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First Vice-Chairman: Claudio Grossman;
Second Vice-Chairman: Juan E. Mendez;
Commissioners: Marta Altolaguirre, Robert K. Goldman, Peter Laurie, Julio Prado Vallejo
Dated: 13 April 2000
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I. SUMMARY

1. The complaint which is the subject of this report was presented to the Inter-American Commission on Human Rights (hereinafter the Commission) on April 26, 1993. It states that on April 9, 1992, Alberto Fujimori, President of the Republic of Peru (hereinafter "the Peruvian State," "the State," or "Peru"), issued Decree-Law 25.423 (hereinafter the Dismissal Decree) removing Dr. Walter Humberto Vásquez Vejarano (and twelve other justices),[FN1] from their posts as justices or magistrates of Peru's Supreme Court of Justice. The petitioner alleges that by promulgating and implementing the aforesaid Decree Law, the Peruvian State violated the rights and guarantees to which Dr. Walter Humberto Vásquez Vejarano was entitled pursuant to Article 8 (Judicial Guarantees); Article 9 (the Principle of Legality and Freedom from ex post facto laws); Article 23 (Right to Participate in Government); and Article 25 (Judicial Protection) of the American Convention on Human Rights (hereinafter "the Convention")

[FN1] At that time, Peru's Supreme Court of Justice was composed of twenty-five judges in all.

II. PROCEEDINGS BEFORE THE COMMISSION

A. Processing of the petition

2. On June 2, 1993, the Executive Secretariat forwarded the relevant sections of the petition to the Peruvian State, which gave its response on September 13, 1993.

3. On October 4, 1993, the Secretariat received a second communication from the Peruvian State, conveying additional background details about the case. On December 27, 1993, the Secretariat received a communication from the petitioner rebutting point by point each of the arguments presented by the State. On June 2, 1994, the Secretariat received a note from the Peruvian State dated May 31, 1994, responding to the petitioner's arguments. The petitioner's observations on the State's June 2nd response were received on November 17, 1994.
4. On August 18, 1995, another communication was received from the State in which it again alleged that the case was inadmissible.
5. On September 7, 1995, the Peruvian State sent the Commission an official communication from the Attorney General's Office, dated August 7, 1995, (Report N° 163/95-mp-fn-dicaj).
6. Report N° 46/97 on the admissibility of this case was approved by the Commission during its 98th regular session and was forwarded to the parties on November 4, 1997.[FN2]

[FN2] IACHR, Annual Report, 1997.

B. Friendly settlement

7. On March 6, 1996, the Secretariat sent a letter to the parties, offering them the Commission's services in the interests of seeking a possible friendly settlement. That proposal was accepted by the petitioner on April 2, 1996.
8. On April 4 1996, the State requested that the deadline for its decision as to a possible friendly settlement be extended. The Secretariat accepted that request in a note dated April 9 and extended the deadline to April 26, 1996.
9. On May 2, 1997, the Secretariat again sent notes to the Government and to the petitioner, repeating the Commission's offer to help negotiate a friendly settlement. The petitioner accepted this offer in a response dated June 16, 1997.
10. On December 2, 1997, the State sent a new note, in which it refused to accept any responsibility in the case and rejected the Commission's offer to mediate a friendly settlement. The Commission then apprised the petitioner of that response. In a letter of January 15, 1998, the petitioner asked the Commission to resolve the case.

III. POSITION OF THE PARTIES

A. Position of the petitioner

11. The petitioner states that he obtained the position of justice or judge of the Supreme Court of Peru by means of a competition held by the National Council of Magistrates and that

the results were ratified by the Senate in full compliance with the country's 1979 Constitution, which guaranteed continued tenure in that office until the age of 70 provided his conduct and performance were consistent with the requirements of the position.[FN3]

[FN3] Article 242 of the 1979 Peruvian Constitution provides that: "The State shall ensure that judicial magistrates enjoy: "1. Their independence. They are subject only to the Constitution and the law. 2. They shall continue to serve in that position until the age of 70, and they may not be removed from office as long as their conduct in the position is acceptable and beyond reproach. Magistrates shall not be promoted or transferred without their consent."

12. He alleged that his removal from the post of Supreme Court Justice was an arbitrary act, since there had been no previous proceeding of any sort; and that his right to due process had been violated.

13. He notes that on April 27, 1992, President Alberto Fujimori issued Decree Law 25.454, whereby any amparo proceedings challenging the effects of the Dismissal Decree was declared inadmissible.

14. Notwithstanding the Decree Law, Dr. Vásquez Vejarano filed an action of amparo on May 26, 1992, to have the Dismissal Decree declared unconstitutional; and accordingly to be reinstated in the position that he had held before the Decree went into effect. In other words, that he be returned to the full exercise of his duties as a Justice of Peru's Supreme Court.

15. He states that his amparo was declared inadmissible at all levels of the court system, i.e., the lower court, court of appeals, and the Supreme Court, pursuant to the aforesaid Decree Law 25,454. The Dismissal Decree has therefore remained in effect, and any other domestic remedies available within the Peruvian judicial system have thus been exhausted—for the simple reasons that no other remedies exist.

16. The petitioner claims that there was no provision--either in the 1979 Constitution or in the new 1993 Constitution--for the Magistrates' Tribunal of Honor, to which the State had argued that the present case could be presented at the internal level. Also, no such Tribunal existed when his rights were violated. The sole appropriate means of defending those rights was through the legal system by means of the amparo proceedings which Dr. Vásquez Vejarano had tried unsuccessfully.

17. The complaint alleges that Dr. Vásquez Vejarano has not yet been reinstated in his position as justice on Peru's Supreme Court.

B. The State's position

18. The State maintains that "...it has been pursuing an open policy for restructuring the Judiciary, starting with the enactment of Decree-Law 25.418, which instituted--on a provisional basis--the National Emergency and Reconstruction Government. Its purported, among other

aims, to organize the Judiciary, the Tribunal of Constitutional Guarantees, the National Magistrates' Council and the Attorney General's Office. All of those entities were to be turned into democratic institutions devoted to restoring peace in the country and providing the general public with access to the proper administration of justice, eradicating for all time the corruption pervasive in the judicial system, and seeking to prevent the impunity that then existed for offenses committed by terrorists, drug traffickers, and organized crime."

19. It argues that on March 4, 1993, Peru's Supreme Court denied the amparo presented by Dr. Vásquez Vejarano and declared the Dismissal Decree valid on grounds that the Constitutional Law of January 9, 1993, enacted by the Democratic Constitutional Congress, declared valid all Decree Laws issued since April 5, 1992 (one of them being the Dismissal Decree). The Government's argument therefore concludes that President Alberto Fujimori--and, therefore, the Peruvian State--acted lawfully in issuing the Dismissal Decree.

20. The State goes on to note that it has created a Magistrates' Tribunal of Honor, thus providing suitable recourse for reviewing any situation involving members of the Judiciary who have been removed from their posts.

IV. GENERAL CONSIDERATIONS

State of emergency

21. On April 5, 1992, President Alberto Fujimori, acting pursuant to Decree Law 25.418 (known as the General Act for the National Emergency and Reconstruction Government) proceeded to declare a reorganization of the Judicial Branch, the Attorney General's Office and the Comptroller's General's Office and proceeded also to dissolve the National Congress and the National Magistrates' Council.

