Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 4/08; Petition 619-00
Session:	Hundred Thirty-First Regular Session (3 – 14 March 2008)
Title/Style of Cause:	Jesus Vera Roncal, Daniel Zelada Abanto and Evaristo Galvez Cardenas v. Peru
Doc. Type:	Decision
Decided by:	Chairman: Paolo Carozza; First Vice-Chairwoman: Luz Patricia Mejia Guerrero; Second Vice-Chairman: Felipe Gonzalez; Commissioners: Florentin Melendez, Paulo Sergio Pinheiro, Clare K. Roberts.
Dated:	4 March 2008
Citation:	Vera Roncal v. Peru, Petition 619-00, Inter-Am. C.H.R., Report No. 4/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1 (2008)

I. SUMMARY

1. On November 29, 2000, the Inter-American Commission on Human Rights (hereinafter "the Commission" or the "IACHR") received a petition lodged by Jesús Vera Roncal, Daniel Zelada Abanto, and Evaristo Gálvez Cárdenas (hereinafter "the petitioners" or "the presumed victims") alleging that the Republic of Peru (hereinafter "Peru," "Peruvian State" or "State") is responsible for the unlawful termination of the positions they held at the Sociedad de Beneficencia de Lima Metropolitana [Metropolitan Lima Welfare Society].

2. The petitioners allege that the State is responsible for violation of the rights to a fair trial, judicial protection, and the progressive development of social security, established in Articles 8, 25, and 26 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"); the latter violation is considered in relation to Article XIV of the American Declaration of the Rights and Duties of Man (hereinafter the "Declaration" or "the American Declaration"), to the detriment of the alleged victims. The petitioners also consider the State responsible for violation of its general obligation to respect and guarantee such rights, stipulated in Article 1.1 of the Convention.

3. The State, for its part, requests that the petition under consideration be declared inadmissible, on the grounds that: i) the petitioners have not complied with the requirement established in Article 46.1.b of the American Convention, which requires the petition to be lodged within a period of six months from the date on which the party alleging violation of his or her rights was notified of the final judgment; and ii) the petition does not state facts that tend to establish a violation of the rights guaranteed by the American Convention, pursuant to Article 47.b. On this point, the State indicated that the petitioners did not refer to articles of the

Convention when they initiated the petition process. Moreover, the State claims that they filed a legal action with the IACHR in order for it to act as a high court and review a judgment by the Supreme Court of Justice of Peru that had acquired the status of res judicata and was issued in accordance with due legal process and in compliance with the pre-established provisions of Peruvian legislation.

4. In this report, after examination of the available information in light of the American Convention, the Commission concludes that the petition was not presented within the allowed period of six months from the date on which the parties whose rights were allegedly violated were notified of the final judgment, pursuant to the requirements of Article 46.1.b of the Convention. The Commission has decided to notify the State and the petitioners of this report, to publish this decision and include it in its Annual Report to the OAS General Assembly.

II. PROCESSING BEFORE THE COMMISSION

5. On November 29, 2000, the Commission received a petition lodged by Jesús Vera Roncal, Daniel Zelada Abanto, and Evaristo Gálvez Cárdenas. On February 21, 2002, and on April 4, 2005, the petitioners submitted additional information pertaining to their complaint.

6. On July 5, 2005, the IACHR forwarded the petition to the State, in accordance with the rules in effect at the time. On September 16, 2005, the State requested that the IACHR grant it an extension for the presentation of its observations. On September 29, 2005, the IACHR granted the State an extension of one month.

7. On December 20, 2005, the IACHR repeated its request to the State to submit the relevant observations. On May 23, 2007, the State presented its position on the petition. On August 6, 2007, the IACHR transferred the State's response to the petitioners, granting them one month to submit any observations they deemed appropriate. On August 30, 2007, the petitioners submitted their observations on the Government's response. On September 14, 2007, the IACHR forwarded to the State the response of the petitioners, granting them one month to submit any observations they deemed pertinent. On November 7, 2007, the State commented on the response of the petitioners. On November 7, 2007, the IACHR forwarded the information submitted by the State to the petitioners.

8. In a brief received by the Executive Secretariat on December 4, 2007, the petitioners presented additional information, which was forwarded to the State on December 18, 2007. The State presented its observations in a brief received on January 25, 2008. The IACHR transferred the relevant parts of that brief to the petitioners on January 31, 2008.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

9. The petitioners allege that they were working as stable, permanent, appointed civil servants in the Sociedad de Beneficencia de Lima Metropolitana [Metropolitan Lima Welfare Society] in the positions of office worker, dispatcher, and gardener. They allege that on

September 23, 1991, by Presidential Resolution No.151-91-P/SBLM, published in the official newspaper "El Peruano," on September 25, 1991, they were dismissed from their jobs without prior notice, on the presumed grounds of redundancy and elimination of their positions.

10. The petitioners contend that the termination occurred in violation of the provisions of Article 228 of the Public Sector Budget Law[FN1] and Articles 224 and 225 of the 1990 Budget Law.[FN2] According to the petitioners, these government laws establish that the following procedure must be followed in termination of posts:

1. Relocation within the same company.
2. In the event relocation is impossible, the employee must enter the Skill Acquisition and Training Program in the National Institute of Civil Service within a period of 60 days.
3. Up to eight months following completion of the Skill Acquisition and Training Program the worker may choose to fill a vacancy in any of the country's organizations.
4. Should the aforementioned procedures not be followed, the employee may resign from the civil service, which will not affect his collection of social benefits, and he or she will be eligible to collect special compensation equivalent to ten full monthly salaries.

[FN1] The petitioners cite Law No. 25303.
[FN2] The petitioners cite Legislative Decree No. 556.

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11. The petitioners argue that their right to due administrative process was not respected, in view of the State's failure to follow the protocol pre-established by government laws regulating this type of termination of employment. They allege that they took administrative steps to be reinstated, but were unsuccessful. The petitioners add that following the negative response they received through government avenues, they resorted to legal ones, where, after seven years of procedures, and a large number of null or invalid proceedings for which the court was responsible, their claims were denied.

12. In this regard, the petitioners indicate that the Supreme Court of Justice violated their right to a fair trial by endorsing the application of a lower-ranking legal provision, in breach of a binding, government law. More specifically, the petitioners maintain that the Supreme Court of Justice denied their petition on the grounds that Supreme Decree No.122-91-PCM[FN3] was applicable to them, and should prevail over application of the Public Sector's Budget Law and the 1990 Budget Law. According to the petitioners, this decision was in violation of Article 236 of the Constitution, which establishes that in the event of incompatibility or conflict between two laws, a judge must favor the higher-level law.

[FN3] The petitioners cite Supreme Decree No. 122-91-PCM – "Stipulates the scope of the law that regulates termination of redundant personnel in the public sector (07-26-91)." This Decree established in its Article 1:
Article 1º- It is established that, in view of its legal ranking, Supreme Decree No. 004-91-PCM suspends all preceding legal provisions that established procedures governing termination of

redundant personnel in Public Sector entities, and especially those procedures established in Articles 224 and 225 of Legislative Decree No. 556 and in Article 228 of Law 25303.
Consequently, it is clarified that, in accordance with Article 5 of Supreme Decree No. 004-91-PCM, personnel declared to be redundant, in accordance with the provisions specified herein, may be terminated without requiring compliance with the Training and Relocation Programs referred to in the provisions listed at the end of the preceding paragraph, and are only entitled to payment of the special benefit of ten (10) full monthly salaries, as stipulated in this Article, without prejudice to applicable social benefits in accordance with the law.
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13. By virtue of the above-mentioned facts, the petitioners allege that the State, to their detriment, failed to comply with the obligation established in Article 26 of the American Convention to respect and protect economic, social and cultural rights, considered in relation to Article XIV of the American Declaration of the Rights and Duties of Man regarding the right to work. Additionally, the petitioners maintain that the State violated their right to due process by not applying the necessary formalities in relation to their dismissals.

14. As for compliance with the admissibility requirements of the petition, the petitioners allege that they pursued a legal avenue through adversarial administrative action, which was decided in the first instance by the First Labor Tribunal of Lima, and then taken to the Supreme Court of Justice. They report that on March 7, 2000, the Supreme Court ruled against them, and that in view of this ruling, they filed a motion for clarification and interpretation on May 5, 2000. According to the petitioners, this motion was declared without merit in a judgment by the Supreme Court on May 9, 2000, of which they were notified on October 17, 2000. In view of this sequence of legal action, the petitioners allege that with the judgment of the Supreme Court of May 9, 2000, which they received notice of on October 17, 2000, the remedies under domestic law were exhausted. Consequently, they contend that in calculating the six month term granted for presentation of petitions, it is appropriate also to consider the judgment that declared the motion for clarification and interpretation to be without merit, a judgment of which they were notified on October 17, 2000.

B. Position of the State

15. In its observations on the petition, the State referred to three issues: i) failure to comply with the requirement established in Article 46.1.b of the Convention; ii) failure of the petition to set forth facts that characterize a violation of the rights protected by the American Convention; and, iii) which treaties can be considered within the field of competence of the Commission.

16. Regarding the first issue, the State argues that in accordance with the American Convention and IACHR practices, in order for a petition to be admissible, it must be lodged within six months of the date on which the party alleging violation was notified of the final judgment. In this case, the State points out that the judgment that should be used to calculate the six month period is the judgment issued by the Supreme Court of Justice of Peru on March 7, 2000, of which the petitioners were notified on April 13, 2000.

17. The State alleges that this decision was the "final decision" because in it the Supreme Court ruled on the judgment issued by the lower court, based on its review of the merits of the case. The State observes that pursuant to domestic legislation, this decision by the higher court acquired the quality of res judicata, since the Single Ordered Text of the Organic Law of the Judiciary establishes that "decisions handed down by a higher court constitute res judicata. They may be challenged only in the cases stipulated by the law."[FN4]

[FN4] The State cites Supreme Decree No. 017-93-JUS, Single Ordered Text of the Organic Law of the Judiciary, Article 11.

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18. According to the State, the motion for clarification and interpretation referred to by the petitioners may not be considered as the "final judgment" for the purposes of calculating the time period referred to in Article 46.1.b of the Convention, because "this is not a remedy that allows judges to settle a matter with equity, as would be the case in a motion effectively challenging the prior decision [recurso impugnatorio]."[FN5] On the contrary, the motion for clarification and correction of decisions, which is regulated by Chapter XIII of the Code of Civil Procedure, may not alter the substantive content of the final decision.[FN6] Consequently, the State contends, the motion alleged by the petitioners in calculating the six-month rule was not the appropriate or adequate one, and therefore it was not necessary that the petitioners exhaust it before petitioning the inter-American system.

[FN5] The State indicates that, according to the Code of Civil Procedure, the following motions are considered as recursos impugnatorios:: i) recurso de reposición [appeal requesting reversal of a court's own decision]; ii) recurso de apelación [[motion for appeal]; iii) recurso de casación [appeal to a higher court to reverse a lower court decision], and, iv) recurso de queja [appeal in the event a lower court judge refuses or delays the filling of an appeal].
[FN6] The provision cites establishes the following:
Article 406.- Clarification.-
Judges may not alter decisions once notification of them has been effected. However, before the decision causes final judgment, either by order of the judge or at the request of the party, any obscure or doubtful concept expressed in the reasoning part of the judgment or that influences it may be clarified. Such clarification may not alter the substantive content of the decision. A petition for clarification shall be decided without formal proceedings. A decision denying such a petition may not be challenged.

