

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 14, 2011
CORRESPONDENTS' REPORTS

PERU¹

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Jurisprudential Standards — Rules of Procedure and Evidence of the International Criminal Court in Sexual Violence Cases

- Supreme Court of Justice, ‘Plenary Agreement’ (Adopted at VII Jurisdictional Plenary, Permanent and Transitory Criminal Chambers, 6 December of 2011)
<www.scribd.com/doc/80930758/Acuerdo-01-Apreciacion-Prueba-Delito-Violacion-Sexual>

The VII Jurisdictional Plenary consisted of three phases.² The first involved a contribution forum, which was aimed at identifying, analyzing and selecting the most important interpretive and normative problems arising from the practice of Peruvian courts’ when they apply procedural, substantive and sanction enforcement provisions.³ The second phase consisted of a public hearing, which took place on 2 November 2011 where national legal community representatives presented their opinions.⁴ The last phase involved the discussion and drafting of the Plenary Agreements by judges in each of the submitted topics.⁵ Deliberation and voting occurred on 6 December of 2011 and, as a result, the Plenary Agreement under analysis was unanimously adopted.⁶

Based primarily on Rules 70 and 71 of the International Criminal Court’s *Rules of Procedure and Evidence*, lawyers participating in the discussion forum proposed to incorporate the following criteria to regulate the examination of evidence in sexual crimes:

A. Victims’ consent cannot be inferred from: 1. victims’ words or conduct when force, threat of force, coercion or taking advantage of a coercive environment undermined victims’ ability to give voluntary and genuine consent; 2. victims’ words or conduct when the victim is incapable of giving genuine consent; 3. silence of, or lack of resistance by, a victim to the alleged sexual violence; 4. credibility, character or predisposition to sexual availability of a

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² Supreme Court of Justice, Plenary Agreement No. 1-2011/CJ-116, para. 2.

³ Ibid., para. 2.

⁴ Ibid., para. 3.

⁵ Ibid., para. 4.

⁶ Ibid., para. 5.

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victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.⁷

B. Evidence of the prior or subsequent sexual conduct of a victim or a witness shall not be admitted.⁸

C. The so-called 'unique declaration' is not a ground for not finding criminal liability and a victim's declaration constitutes a necessary element to sanction non-consensual sexual conduct.⁹

D. Neither forensic examination of loss of virginity nor proof of physical violence shall be overestimated.¹⁰

The Supreme Court began by setting a general analytical framework. First, it stated that although 'gender approaches' do not constitute an exclusive criterion to regulate substantive and procedural criminal law, those approaches held special relevance for sexual crimes due to concerns and the shock produced by sexual violence, particularly where the incidence of sexual crimes is higher in women, adolescents and children as is highlighted by the Inter-American Court of Human Rights in *Gonzales et al. (Cotton Field) v Mexico*.¹¹ Secondly, by referring to international jurisprudence from both the Inter-American Court of Human Rights and the International Criminal Tribunal for Rwanda, the Supreme Court concluded that rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person.¹²

The Supreme Court then identified legal issues relating to the subject matter of jurisprudential analysis as follows:¹³

a) *Whether in rape cases, as defined in the Peruvian criminal code, the victim's resistance to intercourse is irrelevant.*¹⁴ The Supreme Court considered that in an inquiry into whether the alleged perpetrator committed sexual violence, the victim's resistance is what needs to be elucidated during criminal proceedings.¹⁵ This corresponds to the fact that sexual abuse is sometimes committed under serious threat coexistent to the sexual act, or is done in an intimidating environment prior to and during sexual abuse.¹⁶ Moreover, there are cases perpetrated in captivity or as part of a systematic or continuous abuse where the victim does not explicitly resist or opts to remain silent because of the manifest uselessness in resisting and thus the victim adopts this 'passive' attitude to avoid more serious damage on his/her physical integrity.¹⁷

b) *When it comes to testimony as evidence, whether the credibility of original responsibility attribution to the perpetrator is undermined by a sexual violence victim who changes his/her initial testimony.* .¹⁸ In conformity with Rule 70.d. of the ICC's *Rules of*

⁷ Ibid., para. 7.

⁸ Ibid., para. 7.

⁹ Ibid., para. 7.

¹⁰ Ibid., para. 7.

¹¹ *González ('Cotton Field') v Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment of November 16, 2009, para. 502 cited in Supreme Court of Justice, Plenary Agreement No. 1-2011/CJ-116, para. 9.

¹² *Fernandez Ortega v Mexico*, Judgment of 30 August 2010, para. 127; *Prosecutor v Akayesu (Judgment)* (ICTR, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998) para. 597 cited in Supreme Court of Justice, Plenary Agreement No. 1-2011/CJ-116, para. 15.

¹³ Supreme Court of Justice, Plenary Agreement No. 1-2011/CJ-116, para. 17.

¹⁴ Ibid., paras. 18–21.

¹⁵ Ibid., para. 21.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid., paras. 22–27.

Procedure and Evidence, the Supreme Court pointed out that credibility, honour or sexual predisposition cannot be exclusively grounded on the victims' conduct.¹⁹ Moreover, the Supreme Court insisted on the application of literals a) through c) of the Rule 70 of the *Rules of Procedure and Evidence*, which are as follows: '(a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent; (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent; (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence'.²⁰

c) *Some guidelines on objective corroboration: prohibitions and authorizations.*²¹ Based on the principle of pertinence in evidentiary issues and the victim's constitutional right to privacy, evidence requested and connected to victim's sexual or social conduct prior to or subsequent to the sexual crime in question is constitutionally inadmissible when it involves an unreasonable, unnecessary and disproportionate intrusion into the victim's private life.²² The prohibition on general inquiries about a victim's sexual or social conduct, prior to or subsequent to the facts under investigation underlies Rule 71 of the ICC's *Rules of Procedure and Evidence* of the ICC.²³ Nevertheless, the Supreme Court stated that the above-mentioned rule is limited by the accused's general guarantee of procedural defense and the principle of adversarial proceedings.²⁴ When facing a conflict between both fundamental guarantees, in order to enquire into the victim's sexual or social conduct, in principle forbidden under Rule 71, there must be a logical link between the evidence sought from the victim's private life and the accused's defence.²⁵ Accordingly, such examination shall only occur if: (i) it seeks to prove that the perpetrator of the crime is someone else and not the accused; or (ii) when as a result of foreclosing such inquiry, the accused's right to defense is seriously breached.²⁶ For example, this evidence might be adduced in cases where the accused tries to prove previous or subsequent sexual contacts with the victim which might be considered evidence of consent for a sexual act.²⁷ Additionally, the three pronged proportionality test must be satisfied: i) the end sought has to be necessary for the defence; ii) the means used to reach that end must be legitimate; and iii) the means must be strictly necessary to achieve the end.²⁸ The Supreme Court concluded that these jurisprudential standards aim to avoid unnecessary prejudices about victims' moral standing as prejudices are unnecessary and lead to an unreasonable interference into victims' private life without adding any evidentiary element to what happened between the victim and the accused.²⁹

d) *Avoidance of secondary victimization.*³⁰ In order to avoid secondary victimization, in particular the victimization of minors, the following rules shall be taken into account: a) non-public hearings; b) the non-disclosure of victims' identity to public; and c) the promotion of a victim's unique declaration. Exceptionally, a criminal judge can authorize the examination of

¹⁹ Ibid., para. 27.

²⁰ Ibid.

²¹ Ibid., paras. 28–36.

²² Ibid., para. 34.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid., para. 36.

²⁹ Ibid.

³⁰ Ibid., paras. 37–38.

