *ratione loci* to take cognizance of the petition, insofar as petitioners allege violations of rights protected in the American Convention said to have taken place in the territory of Colombia, a state party to that treaty.

44. The Commission is competent *ratione temporis* insofar as the obligation to respect and ensure the rights protected in the American Convention was already in force for the State as of the date on which the facts are alleged to have occurred. The Commission observes that the Inter-American Convention on Forced Disappearance of Persons (hereinafter “Convention on Forced Disappearance”) entered into force for Colombia on December 4, 2005. Therefore, the IACHR is competent *ratione temporis* with respect to the obligation at its Article I(b), considering the continuing nature of the failure to clarify the crime of forced disappearance.

45. Finally, the Commission is competent *ratione materiae*, because the petition sets forth possible violations of human rights protected by the American Convention and the Convention on Forced Disappearance.

B. Admissibility requirements

1. Exhaustion of domestic remedies

46. Article 46(1)(a) of the American Convention requires the prior exhaustion of remedies available in the domestic jurisdiction in keeping with generally recognized principles of international law, as a requirement for the admission of claims alleging a violation of the American Convention.

47. Article 46(2) of the Convention provides that the requirement of prior exhaustion of domestic remedies does not apply when:

- a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

According to the Rules of Procedure of the Commission, like those of the Inter-American Court, whenever a State alleges failure to exhaust domestic remedies, it bears the burden of showing that the domestic remedies not exhausted are “suitable” to cure the violation alleged; in other words, that the operation of those remedies is suitable for protecting the legal situation that has been infringed.[FN64] According to the case-law of the inter-American system’s organs, habeas corpus is one of the remedies suitable for determining the whereabouts of a disappeared person.[FN65]

[FN64] I/A Court H.R., I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988. Series C No. 4, para. 64.

[FN65] I/A Court H.R., Caballero Delgado and Santana Case. Preliminary Objections. Judgment of January 21, 1994. Series C No. 17, para. 64.

48. In the instant case the State alleges that the petition does not satisfy the requirement of prior exhaustion of domestic remedies, provided for in Article 46(1)(a) of the American Convention, as there is an investigation pending. The petitioners allege that they exhausted domestic remedies by filing a writ of habeas corpus, but that in addition, the exception provided for at Article 46(2)(a) and (c) applies, since they have been hindered from exhausting domestic remedies and as there is an unwarranted delay in the proceedings.

49. First, one must clarify the domestic remedies that must be exhausted in the instant case. The Inter-American Court has indicated that only remedies suitable for curing the violations allegedly committed. Adequate domestic remedies are

those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable.[FN66]

[FN66] I/A Court H.R., I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988. Series C No. 4, para. 63.

50. The Commission's case-law recognizes that whenever a crime is committed that should be prosecuted on the prosecutor's own initiative, the State has the obligation to promote the give impetus to the criminal proceeding to its final consequences[FN67] and that, in those cases, this is the suitable means for clarifying the facts, prosecuting the persons responsible, and establishing the corresponding criminal sanctions, in addition to making possible other forms of monetary reparation. The Commission considers that the facts alleged by the petitioners in the present case involve the alleged violation of fundamental, non-derogable rights, such as the right to life and to humane treatment, that translate, in the domestic legislation, into offenses that can be prosecuted at the initiative of the prosecutorial authorities, and that therefore it is this process, pushed by the State itself, that should be considered for the purposes of determining the admissibility of the claim.

[FN67] Report N° 52/97, Case 11,218, Arges Sequeira Mangas, Annual Report of the IACHR 1997, paras. 96 and 97. See also Report N° 55/97, para. 392. Report N° 62/00, Case 11,727, Hernando Osorio Correa, Annual Report of the IACHR 2000, para. 24.

51. In view of the parties' positions and the circumstances of this case, the IACHR considers it pertinent, in addition, to determine the purpose of the claim presented. The Commission considers that the purpose of this petition refers specifically to the events related to the disappearance of Edgar Quiroga and Gildardo Fuentes and aspects related to the investigations of the circumstances in which that disappearance took place, i.e., the failure to clarify the whereabouts of the alleged victims and, eventually, the failure to hand over their remains to their families, and the impunity for the alleged disappearance, as the persons responsible have not been prosecuted.

52. In the instant case, after the events of November 28, 1999, on November 29 the IACHR issued precautionary measures on behalf of Edgar Quiroga and Gildardo Fuentes. In addition, the family members of the disappeared filed a writ of habeas corpus on November 29, 1999, before the First Criminal Court of the Barrancabermeja circuit, which was denied on December 2, 2000. On December 1, 1999, two humanitarian commissions went to Cerro Azul and San Blas to verify the versions of the facts and to inquire into the whereabouts of Messrs. Quiroga and Fuentes. On September 29, 2000, an acción de búsqueda (search action) was filed before the Constitutional Court, based on the Law on Forced Disappearance, which yielded no results.

53. In the criminal proceedings initiated into the kidnappings of Messrs. Quiroga and Fuentes, the Human Rights Unit of the Office of the Attorney General handed down a resolution for a preliminary inquiry on November 30, 1999, and on July 10, 2000, it opened an investigation ordering that Carlos Castaño be ordered linked as a person in absentia in his capacity as determinant person, and his arrest.[FN68] On February 17, 2006, the Office of the Attorney General handed down an indictment against Carlos Castaño for the alleged crime of aggravated kidnapping with extortion (secuestro extorsivo agravado). In addition, on August 15, 2001, the soldier Yesid Fernando Lemus Guzmán was linked to the process; the prosecutor refrained from issuing a detention order in his case. Moreover, the complaint filed before the

Office of the Procurator General of the Nation gave rise to two disciplinary investigations, which were joined and archived for lack of merit on April 6, 2001.

