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Title/Style of Cause: Susana Higuchi Miyagawa de Fujimori v. Peru  
Doc. Type: Report  
Decided by: Chairman: Professor Robert K. Goldman;  
First Vice-Chairman: Dr. Helio Bicudo;  
Second-Vice Chairman: Dean Claudio Grossman;  
Members: Prof. Carlos Ayala Corao, Dr. Jean Joseph Exume, Dr. Alvaro Tirado Mejia.  
Dated: 6 October 1999  
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## I. SUMMARY

1. On February 2, 1995, Mrs. Susana Higuchi Miyagawa de Fujimori reported to the Inter-American Commission on Human Rights (the "Commission") that the Republic of Peru (the "Peruvian state," the "State," or "Peru"), acting through the National Elections Board ("JNE"), had violated Article 23 of the American Convention on Human Rights (the "Convention") to her detriment, by arbitrarily and illegally preventing her from standing as a candidate of the independent group "Armonía-Frempol" for the Democratic Constituent Congress of her country. The complainant further alleged that the reported acts also curtailed the rights of hundreds of thousands of Peruvian citizens who would have voted for her.

## II. PROCESSING OF THE CASE BY THE COMMISSION

2. On January 29, 1995, the Inter-American Commission on Human Rights received a letter from Mrs. Susana Higuchi M. de Fujimori, requesting a hearing to explain to the Commission what she regarded as a violation of her constitutional and political rights by the Peruvian government.

3. The next day, after consulting with the IACHR Chairman and Vice-Chairman, the Executive Secretariat of the Commission, taking into account the urgency expressed by Mrs. Fujimori, notified her that she would be granted a hearing Thursday, February 2, 1995, at 5:30 p.m. On the morning of the same day, January 30, the Secretariat communicated by telephone with the official in charge of human rights matters at Peru's Permanent Mission to the OAS, to notify that person of the time and date of the hearing. At 1:45 that afternoon, the Secretariat of the Commission sent a fax confirming the time and date in writing.

4. On January 31, 1995, after the Chairman explained the nature of the petition, the Commission agreed to confirm the hearing in question.

5. By note No 7-5-M/029 dated February 1, 1995, the Permanent Mission of Peru stated, among other things, that "the Peruvian Government was surprised and concerned over the short time between the notice and the actual date of the hearing on Case No 11.389, which prevents the Peruvian State from being adequately represented."

6. The hearing was held on the day and at the time indicated. No representative of the Peruvian Government attended that hearing, at which Mrs. Fujimori set forth the complaint and the petition described below.

7. On February 9, 1995, the Commission forwarded to the Peruvian Government a copy of the written allegation presented by Mrs. Susana Higuchi de Fujimori.[FN1]

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[FN1] Prior to that, on September 26, 1994, Mrs. de Fujimori had presented a complaint to the Commission, which was processed as Case No 11,389. The Commission began processing this petition as part of the proceedings for Case No 11.389. On February 14, 1995, on considering the merits of this petition, the Commission agreed that, as it was a different matter from the prior petition, under the Regulations, the Commission was called on to open a new case, and it instructed the Secretariat to so proceed.

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8. In the report presented by Mrs. Higuchi de Fujimori to the Commission on February 2, 1995, she requested, inter alia, that:

In view of the fact that this is an urgent case ... since the damage could become irreparable and since it has been demonstrated that the facts alleged are true ... the Inter-American Commission on Human Rights [should] order the JNE of Peru to proceed to register the list of candidates to the National Congress from the independent group "Armonía-Fremopol," so that it can participate in the 1995-2000 election process, mindful of the historic case law of this Commission, in order to ensure that the election process ... is democratic, open, clean, and transparent.

#### Admissibility

9. At its meeting held on February 14, 1995, the Commission, considering that the measures adopted by the National Elections Board of Peru against Mrs. Susana Higuchi M. de Fujimori constituted, prima facie, a violation of its functions, RESOLVED: Single Article. To declare admissible the petition lodged January 17, 1995 by Mrs. Higuchi de Fujimori and by Oscar Pedraza Sierra, on behalf of the "Armonía-Fremopol" independent party.

#### Precautionary measures

10. Based on Article 29(2) of its Regulations, the IACHR decided to proceed as follows:

- (1) To request the Peruvian state, through the National Elections Board, to provisionally register the list of candidates to the National Congress of the Armonía-Fremopol independent party until a decision is reached on the merits of the case.
- (2) To request the illustrious Government of Peru to report to the Inter-American Commission on Human Rights within 15 days, counting from receipt of this report, regarding the measures adopted by the National Elections Board in response to the request in the preceding paragraph.
- (3) Pursuant to Article 48(1)(a) of the American Convention, and Article 34(2) of the Regulations, to request the illustrious Government of Peru, in view of the urgency of the matter and the imminence of the elections, which are to be held on April 9, 1995, to send the information it considers relevant to the merits of the issue raised in the instant case to the Inter-American Commission on Human Rights within 15 days, counted from the date this request is received.
- (4) To establish that once the time period referred to in the preceding paragraph has lapsed, the Commission will proceed to consider and determine the merits of the case presented by the petitioner.

11. On March 2, 1995, the Permanent Mission of Peru to the OAS, by note No. 7-5-M/063, sent a copy of Official note No. 794-950-SG-JNE from the National Elections Board, along with various attachments. On the same date, the Mission also sent a copy of an official note from the Office of the Attorney General.

The letter from the JNE stated, *inter alia*, as follows:

At no time has there been a violation of any constitutional right, and due process has also been guaranteed. Moreover, the National Elections Board has followed consistently the case law established by it in similar cases, pursuant to Resolutions Nos. 182-85-P/JNE, 183-85-P/JNE, and 201-94-P/JNE, of February 8 and 15, 1985, under the chairmanship of Domingo García Rada; and in the Resolutions of the Plenary, chaired by Ulises Montoya Manfredi, and contained in the decisions of March 31 and April 8, 1980, copies of which are attached.

12. The aforesaid documents were forwarded to the petitioner on March 9, 1995, and the petitioner made observations on them in a letter sent to the Commission on March 13, 1995.

13. On March 16, 1995, the Permanent Mission of Peru to the OAS forwarded to the Commission a copy of the text of Resolution No. 149-95 from the National Elections Board, by which it declared that the petition lodged by Mrs. Higuchi de Fujimori was inadmissible.

14. On March 24, the Commission received note No. 7-5-M/096 from the Permanent Mission of Peru to the OAS, along with a copy of Report No. 011-95-SG/JNE on this case, prepared by the National Elections Board.

15. On February 1, 1996, the petitioner forwarded to the Commission a document in which she reiterated the arguments she had made earlier.

16. The illustrious Government of Peru, in turn, forwarded, by note No. 7-5-M/192, report No. 018-96-JUS/CNDH-SE-DPDDH of June 11, 1996, entitled "Additional Report of the Complainant." [FN2]

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[FN2] The term "complainant" ["quejosa"] refers to Mrs. Susana Higuchi Miyagawa.  
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### III. DOMESTIC REMEDIES

17. The petitioner claims that Resolutions Nos. 033-95 and 037-95 of the National Elections Board violated her right to political participation, because they prevented her from taking part in the electoral process.

18. In view of these circumstances, Armonía-Fremopol availed itself of existing domestic remedies to oppose the resolution that declared the application for registration inadmissible, such as a motion to nullify Resolution No. 033-95-JNE of January 16, 1995 and Resolution No. 037-95-JNE of January 18, 1995.

19. According to the petitioner, there is no "effective" judicial remedy that she could have brought against the resolution under Peruvian law. Therefore, she found herself in the circumstances provided for in Article 46(2)(a) of the Convention, since Peruvian legislation does not provide for a prompt and simple judicial remedy for protection of the rights violated to her detriment.

20. Although Article 200, para. 2, of the 1993 Constitution of Peru provides that amparo proceedings shall protect the right of political participation, Article 142 of the Constitution establishes as follows:

Resolutions of the National Elections Board pertaining to electoral matters, as well as resolutions of the National Judicial Council pertaining to evaluation and confirmation of judges, are not subject to judicial review.

Similarly, Article 181 of the Constitution states that:

The plenary of the National Elections Board shall evaluate the facts based on criteria of justice and equity and shall decide in accordance with the law and general legal principles. On electoral matters, or on matters related to referenda or other types of public consultations, its resolutions are final and non-appealable, and are not subject to review. There is no remedy against them.

21. The intent of these provisions was to prevent the use of amparo proceedings against resolutions of the National Elections Board.

22. During the time the 1979 Constitution was in force in Peru, by both statute and case law, it was considered that an amparo action could not be brought against resolutions of the JNE.

In effect, Article 2 of Law No. 24.069 of January 11, 1985, provided that:

No judicial proceedings may be instituted against resolutions of the National Elections Board.

23. In addition, on May 20, 1986, the Court of Constitutional Guarantees ruled as follows in the amparo action "Juan Correa Guillón vs. National Elections Board," (El Peruano, June 22, 1986, Suplemento Despacho Judicial, pp. 2822-2824):

The resolutions of the National Elections Board on electoral matters are irreversible, pursuant to the provisions of Law fourteen thousand two hundred fifty, Law twenty-three thousand nine hundred three, and Law twenty-four thousand sixty-nine.

24. The Court of Constitutional Guarantees issued a similar ruling on July 17, 1986, in the case of "Víctor Guerrero Andía vs. National Elections Board," (El Peruano August 22, 1986, Suplemento Despacho Judicial, pp. 3454-3455), when it held:

That likewise, as established by Article 13 of Electoral Law 14,250, the National Elections Board is the supreme authority on electoral matters, and no appeal whatsoever may be taken of its decisions. The Board may not reconsider, revise, or modify its decisions, and the resolutions it issues in the performance of its functions shall be carried out by the authorities to whom they are directed, and who shall be accountable therefor.

Pursuant to the third article of Law 24079, no judicial action that may interfere with the resolutions issued by the National Elections Board shall be admissible.

In accordance with the sixth paragraph of Article 20 of Electoral Law 14.250, it is the National Elections Board that has, among others, the power to decide in motions of apelación (appeal), revisión (review), and queja (complaint) filed against the resolutions of the Departmental Election Boards.

25. In light of the foregoing, the Commission considers that there was no domestic judicial remedy under Peruvian law that the petitioner could invoke. This constitutes per se a violation of Article 25(1) of the American Convention, since it deprives a person of the "right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights...."

#### IV. JURISDICTION OF THE COMMISSION

26. Article 23 of the Convention states that every citizen has the right to political participation, and that this includes the right "to be elected in genuine periodic elections, which shall be by universal and equal suffrage" and the right "to have access, under general conditions of equality, to the public service of his country."

27. In addition, Article 44 of the Convention establishes that any person may lodge petitions with the Commission containing denunciations or complaints of violations of this Convention by a State Party.

28. With regard to the complaint lodged by the petitioner with the Commission, the Peruvian state, through the National Elections Board, presented the following arguments in report No. 011-95-SG/JNE:

a. [The petitioner] claims to present valid arguments to the effect that having recourse to the Inter-American Commission on Human Rights, to file a complaint, does not constitute a remedy such as an apelación or queja, and so she is not violating the principle of non-appealability contained in Article 181 of the Constitution of Peru, the text of which is attached as Appendix A.

b. This statement is not accurate, not only by virtue of the facts but also by virtue of the legal effects of the petition (Case 11.428).

I must point out that Article 44 of the American Convention on Human Rights authorizes the presentation of petitions containing denunciations or complaints of violations of the Convention; Article 46(1)(a) states that any petition or communication is admissible provided that the domestic remedies have been pursued and exhausted in accordance with generally recognized principles of international law.

...

c. From the preceding paragraph, it can be determined with transparency and absolute objectivity that the Commission may receive any petition referring to a violation of human rights recognized by international treaty once domestic legal remedies in a country which is a party to the American Convention have been exhausted. Such a petition has the content and legal effect of a recurso, queja, denuncia or acción, which are synonyms in legal terminology that refer to having recourse to the Commission for it to issue a pronouncement on a matter that is within its jurisdiction.

29. Although the paragraphs transcribed above contain various statements that lack grounds, the Commission would note that regardless of the interpretation given by the National Elections Board to the "domestic Constitutional order," the Commission has jurisdiction to determine possible violations of fundamental rights that the American Convention on Human Rights guarantees to the petitioner and that the Peruvian state, through the National Elections Board, is alleged to have violated in this case. Upon ratifying the Convention, the Peruvian State acknowledged the jurisdiction of the Inter-American Commission on Human Rights to consider and decide on allegations of violations filed by "[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization" (Article 44). As a result, the Commission has jurisdiction to consider this case.

#### V. THE ISSUE RAISED BY THE PETITIONER: VIOLATION OF THE RIGHT TO POLITICAL PARTICIPATION

30. The Commission considers that the issue raised in this case consists of establishing whether the National Elections Board, in failing to register the list of candidates for the National Congress, headed by Mrs. Susana Higuchi de Fujimori, due to defects of form, after having

published said list, in accordance with Article 89 of the Organic Electoral Law, violated the rights set forth in Articles 23 and 24 of the American Convention, to the detriment of the petitioner, as follows:

#### Article 23. Right to Participate in Government

1. Every citizen shall enjoy the following rights and opportunities:
  - a. to take part in the conduct of public affairs directly or through freely chosen representatives;
  - b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
  - c. to have access, under general conditions of equality, to the public service of his country.
2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

#### Article 24. Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

31. The petitioner alleges that the Electoral Law that gave rise to the violation of her constitutional rights introduces, in its final provision, Article 4, an impediment, which was intentionally added by the pro-government majority in the Democratic Constituent Congress. As a result, the prohibition of the candidacy of anyone having family ties to the Head of State, which prevents them from being candidates for President or Vice-President, also applies to candidates for Congress.

32. According to the petitioner, none of the Constitutions of Peru, including the Constitutions of 1823, 1826, 1828, 1839, 1856, 1860, 1867, 1920, 1933, 1979, and 1993, contained any provision preventing family members or the spouse of the President of the Republic from running as a candidate for the legislature.[FN3]

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[FN3] The relevant parts of Article 4 of the Final Provision establish as follows: "The restriction that prevents a citizen from becoming a candidate for the office of President or Vice-President of the Republic on grounds of family ties with the incumbent President of the Republic shall also apply to candidates to Congress, and impose the same impediments."  
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33. The Constitution that entered into force on December 31, 1993, does not regulate the subject.

34. Later, the National Elections Board, by Resolution No. 043-94, approved the Single Integrated Text regulating general elections in Peru. This resolution stipulated the procedures to be followed to stand for Congressional office, and requiring that for that purpose, the complete list of candidates to be registered by no later than January 9, 1995.

35. The independent group Armonía-Frempol was registered by National Elections Board Resolution No. 252-94-JNE, which gave it legal status and qualified it to participate in the general elections (1995-2000).

36. This party drew up a list of candidates for the National Congress and, on January 9, 1995, proceeded to register it within the legally established time. According to Article 89 of the electoral law in force:

The list of candidates who meet the formal requirements indicated shall be published in the official gazette, "El Peruano," for three (3) consecutive days.

37. The list, pursuant to legal requirements, was published in "El Peruano" on January 11, 12, and 13, 1995. The National Elections Board, three days after circulating the list of candidates, decided to declare the registration invalid because of typographical errors detected in the list, without taking into account that the Electoral Law allows for a period of time to cure any defects in the documents presented.

38. Thus the petitioner's right to be elected was obstructed, as was the right of her fellow party members, and the right of Peruvian citizens who would have voted for the petitioner. Resolution No. 033-95-JNE states only that the list was defective.

39. The petitioner maintains that she was never advised of the defect and she considers that, if there was any formal defect, she should have been granted the five-day period established in Article 86 of the Organic Electoral Law to cure any such defects, as was done in the case of other parties.

40. In these circumstances, Armonía-Frempol filed a motion for nullity based on procedural violations with the National Elections Board and requested in turn that the matter go before the Personero Nacional, so that she could attest to the grounds for her petition in person, in the full exercise of her right to defense, also protected by the American Convention on Human Rights. Both were denied, and the National Elections Board issued an arbitrary and capricious order (ucase) denying the motion for nullity on procedural grounds.

## VI. THE COMMISSION'S CONSIDERATIONS REGARDING THE ISSUE RAISED BY THE PETITIONER

41. The record shows that the party headed by Mrs. Susana Higuchi de Fujimori proceeded to register the list of candidates on January 9, 1995, within the time frame established in Resolution No. 043-94/JNE, issued by the National Elections Board on December 30, 1994.

42. It further shows that by decision of the National Elections Board, the list was published in the "El Peruano" daily paper on January 11, 12, and 13, 1995, and that subsequently, on January 16, acting on its own initiative, without having received a third-party objection (Article 90 of the Organic Electoral Law), the JNE issued Resolution No. 033/95-JNL declaring the registration invalid.

43. The Commission notes that Article 13 of the Organic Electoral Law states as follows in its first paragraph:

The National Elections Board is the supreme authority in election matters. Its decisions may not be appealed. The Board may not reconsider, revise, or modify its decisions. [The underlining is the Commission's.]

44. It was further established that the National Elections Board, in Resolution No. 033-95-JNE issued on January 16, 1995, declared the list invalid.

45. The Commission considers that the declaration by the National Elections Board, subsequent to its publication, of the list's invalidity is not consistent with the provisions of Article 86 of its own Organic Electoral Law, which reads:

Any error or defect in the documents submitted may be cured by the parties or independent groups or alliances or independent lists by notifying the National Elections Board within five days of receiving notice of the error.

46. Furthermore, the National Elections Board, pursuant to the provisions of Article 13 of the Organic Electoral Law transcribed above, was not authorized to revoke its own decision, as it did in this case, once publication of the lists in the "El Peruano" daily paper had been ordered and done.

47. As mentioned in paragraph 48, the Court of Constitutional Guarantees of Peru, in a judgment issued in the case of Víctor Guerrero Andía vs. National Elections Board, stated that:

The Board may not reconsider, revise, or modify its decisions, and the resolutions it issues in the performance of its functions shall be carried out by the authorities to which they are directed, and under their responsibility.

48. Armonía-Fremopol filed a motion for nullity on procedural grounds with the JNE on January 17, 1995, and on January 18, the Board responded to the petitioner as follows, in Official note No. 188-95-SG/JNE:

[Considering] that in the case of the independent group "Armonía-Fremopol," the application to register the list of candidates to Congress was submitted on the last day, i.e., on January 9, 1995, at 2:20 p.m., according to the receipt stamped by party station ((Mesa de Partes ) No 000122, and that consequently, the provisions of Article 86, which are consistent with Article 84(1) of the Organic Electoral Law, are not applicable, since the time period had lapsed; --That the independent group Armonía-Fremopol, by submitting an incomplete list of candidates to Congress

containing only 113 candidates, violated a requirement of public policy which is incurable, since Article 82 of the Organic Electoral Law provides that a complete list consists of 120 members, a requirement that must be met; --That the purpose of publishing the list of Congressional candidates is to inform the public of the list of candidates, and this was done in strict compliance with Article 20(18) and Article 89 of the Organic Electoral Law, but that this does not entail recognition of the validity of said list; --That, as a result, the National Elections Board did not commit a nullity by issuing Resolution No. 033-95-JNE; --That the National Elections Board issued the aforesaid resolution as a final, non-appealable decision in application of Article 181 of the Constitution and Article 13 of the Organic Electoral Law, and in the exercise of the powers conferred on it by Article 20(3) of the same Electoral Law; --The National Elections Board, exercising its powers, --RESOLVES: --Single Article. To declare invalid the application of January 17, 1995, lodged by Mrs. Susana Higuchi de Fujimori and Oscar Pedraza Sierra, on behalf of the independent group Armonía-Frempol.

49. The JNE states that the five-day period established in Article 86 of the Organic Electoral Law is not applicable, because Armonía Frempol submitted the registration application on January 9, 1995, that is, on the last day of the period established by Resolution No. 043-94-JNE and so, according to the JNE's interpretation, "the provisions of Article 86 of the Organic Electoral Law do not apply to it." The Commission notes that said Article 86 of the Organic Electoral Law does not establish any limitation on the five-day period allotted to parties or political groups to correct any errors "in the documents submitted." Consequently, however the provisions are interpreted, it is arbitrary, if not unreasonable, to conclude that the five-day period does not apply to groups that submit the lists on the last day.

50. Moreover, it is difficult to understand the reason why the National Elections Board decided to publish the list if it was defective, especially considering that Article 89 of the Organic Electoral Law establishes that "the list of candidates that meets the formalities" shall be published in "El Peruano" for three days.

51. The Commission considers that the interpretation and application given to Article 86 by the JNE makes that provision incompatible with the principles of Articles 23 and 24 of the American Convention, since the list was excluded after it was published in "El Peruano" for three days.

52. In the above-mentioned Report No. 011-95-SG/JNE, the National Elections Board states as follows:

...

d. It is clear that under the Peruvian Constitution, resolutions of the National Elections Board on election matters may not be subject to review. This is based on the specific rule contained in Article 181 of the aforesaid Constitution, which provides for a special regime in these matters, that is to say, in matters related to the political rights of citizens, for example, to vote or be elected, in which case no review is allowed, on the grounds that the decision was issued by the authority with the last word as a final, non-appealable decision. This provision is consistent with Article 142 of the Constitution, and with case law on the subject established by

the Constitutional and Social Law Chamber of Peru's Supreme Court of Justice, as shown in the decisions attached as Appendix B.

e. Based on the foregoing, the Peruvian Constitution can be construed as not permitting review in any form, i.e. recurso, denuncia, queja or any petition whatsoever of the resolutions of resolutions on election matters issued by the National Elections Board (political rights, pertaining to the right to vote and to be elected). The claimed difference among apelación, queja, and denuncia is of no significance whatsoever in the matter at hand, because it is not the designation of the petition that matters, but rather the effect sought, namely, to have the IACHR review decisions of the National Elections Board.

...

g. We should note that Report 010-95-SG/JNE was misunderstood, in the third section (legal considerations), 3.1, paragraphs e and f, as it was indicated that there is a conflict, and it was alleged that the American Convention on Human Rights, which has the status of law, pursuant to Article 55 of the Constitution in force, was incompatible with the precept contained in Article 181, which establishes the principle that resolutions on election matters issued by the National Elections Board are not subject to review.

This is not a matter of a conflict between a foreign law and a domestic law, an area where we have already indicated that foreign law (international treaty) does not prevail, but rather a question of a conflict between a statute and the Constitution, which obviously has precedence over domestic and international law, pursuant to the principle of constitutional precedence at Article 51 of the Constitution. This principle establishes the primacy of the Constitution over all statutes.

h. As will be seen, the petitioner wrongly poses a supposed conflict between domestic and international law when that is not the issue. The issue is that the Peruvian Constitution has precedence over any legal provision opposing it, and Peruvians are required to respect, abide by, and defend the Constitution.

53. In the first place, the Commission does not consider it correct to describe the American Convention on Human Rights as "foreign law."

54. With reference to the laws prohibiting review of the resolutions issued by the National Elections Board "with respect to the political rights of citizens, for instance, to vote or be elected," the Commission is of the opinion that one essential aspect of due process is the right to have the legality of any decision that imposes an irreparable charge on a person examined or re-examined, as well as when that charge affects fundamental rights or freedoms, such as the right contemplated in Article 23 of the American Convention, in the instant case.