22. Inasmuch as the justification given by the State of Peru in this case centers on the alleged emergency situation in the country, which according to the State provided the grounds for the Dismissal Decree as part of a series of legal and factual events taken within that context, the Commission considered it appropriate to refer first on a preliminary basis to the legal provisions governing states of emergency in the light of the inter-American system of human rights.

23. Article 27 of the Convention establishes that:

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the rights established in: Article 3 (the Right to Juridical Personality); Article 4 (the Right to Life); Article 5 (the Right to Humane Treatment); Article 6 (Freedom from Slavery); Article 9 (Freedom from Ex Post Facto Laws); Article 12 (Freedom of Conscience and Religion); Article 17 (Rights of the Family);

Article 18 (the Right to a Name); Article 19 (the Rights of the Child); Article 10 (the Right to Nationality); and Article 23 (the Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

24. The Inter-American Court of Human Rights (hereinafter called the "Court" or "Inter-American Court"), in its Consultative Opinion N° 8, established guiding principles for the declaration of states of emergency: (1) the emergency must be invoked in order to preserve democracy; and (2) the need for declaring a state of emergency must be objectively justifiable. In particular, the Court stated the following:

...under certain circumstances the suspension of guarantees may be the only way to deal with emergency situations and, thereby, to preserve the highest values of a democratic society. The Court cannot, however, ignore the fact that abuses may result from the application of emergency measures not objectively justified in the light of the requirements prescribed in Article 27 and the principles contained in other here relevant international instruments. This has, in fact, been the experience of our hemisphere. Therefore, given the principles upon which the inter-American system is founded, the Court must emphasize that the suspension of guarantees cannot be disassociated from the "effective exercise of representative democracy" referred to in Article 3 of the OAS Charter. The soundness of this conclusion gains special validity given the context of the Convention, whose Preamble reaffirms the intention (of the American States) " to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man." The suspension of guarantees lacks all legitimacy whenever it is resorted to for the purpose of undermining the democratic system. That system establishes limits that may not be transgressed, thus ensuring that certain fundamental human rights remain permanently protected"[FN4]

[FN4] Inter-American Court of Human Rights, Habeas Corpus in Emergency Situations (Articles 27(2), 25(1), and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87 of January 30, 1987. Series A, N° 8. Paragraph 20 (emphasis added).

A. Rationale and requisites for states of emergency

25. According to Article 27 of the Convention, and the guiding principles set out by the Court, the Commission has the responsibility to review whether there is a fundamental rationale and requisites for a State to validly declare a state of emergency:

Respect for representative democracy

26. According to Article 3(d) of the Bogota Charter (1948), one of the fundamental principles governing the Organization of American States is the requisite that member states be politically

organized in accordance with the premises of representative democracy. Accordingly, the preamble of the Convention reaffirms "the aim of consolidating throughout this hemisphere, and within the framework of democratic institutions, a regime of personal freedom and social justice founded on respect for essential human rights". In the same spirit, Article 29 of the Convention prohibits any interpretation of its provisions as "precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government", whereas Articles 15, 16, 22, and 32 also refer to democracy as a basic premise in the political organization of the States parties.

27. The "Declaration of Santiago de Chile", adopted in 1959 by the Fifth Consultative Meeting of Ministers of Foreign Affairs of the OAS member states, was the first, and thus far only, attempt by an international organization to set forth a number, inter alia, of the characteristics of the democratic system:

1. The principle of the Rule of Law must be assured through the separation of powers and review, by judicial bodies of the State, of the legality of acts of government.
2. The governments of the American republics must be the result of free elections.
3. The perpetuation of power, or its exercise for indeterminate periods of time and with the manifest purpose of perpetuation, are incompatible with the effective exercise of democracy.
4. The governments of the American States must maintain a regime of individual freedom and social justice founded on respect for the fundamental rights of individual human beings.
5. Human rights contemplated in the laws of the American States must be protected by effective judicial means.
6. The systematic use of political proscription is contrary to American democratic order.
7. Freedom of the press, radio, and television, and freedom of information and expression in general, are essential conditions for the existence of a democratic regime.
8. The American States, in order to strengthen the institutions of democracy, must cooperate with each other, to the extent that their resources permit and in accordance with their laws, to consolidate and develop their economic structure, and to provide just and humane living conditions for their peoples.[FN5]

[FN5] The Declaration of Santiago can be found in: General Secretariat of the Organization of American States, *Inter-American System: Treaties, Conventions, and Other Documents*. Washington, D.C., 1981, Vol. 1.

28. In 1991 the OAS General Assembly adopted Resolution N° 1080, concerning the role of the OAS in consolidating democracy in the region, and instructed the Secretary General of the Organization to convene immediately a meeting of the Permanent Council in the event of any sudden or irregular interruption of the democratic process or of the legitimate exercise of power by a democratically-elected government in any of the Organization's member states. The purpose of such meeting could be to determine whether an ad hoc meeting of the Ministers of Foreign Affairs of the OAS member countries should be convened, or even a special session of the General Assembly, within ten days to take the appropriate decisions indicated in the OAS Charter and international law. In this same vein, in 1992, the General Assembly approved the

Washington Protocol^[FN6] which entered into force on September 25, 1997,^[FN7] whereby the OAS member states, for the first time in the history of an international organization, established the possibility of suspending a member State's participation in the organization if its democratic government was overthrown by force.

[FN6] OAS, Official Documents, OEA/Ser.A/2 Add.3 (SEPF), Series on Treaties 1-E Rev. (1995).

[FN7] The Washington Protocol was ratified by Peru on September 20, 1996.

29. Article 9 of the OAS Charter, as amended by the Washington Protocol, now provides the following:

A Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established.

- a) The power to suspend shall be exercised only when such diplomatic initiatives undertaken by the Organization for the purpose of promoting the restoration of representative democracy in the affected Member State have been unsuccessful;
- b) The decision to suspend shall be adopted at a special session of the General Assembly by an affirmative vote of two-thirds of the Member States;
- c) The suspension shall take effect immediately following its approval by the General Assembly;
- d) The suspension notwithstanding, the Organization shall endeavor to undertake additional diplomatic initiatives to contribute to the re-establishment of representative democracy in the affected Member State;
- e) The Member which has been subject to suspension shall continue to fulfill its obligations to the Organization;
- f) The General Assembly may lift the suspension by a decision adopted with the approval of two-thirds of the Member States;
- g) The powers referred to in this Article shall be exercised in accordance with this Charter.”

30. Very early in its history, the Commission recognized the importance of preserving the Rule of Law and constitutional provisions when states of emergency were declared. As early as 1968, the Commission held that, as a fundamental requisite, states of emergency may be declared only in order to preserve democracy:

The suspension of constitutional guarantees or a state of siege is compatible with representative, democratic governance only if declared under the following conditions:

f) There is no restriction on the Rule of Law or on constitutional provisions, and neither the powers of the branches of government nor the functions of the comptroller have been altered.[FN8]

[FN8] IACHR. "Resolution concerning the Protection of Human Rights following the Suspension of Constitutional Guarantees or the Declaration of States of Siege". In, "Report on the 18th Session". Washington, July 1968, page 47.

31. The Inter-American Court has also held that "reference has already been made to the Rule of Law, representative democracy, and the regime of individual freedom and it has been observed that they are inherent in the inter-American system, particularly the provisions for the protection of human rights contained in the 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 N° 9. See also the same Court's rulings on: (1) Compulsory Membership in an Association Prescribed by law for the Practice of Journalism (Arts.13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985. Series A N° 5, para. 66; and (2) the word "laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986. Series A N° 6, para. 30, 32, and 34.

32. Based on the foregoing, observance of the conditions necessary to maintain the political organization of states in accordance with the principles of representative democracy constitutes a fundamental requisite or premise for the legitimacy of a state of emergency.

Requisites for declaring a state of emergency

33. According to the Inter-American Court:

The starting point for any legally sound analysis of Article 27 and the function it performs is the fact that it is a provision for exceptional situations only. It applies solely "in time of war, public danger, or other emergency that threatens the independence or security of a State Party". And even then, it permits the suspension of certain rights and freedoms only "to the extent and for the period of time strictly required by the exigencies of the situation." Such measures must also not violate the State Party's other international legal obligations, nor may they involve discrimination on the ground of race, color, sex, language, religion or social origin.[FN10]

[FN10] Inter-American Court of Human Rights, Habeas Corpus in Emergency Situations *sup. cit.* para. 19.

34. Necessity. In accordance with Article 27 of the Convention for an emergency to be considered real, an extremely grave situation must exist in the country, such as war, public danger, or other emergency that threatens the independence or security of the State party. The Commission has determined that the imposition of a state of emergency "can be justified only by real threats to public order or the security of the State".[FN11]

[FN11] IACHR, Annual Report 1980-1981, page 11.

35. Time limitation. This requisite pertains to the duration of the suspension, which, under Article 27(1) of the Convention, must only be for a strictly limited time as required by the exigencies of the situation. The Commission has stated in this regard that an even more serious matter is a situation in which a state of emergency is decreed for an indefinite or prolonged period of time, particularly when sweeping powers are conferred on the Head of State, including abstention by the Judicial Branch with respect to measures decreed by the Executive Branch, which in certain cases can amount to a rejection of the very existence of the Rule of Law.[FN12]

[FN12] Idem.

36. Proportionality. Article 27(1) of the Convention provides that the suspension of guarantees may be declared only to the extent strictly required by the exigencies of the situation. This requisite pertains to the prohibition of unnecessary suspension of certain rights, the imposition of greater restrictions than are necessary, and the unnecessary extension of the suspension to areas not affected by the emergency.

37. Nondiscrimination. Pursuant to Article 27(1) of the Convention, and consistent with Articles 1 and 24, the suspension of guarantees may not involve discrimination of any kind against a person or group of persons.

38. Compatibility with other international obligations. The suspension of particular guarantees must be compatible with the obligations established in other international instruments ratified by the country.

39. Notification Under Article 27(3) of the Convention, the other States parties to the Convention must be notified immediately, through the Secretary-General of the OAS, that a state of emergency has been declared.

B. Rights that cannot be suspended

40. Inasmuch as the mechanism for protecting human rights in the inter-American system has been conceived for a hemisphere of democratic countries, the proper functioning of the different branches of government, such as the Judiciary, is essential in preventing abuses of power by

other branches of government. In determining which right may be suspended during a state of emergency, the Inter-American Court has affirmed that:

It is clear that no right guaranteed in the Convention may be suspended unless very strict conditions –those laid down in Article 27(1)—are met. Moreover, even when these conditions are satisfied, Article 27(2) provides that certain categories of rights may not be suspended under any circumstances. Hence, rather than adopting a philosophy that favors the suspension of rights, the Convention establishes the contrary principle, namely, that all rights are to be guaranteed and enforced unless very special circumstances justify the suspension of some, and that some rights may never be suspended, however serious the emergency.[FN13]

[FN13] Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations* op. cit., para. 21.

41. The guarantees that cannot be suspended by the State, however grave the emergency might be, are found mainly in Article 27(2) of the Convention, and are those contemplated under Article 3 (Right to Judicial Personality); Article 4 (Right to Life); Article 5 (Right to Humane Treatment); Article 6 (Freedom from Slavery); Article 9 (Freedom from Ex-post Facto Laws); Article 12 (Freedom of Conscience and Religion); Article 17 (Rights of the Family); Article 18 (Right to a Name); Article 19 (Rights of the Child); Article 20 (Right to Nationality); and Article 23 (Right to Participate in Government).

42. Furthermore, under Article 27(1) of the Convention, the suspension of guarantees must be consistent with the obligations established in other international instruments ratified by the country.

43. The Inter-American Court has affirmed that the suspension of guarantees may not result in the suspension of the rule of law or legality:

The suspension of guarantees also constitutes an emergency situation, in which it is lawful for a government to subject rights and freedoms to certain restrictive measures that, under normal circumstances, would be prohibited or more strictly controlled. This does not mean, however, that the suspension of guarantees implies a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of legality by which they are bound at all times. When guarantees are suspended, some legal restraints applicable to the acts of public authorities may differ from those in effect under normal conditions. These restraints may not be considered to be non-existent, however, nor can the government be deemed thereby to have acquired absolute powers that go beyond the circumstances justifying the grant of such exceptional legal measures. The Court has already noted, in this connection, that there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law. (The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986. Series A N° 6, paragraph. 32).[FN14]

[FN14] Idem, para. 24.

It is the function of the judicial branch to protect legality and the rule of law during a state of emergency.

44. Following this reasoning, "in a serious emergency situation it is lawful to temporarily suspend certain rights and freedoms whose free exercise must, under normal circumstances, be respected and guaranteed by the State. However, since not all of these rights and freedoms may be suspended even temporarily, it is imperative that ` the judicial guarantees essential for (their) protection' remain in force." [FN15] It is also essential for the judicial branch to be independent, inasmuch as independence is the fundamental pillar of the Rule of Law and the protection of human rights. In that regard, the Court has affirmed that recourse to habeas corpus and the Action of Amparo are judicial guarantees for the protection of rights that cannot be suspended and that "these judicial remedies have the character of being essential to ensure the protection of those rights." [FN16] It is the function of the judiciary to protect legality and the rule of law during a state of emergency.

[FN15] Idem, para. 27.

[FN16] Idem.

45. An independent and impartial judiciary serves as a controlling factor during a state of emergency. According to the Court, habeas corpus and the Action of Amparo are two remedies that are essential to maintaining legality during an exceptional state of emergency. The Court has ruled:

...in a system governed by the rule of law it is entirely in order for an autonomous and independent judicial order to exercise control over the lawfulness of such measures, by verifying, for example, whether a detention based on the suspension of personal freedom complies with the legislation authorized by the state of emergency. In this context, habeas corpus acquires a new dimension of fundamental importance. [FN17]

[FN17] Idem., para. 40.

46. As stated previously, the right to an independent judiciary set forth in Articles 8 and 25 of the Convention is essential for the enjoyment of human rights; it may not be suspended even during a state of emergency; member states of the OAS and states parties to the Convention are obligated to respect and guarantee it for every person with their jurisdiction free from any kind of discrimination.

C. Guarantees that cannot be suspended

47. The Inter-American Court of Human Rights has indicated that "guarantees are designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof. The States Parties not only have the obligation to recognize and to respect the rights and freedoms of all persons, they also have the obligation to protect and ensure the exercise of such rights and freedoms by means of the respective guarantees (Article 1.1), that is, through suitable measures that will in all circumstances ensure the effectiveness of these rights and freedoms." [FN18]

[FN18] *Idem*, para. 25.