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19. Regarding the second issue, the State alleges that the incidents related by the petitioners do not constitute a violation of any kind under the American Convention. The State points out that the petitioners had the opportunity to have recourse to the judiciary to uphold their presumed violated rights, and that the case was processed judicially and in accordance with pre-established legislation and observance of the rules of due process. The State contends that the petitioners brought adversarial administrative action before the court requesting that the administrative resolution that resulted in the termination of their employments be declared null and void. This

petition was declared without merit by the First Labor Tribunal of the Superior Court of Justice in Lima, because, among other reasons, it was of the view that upon collecting their social benefits the petitioners indicated their recognition of the termination of the labor relationship, as provided for by Peruvian law.

20. On these grounds, the State maintains that the petitioners had judicial remedies available to defend their allegedly violated rights. According to the State, the fact that the petitioners did not obtain favorable results does not imply an automatic violation of the precepts established in the American Convention.

21. Finally, the State contends that in the case under examination, the petitioners alleged violation of Article 26 of the American Convention, thereby extending the competence of the IACHR to the right to work protected by the American Declaration. However, in the opinion of the State, according to Articles 33, 44, 47.b, and 48 of the American Convention, the competence of the IACHR may not be extended to cover the alleged violation of Article XIV of the American Declaration pertaining to work.

22. The State further argues that the right to work does not fall within the competence of the IACHR based on the Additional Protocol to the Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, which states in its Article 19.6 that the system of individual petitions is applicable only in cases of violation of Article 8.a and Article 13. Moreover, the right to work is not included in the American Convention for the purpose of the processing of individual petitions in the inter-American system. Consequently, the State alleges that the petition is inadmissible under the provisions of Article 47.b of the Convention, and "must therefore be declared inadmissible."

IV. ANALYSIS ON ADMISSIBILITY

A. The Inter-American Commission's competence ratione materiae, ratione personae, ratione loci and ratione temporis

23. The petitioners are authorized by Article 44 of the American Convention to lodge petitions with the Commission. The petition states that Jesús Vera Roncal, Daniel Zelada Abanto, and Evaristo Gálvez Cárdenas are the presumed victims, and that the State of Peru undertook the obligation to respect and guarantee their rights as established in the American Convention. Peru has been a state party to the American Convention since July 28, 1978, the date on which it deposited its instrument of ratification. Therefore the Commission has competence ratione personae to examine the petition.

24. Moreover, the Commission has competence rationae loci, inasmuch as, the petition alleges violations of the rights protected by the American Convention that took place within the jurisdiction of the State. The Commission has competence ratione temporis to study the complaint, since the obligation to respect and guarantee the rights protected in the American Convention was already binding upon the State at the time the facts alleged in the petition were said to have occurred.

25. Similarly, the Commission finds that the petitioners allege violations of the rights established in Articles 8 and 25 of the American Convention. Inasmuch as these allegations refer to rights protected by the American Convention, the Commission notes that it has ratione materiae to examine them.

26. Finally, in the instant case, the CIDH notes that the petitioners allege that the State failed to comply, to their detriment, with the obligation established by Article 26 of the American Convention to respect and protect economic, social, and cultural rights, in relation to Article XIV of the American Declaration, regarding the right to work. According to the State, apropos of the competence ratione materiae of the IACHR to examine the petition, "the right to work protected in Article XIV of the American Declaration of the Rights and Duties of Man may not be extended through Article 26 of the American Convention for the purpose of establishing the competence of the IACHR, in accordance with Articles 44, 33, 47.b, and 48 of the American Convention." In this regard, the Commission reiterates that failure to comply with obligations based on Article 26 of the Convention may be reported through the process of individual petitions established in Articles 44 and subsequent articles of the American Convention.[FN7] Thus, the Commission has ratione materiae to examine alleged violations of this Article.

[FN7] IACHR, Report N° 29/01, Case 12249, Jorge Odir Miranda Cortez et al, El Salvador, March 7, 2001.

B. Exhaustion of Domestic Remedies and Deadline for Lodging the Petition

27. Article 46.1 of the American Convention states that in order for a petition lodged with the Inter-American Commission pursuant to Article 44 of the Convention to be admissible, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. The requirement of prior exhaustion applies when the remedies are actually available in the national system and are adequate and effective to correct the alleged violation. On this point, Article 46.2 specifies that the requirement 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.