55. In this case, the provisions of Peruvian law (Article 181 of the Constitution and Article 13 of the Organic Electoral Law), as interpreted by the JNE in its decision of January 18, 1995 (Official note No. 188-95-G/JNE), imply that any decision adopted by the JNE that may affect

the political rights set forth in the Convention are not subject to review and therefore those rights are not protected under domestic law.

56. Regardless of the type of electoral administration that a state decides to adopt, it should guarantee that the decisions it issues that may violate the political rights set forth in the Convention are subject to an effective remedy before a judge or court (Article 25 of the American Convention), or at least to an effective remedy before the electoral authority itself.

57. In the present case, by virtue of the fact that JNE decisions are not subject to review or control of any kind, under Peruvian law, and in view of the non-judicial nature of that organ, the Commission finds that protection of political rights is not guaranteed. In fact, recourse to specialized electoral judges or members of the judiciary, or any other effective recourse, is essential to protect the rights set forth in the Convention, including the rights to political participation.

58. Moreover, whatever rank Peruvian law accords international treaties, it is important to recall that Article 27 of the Vienna Convention on the Law of Treaties prohibits rules of domestic law from being used as grounds to justify noncompliance with an international obligation. The Inter-American Court, in Advisory Opinion OC-14/94, had the following to say on this point:

Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify nonfulfillment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions (Greco-Bulgarian "Communities" (1930) ... Treatment of Polish Nationals and other Persons in Danzig (1931) ... Case of the Free Zones (1932) ... and Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement (Case of the PLO Mission) (1988). [Advisory Opinion OC-14/94 of December 9, 1994: International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), paragraph 35.]

59. Likewise, among the obligations of the Peruvian State, pursuant to Article 2 of the Convention, is the obligation to adopt legislative or other measures--including amending the Constitution--as may be necessary to give effect to the rights and freedoms recognized in the American Convention, in accordance with Article 1(1) of the same.

60. Report No. 018-96-JUS/CDNH-SE-DPDDH, which the State entitled "Additional Information on the Complainant [Quejosa]," referred to earlier, states as follows:

The precautionary measure of the IACHR, which sought to ensure the temporary registration of the list of candidates to the National Congress put forward by the independent group Armonía-Frempol, could not be carried out, for it constitutes clear interference with the functions of the National Elections Board, whose decisions are final and non-appealable, are not subject to review, and indeed no remedy of any kind is permitted against them (Article 181 of the Constitution). This constitutional precept takes on greater force when read in conjunction with

Article 38 of the Constitution, which establishes that it is the duty of all Peruvians to respect, abide by, and defend the national legal order.

An action on grounds of unconstitutionality is not materially viable, since the Constitutional Court, the only tribunal which could hear an unconstitutionality action, pursuant to the provisions of Article 202(1) of the Constitution, cannot pronounce judgment, as it has not been in session, regarding a Law that allegedly limited the political rights of citizen Susana Higuchi and that was allegedly promulgated without following the legal procedures stipulated in the Constitution.

61. Peru is a State Party to the Convention, consequently, any report of a violation of the rights set forth therein by an organ of the Peruvian state is subject to consideration and a decision by the Commission, pursuant to Article 44 of the Convention, and by the Inter-American Court, pursuant to the provisions of Articles 61 to 63 of the Convention.

62. The Inter-American Court on Human Rights had the following to say on the subject in Advisory Opinion OC-13/93:

[26.] A State may violate an international treaty and, specifically, the Convention, in many ways. It may do so in the latter case, for example, by failing to establish the norms required by Article 2. Likewise, it may adopt provisions which do not conform to its obligations under the Convention. Whether those norms have been adopted in conformity with the internal juridical order makes no difference for these purposes.

[27.] In these circumstances, there should be no doubt that the Commission has in that regard the same powers it would have if confronted with any other type of violation and could express itself in the same way as in other cases. Said in another way, that it is a question of "domestic legislation" which has been "adopted pursuant to the provisions of the Constitution" is meaningless if, by means of that legislation, any of the rights or freedoms protected have been violated. The powers of the Commission in this sense are not restricted in any way by the means by which the Convention is violated.

[28.] There are historical situations in which States have promulgated laws which conformed with their juridical order, but which did not offer adequate guarantees for the exercise of human rights, imposed unacceptable restrictions or, simply, ignored them. As the Court has said, the fulfillment of a constitutional requirement "does not always prevent a law passed by the Legislature from being in violation of human rights" [The Word "Laws" in Article 30 of the American Convention on Human Rights, *supra* 25, para. 22].

[29.] This does not mean the Commission has the authority to rule as to how a legal norm is adopted in the internal order. That is the function of the competent organs of the State. What the Commission should verify, in a concrete case, is whether what the norm provides contradicts the Convention and not whether it contradicts the internal legal order of the State. The authority granted the Commission to "make recommendations to the governments of the member states [..] for the adoption of progressive measures in favor of human rights within the framework of their domestic laws and constitutional provisions" ( Art. 41( b ) ) ( emphasis added ) or the obligation

of the States to adopt such legislative or other measures as may be necessary to give effect to the rights or freedoms guaranteed by the Convention "in accordance with their constitutional processes" ( Art. 2 ) (emphasis added ), does not authorize the Commission to determine the State's adherence to constitutional precepts in establishing internal norms.

[30.] At the international level, what is important to determine is whether a law violates the international obligations assumed by the State by virtue of a treaty. This the Commission can and should do upon examining the communications and petitions submitted to it concerning violations of human rights and freedoms protected by the Convention. [Certain attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 46, 47, 50, and 51 of the American Convention on Human Rights), Advisory Opinion OC-13/93 of July 16, 1993].