48. Accordingly, apart from the rights mentioned in the preceding paragraph, the final portion of Article 27(2) of the Convention also prohibits the suspension of judicial guarantees essential for the protection of rights that cannot be suspended, because the Court expressed the view that:

... it must also be understood that the declaration of a state of emergency--whatever its breadth or denomination in internal law--cannot entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires the States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency. [FN19]

[FN19] *Idem*.

49. The Inter-American Court of Human Rights has maintained that:

...the judicial guarantees essential for the protection of the human rights not subject to derogation, according to Article 27(2) of the Convention, are those to which the Convention expressly refers in Articles 7(6) and 25(1), considered within the framework and the principles of Article 8, and also those necessary to the preservation of the rule of law, even during the state of exception that results from the suspension of guarantees. [FN20]

[FN20] *Idem*, para. 38 (emphasis added).

50. It should be noted that in order to reach the conclusion concerning the non-suspendable character of guarantees for preservation of the Rule of Law, the Court first analyzed the wording of Article 29(c) of the Convention [FN21], and concluded that:

[FN21] Which states: "No provision of this Convention shall be interpreted as: ...c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government".

Thus understood, “the guarantees ... derived from representative democracy as a form of government”, referred to in Article 29(c), imply not only a particular political system against which it is unlawful to rebel ..., but the need that it be supported by the judicial guarantees essential to ensure the legality of the measures taken in a state of emergency, in order to preserve the rule of law... [FN22]

[FN22] Inter-American Court of Human Rights, *Judicial Guarantees in States of Emergency*...op. cit., para. 37.

51. In conclusion, on the basis of previous decisions handed down by the Court, the judicial guarantees that may not be suspended during a state of emergency are habeas corpus, Amparo, remedies to preserve the rule of law and, in general, all other judicial procedures that ordinarily would be appropriate for protecting the full exercise of rights that may not be suspended under Article 27(2) of the Convention, which even in a state of emergency, must always be implemented.

D. Controls over states of emergency

52. The Commission considers it extremely important to stress that fulfillment of the premises and requisites for the declaration of states of emergency should always be subject to the judicial control of national authorities as well as the competent international organizations.

a. Internal judicial controls

53. Acts in connection with a state of emergency, normally performed by the Executive Branch, do not constitute "political questions" exempt from judicial review. On the contrary, such acts by their very nature are subject to judicial review. The Constitutional Court of Colombia in a judgment rendered on May 7, 1992[FN23], affirmed that constitutional provisions concerning states of emergency constitute a "limit and check on the abuse of discretionary authority". These provisions confer discretionary authority, in exceptional situations, and that in the public interest order should be restored, and alternative courses of action chosen. Through judicial control, the possibility of controlling the Executive Branch by means of the Political Charter of the State was affirmed.[FN24] One of the limits on the discretionary authority of the President of the Republic to decree states of emergency is, in point of fact, the judicial control exercised by the Constitutional Court.[FN25]

[FN23] Cited in: Report N° 30/97 (Argentina), Case N° 10.087, approved on September 30, 1997. IACHR, Annual Report 1997 (to be published).

[FN24] "El control jurisdiccional de los estados de excepcion", Professor Carlos Ayala Corao, published in "Coleccion de Estudios N° 4: Los estados de excepcion en Chile", Corporación Nacional de Reparacion y Rerconciliacion, Santiago de Chile, 1997, cited in: IACHR, Report N° 30/97 (Argentina), op. cit.

[FN25] IACHR, Report N° 30/97 (Argentina), op. cit., para. 61.

54. The Supreme Court of Justice of Venezuela, in its judgment of March 11, 1993[FN26], ruled on a presidential decree of November 27, 1992, whereby the Executive suspended certain constitutional guarantees, and held that decrees suspending guarantees were subject to judicial review to determine their constitutionality, indicating expressly that apart from the objective or formal review of the official's authority, the proper use of that authority by the Executive Branch, adherence to previously established procedures and the legality of the act itself, the content of the decree suspending guarantees could also itself be reviewed to determine whether it is reasonable, and whether the circumstances motivating it truly existed. The Venezuelan High Court concluded that the fact that it was an act of government did not confer jurisdictional immunity upon the decree suspending guarantees, and that the discretionary authority of the Executive Branch refers solely to its evaluation of the gravity of the circumstances and the advisability of adopting the measure in question.

[FN26] Cited in: Report N° 30/97 (Argentina), Case N° 10.087, approved on September 30, 1997. IACHR, Annual Report 1997.

b. International control

55. Although in general the "margin of appreciation" is left to the states themselves to determine the need for declaring a state of emergency, inasmuch as they have direct and immediate knowledge of the factual circumstances in the country, such margin of appreciation is not unlimited. The Commission has the duty to evaluate whether the circumstances that caused the Peruvian government to declare an emergency in April 1992 fit in with the conventional meaning of the terms "war, public danger" or "other emergency that threatens the independence or security of the State party". The Commission must evaluate for instance whether Peru exceeded "the limited extent required by the exigencies of the situation". Accordingly, the margin of appreciation at the internal level goes hand in hand with inter-American supervision. The Commission must properly assess such relevant factors as the nature of the rights affected by the suspension, the circumstances behind the state of emergency and its duration.

56. It should also be noted that other OAS bodies also conduct a review of an international nature. In response to the measures adopted, on April 5, 1992, the OAS Permanent Council convened an ad hoc meeting of the Ministers of Foreign Affairs, in accordance with General Assembly Resolution AG/RES. 1080 (XXI-0-91), referred to in paragraph 28 above, and in accordance with the democratic principles upon which the Organization is founded. This meeting was held in Washington, D.C., on April 13, 1992, and it was resolved "to make an appeal for the urgent re-establishment of democratic institutional order in Peru and the cessation of all actions affecting the exercise of human rights, avoiding the adoption of new measures that might continue to aggravate the situation". In the same resolution, the Ministers asked Peru to formally invite the Commission to visit the country to perform an on-site inspection of its human rights situation. The Commission visited Peru from May 17 to 21, 1993.[FN27]

[FN27] See IACHR Annual Report, 1993.

V. ANALYSIS OF THE CASE SUBMITTED

A. Competence and admissibility

57. The competence of the Commission to hear this case, and the admissibility of the petition under review, have already been established in Admissibility Report N° 46/97 approved by the Commission during its 97th regular session, and forwarded to the parties on November 4, 1997.

B. Context of the events

58. On April 5, 1992, as noted earlier, President Alberto Fujimori, acting in accordance with Decree Law 25.418 (General Act for the National Emergency and Reconstruction Government) declared a "reorganization" of the Judiciary, the Attorney General's Office and the Comptroller General's Office and also dissolved the National Congress and the National Magistrates' Council.

59 Pursuant to that Decree Law, President Fujimori embarked on what he termed "the organization of the Judiciary, the Tribunal of Constitutional Guarantees, the National Magistrates' Council and the Attorney General's Office, in order to turn them into democratic institutions to restore peace in the country, thus providing the general public with access to the proper administration of justice, eradicating for all time the corruption prevailing in the judicial system, and seeking to prevent impunity for offenses perpetrated by terrorists, drug traffickers, and organized crime." [FN28]

[FN28] The Government's response to the petitioner's complaint, Note N° 7-5-M/321, presented to the Commission on October 4, 1993.

60. Accordingly, steps were taken to dismember the Judiciary by eliminating institutions and removing a large number of judges at the national level. These actions elicited the following observation:

Although the Peruvian government did not openly abolish the independence of the judiciary, we believe that the practical effects of these measures, viewed as a whole within the applicable parameters, have been to seriously erode, if not eliminate, the institutional independence of the judicial branch.[FN29]

[FN29] International Commission of Jurists. Report on the Administration of Justice in Peru. Institute of Legal Defense. Lima, 1994.

61. As part of those actions, and with no other basis than the aforementioned Decree Law, the National Emergency and Reconstruction Government issued the decree dismissing 13 Supreme Court justices--Dr. Vásquez Vejarano among them--who had become justices or magistrates of that Court in accordance with the procedure established in Article 245 of the Peruvian Constitution of 1979. According to that provision, Supreme Court justices were appointed by the President of the Republic, on the recommendation of the National Magistrates' Council, and their appointment was ratified by the Senate. According to Article 242 of the Constitution, the Peruvian State guaranteed Dr. Vásquez Vejarano's tenure in that office until the age of 70, and that he could not be removed from his post provided his conduct and performance were acceptable and beyond reproach.

62. Subsequently, on April 25, 1992, President Fujimori issued Decree Law 25,447 whereby the Supreme Court was reorganized, and 13 temporary Justices appointed;^[FN30] and on April 28, 1992 Decree Law 25.454 was issued, establishing the inadmissibility of any action of amparo that challenged the legality of the Dismissal Decree.

[FN30] The provisional Justices do not enjoy the rights of permanence and immovability from their positions. Their appointment, tenure in the position, and dismissal are discretionary, and they may therefore be removed from their positions at any time, without any preliminary procedure.

C. Undisputed facts

63. Both parties agree that Dr. Vásquez Vejarano served as a member of Peru's Supreme Court of Justice; and that he was removed from that office by the Dismissal Decree. They further agree that Decree-Law 25.454 deprived the magistrate of the means of asserting his rights by means of amparo, which was in fact his only judicial remedy.

D. The alleged emergency affecting Peru

64. As mentioned earlier, the Peruvian state has centered its defense in the present case on an alleged "emergency" in the country, which, it maintains, justified the measures taken on and after April 5, 1992, including the Dismissal Decree. The causes invoked by the Peruvian Executive Branch do not represent a "war, public danger or other emergency" threatening in an imminent manner the independence or security of that country. In his "Manifesto" to the Nation on April 5, 1992, President Fujimori cited what he considered to be the essential underlying causes for the actions initiated from that date forward:

Chaos and corruption, and the failure by a number of fundamental institutions, such as the Legislative and Judicial Branches, to identify with the larger national interest, are obstructions to government action in pursuit of national reconstruction and development.

As President of the Republic, I have directly observed all of these anomalies and have considered it my responsibility to assume an attitude of exception in order to streamline this national reconstruction process. Accordingly, I have decided to take the following extremely important measures....[FN31]

[FN31] "Manifiesto a la Nacion del 5 de abril de 1992", published in the journal "el Peruano" on April 6, 1992, and reproduced in: Centro Peruano de Estudios Internacionales (CEPEI), Proceso de Retorno a la Institucionalidad Democratica en Peru". Eduardo Ferrero Acosta, ed. Lima, 1992. Pages 129 to 135.

65. The Commission is of the view that the corruption and chaos of the Legislative and Judicial Branches are not sufficient grounds such as "war, danger, or other emergency threatening the independence or security of the State", to justify the declaration of a state of emergency, let alone the performance of acts to eliminate or strip those branches, for all practical purposes, of their institutional authority, since the alleged cause does not fulfill the necessary conditions of legitimacy, reality, imminence and exceptional gravity. The Commission noted, however, that the solution to a country's institutional problems should be sought within the parameters of representative democracy and constitutional order. The Commission reiterates the affirmation by the Inter-American Court of Human Rights to the effect that the Rule of Law, representative democracy, and respect for individual freedom are inherent in the inter-American system, particularly with respect to the protection of human rights under the Convention.[FN32]

[FN32] Inter-American Court of Human Rights, Judicial Guarantees in States of Emergency...op. cit., para. 35.

66. It is apparent to the Commission that the acts in question, which included the dismemberment of the Peruvian Judiciary as well as the dissolution of the National Congress, amounted to a flagrant violation of the Rule of Law by the Peruvian Executive, breaching the most elementary principles of representative democracy, respect of which is a fundamental for the validity of the state of emergency.

67. In that sense, the Commission emphatically reiterates that the suspension of constitutional guarantees through the declaration of a state of siege or other similar action is only compatible with a system of representative, democratic government, if the measures taken do not restrict the Rule of Law or application of the Constitution, and do not alter the balance of power among the branches of government or the system of checks and balances.[FN33]

[FN33] Resolution on the Protection of Human Rights under the Suspension of Constitutional Guarantees or State of Siege". op. cit. page 47.

68. Based on the foregoing, the Commission concludes that the Executive used the pretext of a supposed emergency situation to eliminate, in practice, the Judicial and Legislative Branches, violating democratic institutional order and the Rule of Law in the country.

69. The Commission is also of the view that, in taking this course of action, the Peruvian Executive Branch committed what is known in jurisprudence as "misuse of power". The Commission has noted, to quote an eminent legal expert, that:

Misuse of power occurs when an administrative agent acting within its purview and in accordance with the formalities required by law, uses its power in cases, for motives, and for purposes distinct from those envisioned in conferring this power upon it. Misuse of power is an abuse of office, an abuse of the law. An administrative act may have been performed by the official with authority to perform it and with all appearances of regularity, but still, the action this official had the discretionary right to perform, *stricto sensu*, may be tainted with illegality if the perpetrator of this action has used his powers for a purpose distinct from that envisaged when those powers were conferred upon him, or to use the wording found in case law, for a purpose distinct from the general interest or the good of the service.[FN34]

[FN34] Alibery, *Le controle jurisdictionnel de l'Administration*, Paris, 1926, p. 236, cited in IACHR, the General Gallardo case. Report N° 43/96 (Mexico) of October 15, 1996, ICHR, Annual Report 1996, page 613, para. 114.

70. Accordingly, the invocation by the Executive Branch of a supposed emergency situation, which in reality did not exist, as a pretext for eliminating the independence of the Judicial and Legislative Branches, in order to subject them to the Executive Branch, constitutes a usurpation or misuse of power. The Inter-American Court has held that

since it is improper to suspend guarantees without complying with the conditions referred to in the preceding paragraph, it follows that the specific measures applicable to the rights or freedoms that have been suspended may also not violate these general principles. Such violation would occur, for example, if the measures taken infringed the legal regime of the state of emergency, if they lasted longer than the time limit specified, if they were manifestly irrational, unnecessary or disproportionate, or if, in adopting them, there was a misuse or abuse of power.[FN35]

[FN35] Inter-American Court of Human Rights, *Habeas corpus in Emergency Situations* op. cit. para. 39.

71. The Commission considers it important to highlight, by way of illustration, that in a case similar to the present one, in which Greek military officials invoked a state of emergency to contend with the supposed danger of communism, a crisis of constitutional government and a crisis in public order threatening the life of the nation as reasons for a public emergency, the European Commission on Human Rights, basing itself on Article 15 of the European Convention

on Human Rights, similar in content to Article 27 of our Convention, rejected the government's allegation inasmuch as there was no evidence of any real situation threatening the life of the Greek nation and military officials did not have the right to invoke a state of emergency to destroy Greek democracy, but exclusively to preserve it.[FN36]

[FN36] European Commission on Human Rights. The case of Greece. Yearbook of the European Convention on Human Rights, 1969.

