

# **The Rome Statute of the International Criminal Court and the Constitutional Review Process in Peru**

## **Analysis and Recommendations of the Lawyers Committee for Human Rights<sup>1</sup>**

### **Introduction**

On July 17, 1998, the United Nations Conference of Plenipotentiaries approved the treaty known as the Rome Statute which created the International Criminal Court (“ICC”). The function of the ICC is to prosecute perpetrators of the most serious human rights crimes such as genocide, crimes against humanity, and war crimes.<sup>2</sup> The Rome Statute entered into force on July 1, 2002, after it had been ratified by a minimum number of countries. Peru ratified in November of 2001.

Peru has a hierarchic legal system whereby if it ratifies an international treaty, such treaty is automatically incorporated into national legislation.<sup>3</sup> However, Peru’s Constitution does not specify the hierarchy of a treaty within the national legislation. Approval by the Peruvian Congress to ratify a treaty is only needed when human rights issues are involved<sup>4</sup> or when constitutional provisions may be affected.<sup>5</sup> In the latter circumstances, approval by the Congress does not mean that the amendments of the constitutional provisions will occur prior to the ratification of the treaty.

In Peru, the Constitutional Tribunal is the legal body which decides the constitutionality of national legislation, but it is not involved in the ratification of a treaty. After a treaty is ratified, however, the Tribunal may rule on whether specific treaty provisions are in conflict with the Constitution, if a valid case or controversy arises. If no valid case or controversy arises, contradictions would remain in effect, with no hierarchy guidance, as stated above.

The automatic incorporation of a treaty into national legislation and the fact that its constitutionality is not previously decided, do not offer a direct solution to possible contradictions between the Constitutional provisions and the treaty.

Presently, the Peruvian Constitution is undergoing a review process, so it is an opportune time to evaluate the Constitution’s compatibility with the Rome Statute and other international agreements. Furthermore, when it is appropriate, adapting current legislation in order to comply with the provisions of the Rome Statute is advisable.

In this document the Lawyers Committee presents analyses and recommendations concerning the following constitutional issues: immunities, non-statutes of limitation, and amnesties and pardons, in the light of the principles and provisions contained in the Rome Statute. This brief

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<sup>1</sup> This is an English version of a document submitted to the Constitutional Reform Commission in Peru in August 2003. It was prepared by Caterina Reyes, a Peruvian lawyer, on behalf of the International Justice Program of the Lawyers Committee for Human Rights.

<sup>2</sup> Article 5 of the Rome Statute recognizes the crime of aggression. However, it is not defined yet.

<sup>3</sup> Constitution of Peru, Article 55: “Treaties signed by the State and in force are part of national law.”

<sup>4</sup> Constitution of Peru, Article 56: “Treaties must be approved by the Congress before their ratification by the President of the Republic if they involve the following matters: 1. Human rights.”

<sup>5</sup> Constitution of Peru, Article 57: “When the treaty affects constitutional provisions, it must be approved by the same procedure that applies to amending the Constitution before being ratified by the President of the Republic.”

also calls for the criminal code to be changed in order that Peruvian legislation complies with the new international standards provided in the Rome Statute.

### **Irrelevance of Official Capacity and Immunities**

Article 27 of the Rome Statute provides that official capacity shall in no case exempt a person from criminal responsibility nor in and of itself constitute a ground for reduction of sentence. Article 27 also provides that immunities or special procedural rules shall not bar the ICC from exercising its jurisdiction over a person.

This provision is a product of the evolution of international law. Before the Rome Statute was created, several international treaties already espoused this principle of the irrelevance of official capacity with respect to certain crimes (most of those crimes are now also included in the Rome Statute.) Article 7 of the Nuremberg Charter<sup>6</sup> provides that “the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.” In addition, Article 4 of Law 10 of the Allied Control Council<sup>7</sup> provided that “The official position of any person whether Head of State or as responsible official in a Government Department, does not free him from responsibility for a crime or entitle him for mitigation of punishment.” Later, Article IV of the Genocide Convention<sup>8</sup> provided for the irrelevance of official capacity and that states should ensure the implementation of this Convention’s provision within their own legislation.

Article IV of the U.N. Convention Against Torture<sup>9</sup> (1984) allows no exception for the extradition or prosecution of perpetrators of torture. The Statutes for the international criminal tribunals for Rwanda and Yugoslavia also provide that no immunity will apply for war crimes, crimes against humanity or genocide.

These international treaties demonstrate the clear opposition of the international community toward immunity provisions when it comes to the worst human rights violations. The original purpose of immunities was to prevent an official of a state from being prosecuted for political reasons and to guarantee the continuity of his duties for a certain period of time. In that sense, the immunities were not created in order to shield a figure of authority if he committed the worst crimes. The international community agrees that when these crimes are perpetrated, official capacity is irrelevant.

In that regard, it is pertinent to note the Pinochet<sup>10</sup> case, in which the Appeal Committee of the House of Lords in the United Kingdom ruled that General Augusto Pinochet’s immunity as a head of state was not applicable to his requested extradition to stand trial for torture. The reasons given by the Committee in its March 24, 1999 judgment differed from each other in various aspects. However, they all agreed that torture is an international crime, and that

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<sup>6</sup> Charter of Nuremberg International Military Tribunal, August 8, 1945.

<sup>7</sup> The Allied Control Council was approved in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders other than those dealt with by the International Military Tribunal (Nuremberg Tribunal), December 20, 1945.

<sup>8</sup> Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the U.N. General Assembly on December 9, 1948.

<sup>9</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, adopted by the U.N. General Assembly on December 10, 1984.

<sup>10</sup> Regina v. Bartle and the Commissioner of Police for the Metropolis and Others (Appellants) