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Decided by:	Chairman: Dr. Alvaro Tirado Mejía; First Vice Chairman: Dean Claudio Grossman; Second Vice Chairman: Ambassador John S. Donaldson Members: Dr. Leo Valladares Lanza; Dr. Patrick Robinson; Dr. Oscar Luján Fappiano; Professor Michael Reisman
Dated:	07 February 1995
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I. BACKGROUND

1. Context

At 10:00 p.m. on April 5, 1992, television stations in Peru broadcast a recorded message from the President of the Republic, Alberto Fujimori, wherein he announced to the public that he had suspended the Constitution, had dissolved the Senate and the House of Deputies and had taken over legislative powers. He also declared that the Judiciary, the National Judiciary Council and the Tribunal of Constitutional Guarantees were in recess.

As President Fujimori was addressing the Nation, hundreds of soldiers and armored tanks were deployed throughout Lima to take over the Congress Building, the Palace of Justice and the offices of several unions and political parties. The speakers of both houses of Congress, congressmen and leaders of the opposition political parties were placed under house arrest.

This was the setting for the events that prompted the petition filed by former President Alan Garcia Perez, alleging violations of rights protected by the American Convention on Human Rights in his own case and in the case of his wife and children.

II. FILING WITH THE COMMISSION

On April 15, 1992, the Inter-American Commission on Human Rights received a petition that denounced that on April 5 of that year, Army soldiers under the command of General Nicolas de Bari Hermoza Rios had forced their way into the home of former President Alan Garcia Perez with "a superior order of arrest against him". The petitioners further denounced that in the assault on the home of the former President, rights protected by the American Convention had been violated. Not only were Dr. Alan Garcia Perez' life and personal safety threatened, but his wife and children were held incommunicado and under house

arrest and a considerable number of private family documents were removed.

On the very day it received the petition, the Inter-American Commission on Human Rights instituted the processing of the case and referred the pertinent parts of the petition to the Government of Peru, asking that it provide additional information on the facts denounced therein and any other information that would enable the Commission to determine whether the remedies of domestic law had been exhausted in the instant case.

By note dated April 18, 1992, the petitioners presented additional information to expand upon the original facts denounced. They stated that the wife of Dr. Garcia Perez had on several occasions attempted to file a petition of habeas corpus on behalf of the former president, but that Army soldiers surrounding the Palace of Justice had denied her entry. Citing Article 29 of the Commission's Regulations, the petitioners asked that the Commission adopt precautionary measures to protect the life and personal freedom of former President Garcia Perez.

On May 7, 1992, the petitioners supplied new information in connection with the case being processed with the Commission. In effect, they reported that via two ministerial decisions, the Public Prosecutor had been requested to file two criminal indictments against Dr. Alan Garcia for the crime of illegal possession of weapons. The first of the actions was based on the alleged discovery of arms, munitions and explosives at the offices of the Peruvian Aprista Party, of which Alan Garcia was Secretary General. The second was based on the alleged discovery of firearms in the home of the former president on the night of April 5, when his residence was stormed by Army soldiers.

For its part, on May 11, 1992, the Government of Peru replied to the Commission's request, stating that Dr. Alan Garcia was, of his own volition, in hiding and that his purpose was to create some scandal with national and international organizations in the hope of obtaining "some political-partisan advantage from the situation."

Via note of June 2, 1992, the petitioners reported to the Commission that the Government of Colombia had granted Dr. Alan Garcia political asylum and that he had thus managed to leave the country and to escape the political persecution of which he was allegedly the victim.

On June 3, 1992, the Commission forwarded to the parties a summary of the facts as alleged and of the situation of Dr. Alan Garcia Perez, asking that they submit their observations concerning the information reported.

The Government of Peru presented its observations on June 29, 1992. It stated that the information described by the petitioners was a misrepresentation of the facts since the objective of the Army soldiers had been to protect the home of former President Garcia.

In two successive presentations, in August and September 1992, the petitioners denounced to the Commission that, through two ministerial decisions, the President of the Republic had authorized the public prosecutor to seek nullification of the Supreme Court decision in the case of unlawful enrichment brought against former President Garcia Perez and to institute another criminal action based on the facts that had been dismissed previously because there did not exist a legal typification of the crime. They also asked the Commission to adopt, pursuant to its Regulations, precautionary measures to protect the human rights of Dr. Alan Garcia Perez.

On October 2, 1992, concerned over the difficult situation that Dr. Garcia Perez was experiencing, the Commission requested precautionary measures wherein it asked the Government of Peru to guarantee respect for the rights of due process in the proceedings conducted against the former president.

On October 19 and 27, 1992, the Government of Peru presented its observations concerning the precautionary measures that the Commission had requested.

In a number of presentations in the period between December 1992 and October 1993, the petitioners supplied the Commission with additional information to substantiate their claims that the Government of Peru had committed human rights violations against former President Alan Garcia and his family.

For its part, in notes dated January 26, February 2, and March 17, 1993, the Government sent additional information to the Commission, refuting the petitioners' arguments and requesting that the case be declared inadmissible.

III. FACTS DENOUNCED

Based on the information the petitioners supplied to the Inter-American Commission on Human Rights, the facts denounced as violations of rights protected by the Inter-American Convention would be as follows:

A. Actions taken by Army soldiers for the purpose of arresting Dr. Alan Garcia

On the night of April 5, 1992, Army soldiers, under the command of General Nicolas de Bari Hermoza Rios, who was himself acting on orders from the President of the Republic and the Commander-in-Chief of the Armed Forces, surrounded the house of Dr. Alan Garcia Perez with war tanks outfitted with cannons, small tanks and armored troop-carriers. Some one hundred heavily-armed soldiers surrounded the house and then demanded the "surrender of Dr. Alan Garcia Perez who was under arrest on orders from the Joint Command."

They then attacked the house of Dr. Garcia Perez with gunfire and finally broke into the residence. Inside were the former president, Deputy Jorge del Castillo Galvez and six members of the National Police who had been detailed to guard the former president and his home. The latter were beaten, disarmed and arrested.

Although Dr. Garcia Perez managed to escape, Deputy del Castillo Galvez was severely beaten by the soldiers. They put a hood over his head and took him away under arrest.

Also in the house at the time the soldiers burst in were the former president's four children, all of whom are minors, and the household staff. They were told to remain in their rooms and were not allowed to leave.

At the time of these events, the wife of Dr. Alan Perez was abroad. When she returned to Lima the military who had remained at her house tried to prevent her from entering. However, with help of the Ambassador of Venezuela, she was finally able to get into her house. Once there, she found that it was occupied by soldiers and that her children were confined to their rooms and denied their freedom.

For the next four days, Mrs. Garcia and her children remained under house arrest. Once the soldiers had left, she was not given back the police protection to which all former presidents are entitled and was thus left utterly unprotected.

In the search they conducted, Army soldiers had unlawfully seized private documents belonging to the Garcia family, such as identification papers, passports, property deeds, tax declarations, correspondence and all of the original documents from Dr. Alan Garcia's legal defense in his trial on charges of unlawful

enrichment.

Moreover, although it did not have the proper legal warrant, the Army also searched the offices of the Institute of the External Debt, which was headed by Alan Garcia, and did material damage and removed working papers from it. Dr. Garcia's private secretary was arrested and held incommunicado for five days in a facility of the Army Intelligence Service.

Finally, the car belonging to Deputy Jorge del Castillo was severely damaged; the soldiers took from it important documents pertaining to Dr. Garcia's legal defense.

B. The status of the Judiciary subsequent to the events of April 5, 1992

After April 5, 1992, the Government of Peru declared that the Judiciary was being reorganized. As part of that process, a decree was issued removing the justices of the Supreme Court, the judges of the Tribunal of Constitutional Guarantees and the members of the National and District Judicial Benches. Under the same decree, the Attorney General of the Nation, the Comptroller General of the Republic and 134 people serving as superior court judges, superior court prosecutors, district court judges, provincial prosecutors and juvenile court judges were removed from their positions.

Another measure adopted by the Government was to close judges' chambers and the Office of the Government Attorney for a period of 10 working days, leaving only the examining judges and assigned prosecutors functioning. Thus, because of the total paralysis of judicial activities, citizens were unable to file petitions of amparo and habeas corpus.

This situation affected, in particular, the wife of Dr. Alan Garcia Perez, who on several occasions attempted to file a petition of habeas corpus on behalf of the former president. Specifically on April 12, she went to the Palace of Justice, in the company of her children, but her entry was blocked by the Army soldiers surrounding the building. The judge of the assigned examining court, with whom Mrs. Garcia had spoken by phone, offered to come out to receive the petition, but did not follow through with her offer. On April 13, Mrs. Garcia went back to the Palace of Justice and was again stopped by Army soldiers. On April 14, she was not only denied entrance but the police threw tear gas, forcing Mrs. Garcia to retreat.

C. Criminal charges brought against former President Alan Garcia for illegal possession of weapons

On April 14, 1992, the Government of Peru passed Ministerial Resolution 385-92 IN/DM, published the following day in the El Peruano official gazette, authorizing the public prosecutor to file criminal charges against Alan Garcia for the crime of illegal possession of firearms. The charge was the result of a search conducted by Army soldiers at the offices of the Aprista Party, of which Dr. Alan Garcia was Secretary General. There they allegedly had discovered firearms, munitions and explosives. The search was done in the presence of a military prosecutor who had no jurisdiction for raids of this kind. There was no court order and no civil prosecutor present even though a civil prosecutor would later sign the search report, thereby sanctioning the operation conducted.

On April 30 that year, a second Ministerial Resolution, No. 0435-92-IN/DM, was published in the El Peruano. Dated April 29, that resolution ordered that the Public Prosecutor institute a second criminal case against Dr. Alan Garcia for illegal possession of weapons. This case was based on the alleged discovery of firearms at Alan Garcia's home on the night his residence was assaulted by army soldiers. As had happened in the previous case, the search was conducted without a court order and without the presence of a prosecutor, in violation of the provisions of the law in effect.

Subsequently, the wife of former President Garcia Perez presented the licenses for the firearms seized by the Army. She also clarified that one of the weapons seized was an old "Pukuna" rifle that had been a gift from the General Commander of the Army and another rifle that had been a gift from the Government of Nicaragua, both at the time when Dr. Alan Garcia Perez was President of the Republic. They were in their cartridge holders at the time, unloaded and in plain view, in an area of the house.