72. The Commission also notes that the aforesaid Decree Law 25,418 of April 6, 1992, whereby the National Emergency and Reconstruction Government was created, and the judiciary, the Attorney General's Office, and the Comptroller General's Office were reorganized and the National Congress and the National Council of Magistrates dissolved, far from suspending the guarantees established in the Convention, expressly declared (Article 6) that the "National Emergency and Reconstruction Government ratifies and respects the Treaties, Agreements, Conventions, Accords, Contracts, and other international commitments in force, entered into by the Peruvian State". Consequently, the Peruvian State certainly did not notify the other member countries of the OAS through the Secretary General that certain guarantees established in the Convention had been suspended and that Peru therefore had not fulfilled the formal requirement for declaring a state of emergency.[FN37]

[FN37] As noted earlier, Article 27(3) of the Convention provides that any State that avails itself of the right to suspend the rights established therein must inform the other States parties to the Convention immediately through the Secretary General of the OAS of the rights that have been suspended, the reasons for suspending such rights, and the date on which the suspension of such rights will end.

73. As noted earlier, the Commission now turns its attention to analyzing the violations against rights established in the Convention that the petitioner accuses the Peruvian State of having committed:

E. The right to judicial guarantees

74. Article 8 of the American Convention on Human Rights establishes the following:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal or any other nature.

75. As established in Article 242 of the Peruvian Constitution of 1979--the one in effect in 1992, the State guaranteed that Supreme Court Justices would remain in service until they reached seventy years of age, and that they could not be removed from their posts so long as

their conduct and qualifications were appropriate for the performance of their duties. In addition, Article 248 of the Peruvian Constitution established that "The dismissal of the judges calls for a resolution, subject to administrative proceedings," while Article 249 thereof stated that:

The National Council of Magistrates hears accusations concerning the performance of Supreme Court Justices; assesses them; and forwards them to the Solicitor General's Office if an offense is presumed; and to the Supreme Court itself for the application of disciplinary measures.

76. With regard to the immovability of the magistrates, the Commission has affirmed in the past, in a case concerning Argentina, but whose reasoning is perfectly applicable to the present case, that:

The Argentine constitutional system--like that of other democracies--upholds the principle of the irremovability of judges. This system creates stability on the bench; if a judge is to be removed, then such removal must be done in strict accordance with the procedure established in the Constitution, as a safeguard of the democratic system of government and the rule of law. The principle is based on the very special nature of the function of the courts and to guarantee the independence of the Judiciary vis-à-vis the other branches of government and political-electoral changes.[FN38]

[FN38] IACHR, Report N° I30/97 (Argentina). op. cit. para. 41.

77. The provisions cited above make it clear that the Dismissal Decree violated Dr. Vásquez Vejarano's right to due process, since it was not issued in accordance with any stated procedure. Such absolute absence of procedural action implied that Dr. Vásquez Vejarano was not accused of any charge; no charges of misconduct or any other failings were brought against him; he did not have his day in court, nor was he granted time to present evidence or prepare his defense. He had no access to the contents of a possible file or record; he was not judged by his natural judge, nor was he given the right to be judged by an impartial and independent entity.

78. The Commission has also established that "The removal of magistrates by order of the competent body and in accordance with established constitutional procedure is one thing, but the "dismissal of a magistrate" by an illegitimate authority without competence, with utter disregard for the procedure prescribed by the Constitution, is quite another."[FN39]

[FN39] Idem, para. 58.

79. The Commission reiterates the extreme importance of the Judicial Branch-- not only its formal existence, but also its effective independence and impartiality in accordance with the right to the judicial guarantees established in Article 8 of the Convention--for the preservation of democracy and the Rule of Law, and the effective protection of human rights. In its 1993 Report on Peru, the Commission affirmed that:

The IACHR must point out that the procedure followed by the Government subsequent to April 5, 1992, seriously affects the independence of the Judiciary. Any reform needed to correct corruption and inefficiency, should have been carried out in such a way that the basic rules of due process and the complete separation of powers were fully respected.

As the Commission's Chairman told the high-ranking authorities of the Peruvian Government, it would have been preferable to continue the cases under way against magistrates who were being investigated and, after guaranteeing their right to self defense, to have adopted the appropriate decision, rather than the other course of action that was chosen, which was to dismiss them first and then analyze requests for reconsideration later.[FN40]

[FN40] IACHR, Report on the Human Rights Situation in Peru. 1993. OEA/SER.L/II.83 Doc. 31. paragraphs 61 and 62.

80. Based on the foregoing considerations, the Commission concludes that the removal of Justice Vásquez Vejarano, together with 12 other Justices of the Supreme Court, took place outside of the procedures established to that effect and without the most basic guarantees of due process; and it constituted a violation by the Peruvian State of the right to due process established in Article 8 of the Convention. More importantly, this violated the right to due process and the right of all other people of Peru to an independent and impartial judiciary. This violation is particularly grave in that the Court has indicated the need for "the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency".[FN41] To invoke a state of emergency in order to destroy the independence of the judiciary is a violation of the Rule of Law, and renders defenseless the victims of illegal acts perpetrated against them.

[FN41] Inter-American Court of Human Rights, Habeas corpus under suspension of guarantees....op. cit. para. 30.

F. The right to judicial protection

81. Article 25 of the Convention establishes the following:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate the fundamental rights recognized by the constitution or laws of the state concerned or by the Convention, even though such violation may have been committed by persons acting in the course of their official duties.

82. The petitioner alleges that Decree Law 25,454--which established the inadmissibility of the amparo as a means of challenging the effects produced by the Dismissal Decree [FN42]--meant that Peru denied Dr. Vásquez Vejarano access to a simple and prompt remedy that would

have protected him from the act of removal, which--as has already been established--violated his right to the judicial guarantees contemplated in Article 25 of the Convention and in flagrant violation of the case law of the Inter-American Court, which has held, on this point, that "the suspension of (...) habeas corpus or of amparo in emergency situations cannot be deemed to be compatible with the international obligations imposed on these States by the Convention." [FN43]

[FN42] That Decree Law stated textually: AArticle Two: The Action of Amparo designed to impugn, directly or indirectly, the effects produced by the application of Decree Laws Nos. 25,423, 25,442 y 25,446".

[FN43] Inter-American Court of Human Rights, Habeas corpus in Emergency Situations ...op. cit. par. 43.

83. The Commission emphasizes that, notwithstanding the existence of Decree Law 25.454, cited in the preceding paragraph, on May 26 of 1992, Dr. Vásquez Vejarano presented a writ of amparo requesting that the Dismissal Decree be declared inapplicable and that he therefore be reinstated in the position which he held before the Decree entered into effect--in other words, to the full exercise of his functions as a Justice of Peru's Supreme Court. His amparo, however, was declared inadmissible, based precisely on the provision of the said Decree Law 25,454 which declared the action of amparo inadmissible for challenging the effects of the Dismissal Decree.

84. The Commission has maintained that:

In the first place, the logic of every judicial remedy--including that of Article 25--indicates that the deciding body must specifically establish the truth or error of the claimant's allegation. The claimant resorts to the judicial body alleging the truth of a violation of his rights, and the body in question, after a proceeding involving evidence and discussion of the allegation, must decide whether the claim is valid or unfounded. Otherwise the judicial remedy would become inconclusive.

In the second place, in addition to being inconclusive, the judicial remedy would be patently ineffective. This is because, by not allowing recognition of the violation of rights, in the event such violation had been confirmed, it would not be apt for protecting the individual whose right had been impaired or for providing him suitable redress.

The right to effective judicial protection provided for in Article 25 is not exhausted by free access to judicial recourse. The intervening body must reach a reasoned conclusion on the claim's merits, establishing the appropriateness or inappropriateness of the legal claim that, precisely, gives rise to the judicial recourse. Moreover, that final decision is the basis for and origin of the right to legal recourse recognized by the American Convention in Article 25, which must also be covered by indispensable individual guarantees and state obligations (Articles 8 and 1(1)). [FN44]

[FN44] CIDH, Report 30/97 (Argentina). Op cit paragraphs 71, 73, and 74.

85. The Commission has established in the case of the Argentine government's de facto removal of a magistrate from office without legal procedure that the political question doctrine[FN45] did not apply when it was invoked by a government that was not constitutional because the doctrine is premised on the separation of constitutional powers. The Commission concluded therefore that on the basis of that doctrine the State had unduly deprived the petitioner of his right to have a decision on the merits of his claim.[FN46]

[FN45] In accordance with that doctrine, the judiciary shall abstain from certain acts when that decision presupposes a highly political ruling that come exclusively within the purview of the executive or legislative branches of the State. CIDH. Report 30/97 (Argentina). op cit. paragraph 44.

[FN46] IACHR, Report 30/97 (Argentina), op. cit.

86. In view of the foregoing, the Commission notes that the decisions dismissing Dr. Vásquez writ of amparo were not based on the merits of the matter, in other words on the inapplicability of the Dismissal Decree, because of its allegedly unconstitutional nature, and on reinstating the former incumbent to his position but declared it inadmissible on the basis of the Decree Law in question that declared the Remedy of Amparo inadmissible to challenge the Dismissal Decree.

87. The State, for its part, has alleged that by creating the Magistrates' Tribunal of Honor, it had provided a suitable procedure for challenging the situation in question.

88. The Commission was given an opportunity to examine both the procedure and the structure of that body in connection with the analysis of the admissibility of this case. In the report, the Commission concluded that the procedure was neither adequate nor effective, and did not meet the minimal requirements of due process, in terms of procedure, and its decision. Accordingly, it did not represent a remedy of the kind required by Article 25 of the Convention.[FN47]

[FN47] See the decision on admissibility in Report N° 46/97, Case 11.166, which was approved at the 97th Regular Session. Paragraphs 41, 42, 43 and 44, give details of the inadequate and ineffectual procedure before the Tribunal of Honor of the Magistrature.

89. Moreover, the above mentioned procedure of the Magistrates' Tribunal of Honor was clearly political, inasmuch as, when the Tribunal issued its ruling, the decision was sent to the Democratically Elected and Constitutional Congress, in plenary session, for a vote. In that respect, it must be noted that the right to the judicial protection contemplated in Article 25 of the

Convention means that legal recourse must be brought before, and decided upon by, a judicial body--not a political body. The Inter-American Court of Human Rights has established that:

The guarantees must be not only essential but also judicial. The expression “judicial” can only refer to those judicial remedies that are truly capable of protecting those rights. Implicit in this conception is the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency.[FN48]

[FN48] Inter-American Court of Human Rights Habeas in Emergency Situations ...op. cit. para. 30.

90. On this point, the Commission would like to recall the opinion of the Inter-American Court of Human Rights concerning the States' compliance with the binding obligation contained in Article 25 of the Convention. The Court noted in that context that “...for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. 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, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments...”. [FN49]

[FN49] Inter-American Court of Human Rights. Advisory Opinion 4/87, dated October 6, 1987. Paragraph 24.

91. In view of foregoing, the Commission considers that the only prompt and simple recourse available to Dr. Vásquez Vejarano for challenging the effects of the Dismissal Decree was indeed the Action of Amparo. For that reason, the Commission concludes that by eliminating the possibility of using such remedy based on removing the possibility of obtaining judgements on the merits, the Peruvian State flagrantly violated the guarantee established in Article 25 of the American Convention.

G. Political rights

92. Article 23 of the Convention provides the following:

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.

93. The Commission has already analyzed the matter of political rights, and has affirmed that:

The participation by citizens in government, which is protected by Article 20 of the Declaration (similar in content to Article 23 of the Convention) forms the basis and underpinning of democracy, which cannot exist without it, because the right to govern rests with the people, who alone are empowered to decide their own and immediate destiny and to designate their legitimate representatives.

Either the form of political life, nor institutional changes, nor the exercise of power, nor the control of that exercise can be effective without representative government.

.....

The right to political participation allows for a great variety of forms of government. There are many constitutional alternatives in terms of the degree of centralization of state powers or elections and the separation of powers among the organs responsible for the exercise of those powers. Nonetheless, a democratic structure is an essential element for the establishment of a political society where human rights can be fully realized.[FN50]

[FN50] IACHR. Doctrine of the Inter-American Commission on Human Rights (1971-1981), in Ten Years of Activities 1971-1981. Washington, D.C., 1982, page 334.

94. The Commission is of the view that the right to form part of the Judiciary of a State Party to the Convention, under conditions of equality, is a right protected by the aforesaid Article 23(1)(c). This means that any person meeting the pre-established conditions for such an office, such as age, nationality, professional qualifications, etc., is entitled, on conditions of equality, to be appointed to such office, inasmuch as no-one can be discriminated against in the selection process by reason of race, color, sex, language, religion, political or other views, national or social origin, economic status, birth, or any other social condition.

95. On the matter of the appointment and removal of judges, the Commission has also stated that:

Democratic systems recognize the so-called "delegated powers" of the branches of government that is a product of their classic three-way separation. The appointment and removal of magistrates by the Legislature, under the conditions stipulated in the Constitution, is one of those powers

....

This system creates stability on the bench; if a judge is to be removed, then such removal must be done in strict accordance with the procedure established in the Constitution, as a safeguard of the democratic system of government and the rule of law. The principle is based on the very special nature of the function of the courts and to guarantee the independence of the Judiciary vis-à-vis the other branches of government and political-electoral changes.[FN51]

[FN51] Report N° 30/97 (Argentina). op. cit. paras. 41 and 43.

96. Similarly, in the case known as the "Jueces de Chiriqui", concerning the dismissal of several Panamanian judges, the Commission affirmed that "the importance of these acts is augmented by the need for all states to maintain an independent judiciary that is able to provide guarantees ensuring the enjoyment of the rights as established in the Convention"[FN52], and determined that such events constituted a violation of the right to have access, under general conditions of equality, to the public service of one's country, established in Article 23(a)(c) of the Convention.

[FN52] Report N° 28/94 (Panama), Case 10.026, IACHR, Annual Report 1994. para 30.

97. Based on the foregoing, the Commission concludes that the removal of Dr. Vásquez Vejarano from his position as Justice on the Supreme Court of Peru--the supreme Peruvian judicial authority--without regard to the requisites and procedures legally established to that effect, constituted a violation by the Peruvian State of Dr. Vásquez Vejarano's right to have access, under general conditions of equality, to the public service of his country as set out in Article 23(1)(c) of the Convention.

