

June 22, 2010

Dr. Javier Villa Stein  
President of the Peruvian Supreme Court of Justice

Dear Mr. Villa Stein,

We are writing to share with you our analysis of the binding interpretation of the crime of enforced disappearance handed down by the Peruvian Supreme Court in its Plenary Accord 9-2009/CJ-11. We appreciate the Court's effort to unify case law in Peru. However, we are profoundly concerned that the accord could deny victims of grave human rights abuses access to a remedy, and unreasonably limits the scope of state responsibility to an extent that is incompatible with international human rights law and Peru's obligations under it.

We would respectfully urge you to read our attached analysis of the decision and take into account how Peru's international human rights obligations can be properly reflected in law when defining the scope of the crime of enforced disappearances.

Thank you in advance for taking into consideration this important issue.

Yours sincerely,

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CC:

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## Analysis of Accord 9-2009/CJ-116

On November 13, 2009, the Peruvian Supreme Court issued its Plenary Accord 9-2009/CJ-116, which sets out a binding interpretation on the crime of enforced disappearances to be applied by Peruvian courts.<sup>1</sup>

In the Accord, the court held that only state agents who continued to be public officials in 1991—when the amendments to the Peruvian criminal code that provide for the prosecution of the offence of enforced disappearance entered into force—can be prosecuted for this particular crime.<sup>2</sup> According to the court, criminal responsibility for the crime of enforced disappearance is based on an obligation owed by public officials to provide information regarding the whereabouts of a “disappeared” person. Since only public officials have this obligation, the court ruled that to hold an individual, who was no longer a public official in 1991, responsible for the crime, would breach the prohibition against retroactive application of criminal law.

We believe that this interpretation is incompatible with international human rights law and Peru’s obligations under it. It unreasonably limits the scope of state and individual responsibility for enforced disappearances, and risks denying victims of grave human rights violations access to a remedy.

Given that most enforced disappearances occurred in Peru in the early 1980s, it is very likely that several state agents involved in the “disappearances” were no longer in office by 1991. In such cases, the court’s interpretation will mean that many will not be prosecuted for the commission of this crime, which may entail that in many cases of enforced disappearances no one will be held accountable. (It would still be possible to prosecute individuals for the commission of other crimes, such as killings or kidnapping, but prosecutors would have to specifically charge the accused with these crimes. These other crimes may not be considered crimes against humanity, could not reflect the complexity of the crime of enforced disappearances, and could be, for example, subject to different sentences.).

In addition, the impact on victims who have suffered the same violation will be arbitrary. Some victims, simply by virtue of whether particular individuals, over whose continued employment they have no control, will have a remedy, and others will not.

We find the reasoning of the court incompatible with the status of the crime of enforced disappearance under international law in several regards.

### *Definitional Scope of an Enforced Disappearance*

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<sup>1</sup> Peruvian Supreme Court, Plenary Accord number 9-2009/CJ-116, November 2009.

<sup>2</sup> The 1991 reform to the Peruvian Criminal Code (Legislative Decree No. 635 published on April 3, 1991) incorporated the crime of “enforced disappearance” in Article 320.

Article 320 of the Peruvian Criminal Code provides that “the public official who deprives a person of his or her liberty, ordering or executing actions that have as a result the disappearance of the person” may be subject to a prison sentence of up to 15 years.<sup>3</sup> The Court has interpreted that the detention is the “preparatory act” of the crime of enforced disappearances, which is committed when the public official fails to provide the information about the whereabouts and juridical situation of the disappeared person, which the public official is legally bound to give.<sup>4</sup>

Yet, under international law, the crime of enforced disappearance is the “act of depriving a person or persons of his or their freedom, in whatever way” that is *followed* by “an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person.”<sup>5</sup> Therefore, both the deprivation of liberty and the lack of information regarding the victim’s whereabouts are elements of the crime of enforced disappearance.

Secondly the Court does not appear to take into account that an enforced disappearance is a “continuing crime,” which continues to take place so long as the “disappeared” person remains missing, and information about his or her fate or whereabouts has not been provided. In the words of the Inter-American Court of Human Rights, “[t]he duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared.”<sup>6</sup> Therefore, if the person who bore the responsibility to provide information on the detention, fate or whereabouts of a detained person has not discharged that duty, then their obligation to provide information persists under international law irrespective of a change of employment status.

### *Obligation to investigate and punish*

The court’s interpretation undermines Peru’s obligation to investigate, prosecute, punish, and remedy violations of human rights.<sup>7</sup> This obligation attaches to all states parties to human rights treaties on the basis that the effective protection and prevention of human rights violations requires investigation and punishment of violations that do occur. The

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<sup>3</sup> Article 320, Peruvian Criminal Code.

<sup>4</sup> Plenary Accord, paragraph 10.

<sup>5</sup> Inter-American Convention on Forced Disappearance of Persons, 33 I.L.M. 1429 (1994), entered into force March 28, 1996, ratified by Peru on February 8, 2002, art. 2. See also Article 7 (2) (i) of the Statute of the International Criminal Court, ratified by Peru on November 10, 2001, which defines an enforced disappearance by the act of “arrest, detention or abduction” of a person “followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts” of the person.

<sup>4</sup> Inter-American Court of Human Rights, Velazquez Rodriguez, Judgment of July 31, 1988, Inter-Am.Ct.H.R., (Series C) No. 4, para. 181..

<sup>7</sup> This obligation derives from Peru’s ratification of a number of human rights treaties, such as the ICCPR, the American Convention on Human Rights (ACHR) (“Pact of San Jose, Costa Rica”), adopted November 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), ratified by Peru on July 28, 1978. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, ratified by Peru on July 7, 1988. Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, entered into force February 28, 1987, ratified by Mexico on February 11, 1987, arts. 1, 6. Inter-American Convention on Forced Disappearance of Persons, 33 I.L.M. 1429 (1994), entered into force March 28, 1996, ratified by Peru on February 8, 2002.

Inter-American Court of Human Rights, for example, has held that “the State has the obligation to use all the legal means at its disposal to combat [impunity], since impunity fosters chronic recidivism of human rights violations and total defenselessness of victims and their relatives.”<sup>8</sup>

The duty to investigate and punish also derives from the right to a legal remedy that these treaties extend to victims of abuse. Under international law, states have an obligation to provide victims of human rights abuses with an effective remedy—including justice, truth, and adequate reparations—after they suffer a violation. Under the International Covenant on Civil and Political Rights (ICCPR), states have an obligation “to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.”<sup>9</sup>

At the regional level, the American Convention on Human Rights (ACHR) states that every individual 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 his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.”<sup>10</sup> The Inter-American Court has held that this right imposes an obligation upon states to provide victims with effective judicial remedies.<sup>11</sup>

In addition, there are specific obligations on states to prevent and punish enforced disappearances. Although Peru has not yet ratified the recent International Convention for the Protection of All Persons from Enforced Disappearance, the treaty codifies an already existent obligation of states to ensure that, whenever an offense occurs, there is effective investigation and prosecution and a proper remedy for the victim.<sup>12</sup>

### *Scope of state responsibility*

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<sup>8</sup> Inter-American Court of Human Rights, Paniagua Morales et al., Judgment of March 8, 1998, Inter-Am.Ct.H.R., (Ser. C) No. 37 (1998), para. 173.

<sup>9</sup> ICCPR, art. 2(3)(a). The ICCPR imposes on states the duty to ensure that any person shall have their right to an effective remedy “determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.” ICCPR, art. 2 (3)(b). Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of international Human Rights Law and Serious Violations of International Humanitarian Law, March 21, 2006, adopted by the 60th session of the United Nations General Assembly, A/RES/60/147, principle II.3.(d): “The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: (d) Provide effective remedies to victims, including reparation, as described below.”

<sup>10</sup> ACHR, art. 25. Similarly, the Inter-American Convention to Prevent and Punish Torture requires states to “take effective measures to prevent and punish torture” and “other cruel, inhuman, or degrading treatment or punishment within their jurisdiction” (Article 6). It also requires states parties to guarantee that “any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case,” and that “their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process” (Article 8).

<sup>11</sup> Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R., (Ser. C) No. 4 (1988), paras. 166, 174, 176. Inter-American Court of Human Rights, Loayza Tamayo Case, Judgment of November 27, 1998, Inter-Am.Ct.H.R., (Ser. C) No. 33 (1998), para. 169.

<sup>12</sup> International Convention for the Protection of All Persons from Enforced Disappearance, adopted by General Assembly Resolution 61/177 of December 20, 2006, arts. 3 – 12, 24, 25.

Additionally, as the court itself recognizes in paragraph 9 of the accord, the definition of enforced disappearance included in the Peruvian Criminal Code contradicts international standards when it limits the scope of state responsibility to state agents. Article 320 of the Criminal Code states that only “public officials” can be responsible for enforced disappearances.