D. The case for unlawful enrichment

Once the new constitutional president, Alberto Fujimori, was in office, a congressional inquiry was instituted against Alan Garcia. As a result of that inquiry, impeachment proceedings were conducted for the alleged crime of unlawful enrichment. Those proceedings ended on October 19, 1991, with Senate Resolution No. 1189-91, which declared the case "admissible". With that, the accused was suspended from his office as Senator for life, under the provisions of Article 184 of the Constitution, making him "subject to prosecution."

The impeachment case was based on the following charges against the former president:

- a. a lack of proportion in his assets during his time in public office, as there was an unjustified increase in his assets;
- b. presumptions of an even greater gap between income and expenditures by reason of the possible existence of bank accounts abroad;
- c. presumptions of his direct involvement in the decision to invest reserves of the Central Bank of Peru in the BCCI, transactions that would have involved bribes;
- d. presumptions of his direct involvement in reducing the purchase of Mirage aircraft, under the Jupiter I, Jupiter II and Jupiter III contracts, which may have been coupled with a sale of aircraft manufactured for Peru but sold to third parties, which would have generated personal profits for Dr. Garcia.

When the impeachment file was sent to the Attorney General of the Nation, the latter instituted criminal proceedings before the Second Chamber of the Supreme Court, for the crime of unlawful enrichment, with the State as the aggrieved party. The Attorney General based that decision on item a) of the articles of impeachment, in other words the undue increase in Dr. Garcia Perez' assets during his time in public office. Items b), c) and d) of the articles of impeachment were dismissed since the pertinent criminal law had been changed under the new Code, where indications are defined as "signs, presumptions, circumstances revealing something that is hidden or instrumental in uncovering actual proof, but not inherent in the nature of the criminal offense of unlawful enrichment." Hence, the Attorney General concluded that the facts contained in points b), c) and d) of the Impeachment were suspicions that were not part of what constitutes the crime and did not corroborate guilt.

Once the Criminal Section of the Supreme Court had received the case, the Examining Justice (charged with investigating the allegations) was appointed. After examining the terms of the case, he ruled under Article 77 of the Code of Criminal Procedure that no pre-trial hearing should be held, and ordered that the case be filed permanently.

When the decision of the Examining Justice was appealed, the case was presented to the Special Correctional Tribunal of the Supreme Court, which upheld the denial of the request to open preliminary proceedings.

Both the Public Prosecutor and the Supreme Prosecutor for Civil Matters filed petitions requesting that the decision be vacated based on procedural violations (*recurso de nulidad*), but their petitions were denied. The Office of the Attorney General and the Office of the State's Attorney then filed an appeal

(recurso de queja) with the First Criminal Chamber of the Supreme Court. On January 29, 1992, the First Criminal Chamber of the Supreme Court declared both petitions unfounded.

Thus, the original decision taken by the Examining Justice became *res judicata* once the petitions to vacate the original decision and the appeal were denied.

However, since the measures adopted by President Fujimori starting on April 5, 1992, attempts had been made to reopen that case and another new criminal case has been instituted based on the articles of impeachment that were originally dismissed by the Attorney General on the grounds that they did not constitute crimes.

In effect, on July 15, 1992, the Public Prosecutor designated by President Fujimori filed a petition with the Criminal Chamber of the Supreme Court to have the decision by the Examining Justice nullified, particularly that part of the decision that refused to allow preliminary proceedings to be instituted against former President Alan Garcia.

Through a Supreme Resolution dated September 11, 1992, the Government of Peru designated and authorized the Public Prosecutor to "institute, prosecute, and finalize ... the legal and judicial proceedings against the former president..." for the matters contained in the Senate resolution that authorized prosecution of Alan Garcia and that were originally dismissed by the former Attorney General of the Nation.

Once the complaint was formally entered, the provisional Attorney General of the Nation instituted the corresponding criminal proceeding. Once the Supreme Court Examining Justice was designated, he submitted his decision on September 23, 1992, ordering that preliminary proceedings be instituted against Dr. Alan Garcia for the crime of unlawful enrichment.

On November 23, 1992, the Supreme Court' Special Correctional Tribunal voided any action taken on the basis of the decision -adopted by this Tribunal's previous members- denying the initiation of preliminary proceedings against Alan Garcia. On March 17, 1993, the Supreme Court' Special Criminal Chamber voided the decision denying the institution of preliminary proceedings and ordered the opening of these proceedings.

E. Congressional immunity and the right to impeachment proceedings

At the end of his term as President of the Nation, on July 28, 1990, Dr. Alan Garcia Perez became a Senator for life, under the terms of the 1979 Constitution.

Under Resolution No. 1189-91 the Senate decided to adopt the articles of impeachment against the former president and, as a consequence, decided to lift his congressional immunity so that he might be prosecuted in accordance with the law.

Once the judicial inquiry process ended with the Supreme Court's final ruling confirming the refusal of the order to institute a preliminary inquiry against former President Alan Garcia Perez, the Officers of the Senate officially restored his congressional privileges on March 20, 1992. Thus, the former president once again enjoyed Congressional immunity and, with it, all the rights that the Constitution and laws of Peru accord to Senators for life.

However, his status as a Senator for life and the immunities that go with that were not acknowledged in the new proceedings instituted against him.

In effect, even though Article 176 of the 1979 Peruvian Constitution, which was in force until December 31, 1993, provides that senators and deputies may neither be tried nor arrested without the prior authorization of the Chamber of which they are a member, since April 5, 1992 two criminal proceedings have been instituted against Dr. Alan Garcia based on the alleged commission of the crime of illegal possession of weapons. In neither case was proper Senate authorization sought.

Moreover, in the new criminal case brought against the former president for the crime of unlawful enrichment, there was no constitutional impeachment proceeding beforehand, as required under articles 183 and 184 of the 1979 Constitution, in effect at the time.

IV. OBSERVATIONS OF THE PARTIES

A. Position of the Government

1. Exhaustion of remedies under domestic law

The Government of Peru alleged that in the instant case, the remedies under domestic law had not been exhausted and hence, in keeping with the provisions of Article 46.1.a of the Convention, the petition should be ruled inadmissible. The Government also noted that the handling of the unlawful enrichment case had not been completed in the local court and thus, before proceeding to examining the conduct of the Peruvian state, the Commission should wait for the final outcome of the remedies under domestic law.

As regards the other alleged violations, particularly violations of personal liberty, right to privacy, and violations relating to the alleged illegal handling of two counts of illegal possession of firearms, the Government furnished no observation whatsoever.

2. Merits of the case

The Government of Peru refuted the facts denounced by the petitioners, that there was no order to forcibly arrest Dr. Garcia Perez on the night of April 5, 1992. Quite the contrary, the order that the Army soldiers received was to stand guard over the residence of the former president to prevent any possible disturbance of law and order. However, because of the evidence that there were arms and men bearing arms within the residence of Dr. Garcia Perez, "in order to prevent any criminal attempts, elements of the forces of law and order seized the weapons and explosives inside that residence and took the necessary precautions to protect the individuals from any danger."

Moreover, the Government of Peru denied that there had been any violation of the residence of the former president or that the children and wife of Dr. Alan Garcia had been held incommunicado for four days. It stated that "the forces of law and order remained in the immediate vicinity in order to provide the residence with the necessary security and to prevent any attempt capable of being used or magnified to the detriment of the forces of law and order or the established order."

The Government of Peru argued that the impeachment proceedings that resulted in Senate Resolution No. 1189-91 declaring that there were grounds to prosecute former president Alan Garcia Perez for the commission of unlawful enrichment, with the state as the aggrieved party, had properly substantiated that the former president did indeed have undeclared foreign bank accounts; that he had been instrumental in the decisions to invest the reserves of the Central Bank of Peru in the BCCI, transactions that would have involved bribes; and that he had participated in the decision to reduce the number of Mirage aircraft that Peru purchased from the Government of France under the Jupiter I, II and III contracts, transactions from which the former president would have profited financially. However, the Government alleged, when the articles of impeachment were sent to the Office of the Public Prosecutor, the former Attorney General of

the Nation, Dr. Pedro Mendez Jurado, did not include any of the alleged facts in the case against the former president before the Criminal Chamber of the Supreme Court. Hence, the Government reasoned, the former Attorney General failed to comply, first of all, with the binding order to "prosecute" Alan Garcia, once the Senate declared that there were grounds for prosecution (Article 184 of the 1979 Constitution) and, secondly, with his obligation to "bring all ...civil and criminal actions... against the President of the Republic, senators and deputies ... once the Senate has declared that there are grounds for prosecution" (Article 66, paragraph 2, of the Organic Law of the Attorney General's Office).

And so, both the Public Prosecutor and the Attorney General of the Nation brought a new criminal case against former President Alan Garcia on the grounds that Article 184 of the 1979 Constitution of Peru does not empower the judiciary to decide whether or not to institute a legal inquiry. Quite the contrary, the constitutional mandate is imperative; in other words, once the Senate has declared that there are grounds for prosecution, the Judiciary must institute the inquiry. Moreover, it argued, the function of the Attorney General under Article 66, paragraph 2 of the Organic Law of the Attorney General's Office, which is to prosecute high-ranking public officials, must be carried out. Hence, because of the way the two laws function, inasmuch as the Senate authorized proceedings, the Attorney General of the Nation was obliged to institute the proper criminal prosecution and the Judiciary was obliged to institute the examining phase. The purpose of the examining phase is to investigate the alleged crimes being charged and determine whether the accused is in any way implicated. Hence, the inquiry into the case in no way signifies that the Judiciary is convicting the accused before any trial is even held.

Using these arguments, the Government of Peru alleged that this criminal action brought by the Attorney General of the Nation against former President Alan Garcia was based on articles of the Constitution and the provisions of the Statute of the Office of the Attorney General, which require that a criminal case be filed against the high-ranking official, in this case a Senator, and that the examining phase be instituted when the Senate, after hearing the articles of impeachment prepared by the Chamber of Deputies, declares that there are grounds for prosecution under the terms prescribed by law.

As for the question of *res judicata*, the Government of Peru, in a writ from the Attorney General of the Nation, states that the principle of *res judicata* "is not applicable in the instant case, since *res judicata* exists when an adversarial proceeding before a judge or court has resulted in a ruling that is final and thus not subject to appeal except in the very exceptional cases where review is permissible." Hence, the Government contends, there are two prerequisites for *res judicata*: the existence of an adversarial proceeding and the culmination of that proceeding in the form of a final sentence.

As for the first point, the Government contends that the decision handed down by the former Supreme Court Examining Justice denying the request to institute proceedings against Dr. Alan Garcia Perez "does not constitute *res judicata*" inasmuch as it was not the result of a "court inquiry into the merits of the facts duly [alleged] by the National Congress in the preliminary hearing conducted in accordance with articles 183 and 184 of the National Constitution."

The Government further asserts that criminal charges must be dismissed in the proceeding itself when, because it has become obvious that no crime has been committed or that the accused is not the guilty party, the proceeding is terminated with effects analogous to an acquittal. Hence, the Government argues, a dismissal, whether without prejudice or permanent, must be the outcome of a legal proceeding; in other words, it must come once the examining phase has already started and never before it. The Government argues that the principle of *res judicata* was not violated in the case of former President Alan Garcia because the ruling that disallowed the institution of an inquiry was not a definitive stay of proceedings inasmuch as it was not the outcome of a proceeding ("court inquiry into the merits of the facts duly [alleged]").

The Government of Peru also asserts that there is no "new trial" against Alan Garcia but rather an "amplification" of the first trial, since the facts involved are the very ones that were the basis of the articles of impeachment and that the former Attorney General of the Nation subsequently failed to include in the indictment presented before the Criminal Chamber of the Supreme Court.

B. Position of the petitioners

1. Exhaustion of remedies under domestic law

The petitioners alleged that they were really hindered in their efforts to seek remedy under the domestic law as there was absolutely no judicial activity on the days after April 5, 1992. In their statements to the Commission, the petitioners in fact claimed that on several occasions Dr. Alan Garcia Perez's wife attempted to file a habeas corpus petition on behalf of the former President. Those attempts were frustrated by Army soldiers stationed at the Palace of Justice who not only prevented her from entering, but also prevented her from making any contact with the judges on duty.

They also stated that, as soon as judicial activity resumed, the appeals filed locally to protect the rights of Dr. Alan Garcia proved to be totally ineffective insofar as they were repeatedly dismissed with insubstantial arguments or based on purely procedural considerations.

Finally, the petitioners claimed in all of their statements that since April 5, 1992, decisions by the Executive Branch have continued to interfere with the Judiciary in Peru. Apart from replacing judges by decree, the Executive Branch has also influenced decisions handed down by the courts. The petitioners repeatedly stated that Peru has failed to guarantee its citizens the right to a hearing by an independent and impartial court.

Using the aforementioned reasoning, they asked the Commission that, invoking the exemptions provided for in Article 46.2 in terms of exhausting local remedies, it should rule the case admissible and then consider its merits.

2. Merits of the case

Firstly, the petitioners emphasized that nowhere in its various presentations does the Government deny the charges of human rights violations committed against former President Alan Garcia, his wife and children. Quite the contrary, it justifies the measures taken by the Army and then simply discusses the existence or nonexistence of res judicata and double jeopardy in the cases being prosecuted against former President Alan Garcia Perez for the crime of unlawful enrichment.

The petitioners argue that under Peruvian law, res judicata does not come about solely by virtue of a court ruling. Indeed, under Article 2, subparagraph 20 LL of the 1979 Peruvian Constitution, "amnesty, pardon, permanent dismissals and prescriptions are to have the effect of an adjudicated matter." The petitioners further point out that under Article 233.2 of the Constitution, one of the guarantees of the administration of justice is that "decisions that have acquired the authority of res judicata must be enforced."

The petitioners also assert that if the basis of a decision is the very basis that can be used to substantiate an acquittal and if that decision is reviewed by successive courts and ends up being adopted or confirmed by any one of them that has the jurisdiction and competence to order acquittal or to convict, then res judicata applies. Thus, once a decision ordering that a criminal case be filed because the facts alleged are not codified as criminal offenses is upheld on appeal, it becomes final and has the authority of res judicata.

The case prosecuted against Dr. Alan Garcia for the crime of unlawful enrichment ended with a ruling or order from the Supreme Court Examining Justice to the effect that no inquiry was to be instituted because the facts alleged did not have sufficient merit and were not codified as offenses under criminal law. That decision was confirmed by the Special Correctional Tribunal of the Supreme Court. When an appeal was filed to have that decision vacated, the appeal was considered legally unfounded. When an appeal was filed, it was declared unsubstantiated by the First Criminal Chamber of the Supreme Court. Given those facts, the petitioners argue, the ruling ordering that an inquiry not be instituted became res judicata.

The foregoing notwithstanding, the petitioners allege, on September 11, 1992, by decision of the Council of Ministers, the Public Prosecutor was authorized to request the Attorney General of the Nation to institute a new criminal action against former President Alan Garcia for the crime of unlawful enrichment, thereby violating the principle of res judicata.

The petitioners further contend that the principle of res judicata was violated by the Supreme Court decision to nullify the Supreme Court Examining Justice's decision against instituting an inquiry, a decision that was confirmed by the Supreme Court itself with its previous membership.

The petitioners reason that once that case was reopened and since a new criminal action was instituted, there are in effect two cases in progress against Dr. Alan Garcia, based on the same facts and accusing him of the same crime.

Finally, the petitioners argue that instituting a new trial against the former president, without impeachment proceedings being conducted in accordance with the provisions of articles 183 and 184 of the 1979 Constitution, contravened the proper proceedings before the previously established competent court, that is to say the rule that prohibits removal of a case from its legally pre-established jurisdiction.

VI. GENERAL CONSIDERATIONS

A. The Competence of the Commission and the formal requirements of admissibility

The Inter-American Commission on Human Rights is competent to take up the instant case as it concerns violations of human rights recognized in articles 7, 8, 11, 19 and 25 of the American Convention on Human Rights.

The present petition satisfies the formal requirements of admissibility stipulated in Article 46 of the Convention and in Articles 32, 37, 38 and 39 of the Commission's Regulations. In effect, the petition contains the data of the petitioner, a description of the facts alleged to be violations of human rights protected by the Convention, the identity of the government alleged to be responsible for the alleged violation, and exact information on the resources used in the domestic jurisdiction. The complaint is not pending settlement in any other procedure under an international governmental organization and does not essentially duplicate a petition pending or already examined and settled by the Commission.

As to the proceedings set forth in article 48 1.f of the Convention, neither the Government nor the petitioners expressed their willingness to reach a friendly solution in the present case.

Article 46.1.a of the Convention states that for a petition or communication submitted to the Commission under Article 44 or 45 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 Inter-American Court of Human Rights has stated that "the rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law. Before being confronted with an

international proceeding...". [FN1]

[FN1] Inter-American Court of Human Rights, Velasquez Rodriguez Case, Judgment of July 29, 1988. Series C, No. 4, paragraph 61.

However, this right of the State to resolve an alleged human rights violations using its own remedies and within its own courts implies an obligation to provide those remedies in accordance with generally recognized principles of international law. [FN2]

[FN2] Monica Pinto, "La denuncia ante la Comision Interamericana de Derechos Humanos", Buenos Aires, Editores del Puerto, 1993, p.59.
Antonio A. Cancado Trindade, "A aplicazro da regra do esgotamento dos recursos internos no sistema interamericano de protezro dos direitos humanos", Derechos Humanos en las Americas, Washington, IACHR, 1984, p. 217.

Accordingly, the Inter-American Court has also stated that "the rule of prior exhaustion of domestic remedies under the international law of human rights has certain implications that are present in the Convention. Under the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Article 25), remedies that must be substantiated in accordance with the rules of due process of law (Article 8.1), all in keeping with the general obligation ... to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1)". [FN3]

[FN3] Inter-American Court of Human Rights, Velasquez Rodriguez Case, supra note 1, paragraph 62.

Thus, the rule requiring exhaustion of domestic remedies presupposes that a State is not only obliged to offer effective judicial remedies but also to guarantee that those remedies can be used in respect of the provisions of due process. This is because the very effectiveness of the remedies largely depends on the fact that the proper guarantees will be observed when those remedies are processed.

Article 46.2 of the Convention states that the requirement of exhaustion of the remedies under domestic law shall not apply when the following conditions obtain:

- 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; and
- c) there has been unwarranted delay in rendering a final judgement under the aforementioned remedies.

In the instant case, two of the exceptions to the provision requiring exhaustion of domestic remedies apply, namely: the exception under subparagraph 2.a, i.e., that domestic legislation does not afford due process of law for the protection of the rights allegedly violated; and the exception in subparagraph 2.b, i.e., that the party alleging the violation has been denied access to the remedies under domestic law or has been prevented from exhausting them.

1. Ineffectiveness of the remedies afforded under domestic law
 - a. Denial of access to remedies under domestic law

Dr. Alan Garcia reported to the Commission that Army soldiers broke into his house to arrest him and that this, in his opinion, constituted a threat to his right to freedom insofar as his arrest was not carried out in accordance with the constitutional procedures. On several occasions his wife attempted to file a habeas corpus on behalf of the former president, but her efforts were frustrated by Army soldiers stationed at the Palace of Justice who prevented her from entering and prevented her from making any contact with the judges on duty.

In the Convention, where one of the rights protected under it is violated, the state under whose jurisdiction the presumed violation takes place is responsible for ensuring the victims a simple and prompt redress to their claims. [FN4]

[FN4] See articles 1.1 and 25 of this instrument.

The right to personal freedom is among the rights enshrined in the Convention. Article 7 stipulates that no one shall be deprived of his physical liberty, except for the reasons and under the conditions established beforehand by the Constitution of the State Party concerned or by laws enacted in accordance with it. In order to challenge the legality of his arrest, any person deprived of his personal freedom has the right to a judge who shall hand down a decision on the matter.

In States Parties whose laws "provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat...", the said article states that "...this remedy may not be restricted or abolished..."

Thus, based on the interpretation of the rules of the Convention plus the jurisprudence established by the Court, the Commission can conclude that where a deprivation of freedom, or a threat of deprivation of freedom, occurs --in states whose laws so provide-- all persons should enjoy prompt and effective remedy to challenge the legality of a measure.

Amparo and habeas corpus are simple and prompt legal remedies to protect victims of human rights violations. In the view of the Inter-American Court of Human Rights, both remedies are indispensable constitutional guarantees designed to ensure that the rights and freedoms protected by the Convention are respected. [FN5]

[FN5] Inter-American Court of Human Rights, Judicial Guarantees in States of Emergency, note 3 above, par. 33.

In the instant case of Peru, a prompt and effective legal recourse to challenge the legality of a deprivation or threat of deprivation of freedom is the habeas corpus. Article 295 of the Constitution of Peru (1979) in fact stipulates that:

An action or omission by any authority, official or person who undermines or threatens individual liberty is ground for an action of "habeas corpus."

The obligation to guarantee access to prompt and effective remedy is not only applicable in times of political stability but during states of emergency as well.

Under the provisions of Article 27.2 of the Convention both remedies --namely, amparo and habeas corpus-- are, in essence, indispensable judicial remedies. They cannot be suspended, not even during a state of emergency.

The Inter-American Court interprets the guarantees provided for in the aforementioned article as ...serving to protect, ensure, and uphold entitlement to or exercise of a right... These guarantees are hence ...the most suitable measures for the rights and freedoms [protected by the Convention] to be effective under all circumstances..., in other words, even in cases where, based on a real need, a State Party declares a state of emergency. [FN6]

[FN6] Inter-American Court of Human Rights, Habeas Corpus under suspension of guarantees (articles 27.2, 25.1 and 7.6 of the American Convention on Human Rights)), Consultative Opinion OC-8/87 of January 30, 1987.

It is the position of the Inter-American Court that even if the right to personal freedom --or threat to personal freedom where states provide for habeas corpus as a suitable means for remedy-- is a right that may be suspended under a state of emergency, a habeas corpus remedy cannot be derogated as it is what a court may use to assess the legality of the decision by the Executive Branch to arrest an individual and the judicial authority can thus prevent the adoption of measures that would be contrary to the protection of the rights of persons under its jurisdiction. [FN7]

[FN7] *Idem*, par. 40.

Applying the arguments advanced hitherto, the Commission is led to conclude that by denying Dr. Garcia Perez access to a simple and prompt remedy to prevent violation of his rights, the Government of Peru has failed to honor its obligations under the Convention. As such under the provisions of the Convention, and as the Inter-American Court understands those provisions, not even if the Government were to claim that there was a state of emergency would a suspension of indispensable guarantees such as habeas corpus be justified.

b. Inability to exhaust legal remedies locally

Except for provincial Judges and public prosecuting attorneys who were on duty, judicial activity at the national level was suspended for ten working days --a situation which, as stated earlier, denied the petitioners recourse under domestic law on the days immediately following the events of April 5, 1992.

When judicial activity resumed, however, the petitioners filed several appeals challenging the two criminal charges brought against Dr. Alan Garcia allegedly for unlawful possession and use of firearms, munitions, and material used exclusively by the Armed Forces and the State Police, with the State as the aggrieved party.

On May 11, 1992, Mrs. Pilar Nores de Garcia filed an appeal with the 42nd District Attorney's Office of Lima, seeking to have the criminal charges dropped as they were based on evidence obtained illegally.

She also sought to invoke Article 176 of the 1979 Constitution, under which Dr. Garcia could not be prosecuted without authorization from the Chamber to which he belonged, as he was a senator for life.

Dr. Ana Maria Santiago, the prosecutor in charge, raised the matter for consultation with Attorney General Dr. Blanca Nelida Colan Maguico who then issued a ruling which classified the acts as "common crime" and ordered that the charges be pursued. Her ruling was based on the following arguments:

"...this office establishes the interpretation, scope, and application of articles 183 and 184 of the Constitution... insofar as the police investigations indicate that the person responsible for those acts was ... Alan Garcia Perez. As provided for in articles one, four, five and eight of Decree Law No. 25418 [Basic Law of the Emergency and National Reconstruction Government, April 5, 1992], the aforementioned articles of the Constitution are hereby suspended as they are contrary to the aims and objectives of the said Decree Law..."

Once the charges were brought and the case opened, Dr. Alan Garcia filed a prior issue as he did not meet the requirement for deprivation of rights under article 176 of the National Constitution of 1979. The Examining Court and the Second Criminal Chamber of Lima ruled that there were no grounds for prior issue. The petitioners filed another appeal with the Supreme Court seeking to annul that judgment, and that was also dismissed. The judgments were based, in general, on the fact that the offense with which he is charged --possession of firearms-- did not meet the criteria of article 183 of the Constitution, as it was not treated as an offense committed by the accused in the exercise of his functions as President or Senator for Life.

The petitioners filed various other appeals challenging the institution of new criminal proceedings against Alan Garcia --for the alleged offense of unlawful enrichment-- without following the procedures provided for in articles 183 and 184 of the Constitution, namely the impeachment proceedings. On October 19, 1992 in fact, Dr. Garcia Perez's parents filed a habeas corpus writ in which they pointed out that since his congressional immunity had been reinstated, the relevant impeachment procedures would have to be followed to prosecute a crime committed in the exercise of his functions as President. The petitioners based the admission of the action of guarantee upon the provisions of article 12.17 of Law 23503 (habeas corpus and amparo):

Individual freedom is undermined or threatened and as a result gives rise to the habeas corpus, expressly as follows:

The corresponding procedure is followed in handling an indictment or arrest of persons referred to in article 183 of the Constitution.

The judge presiding over the prosecution of the action, in handing down his ruling on November 3, 1992, stated that:

...from the examination of the act committed and comparing it with the documents presented, it is determined:

Five: that [Alan Garcia] regained (his) [congressional] immunity after the pronouncement from the First Criminal Chamber of the Supreme Court...

Six: that it was so understood by the Senate when its Officers... decided to fully restore him to that Branch of the Congress as a Senator for Life...

Eight: that ... the corresponding impeachment procedures had to be followed as it was a case of indictment of a person recognized under article 183 of the Constitution and referred to in article 12.17 of the Law on Habeas Corpus and Constitutional Protection...

Recognition of the obligation to follow impeachment procedures notwithstanding, the Judge ruled the action without grounds, invoking article 16 of Law 25398 which states that no habeas corpus action can be brought where judicial investigation is underway against a petitioner or when petitioner is being tried for the actions that originated the writ.

After the appeal was filed on December 2, 1992, the Eighth Criminal Chamber declared the sentence from the a quo court null and void as there were obvious contradictions between the preamble and the operative section of the sentence.

When the sentence was referred back to the court of first instance, the examining judge handed down a new sentence on December 29, 1992, declaring the action without grounds. That decision was based, in general terms, upon the following arguments:

1. That Dr. Alan Garcia's reinstatement was approved by the Officers of the Senate but was not officially published. Although the internal regulations of the Senate sets forth no process for reinstatement of a Senator facing impeachment and charges under the Constitution, likewise, the rule requiring an absolute majority of the votes to determine that there "are grounds" for a case and to publish the findings in the official journal, should be applied.
2. In light of article 16 of Law 23598, there are no grounds for habeas corpus action where an accused faces proceedings or is on trial for acts which give rise to the guarantee action.

After the decision was appealed, the Eight Criminal Chamber of Lima upheld the a quo decision on January 27, 1993 based on arguments similar to those brought by the court of first instance. The Chamber stated also that:

...the afore-mentioned right of the accused to impeachment proceedings ... became inapplicable and impossible to honor in real terms as the Basic Law of the Emergency and National Reconstruction Government was in force at the time the complaint was filed and the warrant issued. Said law was the same one which was used to suspend the Congress...

In challenging this decision, the petitioners filed an appeal for annulment with the Supreme Court, and that was ruled inadmissible

...because a case is underway against the person on whose behalf the guarantee action is being filed and he is on trial for the acts which gave rise to the case in the first place.

The Inter-American Court has stated that "a remedy must be ... effective, that is, capable of producing the result for which it was devised. A remedy can become ineffective if it is subject to procedural requirements that render it inapplicable; if it in fact has no grounds on which to make the authorities accountable; ... or if it is not applied impartially." Furthermore, it states that "...when it is proven that the appeals are thrown out... on insubstantial grounds... resorting to them becomes a senseless formality ..."

In the opinion of the Commission, the appeals filed by Dr. Alan Garcia under the domestic law were, for all practical purposes, ineffective.

The arguments presented by the Attorney General stating that the provisions of the Constitution which, according to Dr. Alan Garcia, were suspended as they were contrary to the purposes and objectives of Decree Law No. 25418 [Basic Law of the Emergency and National Reconstruction Government, April 5, 1992] generally show that in the ensuing transition period following April 5, 1992, the petitioner was unable to have recourse to protect his rights through the various courts that provided local jurisdiction.

If in fact the Attorney General, the highest judicial authority who is responsible, in that capacity, for safeguarding law and order, citizens' rights, the independence of the judicial organs, and the proper administration of justice, was of the opinion that the petitioner's constitutional rights were violated as extra-constitutional rules were applied, then the prospects for obtaining redress were, in principle, slim.

The decisions handed down by the different organs of the Judiciary concerning the previous issue filed by the petitioner concerning the unlawful firearms possession and concerning the habeas corpus appeal filed for impeachment proceedings to be followed in the unlawful enrichment case help to strengthen the foregoing argument.

As stated, Dr. Alan Garcia claimed that the procedures provided for under article 176 of the 1979 Constitution were followed --that is, the Senate gave authorization for the judicial proceedings to be instituted against him. Both the prosecuting judge and the Second Criminal Chamber of Lima in its capacity as appeals court, based their dismissal of the previous issue on the fact that under the provisions of article 183 of the Constitution, the possession of arms was not a crime committed in office, as further borne out by the Supreme Court when it threw out the appeal filed by the petitioner to annul the a quo decision.