28. Under the principles of international law, as reflected in the case law established by the Inter-American Commission and the Inter-American Court, a State may waive invocation of this rule, either tacitly or expressly.[FN8] Secondly, to be timely the objection asserting failure to exhaust the remedies under domestic law must be made during the early stages of the proceedings with the Commission; if not the presumption will be that the interested State has waived its right to enter that objection.[FN9] Thirdly, in keeping with the principle of the burden of proof, the State that alleges a failure to exhaust the remedies under domestic law must show what domestic remedies remain to be exhausted and provide evidence of their effectiveness.[FN10]

[FN8] IACHR, Report Nº 69/05, Petition 960/03, Admissibility, Iván Eladio Torres, Argentina, October 13, 2005, par. 42; I/A Court H.R., Case of Ximenes López. Preliminary Objection. Judgment of November 30, 2005. Series C No. 139, par. 5; Case of the Moiwana Community. Judgment of June 15, 2005. Series C No. 124, par. 49; and the Case of the Serrano Cruz Sisters. Preliminary Objections. Judgment of November 23, 2004. Series C No. 118, par. 135.

[FN9] I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66, par. 53; Castillo Petruzzi et al. Case. Preliminary Ojbections. Judgment of September 4, 1998. Series C No. 41, par. 56, and Loayza Tamayo Case. Preliminary Objections. Judgment of January 31,1996. Series C No. 25, par. 40. The Commission and the Court have written that "the first stages of the proceeding" must be understood to mean "the admissibility stage of the proceeding before the Commission, in other words, before any consideration of the merits. […]." See, for example, IACHR, Report Nº 71/05, Petition 543/04, Admissibility, Ever de Jesús Montero Mindiola, Colombia, October 13, 2005, citing I/A Court H.R., Case of Herrera Ulloa. Judgment of July 2, 2004. Series C No. 107, par. 81.

[FN10] IACHR, Report No. 32/05, Petition 642/03, Admissibility, Luis Rolando Cuscul Pivaral and other persons affected by HIV/AIDS, Guatemala, March 7, 2005, paragraphs 33-35; I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66, par. 53; Durand and Ugarte Case. Preliminary Objections. Judgment of May 28, 1999. Series C No. 50, par. 33; and Cantoral Benavides Case. Preliminary Objections. Judgment of September 3, 1998. Series C No. 40, par. 31.

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29. As for compliance with the requirement of prior exhaustion of the remedies under domestic law stipulated in Article 46.1.a of the American Convention, the petitioners allege that they brought and exhausted an adversarial administrative action before court that resulted in a decision issued by the Tribunal of Constitutional and Social Law of the Supreme Court of Justice on March 7, 2000. The petitioners indicate that they filed a motion for clarification and interpretation of that decision on May 5, 2000, which was decided by the highest court on May 9, 2000, and of which the petitioners were notified on October 17, 2000. In summary, the petitioners argue that the decision that exhausted remedies in the domestic legal system was the Supreme Court ruling on the motion for clarification and interpretation, of which they were notified on October 17, 2000. With that decision, the petitioners contend, the domestic remedies should be understood as exhausted, and that is the date from which the period for lodging a petition, as established in Article 46.1 of the Convention, should be calculated.

30. The State, on the other hand, points out that the appeal for clarification and interpretation should not be regarded as the "final judgment" for the purposes of calculating the period referred to in Article 46.1.b of the Convention, since it is not "a motion that permits judges to resolve a matter equitably, as an appeal effectively challenging a prior judgment would be." As a result, the State holds that the remedies under domestic law should be understood as exhausted with the issuance of the final judgment by the Supreme Court of Justice on March 7, 2000.

31. Here it should be pointed out that the IACHR notes that the petitioners did not challenge this argument made by the State. They argued that the Supreme Court had unjustifiably delayed its judgment on the clarification and interpretation motion, and so that judgment was subject to the provisions of Article 46.2.c of the American Convention. In effect, the petitioners did not submit arguments to justify why they considered that motion as a suitable remedy for resolving the situation of legal infringement.