63. With regard to the statement made by the state in its Report No. 018-96 to the effect that "it is the duty of all Peruvians to respect, abide by, and defend the national legal order," it is important to clarify that recourse to international organizations for protection of human rights is a right of any person who considers that such rights have been violated, and this is recognized in both the Peruvian Constitution and the American Convention. Therefore, recourse to such organizations cannot be regarded as disrespect for or failure to comply with the duty to defend the Peruvian legal order. On this point, the Inter-American Court had the following to say:

The insinuation that persons who, for any reason, resort to the inter-American system for the protection of human rights are disloyal to their country is unacceptable and cannot constitute a basis for any penalty or negative consequence. [Velásquez Rodríguez, Judgment of July 29, 1988, para. 144].

## VII. FRIENDLY SETTLEMENT

64. At the Commission's 97th session, it instructed the Secretariat to inform the parties, pursuant to Article 48(1)(f) of the American Convention and Article 45(1) and (2) of its Regulations, that it was putting itself at their disposal to seek a friendly settlement of the matter. The Secretariat duly informed the parties by letter of October 28, 1997, and asked them to reply within 15 days as to whether they accepted the proposal to begin negotiations for a friendly settlement.

65. By note No. 7-5-M/394 of November 7, 1997, the Peruvian State asked for a 30-day extension to reply. By letter of November 13, 1997, the Commission granted the State a 30-day extension.

66. By note No. 7-5-M/444 of December 9, 1997, the Peruvian State replied to the Commission's request by providing information from the Deputy Minister of Justice. The reply from the Deputy Minister of Justice defended the measures adopted in connection with Armonía-Frempol at the time, but pointed out that the situation had changed, since the Organic Elections Law (Ley Orgánica de Elecciones) had amended the former Organic Electoral Law.

67. Articles 93 and 118 of the new Organic Elections Law have amended the former Organic Electoral Law. The provisions relevant to the instant case read as follows:

Article 93: If, as a result of the verification referred to in the previous article, the number of valid signatures is less than the number required, the National Elections Board shall report the deficiency to the party, alliance, or independent group that applied for the registration, so that the applicant organization may cure it. This cure may not occur later than the closing date for registration of political parties, independent groups, or alliances. If the defect is not cured, the application for registration shall be considered withdrawn.

Article 118. No citizen may be included on the list of candidates to the National Congress or the Andean Parliament without his consent. In the event that a candidate's name appears on two or more lists and the candidate fails to ask the National Elections Board to consider him only for the list specifically indicated by him, once two calendar days have lapsed after the publication referred to in Article 119, that candidate shall be excluded from all the lists on which his name appears. Any list that has a candidate in more than one place is thereby rendered invalid, unless such error is cured within the period established in this law. In the event the registration period has passed, the list in question shall be eliminated from the process.

Having reviewed these provisions, the Peruvian State attempted to clarify that the correction could not take place after the deadline for registration of the lists. With this clarification, the State was hoping to eliminate any erroneous interpretation of the law and claims such as the one that led to this case.

68. In conclusion, the State, in its note of December 9, 1997, proposed a basis for negotiating a friendly settlement:

The Peruvian state, through the Inter-American Commission on Human Rights, would like to express its disposition and interest in amending Articles 93 and 118 of the Organic Elections Law, by suggesting a more correct wording that will make the relevant text easier to understand. The Peruvian State wishes to point out that what is at issue is an amendment to the wording of the provisions and not their content, which is why it does not violate any right recognized in treaties or in the Peruvian Constitution.

The Commission forwarded the reply from the Peruvian State to the petitioners by fax on December 23, 1997.

69. The petitioners replied to the Government proposal with a counterproposal sent by letter of January 9, 1998, but received by the Commission on January 26, 1998. The petitioners' reply was forwarded to the Peruvian State on January 26, 1998.

70. The petitioners argue that at the time that "Armonía Frempol" submitted its list of candidates to Congress, it was already registered as a political movement, pursuant to JNE Resolution No. 252-94, which granted it legal status. In its opinion, the Electoral Law was never applied to them, because, if it had been, they argue, they could not have been excluded from the elections. According to the petitioners, their problem was not one of attempting to "register their movement," as the Deputy Minister asserted, but rather of having the time to correct any error or omission, precisely because they were already registered. According to Article 89 of the Organic Electoral Law, applicable at the time, "the lists of candidates who meet the indicated

requirements shall be published in the official gazette, 'El Peruano' for three consecutive days." Even though their list was published in "El Peruano" from January 11 to 13, 1995, they were not allowed to participate in the electoral process.

71. The petitioners submitted their own counterproposal for reaching a friendly settlement:

1. Registration of our Independent Political Movement, "Armonía-Fremopol," in view of the fact that we were not allowed to participate in the elections for the reasons stated. This registration would mean that the party does not have to collect signatures again and that consequently it is entitled to participate in the upcoming Municipal and General Elections, with no limits or conditions whatsoever.

2. Abandonment, on our part, of the complaint lodged against the Peruvian government.

72. By note No. 7-5-M/052 of February 5, 1998, the Peruvian State responded to the petitioners' counterproposal in a letter from the Deputy Minister of Justice. In its reply, the Peruvian state argues that the petitioners are confusing "the registration of a political movement with the registration of the list of candidates to the National Congress." The Justice Minister pointed out that the JNE did not object to the registration of the political movement in Resolution No. 252-94-JNE of November 28, 1994. On that occasion, the JNE applied Article 27 of the Organic Electoral Law, which established that political groups could register provided they were in compliance with the provisions of Article 60, paragraphs 1(2) and 5, of Decree-Law 14250. This registration, however, would be valid only for the 1995 election process. The present law, according to the note, allows registration of political groups that have obtained at least 5% of the vote in the most recent national elections. In the specific case of Armonía-Fremopol, according to the state, its registration lapsed after the 1995 elections, and, therefore, it cannot benefit from the new Electoral Law since it did not participate in the most recent national election.

73. According to the state's note of February 5, 1998, in order for Armonía-Fremopol to participate in the upcoming elections, it must fulfill the requirements of Article 88 of the Organic Elections Law.[FN4] As to Armonía-Fremopol not participating in the 1995 elections, the State argues that:

"Armonía-Fremopol" had a valid registration, as has been shown. However, according to Article 82 of the Organic Electoral Law, it was required to register its candidates to Congress by submitting a complete list of 120 candidates.