Although under the provisions of article 183 of the Constitution the firearms possession is not a so-called crime committed in office, the petitioner is not making a claim on the provisions of this rule. As seen in the Constitution, both provisions --that is, articles 176 and 183-- are appreciably different. [FN8] Article 176 addresses the person who is the subject of the rights deprivation, in other words, the need for authorization from the pertinent congressional Chamber before initiating a judicial process against a Deputy or Senator. Article 183 and its corollary, article 184, refer, on the other hand, to a person facing impeachment --that is, the procedures to be followed for certain senior officials of the state, such as the President or members of both Chambers of the Congress, for violations of the Constitution and for crimes committed in the exercise of their functions.

[FN8] Articles 176, 183 and 184 of the Peruvian Constitution read as follows: Article 176: Senators and Deputies... cannot be prosecuted or arrested without previous authorization of the Chamber to which they belong...

Article 183: The Chamber of Deputies has the power to impeach before the Senate, the President of the Republic, members of both Chambers..., for violating the Constitution and for any crime which they may commit in the exercise of their functions, even though they may no longer hold these positions.

The decisions arrived at by the different judicial bodies that heard the previous issue appeal, by arbitrarily failing to consider the petitioner's claim, corroborated the argument that those bodies were ineffective in terms of redressing the alleged violation of the rights of the aggrieved party.

A remedy may be deemed ineffective if, as noted by the Inter-American Court of Human Rights, it has to meet procedural requirements which render it inapplicable. In this respect, the Commission is of the understanding that to challenge the appropriateness of a habeas corpus action by claiming it must follow impeachment procedures since a judicial process is underway, in essence, renders the remedy provided for under article 12.17 of Law 23503 ineffective ab initio. It is precisely when a process is initiated without the impeachment procedures that the terms of article 183 are violated, in essence, and filing a habeas corpus motion is therefore in order. To understand it otherwise would imply acknowledging that the Habeas Corpus and Protection Law (23503) establishes an inapplicable remedy per se.

It is the Commission's opinion that the repeated dismissal of the habeas corpus appeal on strictly procedural grounds means that, for practical purposes, the guarantee action provided for under the internal laws to challenge failure to follow impeachment procedures through a prompt recourse, would prove ineffective in redressing the alleged violation of Dr. Alan Garcia's rights. That decision was upheld by the reasoning advanced by the Superior Court of Lima which stated that, in any case, the petitioner's right could not be upheld as the Basic Law of the Emergency and National Reconstruction Government was in effect. Under this law, inter alia, the Congress was dissolved and the rights enshrined in the Constitution suspended.

c. Application of the exception contained in article 46.2.b

Based on the grounds put forward in sections a and b above, the Commission is of the understanding that the exception to the exhaustion of remedies under domestic law contained in article 46.2.b of the Convention, is applicable to this case and thus exempts the petitioner from this requirement of admissibility.

2. The absence of due process under the domestic law

a. The Judiciary's lack of impartiality and independence

Article 8.1 of the Convention provides that "every person has the right to a hearing, with due guarantees ... by a competent, independent and impartial tribunal ... in the substantiation of any accusation of a criminal nature made against him..."

The Inter-American Court of Human Rights has stated that Article 8 recognizes "due process of law" and has defined it as the prerequisites necessary to ensure adequate protection of those persons whose rights or obligations are pending judicial determination. It has also asserted that "the concept of due process of law expressed in Article 8 of the Convention should be understood as applicable ... to all the judicial guarantees... [protected] ... in the American Convention ..." [FN9]

[FN9] Inter-American Court of Human Rights, Judicial Guarantees in States of Emergency (Articles 27.2, 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, of October 6, 1987. Series A, No. 9, paragraph 29.

The Commission's repeated position has been that "effective observance of [judicial] guarantees is based on the independence of the judiciary, which derives from the classic separation of the three branches of government. This is the logical consequence of the very concept of human rights. In effect, to protect the rights of individuals against possible arbitrary actions of the State, it is essential that one of the branches have the independence that permits it to judge both the actions of the executive branch and the constitutionality of the laws enacted and even the judgments handed down by its own members. Therefore, the Commission considers that the independence of the Judiciary is an essential requisite for the practical observance of human rights in general." [FN10]

[FN10] Seventh Report on the Situation of Human Rights in Cuba, 1983, OEA/Ser.L/V/II.61 doc.29 rev. 1, p. 51.

The position taken by the petitioners is confirmed by what the Inter-American Commission itself stated in its own Special Report on the Situation of Human Rights in Peru, to the effect that "On April 5, 1992, the Government of Peru declared that the Judiciary, the Office of the Government Attorney and the Office of the Comptroller General of the Republic were undergoing reorganization. Troops of the Security Forces, supported by tanks, occupied the Palace of Justice and the premises of the other institutions, and barred entry thereto. On April 6, the President of the Republic announced the removal of judges and justices; on April 9, Decree Law 25423 removed 13 justices from the Supreme Court; Decree Law 25422 removed the eight members from the Tribunal of Constitutional Guarantees; and Decree Law 25424 removed members of the National and District Judiciary Councils ... On April 8, through Decree Laws 25419 and 25420, the Comptroller General of the Republic was removed and the Judicial Office and the Office of the Government Attorney were suspended for ten working days, leaving only examining judges and lower-ranking prosecutors. By Decree Law 25445, of April 23, 1992, 134 individuals were removed, among them magistrates on the superior courts, chief prosecutors, judges in the court districts, provincial prosecutors and minors' court judges in the districts of Lima and Callao. That Decree Law specifically precluded any possibility that judges might avail themselves of amparo to have this measure declared null and void. [FN11]

[FN11] Report on the Situation of Human Rights in Peru, 1993, OEA/Ser.L/V/II.83 doc.31, p.18.

The right to be heard by an independent and impartial tribunal has been examined on a number of occasions by the Commission and by the European Court of Human Rights. Based on the jurisprudence established, certain criteria have developed to be used to determine whether, in a specific case, the independence and impartiality of the courts have been adversely affected and whether, as a result, the victim has been denied proper protection of his or her rights.

For example, in the case of Campbell and Fell, [FN12] the European Court of Human Rights ruled that in determining whether a court is independent of the executive, the manner of appointment of its members and the duration of their terms, the existence of guarantees against outside pressures must all be considered.

[FN12] European Court of Human Rights, Campbell and Fell judgment of June 28, 1984, Series A No. 80, para. 78.

Moreover, the jurisprudence of the Commission and the European Court [FN13] has found that "the irremovability of judges ... must ... be considered a necessary corollary of their independence."

[FN13] See Campbell and Fell, supra note 7, paragraph 80 and Zand v. Austria, Comm. Report 12.10.78, D.R. 15 p.82, para. 80.

To evaluate the situation of the Judiciary in Peru, given the foregoing principles, one must analyze the internal norms that establish the manner of appointment and removal of magistrates.

As for the appointment of judges, Article 245 of the Peruvian Constitution stipulates that the President of the Republic shall appoint judges, who shall be nominated by the National Judiciary Council. The Senate confirms appointments of justices on the Supreme Court.

As for their terms, Article 242 of the Constitution guarantees that all judges may remain on the bench until they are 70 years of age and may not be removed.

Finally, articles 183 and 184 provide that members of the Supreme Court and of the Court of Constitutional Guarantees shall be subject to impeachment by both legislative chambers in the event of a violation of the Constitution and for any crime that they commit in the performance of their functions.

As the petitioners, and the Commission in its report, have pointed out, the justices of the Peruvian Supreme Court, of the Tribunal of Constitutional Guarantees and of the Judiciary Council were removed from their posts by several decrees issued by the Executive Power. A decision of the Executive Branch also removed another 134 people in judicial posts, among them lower court judges and prosecutors.

Following the massive dismissal of judges, the Executive Branch proceeded to appoint new judges under several decrees, thereby failing to comply with the procedures established by the Constitution.

The third criterion that the European Court gives for the independence and impartiality of the courts is the protection against external pressures exerted on the judiciary.

The Constitution of Peru assures those guarantees by providing a system of checks and balances among the various powers in selecting, designating and removing judges (articles 245, 242, 183 and 184). However, subsequent to the events of April 5, 1992, the Executive Branch, by "dissolving" the two Chambers of Congress and replacing, without any kind of process, a large majority of the judges in the Judicial Branch, has upset the balance of power created by the 1979 Constitution.

That very situation has, for all practical purposes, eliminated the separation of powers and as a consequence has focused many functions in the Executive Branch. That concentration of powers has had the effect of subjecting "the Judiciary even more to the dictates of the Executive Branch." [FN14]

[FN14] Report on the Situation of Human Rights in Peru, supra note 6, p.27.

Hence, since the judges were removed without any type of proceeding and replacements were then appointed solely on the basis of an Executive decision, it is reasonable to say that in Peru there are no guarantees to shield the Judiciary from outside pressure.

In that sense, in its Special Report on Peru the Commission stated "None of the formalities was observed when the members of the Judiciary were removed from the bench. Hence, judges who remain in their posts or those who have been appointed to replace the judges who have been removed from the bench, are at the mercy of the Executive Branch..." [FN15]

[FN15] Idem, p.27.

Given these arguments, the Commission considers that by removing a significant number of its judges, among them justices of the Supreme Court and of the Court of Constitutional Guarantees, and by appointing new judges without, in either of the two cases, observing the formalities required under the Constitution, the Government of Peru has seriously compromised the independence and impartiality of the courts and has thereby failed to guarantee due process of law in its jurisdiction.

The nonexistence of due process within the jurisdiction of a State weakens the efficacy of the remedies provided under domestic law to protect the rights of individuals.

The Inter-American Court has found that Article 25.1 of the Convention "incorporates the principle recognized in the international law of human rights of the effectiveness of procedural instruments or means designed to guarantee such rights..." [FN16]

[FN16] Inter-American Court of Human Rights, Judicial Guarantees and states of emergency, (articles 27.2, 25 and 8 of the American Convention of Human Rights, supra note 3, paragraph 24.)

This principle generates an obligation for the States Parties to the Convention, which is to provide effective judicial means in the event of a violation of human rights of individuals within its jurisdiction. Failure to comply implies a violation of that principle and, therefore, the offending State incurs international responsibility.

A remedy may not necessarily satisfy the requirements of exhaustion simply because it is stipulated in a State's constitution or laws; instead, "it must be truly effective in establishing whether there has been a violation of human rights and in providing redress." [FN17]

[FN17] Idem, para. 24.

In that sense, the Inter-American Court has underscored the following:

"A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case ... when practice has shown its ineffectiveness: when the judicial power lacks the necessary independence to render impartial decisions..." [FN18]

[FN18] Idem, para. 24.

It can be shown, in the specific case of Alan Garcia Perez, that because the Peruvian courts were not independent and impartial he was prevented from having his rights protected under the domestic law of the state.

Peruvian law provides a special procedure for investigating and judging crimes of which the officials referred to in article 183 of the Constitution, including the President and members of both chambers of the Senate, are accused. Under article 66 of the Statutes of the Attorney General's Office, in fact, the Attorney General shall institute criminal action against the President, Deputies, and Senators, where there are grounds for such action; article 34 of the Statutes of the Judiciary stipulates that the Criminal Chambers of the Supreme Court hear the proceedings and rulings on such cases.

As noted in the statement of facts, since the Senate ruled that there were grounds for prosecuting Alan Garcia, the Attorney General instituted new criminal proceedings for one of the incidents included in the impeachment, dismissing the other three as they were considered not to constitute crimes. On learning

that the only incident reported was also not defined as a crime, the Examining Justice decided not to open investigations. When that order was appealed, the Chamber of the Supreme Court as the court of second instance, upheld it. After the appeal for annulment and following the complaint, based on the dismissal by the court of first instance, it was declared without grounds by the Chamber of the Supreme Court acting as the highest court.

Following the events of April 5, 1992 and after the Attorney General and most of the members of the Supreme Court were dismissed by decree and their replacements appointed by exclusive Executive Branch decision, a new criminal action was prosecuted for the crime of unlawful enrichment and every action taken since the ruling not to reopen the case already prosecuted for the same crime was ruled null and void.

Using the same evidence, the new Attorney General decided that the events which her predecessor did not consider as crimes were now in fact so defined under Peruvian criminal law. Thus, through a subsequent change of officer, the same body was ruling twice, in the first instance holding a particular opinion, and then acting otherwise.

Similarly, the new Supreme Court judges believed that it was a "wrong" for their predecessors to decide that the appeal for annulment and the second appeal were unfounded. In the second ruling, they decided that the decision not to open proceedings and the decision confirming that were indeed null and void. The same body thus contradicted its own ruling in relation to the same case, the same events, and the same irregularities on which its had issued a previous ruling.

That the majority of the members of the Judiciary were virtually replaced by exclusive Executive decision, coupled with the way this situation directly affected the petitioner, in his specific case, lead the Commission to conclude that, as the courts in Peru were not independent and impartial, the procedural measures specially designed to protect the rights of individuals were, for all practical purposes, ineffective in terms of producing the result for which they had been devised.

This was the position of the Commission in its Special Report on Peru, where it stated that "... In consequence of the elimination of the separation of powers [in Peru] the remedies instituted to protect and guarantee the exercise of rights by individuals have been weakened..." [FN19]

[FN19] Report on the Situation of Human Rights in Peru, supra note 6, p.24.

Finally, the Commission wishes to point out that in the adoption of precautionary measures vis-a-vis the particular situation of Dr. Alan Garcia Perez, this body requested that the Government of Peru implement measures to guarantee the petitioner respect for his rights to have the proper guarantees, in accordance with Article 8.1 of the Convention, especially the right to be heard by an independent and impartial tribunal. [FN20]

[FN20] Precautionary measures requested by the Inter-American Commission on October 2, 1992.

However, the Government of Peru failed to comply with the Commission's recommendations.

b. Application of the exception under article 46.2.b

Given the foregoing, the Commission considers that the exception to the requirement concerning exhaustion of domestic remedies provided in Article 46.2.a applies to the instant case; hence, the petitioner is exempt from the obligation stipulated in the Convention.

B. The merits

The issues raised in the case under study can be summarized as follows:

1. Whether, as a result of the events that took place on April 5, 1992, the right to individual freedom and personal security of Dr. Alan Garcia Perez, his wife and children and the right to the inviolability of domicile and of private papers were violated.
2. Whether, in the criminal cases instituted for the crime of illegal possession of weapons, the necessary guarantees protected by the Convention have been observed.
3. Whether the institution of the second case for unlawful enrichment and the nullification of certain procedural acts in the first prosecution for this crime constitute a violation of the principle of non bis in idem.
4. Whether the failure to seek the Senate's authorization to prosecute Dr. Garcia for the crime of illegal possession of weapons and the failure to conduct the impeachment proceedings prescribed by the Constitution in the case of the new prosecution instituted for the crime of unlawful enrichment constitute violations of due process of law.

1. Actions taken by Army soldiers on April 5, 1992

The petitioners have alleged that the events that took place on April 5, 1992, when Peruvian Army soldiers surrounded, fired on, and then burst into the home of Dr. Alan Garcia for purposes of arresting him, constitute violations of rights protected under Article 7 of the American Convention.

That article upholds every person's right to personal liberty and security. In its second subparagraph, Article 7 provides that no one may be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the Constitution or by a law enacted pursuant thereto.

In its jurisprudence the European Commission on Human Rights has held that the words liberty and security must be taken together and understood to refer to physical liberty. [FN21] In the case of X v. the Federal Republic of Germany, the Commission's finding was that threatening with arbitrary and unjustified detention can infringe the right to security of person. [FN22]

[FN21] Winer v. UK, Comm. Report 10.7.86, D.R. 48 p.154.

[FN22] X v. Federal Republic of Germany, Comm. Report 7.5.81, D.R. 24 p.103.

Under the terms of Article 7 of the Convention, the legality or arbitrariness of an arrest must be analyzed on the basis of whether or not there was observance of the constitution and/or domestic laws enacted pursuant thereto that prescribe the reasons why an individual can be deprived of his or her freedom and establish the procedures that must be carried out in arresting an individual.

In that respect, the 1979 Constitution of Peru stipulated the following in Article 2:

Every individual has the right to: Parr. 20. Personal freedom and security.

g) no one can be arrested without written court order with a reason assigned by a judge or by the police authorities in a case of "flagrante delicto...."

h) every individual will be informed immediately and in writing of the cause or reasons of his detention....

As the petitioners have described in their statement of facts, the manner in which the attempted arrest of former President Alan Garcia was conducted utterly disregarded the procedural clauses of the Constitution. These actions were taken without a court order issued by a competent authority setting forth the reasons why the attempt to arrest Dr. Garcia was made.

Moreover, the arrest attempt was carried out by Army soldiers who had no authority to carry out such actions. The Peruvian Constitution, like the constitutions of other democratic states, provides that the role of the armed forces is to guarantee the independence, sovereignty and territorial integrity of the Republic; they therefore have no authority to arrest civilians.

This point is corroborated by the Armed Forces' Service Regulations, which stipulate that in the event troops are used to maintain and restore law and order, they shall confine themselves to discharging their assigned mission and avoid any improper use of their weapons. The Armed Forces are to be accompanied by members of the National Police, who shall make any arrests and detentions that the situation necessitates. [FN23]

[FN23] Underlining added.

The Commission considers that arrests must be made by the authority who is competent under the domestic laws of the State and that failure to comply with that requirement and failure to observe the procedures required by international law for making an arrest occur in a situation wherein "...arrests cease to be arrests per se and become kidnappings...." [FN24]

[FN24] Report on the Situation of Human Rights in Chile, 1985, OEA/Ser.L/V/II.66 doc.17, p.138.

These arguments, combined with the acts of violence committed by Army soldiers against former President Garcia --the firing of gunshots on his residence-- for purposes of arresting him, lead the Commission to conclude that in the instant case, the former President was threatened with arbitrary and unlawful arrest and therefore his right to personal security, which is protected under Article 7 of the American Convention, was violated by the measures taken by the Peruvian Armed Forces on April 5, 1992.

The petitioners have further claimed that the children of former President Garcia, who are minors, and his wife were also denied their freedom, as they were held under house arrest by the Army soldiers and that this, too, was a violation of Article 7 (right to personal liberty) and Article 19 (rights of the child) of the American Convention on Human Rights.

As stated earlier, no one may be deprived of his physical liberty except for the reasons and under the conditions established by the constitution or the laws enacted pursuant thereto.

The Peruvian Constitution provided that personal liberty could be restricted only for the reasons stipulated by the law, that no one could be arrested without a written court order from a competent judge stating the reasons for the arrest and that anyone who was arrested must be brought before a judge within twenty-four hours and informed of the reasons for his or her arrest. [FN25]

[FN25] See Article 2, subparagraphs 20.b, g, and h of the Constitution in effect until December 31, 1993.

Based on the cited constitutional clauses, it is the Commission's understanding that the arrest to which the wife of former President Alan Garcia was subjected can be described as unlawful and arbitrary inasmuch as there was no written arrest warrant from a competent judge stating the reasons for the arrest and inasmuch as she was neither brought before a competent court authority nor informed of the reasons for her arrest.

The detention of the children of Dr. Alan Garcia, who are minors, deserves separate examination. The petitioners have pointed out that the children were deprived of their freedom by Army soldiers when the latter entered the home of the former President in an attempt to arrest him. Subsequently, that "detention" was prolonged in the form of the house arrest to which their mother was subjected.

Article 19 of the American Convention requires that States Parties afford to minors the measures of protection required by their status as minors.

International instruments to protect the rights of the child interpret that right to "measures of protection required by one's condition as a minor" as an affirmative obligation of States to consider the best interests of the child in all their actions. The primacy of this concept has been regarded as the duty that States and society in general have to be particularly vigilant in protecting the rights of minors. [FN26]

[FN26] Daniel O'Donnell, "Proteccion Internacional de los Derechos Humanos", Lima, Comision Andina de Juristas, 1988, p.317.

Given the special protection that the state is required to provide to children, the Commission finds the measures taken by the Peruvian Armed Forces that deprived the minor children of Dr. Garcia of their freedom to be particularly repugnant. Those acts, for which the Peruvian Government is responsible, constitute a violation of the obligations that the American Convention on Human Rights upholds in this regard.

The Commission wishes to point out that there is a special prohibition in the Convention that proscribes extending punishment to the family of the person alleged to be guilty of a crime. [FN27] And so while the Peruvian Government believes that Dr. Garcia Perez should have been arrested for the commission of a criminal offense, the inability to apprehend him did not justify applying punishments intended for him to his wife and children instead.

[FN27] See Article 5, subparagraph 3.

Thirdly, the petitioners have stated that on the night of April 5, 1992, Army soldiers under the command of General Hermoza Rios entered the home of Dr. Alan Garcia and unlawfully seized private family papers, such as identification papers, passports, property deeds, tax declarations and legal documents used in the defense of the former President in the case brought against him for the crime of unlawful enrichment.

Article 11 of the American Convention on Human Rights protects the right to privacy and stipulates that no one may be the object of arbitrary or abusive interference in his private life or family.

By explicitly protecting the home and private correspondence of individuals, this article serves to guarantee that the right to privacy will be respected. This protection is consistent with the American Declaration of the Rights and Duties of Man inasmuch as it upholds the inviolability of domicile and private papers as guarantees against arbitrary State interference in the private lives of individuals. [FN28]

[FN28] See articles IX and X of the American Declaration of the Rights and Duties of Man.

However, the right to privacy is not absolute; quite the contrary, exercise of this right is routinely restricted by the domestic laws of States.

The guarantee of the inviolability of the domicile and of private papers must give way when there is a well-substantiated search warrant issued by a competent judicial authority, spelling out the reasons for the measure being adopted and specifying the place to be searched and the objects that will be seized.

The 1979 Constitution of Peru stipulated the inviolability of domicile and of private papers except when an order has been issued by a competent judicial authority authorizing the search, explaining its reasons and, where appropriate, authorizing the seizure of private papers, while respecting the guarantees stipulated by law. [FN29]

[FN29] See Article 2, subparagraphs 7 and 8 of the Constitution in force until December 31, 1993.

Based on these concepts, the Commission concludes that the warrantless search of Dr. Garcia's home and the seizure of private family papers -actions committed by Peruvian Army soldiers- were committed in complete disregard of the procedural requirements stipulated in the Constitution. The violation of those requirements indicates that the Government of Peru failed to guarantee to Dr. Alan Garcia and to his family the full exercise of their right to privacy.

The arguments made by the Government of Peru to the effect that the Army soldiers surrounded the residence of Dr. Garcia Perez in order to protect him are, in themselves, insufficient. Protection of a private residence does not call for action by heavily armed soldiers nor for the use of war tanks equipped with canons, small tanks or armored troop carriers.

2. Criminal prosecution for the crime of illegal possession of weapons

As the petitioners indicated, Dr. Alan Garcia Perez is charged in two criminal cases for the illegal possession of weapons, wherein the only incriminating evidence --firearms, munitions and explosives-- was unlawfully obtained by searching his private residence, in one case, and the headquarters of the Aprista Party of which the former President is Secretary General in the other case.

Article 8.1 of the American Convention provides that every person has the right to a hearing, with due guarantees, in the substantiation of any action of a criminal nature made against him.

Similarly, Article 8.2 provides that during proceedings, every person is entitled, with full equality, to certain minimum guarantees. The enumeration contained in this clause has been interpreted as a list of the

minimum guarantees, but not an exhaustive list. Hence, there are other guarantees recognized in the domestic laws of the State that, although not explicitly included in the text of the Convention, are equally protected under the broad wording of subparagraph 1 of Article 8 of the Convention. [FN30]

[FN30] Daniel O'Donnell, *supra* note 22, pp.166 and 167.

The inviolability of domicile is one of the implicit guarantees of that article. In effect, inviolability of domicile is more than a guarantee of privacy; it is a guarantee of due process inasmuch as it establishes what can be seized, that being incriminating evidence against an individual charged with a crime. When a search of a domicile is conducted without observing the proper constitutional procedures, that guarantee prevents any evidence thus obtained from being used to arrive at a subsequent court decision. Thus, in practice it functions as an exclusionary rule, one that eliminates illegally obtained evidence.

The *raison d'être* of this guarantee and of the rule excluding evidence obtained by violating that guarantee has been explained by Maier as follows:

The justification of the methods used to arrive at the truth depends upon the observance of juridical rules governing how they can be validly weighed in the proceedings. Not all methods are allowed and authorities must compile evidence according to the discipline imposed by procedural law. The judicial procedures are not mere formalities; instead, since they work directly to protect human dignity, they act as a material category... [FN31]

[FN31] B. J. Maier, *Derecho Procesal Penal Argentino*, Buenos Aires, Editorial Hammurabi, 1989, pp.470 and 471.

The proceedings instituted against Dr. Garcia Perez for illegal possession of weapons were based exclusively on unlawfully obtained evidence. The searches conducted of his private residence and of the headquarters of the Aprista Party were effected by means of intimidating tactics by Army troopers, in total disregard for the procedures stipulated by Peru's domestic laws.

For this reason, the Commission considers that the "procedural guarantees" protected by the American Convention were not respected in processing the criminal cases against former President Alan Garcia.

3. Institution of a new case for the crime of unlawful enrichment

The petitioners have pointed out that after being acquitted on the charge of unlawful enrichment, Dr. Alan Garcia has since been the target of a multiple criminal prosecution. According to what has been reported, on July 15, 1992, in other words six months after the Supreme Court's decision confirming the definitive filing of the case, the Public Prosecutor appointed by President Fujimori filed a petition with the Criminal Chamber of the Supreme Court seeking nullification of the ruling that had declared that there were no grounds for instituting an inquiry against former President Alan Garcia. Then, with the authorization of the Council of Ministers, on September 11 of the same year a new charge was filed for the crime of unlawful enrichment, based on the same facts and events that had been the basis for the first case. Based on the arguments described above, the petitioners denounced that both the reopening of the case with a time-barred petition for nullification and the institution of the new trial are violations of the principle of *res judicata*.

Subparagraph 4 of Article 8 of the American Convention upholds the guarantee of non bis in idem by providing that "an accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause."

Analyzing that subparagraph shows that the underlying elements of the principle, for the Convention, are as follows:

1. the accused must have been acquitted;
2. the acquittal must be a final judgment; and
3. the new trial must be based on the same cause that prompted the original trial.

To apply this principle to the instant case, one must first analyze the meaning of the concepts "accused person acquitted" and "nonappealable judgment" under the human rights protection system established by the American Convention.

The language used by the Convention, i.e., "accused person acquitted" implies that someone who, having been charged with a crime, has been exonerated from all criminal responsibility, since he has been acquitted because his innocence has been demonstrated, because his guilt has not been proven, or because it has been determined that the acts of which he is accused are not defined as crimes.

The Commission considers that the expression "nonappealable judgment" in subparagraph 4 of Article 8 of the Convention should not be interpreted restrictively, that is, limited to the meaning given to it by the domestic law of the States. In this context, "judgment" should be interpreted as any procedural act that is fundamentally jurisdictional in nature, and "nonappealable judgment" as expressing the exercise of jurisdiction that acquires the immutability and incontestability of *res judicata*.

Within the framework of the interpretation given to the text of subparagraph 4, article 8 of the American Convention, it is to be determined in this instance whether in this case there was a firm pronouncement exonerating former-president Alan Garcia from guilt.

Article 77 of the Peruvian Code of Criminal Procedure reads:

Once he receives the complaint, the Examining Judge shall open the preliminary hearing only if he deems that the act reported constitutes a crime, that the accused has been pin-pointed as the alleged perpetrator of the act, and that criminal proceedings have not been barred by a statute of limitations... If the judge concludes that no action is to be taken, he shall dismiss the case.

Accordingly, the text of the rule quoted shows that in the event that one of the required elements is not present, the court shall declare that preliminary hearings shall not be initiated because the proceeding is not admissible.

Unlike other bases for dismissing a charge--for procedural reasons, for example--when the order not to open preliminary hearings is based on the fact that the acts charged are not defined as criminal, the ruling establishing that finding may not be overturned. In fact, in a case where a court rules on one occasion that an individual cannot be prosecuted by the State because the acts charged are not defined as a crime, another court, citing the same acts, cannot hold that they constitute a crime. Having exhausted the remedies provided for under the law, this decision shall also be uncontestable, that is, it may not be changed during the same proceedings or in later proceedings.

In the Alan Garcia case, as was indicated earlier, the Superior Court Justice -- performing the duties of an examining judge -- ruled that preliminary hearings should not be initiated, and ordered the case to be filed

permanently because the acts charged were not defined as a crime. That ruling was contested by the remedies provided for under the law. Once those remedies were denied as inadmissible, the procedural ruling became final because of the principle of res judicata.

While the Convention explicitly refers to the prohibition against instituting a new trial based on the same facts, from a literal interpretation of its text, one would have to acknowledge that the violation of the principle of res judicata by reopening a proceeding that had already been closed, would not be covered under Article 8, subparagraph 4. Hence, there is the possibility that a State Party to the Convention could file time-barred petitions and thus reinstate the criminal prosecution of an individual previously acquitted.

But in actual fact, the Commission finds that the protection accorded under Article 8, subparagraph 4, implicitly includes those cases in which reopening a case has the effect of reviewing questions of fact and of law that have come to have the authority of res judicata.

As the petitioners point out, confirmation of the decision not to reopen the case and to file it permanently took place in January 1992, via a decision of the Supreme Court to dismiss, as unfounded, the complaints filed by the Attorney General's Office and the Office of the State's Attorney to challenge the ruling on the petition to have the earlier decisions declared null and void. On July 15, 1992, in other words six months later, the Attorney General filed a new petition seeking nullification, which the Supreme Court declared admissible on November 23, 1992. The Court decided to nullify all rulings as of and including the one that ordered that no inquiry be instituted and that the case be definitively filed.

Article 295 of the Code of Criminal Procedure of Peru provides that the petition for nullification must be filed within one day of the ruling or of notification of the decision being challenged. In the event that petition is denied, Article 297 of the Procedural Code provides that a complaint may be filed with the Supreme Court within 24 hours.

Once both challenges have been filed, the Supreme Court's final decision will put an end to the proceedings and become res judicata. Any procedural measure taken on a finalized case will in practice imply a reopening of that case, save for the remedy of review, where allowed.