[FN68] Note DDH.GOI/36671/1913 of the Ministry of Foreign Relations of Colombia, June 30 2006.

54. The Commission considers that given the characteristics of this case, the victims' next-of-kin have exhausted habeas corpus as a suitable remedy, and have recurred to the other means available to them to judicially clarify the whereabouts the alleged deaths of Edgar Quiroga and Gildardo Fuentes. While habeas corpus is a suitable remedy with respect to the right to personal liberty, the petitioners are authorized to pursue other remedies to seek redress in relation to all the aspects of the situation alleged. With respect to these remedies, they allege a continuing denial of justice. The Commission notes that the facts that are the subject of the case occurred on November 28, 1999, and that almost seven years after the fact, the whereabouts of Edgar Quiroga and Gildardo Fuentes are still unknown. In addition, the criminal proceeding still pending resolution was initiated on November 30, 1999, and the circumstances of the disappearances are still unknown, and no responsibilities have been determined nor have the perpetrators of the facts alleged been punished, which implies an unwarranted delay in the terms of Article 46(2)(c) of the American Convention, and therefore, the petitioners should be excepted from the requirement to exhaust domestic remedies before having recourse to the inter-American system in search of protection.

55. Invoking the exceptions to the prior exhaustion rule provided for in Article 46(2) of the Convention is closely linked to the determination of possible violations of certain rights enshrined in it, such as the guarantees of access to justice. Nonetheless, Article 46(2), given its nature and purpose, is a norm with autonomous content vis-à-vis the substantive provisions of the Convention. Therefore, the determination as to whether the exceptions to the prior exhaustion rule are applicable to the case in question should be done prior to and separate from the analysis of the merits, as it depends a different standard of appreciation than that used to determine the possible violation of Articles 8 and 25 of the Convention. It should be clarified that the causes and effects hindering the exhaustion of domestic remedies will be analyzed in the report the Commission adopts on the merits of the controversy, so as to verify whether there have been violations of the American Convention.

2. Time period for submitting the petition

56. The American Convention establishes that for a petition to be admissible by the Commission, it must be submitted within six months from the date on which the person allegedly harmed has been notified of the final decision. In the claim under analysis, the IACHR has established the application of the exceptions to the prior exhaustion rule in keeping with Article 46(2)(c) of the American Convention. In this respect, Article 32 of the Commission's Rules of Procedure establishes that in those cases in which the exceptions to the prior exhaustion rule apply, the petition must be submitted within a term which, in the Commission's view, is

reasonable. To that end, the Commission should consider the date on which the alleged violation of rights occurred and the circumstances of each case.

57. In the instant case, the petition was received on May 14, 2001, the facts that are the subject matter of the claim occurred on November 29, 1999, and their effects in terms of the alleged lack of results of the administration of justice continue to the present day. Therefore, in view of the context and characteristics of the present case, the Commission considers that the petition was submitted within a reasonable time, and that it should be considered to satisfy the admissibility requirement regarding the time of submission.

3. Duplication of procedures

58. It does not appear from the record that the subject matter of the petition is pending before another international procedure, or that it reproduces another petition already examined by this or any other international body. Therefore, the requirements established in Articles 46(1)(c) and 47(d) of the Convention should be considered satisfied.

4. Characterization of the facts alleged

59. Given the elements of fact and of law presented by the parties and the nature of the matter presented to it, the IACHR finds that in the present case one should establish that the petitioner's allegations relating to the alleged violation of the rights to life, humane treatment, personal liberty, judicial protection, and a fair trial tend to establish violations of the rights protected at Articles 4(1), 5(1), 5(2), 7, 8(1), and 25 in conjunction with Article 1(1) of the American Convention.

60. The IACHR, in application of the principle *iura novit curia*, considers that the facts could characterize violations of Article 3 of the American Convention and Article I(b) of the Inter-American Convention on Forced Disappearance of Persons, given the continuing nature of the failure to clarify the crime of forced disappearance. As it is not apparent that these aspects of the claim are unfounded or out of order, the Commission considers that the requirements established at Articles 47(b) and (c) of the American Convention have been satisfied.

V. CONCLUSIONS

61. The Commission concludes that it is competent to examine the claims presented by the petitioner on the alleged violation of Articles 3, 4(1), 5(1), 5(2), 7, 8(1), and 25, in conjunction with Article 1(1) of the American Convention and Article I(b) of the Convention on Forced Disappearance of Persons, and that they are admissible, in keeping with the requirements established in Articles 46 and 47 of the American Convention.

62. Based on the arguments of fact and law set forth above, and without that representing any prejudgment of the merits,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To find the instant case admissible in relation to Articles 3, 4(1), 5(1), 5(2), 7, 8(1), and 25, in conjunction with Article 1(1) of the American Convention and Article I(b) of the Convention on Forced Disappearance of Persons.
2. To notify the Colombian State and the petitioner of this decision.
3. To continue with the analysis of the merits.
4. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 15th day of the month of October, 2007.
(Signed): Florentín Meléndez, President; Paolo G. Carozza, First Vice-President; Víctor E. Abramovich, Second Vice-President; Evelio Fernández Arévalos, Sir Clare K. Roberts, and Freddy Gutiérrez, Commissioners.