In actual fact, "Armonía Fremopol" did meet the requirement of submitting the list of candidates on the last day for registration. When the National Elections Board reviewed and evaluated the list, it ascertained that it had submitted an incomplete list of 113 names, thereby failing to meet the basic requirement of the aforesaid law. It therefore proceeded to declare the application for registration invalid.

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[FN4] The requirements include the following: submit the request for registration to the JNE on behalf of a political party or group, indicating the name and domicile of the person responsible;

register up to 90 calendar days prior to election day; submit a list of no less than 4% of citizens qualified to vote, with their signatures and national identification numbers; submit a copy of the signatures and identification numbers of the supporters on diskette.

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74. The State concludes that to accept the petitioners' request to allow them to participate without having met the requirements of the registration process would be illegal. It indicates that it is surprised that the petitioners are seeking equal treatment under the Organic Electoral Law, while at the same time they are requesting that they be allowed to receive special advantages in the forthcoming elections that are in violation of the Constitution and the law and constitute privileged treatment vis-à-vis other candidates who aspire to be elected to Congress. It further states that the JNE is an autonomous organ, and that any interference in registration procedures would vitiate the electoral process. Since the parties did not change their initial positions in this case, it can be concluded that the effort to pursue a friendly settlement failed.

#### VIII. CONSIDERATIONS REGARDING THE STATE'S REPLY

75. The Commission approved Report No 12/98 (Article 50) on this case on March 2, 1998, during its 98th regular session. This Report, containing the Commission's recommendations, was forwarded to the Peruvian government on March 23, 1998, and the Commission gave it 60 days, counting from the date the Report was sent, to comply with the recommendations made.

76. By note No. 7-5-M/187 dated May 11, 1998, the State forwarded to the Commission its response to Report No. 12/98. In that communication, the State maintained that the Commission arrived at two conclusions that are inaccurate, and that because of the seriousness of the conclusions, the Government of Peru believes that it should clarify them before proceeding to report on the measures adopted to implement the recommendation in question.

77. The State referred to the possible impact of the considerations contained in paragraphs 42, 44, and 45, of that Report, on the Commission's conclusion that the state violated the rights set forth in Articles 23 and 24 of the American Convention, to the detriment of the victim. Those paragraphs state that Resolution No. 033-95-JNE lacks foundation. The State attached a certified copy of the text of that resolution.

78. In response to this allegation by the state, the Commission observes that the aforesaid Resolution provided as follows:

#### CONSIDERING:

That by Official note No. 028-95-DTREP, the Technical Director of the Peruvian Electoral Register reports that on examining the list of Congressional candidates submitted by ..., it was found that the names of the candidates are repeated for entries 111 and 118, 39 and 82, 101 and 103, and 67 and 114, ... respectively....

That pursuant to Article 82 of the Law, applications for registration must be accompanied by a complete list of 120 candidates;

That, consequently, the political group in question has submitted an incomplete list, with only 113 candidates, thus failing to comply with the requirement indicated in the previous paragraph;

...

RESOLVES:

To declare the registration of the list of candidates invalid.

79. In view of the fact that the Resolution transcribed above contains information on the underlying grounds or foundation, the Commission, taking into account the allegations made by Peru, modified paragraphs 42 and 44 of Report No 12/98 and deleted paragraph 45. The Commission also decided, *motu proprio*, to modify paragraphs 46 and 52 of that Report, which also referred to the same issue. However, these alterations do not change the Commission's conclusion that the State violated, to the detriment of the victim, the rights contained in Articles 23 and 24 of the Convention, based on the other grounds set forth in this Report.

80. The State also alleged that the Commission's conclusion that Peruvian law violated the right of victims to prompt and simple recourse to protect them from violations of their fundamental rights, in breach of the provisions of Article 25 of the American Convention, lacked any basis. The Commission refrains from analyzing that argument of the Peruvian State, since it essentially implies a request to reconsider Report No 12/98, while the Commission's responsibility at this stage in the proceedings is to determine whether the State has resolved the matter.

81. As for the Commission's recommendation that the State adopt the necessary measures to amend the provisions of domestic law that prevent persons who allege a violation of their fundamental rights from political participation in Peru, and "the right to simple and prompt recourse, or any other effective recourse, ... against acts that violate [their] fundamental rights," as stated in Article 25 of the American Convention, or at least the right to appeal to the electoral authority itself, the State replied that as of October 2, 1997, Law No 26.859, the "Organic Elections Law," has been in force in Peru, which, it argues, is tantamount to fulfilling that recommendation. The Commission refrains from analyzing this reiteration by the Peruvian State of arguments made prior to the adoption of Report No 12/98. The law in question has been in force since October 2, 1997, whereas Report No 12/98 was adopted by the Commission on March 2, 1998. Therefore, if the Commission had considered that said Law established simple and effective recourse for the above-mentioned purposes, it would not have issued the recommendation in question to Peru. Furthermore, it should be pointed out that in paragraphs 67 and 68 of that Report, which are identical to paragraphs 66 and 67 of this one, the Commission made specific reference to that law.

82. The State added, with regard to compliance with the recommendation in question, that it was drafting a bill for the creation, within the National Elections Board, of an entity of first instance, which would be in charge of making the initial determination as to the validity of the registration of political organizations and candidates. The decisions of that first-instance

authority could be challenged before the National Elections Board, which would issue the final decision. It added that the bill in question had been drafted by the Ministry of Justice and sent to the National Elections Board, so that the Board could introduce it in Congress, since it has the authority to do so, pursuant to the provisions of Article 138 of the Peruvian Constitution. The State declared that it is making a commitment to take the steps required to establish this first-instance authority, which will provide for effective recourse against acts that may limit the right of its citizens to political participation, and the State has also pledged to exercise its right of initiative in the event the National Elections Board should fail to issue a decision.