The arguments lead the Commission to conclude that in the case in question, the time-barred filing of the petition for nullification and the decision of the Supreme Court to grant that petition have reopened a closed case, thereby violating the principle of res judicata.

In the final analysis, it is for the Commission to determine whether the second trial instituted for the crime of illegal enrichment is based on the same facts that were the grounds for the first criminal prosecution.

The impeachment that found grounds for prosecution of Alan Garcia was based on four facts alleged to constitute the crime of unlawful enrichment. When the articles of impeachment were presented to the Attorney General of the Nation, the latter instituted a criminal case against the former President based on just one of those articles and eliminated the others on the grounds that they were suspected of not constituting the crime of unlawful enrichment and did not prove liability.

The Commission considers the Attorney General's decision to dismiss criminal proceedings on the grounds that the incidents brought before it did not objectively constitute a crime since they are not so defined in any criminal law, as an act that is essentially jurisdictional in nature and --like all actions taken by the Attorney General's Office in the proceedings-- once final, cannot be repeated and is uncontestable, having the effect of res judicata. Thus, the judicial decision is final, and accordingly it has the effect of banning future actions being brought based on the same material facts of the judgment.

In the case under review, as was indicated earlier, the prosecutor, in his decision, on the one hand dismissed three of the acts included in the impeachment, and on the other hand, brought criminal proceedings for the remaining act. During the proceedings, neither the petitioner nor the government have indicated whether the prosecutor's decision to dismiss the case was appealed to a higher court. For that reason, the Commission must assume that, since the prosecutor's decision was not appealed, it was consented to, and accordingly became final.

Therefore, based on the foregoing, the Commission concludes that the prosecutor's decision, which dismissed three of the initial charges because they do not constitute crimes, became final and concluded the State's criminal proceedings for the acts that were set forth in the judgment. Initiation of a new criminal prosecution based on the same charges brought previously violates the principle prohibiting multiple criminal prosecutions, and accordingly, subparagraph 4, article 8 of the American Convention.

4. Immunities and privileges of Dr. Garcia Perez

The petitioners have alleged that because former President Garcia Perez is a Senator for life, the Constitution gives him certain privileges and immunities inherent in his office, privileges and immunities that were not respected when prosecuting the cases for illegal possession of weapons or in the substantiation of the new trial for the crime of unlawful enrichment. For this reason, the petitioners contend that Dr. Garcia has not been guaranteed the right to a competent court previously established by law contravening in this sense the right to due process of law protected under Article 8 of the American Convention.

To rule on the issue in dispute, it is necessary first of all to establish whether, at the time the proceedings for the cases mentioned earlier, Dr. Alan Garcia was in fact a Senator for life, and if he was, to determine what immunities and privileges the Constitution accords the members of both Houses of Congress.

On this point, petitioners have indicated that, after the Supreme Court ruled that preliminary hearings were inadmissible, Dr. Alan Garcia requested that he be reinstated in the Senate, and the Senate Executive Committee granted his request in an official communication dated March 20, 1992, of which he was duly notified. As support for their arguments, petitioners submit the ruling handed down in a habeas corpus proceeding filed by the parents of Dr. Alan Garcia contesting the noncompliance with the impeachment requirement in the case of the second trial for unlawful enrichment. In its decision on the matter concerning us, the court points out that Alan Garcia "...recovered that privilege when the First Criminal Section of the Supreme Court handed down a ruling ... the decision ... that held that instituting preliminary hearings was inadmissible..." and that "...the Senate of the Republic so understood when ...it accorded him full reinstatement to the Senate...".

In view of the Government's failure to contest the issue and based on the evidence submitted by the petitioners, the Commission considers that indeed after the proceedings of the first trial for illegal enrichment were concluded, Dr. Alan Garcia was reinstated to his position as Senator for life.

Article 8 of the Convention provides that anyone has the right to be heard by a competent judge or court. The restrictions regarding interpretation of the Convention contained in Article 29 stipulate that no provision thereof shall be interpreted as restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party.

As for the principle of the natural judge, the Constitution of Peru established the following in Article 2, subparagraph 20.1):

"No person may be removed from a predetermined jurisdiction by law or subjected to procedures

different from those previously established..."

Moreover, articles 176, 183 and 184 of the Constitution stipulated as follows:

"Senators and Deputies ... cannot be prosecuted or arrested without previous authorization of the Chamber to which they belong..."

"The Chamber of Deputies has the power to impeach before the Senate, the President of the Republic... for violating the Constitution and for any crime which they may commit in the exercise of their functions, even though they may no longer hold these positions."

"The Senate declares if there are grounds or not to find him guilty on the basis of the charges made by the Chamber of Deputies..."

Two different types of immunities and privileges are provided for in the articles cited above. In effect, while Article 176 concerns the immunity from arrest and prosecution that members of Congress enjoy, articles 183 and 184 concern the procedure through which certain high-ranking state officials must be charged--in this case, a former President and now Senator for life--for violations of the Constitution or for crimes committed in office.

The cases instituted against Alan Garcia for the crime of illegal possession of weapons were not for crimes committed while in office and therefore should be prosecuted in accordance with the requirements of Article 176 of the 1979 Constitution; in other words, the judge hearing the cases should have first requested the Senate's authorization before instituting proceedings. Failure to observe this requirement was a violation of a constitutional principle that anyone is entitled to be tried solely in accordance with the procedures the law prescribes.

The right to be tried according to the legally established procedures is one of the most elementary rights of due process of law and the obligation to respect that right is upheld in Article 8 of the American Convention.

The constitutional provisions mentioned earlier govern a special procedure, called impeachment, which must be used to process charges against certain high-ranking State officials, among them the President and the members of both houses of Congress, for violations of the Constitutions or for crimes committed in the exercise of their functions.

As indicated in the Statement of Facts, this procedure was used in the case of Alan Garcia when, after his term in office was over, he was charged with the crime of illegal enrichment at State expense.

The petitioners argued that, since Dr. Alan Garcia recovered his position as Senator for life, in order to bring a second criminal case against the former President, impeachment proceedings should have been instituted first. Using this argument, the petitioners allege that the due process of law protected under Article 8 of the Convention has not been guaranteed.

The Commission considers that, because Dr. Alan Garcia is a Senator for life, he was covered by the provisions of Article 183 of the Constitution, and therefore, the Peruvian Government should institute impeachment proceedings before bringing any criminal action based on the commission of a crime in the performance of his duties as President of the nation.

Putting forth its argument, the Government of Peru sought to justify the failure to proceed in accordance with the provisions of articles 176, 183 and 184 of the 1979 Constitution.

The Government noted, in this regard, that the Congress of the Republic was "temporarily adjourned" and

that the provisions of the Constitution did not apply because "under decree law 25418 (Basic Law of the de facto Government), the articles of the Constitution [were] suspended..." Furthermore, the Government of Peru has stated that impeachment proceedings were not necessary as that had already been pursued. It decided to suspend Dr. Alan Garcia as a Senator for life and ruled that "there were grounds for a case to be brought" against the former President. Insofar as the ruling of the Senate was a compulsory "mandate" which both the Attorney General and the Examining Prosecutor failed to carry out in the first place, the new charges and the declaration of a new case opened were supposed to be pursuant to the mandate prescribed under the Constitution.

The argument put forward by the Government conflicts with the conduct of the Senate itself which reinstated the petitioner to it. This is what the Commission must deal with. Through its own acts, this organ conceded that the investigations into the events included in the impeachment were, in effect, already concluded by pronouncement from the Attorney General or by ruling from the Criminal Chamber of the Supreme Court. No argument from the Government of Peru can therefore justify its failure to have the Senate carry out its mandate since, as was pointed out, this organ clearly knew otherwise.

Accordingly, as the impeachment proceedings in the case of persons covered by article 183 of the Constitution is a prior requirement for trial as set forth in the Constitution, the omission of which compromises due process of law, the Commission concludes that in the instant case, article 8 of the American Convention has been violated.

VII. CONCLUSIONS

Before setting forth its final conclusions, the Commission wishes to reiterate that violations of the human rights protected by the American Convention that are the result of acts or omissions attributable to any organ of the State, generate international responsibilities for that State. The notion that only organs responsible for international affairs of a government can compromise its international responsibility is erroneous, because other government organs that perform purely domestic duties can have occasion to apply and therefore violate rules of international law. [FN32]

[FN32] Eduardo Jimenez de Arechaga, "Derecho Internacional Publico" (Public International Law), vol. IV, Montevideo, Fundacion de Cultura Universitaria, 1991, p.51).

Although the Judicial Branch is independent from the Executive Branch, it is not independent from the State. Therefore, any ruling handed down by a domestic court that violates human rights protected by the American Convention, so long as it is issued by a government organ comparable to the legislature or the executive branch, generates international responsibilities directly ascribable to the State party to the Convention.

Finally, the Inter-American Commission on Human Rights, based on the considerations analyzed in this report and in light of the observations submitted by the Government of Peru on Preliminary Report 15/94, sets forth the following conclusions:

1. The Government of Peru is responsible for violating the right of personal freedom and security and the right to privacy in the case of Dr. Alan Garcia Perez, his wife and their children and the latter's right to special protection (articles 7, 11 and 19 of the American Convention) by virtue of the events that took place in April 5, 1992.
2. The Government of Peru is responsible for violating the right to judicial guarantees and the right

to due process of law of Dr. Garcia Perez (Article 8 of the Convention) because two cases were conducted on the basis of illegally obtained evidence, because a second criminal case was instituted based on the same material facts that had been the basis of the original criminal action, and because it failed to prosecute him in accordance with the procedures established by law for instituting a criminal action against a Senator.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,
RESOLVES:

1. That the Government of Peru take into consideration the Commission's analysis of the facts and of the law and that based on that analysis, it take the necessary measures to reestablish the status quo ante, by restoring to Dr. Alan Garcia Perez his rights that were violated.
2. That the Government of Peru make reparations for the consequences of violating the human rights of Dr. Alan Garcia Perez, his wife and children.
3. To publish this report pursuant to Article 48 of the Commission's Regulations and Article 53.1 of the Convention, because the Government of Peru did not adopt measures to correct the situation denounced within the time period.