H. Principle of legality and freedom from ex post facto laws

98. Article 9 of the Convention establishes the following precept:

"No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

99. The provisions of Article 9 may be construed to be analogous to similar legal situations. For instance, Article 29(c) of the Convention provides that no Article of the Convention may be interpreted to exclude other rights and guarantees that are inherent to the individual or that are derived from a democratic form of government. More importantly, the right to the principle of legality and freedom from ex post facto laws covered in Article 9 of the Convention is particularly important in the sense that Article 27(c) of the Convention states expressly that this right may not be suspended even if the country is in a state of emergency. On this basis, the right guaranteed in Article 9 applies to any type of sanction adversely affecting the rights of the individual since their ultimate aim is to provide security to the individual in the sense of knowing what kind of behavior is legal and what kind is not so that the legal consequences of his actions can be anticipated.

100. In this case, Dr. Vásquez was removed from office without having engaged in inappropriate conduct inconsistent with his position, which pursuant to Article 242(2) of the Peruvian Constitution were the only grounds for which he could be dismissed. Accordingly, he was not removed on legitimate ground provided for in the law and therefore the action constituted a violation on the part of the Peruvian State against Dr. Vásquez of his right to the principles of legality and freedom from ex post facto laws as provided in Article 9 of the Convention.

I. Right to equal protection under the law

101. Although the petitioner did not denounce the contested actions as a violation of the right to equality before the law, the Commission, by virtue of the authorities vested in it, has endeavored to determine whether such a violation has occurred, inasmuch as it considers that certain aspects of the contested actions could lead to such a conclusion.

102. In this regard, Article 24 of the Convention provides the following:

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

103. Similarly, Article 1 of the Convention provides that:

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

104. Based on an interpretation of the two Articles reproduced above, any person subject to the jurisdiction of a State Party to the Convention, has the right to equal protection before the law, without any discrimination whatever by reason of race, color, sex, language, religion, political or other views, national or social origin, economic status, birth, or any other social condition.

105. According to Article 295 of the Peruvian Constitution of 1979, which was in force in 1992, the Action of Amparo is intended to protect the constitutional rights of all inhabitants of Peru against the violations or threats of any authority, official, or person.

106. In this case, the aforementioned Decree Law 25.454 provided that the Action of Amparo directly or indirectly challenging the application of the Dismissal Decree or Decree Laws Nos. 25.442 and 25.446 was invalid.[FN53] Accordingly, a de facto situation was created in which all the inhabitants of Peru had access to the Action of Amparo for the protection of their constitutional rights except the 147 magistrates, judges, and prosecutors, who had been removed from office by the aforementioned decree laws. This created an evident situation of inequality for these 147 persons with respect to all other inhabitants of Peru, and also amounted to discriminatory treatment, inasmuch as 13 of the 25 justices on the Court were dismissed.

[FN53] By means of Decree Law 25.442, of April 22, 1992, the removal of a Supreme Court justice was nullified and two other justices from the same Court were removed. By means of Decree Law 25.446, of April 25, 1992, 133 judges and prosecutors were removed.

107. In this regard, the Inter-American Court of Human Rights has affirmed the following:

Accordingly, no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.[FN54]

[FN54] Inter-American Court of Human Rights, Proposed Amendment to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984. Series A N° 4. Para. 57.

108. As evident in the opinion of the Court, while it is indeed possible for differences to exist as to the State's treatment of an individual, such differences must be based on legitimate grounds, that is to say, based on reason, justice, or the nature of the situation. However, in the present case, the Commission finds no legitimate reason for depriving Dr. Vásquez Vejarano, together with the other 12 Justices, of recourse to the Action of Amparo as a means of defending their constitutional rights.

109. Accordingly, the Commission concludes that the Peruvian State, in issuing the aforementioned Decree Law 25.454, which established the inadmissibility of Actions of Amparo for the purpose of contesting the application of the aforementioned Decree Laws, violated, to the

detriment of Dr. Vásquez Vejarano, the right under Article 24 of the Convention to be treated equally and to receive equal and non-discriminatory protection under the law.

VI. ACTIONS SUBSEQUENT TO REPORT 57/98

110. The Commission approved Report 57/98 (Article 50) on the present case on December 9, 1998 at its 101st session. The Report, together with the Commission's recommendations, were forwarded to the State of Peru on December 21, 1998, and the State was granted a period of two months, from the date on which the Report was sent, in which to comply with the Commission's recommendations .

111. On February 26, 1999, at the request of the parties, the Commission granted a period of three months reckoned from February 18, 1999, for the parties to discuss the remuneration referred to in recommendation 2 in paragraph 113 below. During and after the deadline, the parties failed to reach agreement on this matter. Furthermore, the Peruvian State has not demonstrated that it has fulfilled the recommendations made by the Commission in Report 57/98.

VII. CONCLUSIONS

The Commission reiterates the following conclusions reached in the aforesaid report:

112. Based on the reasons outlined above, the Commission concludes that when the Peruvian State removed Dr. Walter Humberto Vásquez Vejarano from his post as a judge on the country's Supreme Court, and subsequently issued Decree Law 25.454, thus depriving him of the right to challenge the Dismissal Decree, the State violated the following rights protected by the American Convention, to the detriment of Dr. Vásquez Vejarano: the right to due process (Article 8), political rights (Article 23), the right to the principle of legality and freedom from ex post facto laws (Article 9), the right to equality before the law (Article 24), and right to judicial protection (Article 25); all of which are violations that run counter to the State's inherent duty to respect and guarantee the rights of all persons subject to its jurisdiction (Article 1(1)).

VII. RECOMMENDATIONS

113. Based on the foregoing analysis and conclusions,

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

1. To provide appropriate compensation to Dr. Vásquez for moral and material damages sustained as a result of the violations of his human rights, and in particular,
2. To reinstate Dr. Vásquez to his position as Justice of the Supreme Court of Peru and pay him back salary and other remuneration since the date of his removal from office, and grant him all other benefits to which he is entitled as a Justice of the Supreme Court including if appropriate his pension, or alternatively to pay Dr. Vásquez Vejarano all salary and other remuneration to which he would be entitled as a Justice of the Supreme Court until the age of 70,

to which age the Peruvian Constitution provided guarantees of irremovability from office, and to pay him as well back salary not received since the date on which he was removed from office and to grant him all other financial benefits to which he is entitled as a Justice of the Supreme Court, including if appropriate in the present case pension benefits.

IX. PUBLICATION

114. On March 1, 2000, the Commission transmitted Report 17/00--the text of which precedes--to the Peruvian State and to the petitioner, according to Article 51(2) of the Convention, and granted Peru an additional period to comply with the recommendations set above. On April 3, 2000 the State forwarded the Commission a note and did not exposed any action taken towards the compliance of the recommendations made by the Commission.

115. According to the above considerations, and to Articles 51(3) of the American Convention and 48 of the Commission's regulations, the Commission decides to reiterate the conclusion and the recommendations set forth in chapters VII and VIII; to make public the present report and to include it in its Annual Report to the OAS General Assembly. The Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the Peruvian State in respect to the above recommendations, until they have been complied with by the Peruvian State.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in Washington, DC., on the 13 day of April 2000. Signed by Hélio Bicudo, Chairman; Claudio Grossman, First Vice-Chairman; Juan Méndez, Second Vice-Chairman; Commissioners: Marta Altolaguirre, Robert K. Goldman, Peter Laurie, and Julio Prado Vallejo.