83. The Commission recognizes the efforts being made by the Peruvian State to comply with the Commission's recommendation. In principle, this bill appears to cover the necessary points so that, once it is approved, the recommendation of the Commission will have been carried out. The Commission deemed it important to point out how difficult it is to make a recommendation to make full reparation for the human rights violations suffered by the victim. The recommendation made to the Peruvian State is the least it can do to make redress to the victim for the violations she has suffered. The 60-day period the Commission granted to the State on March 23, 1998, to comply with said recommendation has lapsed, and the Commission has still not been informed on the approval of that law. The only information the Commission received in this regard was a communication sent by Peru on June 22, 1998, informing it that the National Elections Board was studying the above-mentioned bill.

84. The Commission therefore decided to approve this report, under Article 51(1) and (2) of the Convention, and granted the State another three-month period to comply with the recommendations contained in it.

## X. CONCLUSIONS AND RECOMMENDATIONS

85. The Commission concluded that in applying the Organic Electoral Law, by Resolution No. 033/95-JNL of the National Elections Board issued on January 16, 1995, the Peruvian State violated, to the detriment of Mrs. Susana Higuchi Miyagawa, the right to political participation and the right to equal protection before the law, which are guaranteed in Articles 23 and 24 of the American Convention on Human Rights. By virtue of the arguments set forth in this Report, pursuant to Article 46(2), of its Regulations, the Commission concludes that the provisions of Peruvian law, which establish that the resolutions of the National Elections Board "are final and may not be reviewed. There is no recourse against them" (Article 181 of the Constitution), are a violation of the right to "simple and prompt" recourse, which protects persons against acts that violate their fundamental rights, as stipulated in Article 25 of the Convention.

86. The Commission recommended that the state adopt the measures needed to amend the provisions of domestic law that impede political participation in Peru, by granting "the right to simple and prompt recourse, or any other effective recourse ... against acts that violate [their] fundamental rights," as stated in Article 25 of the American Convention, or at least effective recourse to the electoral authority itself.

87. Commission transmitted the report to the Peruvian state, pursuant to the provisions of Article 51 of the Convention, and gave it three months to carry out the recommendations

contained therein. The 90-day period began to run as of the date this report was forwarded to the state, December 10, 1998, which was not authorized to publish it. The Commission also decided to send this report to the petitioner, who likewise was not authorized to publish it.

88. As regards the specific implementation of the recommendations the Commission made to the Peruvian state in the Report 61/98, the Commission observes that the record shows no actual implementation of the recommendations. Compliance with the Commission's call on the state authorities to adopt measures to modify the domestic law, which impedes persons who allege violations of the right to political participation "simple and prompt recourse, or any other effective recourse," has become excessively drawn out over time. This delay, in the view of the Commission, is tantamount to a failure on the part of the State to heed the recommendations.

89. The representatives of the Peruvian State, meanwhile, have informed the Commission, through Note No. 7-5-M/222, of June 1, 1999, on the "progress" in "carrying out the recommendation" made by the Commission. Along these lines, they have highlighted the existence of the report by the Subcommittee on the Constitution, of the Congress of the Republic, which establishes the commitment to improve the elections regime "for the purpose of contributing to the transparency of the process." In addition, the Subcommittee expressed its support for discussing and analyzing bill number 4519-98/CR, which was introduced by the National Elections Board. With respect to that bill, and without getting into an analysis of its content and/or specific provisions, the Commission is of the opinion that the Peruvian State cannot continue to invoke a mere willingness to comply with the recommendations that were made in a timely manner. The willingness the State has expressed to carry out the recommendations of the Commission, while genuine on their face, do not exonerate it from its actual non-compliance. The Commission understands that, in effect, a reasonable and prudential period has gone by since issuance of the report containing the Commission's recommendations. In the view of the Commission, the Peruvian authorities should have displayed, in concrete acts, that same willingness to bring its legislation into line with the recommendations that were issued. The gap between the positive legislation in force in Peru, in respect of oversight of the legality of the elections board's decisions, and the international standards as indicated by this Commission, cannot be excused by a mechanical reiteration of future compliance.

## IX. CONCLUSION

90. The Commission, based on the information in the record, reiterates its conclusion that the legislation still in force in Peru, regarding the non-appealability of the National Elections Board's decisions to a higher body, has not been corrected by the pertinent organs of the state.

## X. RECOMMENDATIONS

91. Based on the analysis and conclusion of this Report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THE FOLLOWING RECOMMENDATIONS TO THE PERUVIAN STATE:

1. To adopt measures aimed at modifying the provisions of Article 181 of the 1993 Constitution and Article 13 of the Organic Elections Law, providing for an effective and simple recourse, in the terms of Article 25(1) of the Convention, to oppose the decisions of the National Elections Board that may violate the guarantee of political participation for citizens.
2. To report to the Commission, as soon as the derogation and/or modification of the above-referenced articles is ordered, including the text of the legislation as amended.

## XI. PUBLICATION

92. The Commission transmitted the Report adopted to the state and to the petitioner, pursuant to Article 51 of the American Convention, on December 10, 1998, and the state was given three months to submit information on the adoption of the measures needed to carry out the Commission's recommendations.

93. Since then, the Commission has continued to receive information from the Peruvian state regarding the initiatives aimed at amending the electoral legislation in order to carry out the Commission's recommendations. Nonetheless, the Commission can report that to date the Commission's recommendations have not been adopted.

94. In view of the foregoing considerations and pursuant to Article 51(3) of the American Convention and Article 48 of the Commission's Regulations, the Commission decides to reiterate the conclusions and recommendations, to make this Report public, and even to include it in its Annual Report to the General Assembly of the OAS. The Commission, in fulfillment of its mandate, will continue to evaluate the measures taken by the Peruvian state in relation to the recommendations issued, until they have been implemented completely.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the sixth of October, 1999. (Signed by:) Robert K. Goldman, Chairman; Hélio Bicudo, First Vice-Chairman; Claudio Grossman, Second Vice-Chairman; Carlos Ayala Corao, Jean Joseph Exumé, and Alvaro Tirado Mejia.