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a victim when: a) a preliminary examination was not conducted in accordance with minimum procedural requirements to guarantee the accused's right to a defence; b) a preliminary examination was incomplete or deficient; c) preliminary examination was requested by the victim or when the victim has rectified his/her statement in writing; d) based on the accused's declarations and/or witnesses' testimonies, asking the victim to add new information or to clarify obscure or ambiguous sectors of his/her version is imperative; and e) contact between victim and the accused is avoided unless criminal proceedings require otherwise.³¹

The Supreme Court decided to set the above-mentioned criteria as legal doctrine and stated that the legal principles discussed shall be invoked by all judges.³²

Legislation — Compensation for Victims of Terrorism

- Urgent Decree No. 052-2010 — Authorization to the Ministry of Justice to Provide Compensation [Autorización al Ministerio de Justicia para compensar obligaciones de pago de cargo del estado peruano]
<www.congreso.gob.pe/ntley/Imagenes/DecretosDeUrgencia/2010052.pdf>

The Inter-American Court of Human Rights ordered Peru to compensate victims of terrorism related to cases against Peru before the Court.³³ In order to provide reparations to victims, Peru appointed a specific organ to act both as creditor and debtor in obligations resulting from the Court's decisions.

Urgent Decree No. 052-2010 lists certain procedural rules for the State so as to offer due compensation to victims. The decree's primary aim is to authorize the Ministry of Justice to be the creditor and the debtor³⁴ in terrorism cases³⁵ judged by the Inter-American Court of Human Rights. This Decree also authorizes the Attorney-General to perform all procedural acts to protect the interests of the Peruvian State in such cases. Essentially, the decree provides that compensation obtained from the offender by the Attorney-General is handled by the Ministry of Justice. Thus, the Ministry of Justice is responsible to grant reparation to victims or their next of kin.³⁶

Legislation — Enforcement of International Decisions concerning Human Rights

- Administrative Resolution No. 1933-2010-CE-PJ about provisions on the enforcement of international decisions concerning human rights issued by international courts, 2 June 2010 [Resolución Administrativa No. 193-2010-CE-PJ, dispone que la Corte Superior de Justicia de Lima adopte medidas para remitir al Juzgado Especializado en materia de Ejecución de Sentencias Supranacionales las sentencias emitidas por Tribunales Internacionales en materia de Derechos humanos].
<www.asesoresempresarial.com/web/adjuntos-sumilla/2010-07-23_JCLYRRO.pdf>

This administrative resolution responded to the Human Rights NGO APRODEH [*Asociación Pro Derechos Humanos*], which claimed that the Supreme Court of Justice did not report the decisions of the Inter-American Court of Human Rights concerning Peru to the Special Chamber for the Execution of Supranational Sentences. On 11 March 2010, the Peruvian

³¹ Ibid., para. 38.

³² Ibid., paras. 40–41.

³³ See *Case of Barrios Altos v. Peru*, Inter-American Court of Human Rights, Judgment of 14 March 2001.

³⁴ Urgent Decree No. 052-2010 — Authorization to the Ministry of Justice to Provide Compensation, Art. 2.1.

³⁵ Terrorism offences are defined in Title XIV of the *Criminal Code* and Decree No. 25475.

³⁶ Urgent Decree No. 052-2010 — Authorization to the Ministry of Justice to Provide Compensation, Art. 3.1.

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government established a Special Chamber for the Execution of Supranational Sentences³⁷ with a mandate to execute international decisions regarding human rights. According to the claimant, however, the Special Chamber was not yet operational.

Therefore, this resolution reiterated that the President of the Supreme Court of Justice should implement necessary measures to refer international decisions on human rights to the Special Chamber.³⁸

Cases — Enforced Disappearance of Persons

- *Los Laureles* Case, Supreme Court of Justice, Judgement of 27 December 2010, File No. 229-2010
<www.idehpucp.pucp.edu.pe/images/documentos/jurisprudencia/caso_los_laureles-sentencia_segunda_instancia.pdf>

The *Los Laureles* case, concerning enforced disappearances, was named after events that occurred at the Military Base BCS 313, Los Laureles, which is located in the northwest part of Tingo Maria city (left margin of the Huallaga River).³⁹ According to witnesses, Los Laureles was a centre of imprisonment, torture and extrajudicial executions during Peru's internal armed conflict from 1987–1997. In particular, this case was about the alleged enforced disappearances of three citizens in Tingo María.

On 7 May 1990, while walking around Picuruyacu in Castilla district, Samuel Ramos Diego and Jesus Liceti Mego were arrested by six armed individuals dressed as civilians who dropped off a small truck and caught the two victims.⁴⁰ In a separate event, on 20 November 1990, Esaú Cajas Julca was arrested by members of the Peruvian army's Huallaga Front. The victim was intercepted while driving a small truck on Tarapacá Street towards a supplier's house, when he was caught by two individuals who blindfolded and carried him first to the BCS 314, located in the outskirts of Huánuco city, and afterwards to the BCS 313 in Tingo María. Until now, his whereabouts are unknown.⁴¹

On 13 October 2009, the National Criminal Chamber found six defendants in the two situations mentioned above not-guilty.

In relation to the disappearances of Samuel Ramos Diego and Jesús Licetti Mego, though most facts were accepted by the Court, their disappearances were not considered forced since they were apparently set free after their imprisonment.⁴² Another fact that generated doubt was that Mr. Ramos Diego's family had his national identity card, which might have meant that his family was able to contact him during his imprisonment.⁴³ As for Esaú Cajas Julca, the main fact that raised doubts about his enforced disappearance was certain flight records.⁴⁴ Also, there were some divergences between the declarations of one of the disappeared persons' family and the witness's testimony.⁴⁵

Following the decision of 13 October 2009, the Office of the Prosecutor and victims' lawyers appealed the decision to the Supreme Court.

³⁷ Administrative Resolution No. 089-2010-CE-PJ.

³⁸ *Ibid.*, Art. 1.

³⁹ *Los Laureles* case, Judgement of 27 December 2010, para. 1 (ii).

⁴⁰ *Ibid.*, para. 3 (i).

⁴¹ *Ibid.*, para. 3 (ii).

⁴² *Ibid.*, para. 6.

⁴³ *Ibid.*, para. 6.

⁴⁴ *Ibid.*, para. 1 (vi).

⁴⁵ *Ibid.*, para. 1 (v).

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As there was no evidence of Mr. Cajas Julca's whereabouts, the Supreme Court considered it unfair to attribute criminal liability to Mr. Hanke Velasco, one of the co-accused, as the alleged perpetrator of the enforced disappearance.⁴⁶ As for Mr. Ramos Diego and Mr. Licetti Mego, according to the Supreme Court, the National Criminal Chamber failed to consider certain evidence properly and thus the Court found that the evidence was insufficient to establish a finding of guilt.⁴⁷ Of the six accused, the Supreme Court declared the judgment issued by the National Criminal Chamber partially null for five of them. For the remaining accused, Mr. Hanke Velasco, the Court declared his innocence.

Cases — Statute of Limitations for War Crimes and Crimes against Humanity

• Case D.L. 1097, Constitutional Tribunal, Judgement of 21 March 2011, File No. 0024-2010-PI/TC

<www.tc.gob.pe/jurisprudencia/2011/00024-2010-AI.html>

This case involved an application for a declaration of the unconstitutionality of Decree No. 1097.⁴⁸ This decree was intended to deal with the anticipated effects of the new procedural criminal code (not yet into force) in relation to crimes against life, personal integrity and humanity of the.⁴⁹

The petitioners argued that Decree No. 1097 violated the principle of equality before the law,⁵⁰ which is recognized by the *Peruvian Constitution*⁵¹ and the *American Convention on Human Rights*.⁵² They argued that the provisions of Decree No. 1097 were aimed only at policemen and the Military and were therefore discriminatory.⁵³

The Office of the Attorney-General responded to the request arguing that Decree No. 1097 violated neither the Constitution nor international treaties ratified by Peru, including the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*. According to the Attorney-General, it was important to remove all normative and legal barriers in order to facilitate the investigation and prosecution of human rights violations and crimes against humanity.⁵⁴

The Decree was drafted to serve as a tool to anticipate the introduction of the new scheme to bring violations of human rights and crimes against humanity before a court. However, that instrument was not well received by a large group of congressmen due to an alleged violation of the principle of equality.⁵⁵ The Tribunal held that while many provisions did not discriminate between officers and non-officers, some provisions were in fact discriminatory and, thus, were unconstitutional.⁵⁶

In the present case, there was extensive argument about the applicability of a statute of limitations to crimes against humanity.⁵⁷ First, crimes against humanity are defined in

⁴⁶ Ibid., para. 9.

⁴⁷ Ibid., para. 11.

⁴⁸ Case D. L. 1097, Section I.

⁴⁹ Decree No. 1097, Art. 2.

⁵⁰ Case D. L. 1097, Section III, para. 1.

⁵¹ *Peruvian Constitution*, Arts. 2.2, 103.1.

⁵² *American Convention on Human Rights*, Art. 2.

⁵³ Case D. L. 1097, Section III, para. 1.

⁵⁴ Ibid., para. 2.

⁵⁵ Ibid., Section I.

⁵⁶ Case D. L., Section VI, in reference to Article 3.2, literals a and b, Articles 3.4, 4.2, 6.2, 6.3 and 6.4, as well as first, second and third complementary, final and transitory provisions.

⁵⁷ Case D. L. 1097, Section V, para. 42.

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accordance with the *Rome Statute*.⁵⁸ Second, only some elements of crimes against humanity are defined.⁵⁹ Third, *ius cogens* norms are referred to as exceptions to the principle of *res judicata*.⁶⁰ Fourth, the Constitutional Tribunal examined the apparent conflict between the *Peruvian Constitution* and the non-applicability of statute of limitations to the case concerning *ius cogens* and emphasized that crimes against humanity cannot be left unpunished. It noted that the right to the truth does not belong exclusively to victims and their families but is also relevant to the whole Peruvian population.⁶¹

The Constitutional Tribunal concluded that the principle of the non-applicability of a statute of limitations to crimes against humanity, which *prima facie* violates *ius cogens* norms, stems from international human rights law and hence, is fully effective in the Peruvian legal system.⁶² However, the decision on the non-applicability of the statute of limitations to crimes against humanity must be reasonable⁶³ and respect the principle of proportionality.⁶⁴

Cases — Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and Its Incorporation into the Peruvian Domestic Legal System

• Case EXP. No. 00018-2009-PI/TC, Constitutional Tribunal, Decision of 23 March of 2010, File No. 00018-2009-PI/TC

<www.tc.gob.pe/jurisprudencia/2010/00018-2009-AI%20Resolucion.html>

Callao's Bar Association filed a petition seeking a declaration of the unconstitutionality of Legislative Resolution No. 279888 which approved Peru's adherence to the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*. The petition was based on the argument that in order to implement the Convention, the *Peruvian Constitution* required constitutional amendment, not merely a Legislative Resolution insofar as the Convention purportedly affected the application of the statute of limitations to all crimes, a matter regulated by the Constitution.⁶⁵ The Constitutional Tribunal found this petition groundless as it was filed out of time.⁶⁶ The focus herein is only on relevant findings under IHL.

The Constitutional Tribunal acknowledged that the purpose of the Convention was to provide States with mechanisms to investigate and punish those alleged to be responsible for serious human rights and grave IHL violations constitutive of international crimes and about which the obligation to prevent and punish is of a *ius cogens* nature.⁶⁷ The Constitutional Tribunal then stated that, in conformity with international law, each State decides on the manner in which a ratified treaty is to be incorporated into the national system.⁶⁸ The Constitutional Tribunal pointed out that declaring the Convention unconstitutional would undermine both the *pacta sunt servanda* principle (agreements must be kept) and the

⁵⁸ Ibid., paras. 44–45.

⁵⁹ Ibid., paras. 46–52.

⁶⁰ Case D. L. 1097, Section V, paras. 53–55.

⁶¹ Ibid., para. 59.

⁶² Ibid., para. 62.

⁶³ Case D. L. 1097, Concurring Opinion of Judge Calle Hayen.

⁶⁴ Case D. L. 1097, Section V, para. 63.

⁶⁵ Case EXP. No. 00018-2009-PI/TC, Judgment of 23 March 2010, para. 3.

⁶⁶ Ibid., para. 18.

⁶⁷ Ibid., para. 4.

⁶⁸ Ibid., para. 8.

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principle of observance of treaties in good faith, the latter of which includes the State obligation to refrain from acts which would defeat the object and purpose of a treaty.⁶⁹

Cases — Statute of Limitations in Serious Human Rights Violations and Application of the Jurisprudence of the Inter-American Court of Human Rights

• *Accomarca* Case, Constitutional Tribunal of Peru, Judgment of 18 November 2010, File No. 00218-2009-HC/TC
<www.tc.gob.pe/jurisprudencia/2010/00218-2009-HC.pdf>

On 14 August 1985, a Peruvian Army unit, part of the company 'Lince-7' from Huamanga and under the command of second Lieutenant Telmo Ricardo Hurtado, murdered 62 people, including women, the elderly and children, all of whom were inhabitants of the Accomarca district, Vilcashuamán province, Ayacucho department. The killings were carried out as part of the 'Operation Huancayoc', an anti-subversive action planned by the military.⁷⁰

Mr. Roberto Contreras Matamorros was a member of the unit that intervened in 'Operation Huancayoc'. Later, he was arrested and brought to trial for murder but filed a motion to dismiss the case on grounds of the statute of limitations. The defendant argued that the time of the statute of limitations for murder begins from the date of the penal action and that the time limit is 20 years.⁷¹ The Peruvian *Criminal Code of 1924* reduced the statute of limitations by half where the alleged perpetrator of the crime was under 21 years at the time of the alleged offence.⁷² Given that the accused was 19 years old when the acts were committed, he argued for a reduction of the statute of limitations to 10 years.⁷³ The motion for dismissal on grounds of the statute of limitations was declared admissible in the first instance. However, the National Criminal Chamber overruled the decision declaring the claims based on the statute of limitations inadmissible in the case. Subsequently, Mr. Matamorros filed a *habeas corpus* action before the Constitutional Tribunal.⁷⁴

The most contentious point in this case was the injunction on the statute of limitations for the crime of murder. There was also a minor issue as to the permissibility of arguing statute of limitations in the *habeas corpus* action. Concerning the main point, the Tribunal first decided that it had jurisdiction to decide on the question of the applicability of the statute of limitations.⁷⁵ Second, the Tribunal noted the 1995 Peruvian Amnesty laws⁷⁶ and the fact that in 2001, the Inter-American Court of Human Rights had decided that they were incompatible with the *American Convention on Human Rights*.⁷⁷

The Constitutional Tribunal decided by majority to declare the case inadmissible. The judges argued that after the decision of the Inter-American Court of Human Rights, all obstacles concerning time limits for prosecuting and trying cases of serious offences had been removed. Therefore, the question of the statute of limitations did not apply in such cases.⁷⁸

⁶⁹ *Ibid.*, para. 16.

⁷⁰ *Accomarca* case, Judgment of 18 November 2010, para 8.

⁷¹ *Criminal Code 1924*, Art. 119.

⁷² *Criminal Code 1924* Art. 148.

⁷³ *Accomarca* case, Judgment of 18 November 2010, para. 18.

⁷⁴ *Accomarca* case, Judgment of 18 November 2010, Dissenting opinion of Judge Vergara Gotelli, para. 1.

⁷⁵ *Accomarca* case, Judgment of 18 November 2010, para 6.

⁷⁶ Amnesty Laws No. 26479 and No. 26492.

⁷⁷ *Accomarca* case, Judgment of 18 November 2010, para 11. See also *Case of Barrios Altos v. Peru*, Inter-American Court of Human Rights, Judgment of 14 March 2001, para. 41.

⁷⁸ *Ibid.*, para 19.

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Judge Beaumont Callirgos issued a concurring opinion stressing that the question of the statute of limitations never applies in cases of serious human rights violations.⁷⁹

It is important to mention that the dissenting opinions argued extensively about procedural matters. One of the criticisms dealt with the principle of *Nullum crimen, nulla poena sine praevia lege poenali* (no punishment without previous law),⁸⁰ which is enshrined in the *Peruvian Constitution*.⁸¹ According to Judge Vergara Gotelli, the only exception to this principle occurs when it favours the defendant.⁸² Judge Vergara Gotelli noted that both the *Rome Statute* and the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* had been ratified by Peru in 2001 and 2003 respectively and, thus, they take precedence over the statute of limitations as they were ratified after the statute of limitations was passed.⁸³

Finally, Lieutenant Telmo Hurtado was extradited from the United States to Peru and, in application of the *Alien Tort Act*, is required to pay compensation to the next of kin of the victims. He is currently being tried in Peru.

Cases — Extradition and Diplomatic Assurances

- *Wong Ho Wing Case*, Constitutional Tribunal of Peru, Judgment of 24 May 2011, File No. 02278-2010-PHC/TC
<www.tc.gob.pe/jurisprudencia/2011/02278-2010-HC.html>

On 27 October 2008, Mr. Wong Ho Wing, a Chinese citizen, was arrested in Peru on the basis of an extradition order issued by the People's Republic of China. On 20 January 2009, the Supreme Court of Justice of Peru granted China's requested extradition of Mr. Wing. The request, based on alleged crimes of smuggling, tax evasion and bribery, included diplomatic assurances concerning non-application of death penalty from China for his extradition.⁸⁴ Nevertheless, if a Chinese court considers Mr Wing's alleged acts were aggravated, then he is liable to be sentenced to life imprisonment or the death penalty.⁸⁵ On 9 February 2010, Mr. Wing's defense counsel filed a *habeas corpus* petition before the Constitutional Tribunal on the basis of an imminent threat of death or serious injuries.

In cases of extradition, the Constitutional Tribunal indicated that there is an alternative obligation (*aut dedere aut judicare*), namely extradite or prosecute.⁸⁶ The Tribunal expressed that there are limits set in international human rights law to the obligation to extradite, and that in such cases 'the obligation to judge prevails over the obligation to extradite.'⁸⁷ The Tribunal emphasized that one limitation to the obligation to extradite is the protection of the right to life.⁸⁸

With regard to the diplomatic assurances offered by China, based on a report detailing arbitrary executions in China,⁸⁹ the Constitutional Tribunal considered them insufficient to

⁷⁹ *Accormarca* case, Concurring opinion of Judge Beaumont Callirgos, para. 3.

⁸⁰ *Accormarca* case, Dissenting opinion of Judge Vergara Gotelli, para. 6.

⁸¹ *Peruvian Constitution* Art. 2, inciso 24, literal d.

⁸² *Ibid.*, Art. 103.

⁸³ *Accormarca* case, Dissenting opinion of Judge Vergara Gotelli, para. 7.

⁸⁴ *Wong Ho Wing* case, Judgment of 24 May 2011, procedural background.

⁸⁵ *Ibid.*, para. 2.

⁸⁶ *Ibid.*, para. 3.

⁸⁷ *Ibid.*, para. 5.

⁸⁸ *Ibid.*, para. 5.

⁸⁹ Human Rights Council, UPR, A/HRC/WG.6/4/CHN/2, para 46.

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guarantee that Mr. Wing would not receive death penalty.⁹⁰ Furthermore, the Tribunal recognized that Peru would be responsible should the alleged offender receive the death penalty following his extradition.⁹¹

As the Tribunal found the request admissible, it ordered the government to refuse to extradite Mr. Wing to China.⁹²

Despite the outcome, the decision itself was not unanimous. Judges Álvarez Miranda and Vergara Gotelli found the petition inadmissible, based mainly on procedural grounds.⁹³ They considered that the Chinese diplomatic assurances were sufficient⁹⁴ and thus according to them, the requirements for the *habeas corpus* had not been fulfilled.⁹⁵ Judge Calle Hayen also found the petition inadmissible for procedural reasons regarding the diplomatic assurances⁹⁶ and the fact that the defendant had also presented a *habeas corpus* claim before the Inter-American Court of Human Rights which meant that he had renounced his constitutional protection in Peru.⁹⁷

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⁹⁰ Ibid., para. 10.

⁹¹ Ibid., para. 8. The judgment quoted the landmark Judgment of *Soering v United Kingdom* (1989) 11 EHRR 439.

⁹² *Wong Ho Wing* case, Judgment of 24 May 2011.

⁹³ *Wong Ho Wing* case, Dissenting opinion of Judges Álvarez Miranda and Vergara Gotelli, para. 11.

⁹⁴ Ibid., para. 10.

⁹⁵ Ibid., para. 11.

⁹⁶ *Wong Ho Wing* case, Dissenting opinion of judges Callen Hayen para. 3.

⁹⁷ Ibid., para. 2.