Under international law, however, state responsibility is also engaged when acts are carried out with the authorization, support, acquiescence, or tolerance of the state. In 2005, the Inter American Court ordered Peru to modify its criminal code, arguing that it inadequately limited state responsibility only to public officials. According to the court, criminal laws must ensure that all “authors, accomplices and those who cover up the crime of forced disappearance,” whether they are state agents or “persons or groups of persons that act with the authorization, support or acquiescence of the state,” must be sanctioned.<sup>13</sup> The court reiterated its findings in 2009, stating that so long as Peru does not modify its definition of enforced disappearances in its criminal code, it will continue to violate its international obligations.<sup>14</sup>

### *Prohibition on Retroactive Penal Sanctions*

The prohibition on retroactive application of the penal law is not intended to prevent the punishment of acts that were recognized as criminal under international law at the time that they were committed. This is made clear in article 15 of the International Covenant on Civil and Political Rights, to which Peru is a party.<sup>15</sup> While setting out the prohibition on retroactive penal laws, article 15 notes specifically that “[n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

The crime of enforced disappearance falls into that category:

- The codification process of the prohibition on enforced disappearances in international human rights instruments that began with a General Assembly resolution in 1978 that recognizes that involuntary or enforced disappearances are violations of existing protections concerning the right to life, freedom from torture, freedom from arbitrary arrest and detention.<sup>16</sup>

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<sup>13</sup> Inter-American Court of Human Rights, Gómez Palomino Case, November 22, 2005, Inter-Am.Ct.H.R., (Ser. C) No. 136 (2005), paras. 100-102.

<sup>14</sup> Inter-American Court of Human Rights, Anzualdo Castro Case, September 22, 2009, Inter-Am.Ct.H.R., (Ser. C) No. 202 (2009), para. 167.

<sup>15</sup> International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by Peru on April 28, 1978.

<sup>16</sup> Resolution A/33/173. In the resolution the General Assembly recalls articles 3, 5, 9, 10, 11 of the Universal Declaration of Human Rights, and articles 6, 7, 9, and 10 of the International Covenant on Civil and Political Rights and then “Calls up on Governments ... to ensure that law enforcement and security authorities or organisations are fully accountable, especially in law, in the discharge of their duties, such accountability to include legal responsibility for

- As a result of the 1978 General Assembly resolution, the UN Working Group on Enforced or Involuntary Disappearances (UNWGEID) was established in February 1980. Following that, throughout the 1980s, states regionally and at the UN began negotiations for a specific instrument to address the crime of enforced disappearances. At no stage was the issue of whether enforced disappearances were illegal under international law challenged, only whether an instrument was necessary since the acts were already outlawed.
- The case of Velásquez Rodríguez before the Inter-American Court also made clear the scope of the crime under international law in respect of a disappearance that had occurred in 1981.<sup>17</sup>
- When the Declaration on the Protection of all Persons from Enforced Disappearance was adopted by the General Assembly in December 1992, it explicitly stated that the acts which comprise enforced disappearance already constituted a grave and flagrant violation of the prohibitions found in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention Against Torture, regarding the right to life, the right to liberty and security of the person, the right not to be subjected to torture and the right to recognition as a person before the law.<sup>18</sup>
- The criminal status of enforced disappearances also has a long history under international law as a war crime and crime against humanity. Significantly, the ICRC has included the prohibition on enforced disappearances as part of customary law in its most recent codification of customary norms for both internal and international conflicts.<sup>19</sup>

Therefore, the principle of legality by no means requires that prosecutions of public officials for enforced disappearance be limited to those crimes committed after Peru incorporated the crime into its domestic penal code. The underlying conduct has long been criminalized in both national and international law, and the defendants would have been on notice that their actions were contrary to law. The crime has been recognized as such in international law since at least the beginning of the 1980s, and before that its constituent elements were universally recognized as violations of international law. The interpretation in the Plenary Accord would reduce this grave international crime to a mere failure to carry out a bureaucratic function, in violation of Peru's international obligations.

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unjustifiable excesses which might lead to enforced or involuntary disappearances and to other violations of human rights”.

<sup>17</sup> Inter-American Court of Human Rights, Velazquez Rodriguez, Judgment of July 31, 1988, Inter-Am.Ct.H.R., (Series C) No. 4.

<sup>18</sup> UN General Assembly, Declaration on the Protection of all Persons from Enforced Disappearance was adopted by the General Assembly, A/RES/47/133, December 18, 1992.

<sup>19</sup> See Rule 98 in Henckaerts and Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules, (ICRC, 2005), at pp. 340-343. See also the 24<sup>th</sup> International Conference of the Red Cross in 1981, Res. II para. 2434, where the ICRC note that enforced disappearances “imply violations of fundamental human rights such as the right to life, freedom and personal safety, the right not to be subjected to torture or cruel inhuman or degrading treatment, the right not be arbitrarily arrested or detained and the right to a just and public trial”