32. As a result, in order to determine if the requirements of prior exhaustion of domestic remedies and lodging of the petition within six months were met in the present case, it must be determined if the motion in question (motion for clarification and interpretation) was adequate and effective to remedy the alleged violation. Once the adequate remedy for the case in point is determined, then the date of notification of that remedy must be considered in relation to the date on which the petition was lodged with the Commission, to determine if the six month requirement was met.

33. On this point, the Commission notes that in accordance with applicable Peruvian procedural law, the "motion for clarification" does not have the nature of an effective challenge, since the judge is not in a position to alter the substantive content of a decision by virtue of that remedy. The motion is limited to providing the parities an opportunity to clarify an unclear or questionable concept expressed in the operative part of the judgment that brings the court proceeding to an end. This is deduced from pertinent legislation[FN11] and from the peaceful doctrine established both by the Supreme Court of Justice and by the Peruvian Constitutional Court.[FN12].

[FN11] See Article 406, Code of Civil Procedure, Civil, Supra footnote 6.
[FN12] See Constitutional Court, Decision of December 17, 2004, EXP. N.° 1124-2002-AA/TC; where the Court states that : "although the appellant refers to his motion as "clarification," it can be deduced from the brief submitted that appellant plainly seeks reconsideration of the judgment, which is incompatible with the purposes of clarification, which is only to clarify a concept or correct any material error that may have occurred."

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34. In effect, the Commission notes that the motion referred to by the petitioners did not have the legal capacity to reverse the situation alleged as a violation. Since the Supreme Court of Justice issued a decision on the merits of the matter by denying the claims of the petitioners, the motion for clarification was not a suitable remedy for pursuing the legal decision sought by the petitioners, namely to appeal or challenge the decision. The Commission has stated on previous occasions that remedies that are inappropriate to resolve a legal situation alleged as a violation must not be taken into account for the purposes of calculating the six month period referred to in Article 46.1.b of the Convention.[FN13]

[FN13] IACHR, Report Nº 32/98, Case 11507, Anselmo Ríos Aguilar, Mexico, May 5, 1998, paras. 25 ff., IACHR, Report Nº 80/05, Petition 12397, Inadmissibility, Hélio Bicudo, Brazil, October 24, 2005, paras. 29 ff.

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35. This being the case, the Commission point out that notification of the judgment of the Supreme Court on the merits of the case was sent to the petitioners on April 11, 2000, and that the petition was received by the Executive Secretariat of the Commission on November 29, 2000, that is to say, subsequent to the expiration of the period established in Article 46.1.b of the Convention.

36. For the aforesaid reasons, the Commission considers that the motion for "clarification an interpretation" filed by the petitioners with the Supreme Court of Justice of Peru on May 5, 2000 was inappropriate to rectify their situation of legal infringement. The Commission further considers that this action is not a jurisdictional remedy in the sense of Article 46.1.a of the American Convention.

37. Consequently, the petition for clarification filed by the petitioners did not delay the beginning of the period of six months stipulated in Articles 46.1.b of the American Convention and Article 32 of the IACHR's Rules of Procedure, which must be calculated as of the final judgment, dated March 7, 2000.

38. The IACHR concludes that the domestic remedies were exhausted, but the petition was lodged after the period of time stipulated in the American Convention. Once the Commission determines that the case is inadmissible due to failure to comply with one of the requirements stipulated in this Convention, it is not necessary to consider the remaining requirements.

C. Conclusions

39. The Inter-American Commission determines that the petition is inadmissible, in accordance with Article 47.1 of the American Convention. Based on the foregoing arguments of fact and of law,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present petition inadmissible.
2. To notify the State and the petitioners of this decision.
3. To publish this report and include it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 4th day of the month of March, 2008. (Signed): Paolo G. Carozza, Chairman; Luz Patricia Mejía Guerrero, First Vice-Chairwoman; Felipe González, Second Vice-Chairman; Florentín Meléndez, Paulo Sérgio Pinheiro, and Clare K. Roberts, members of the Commission.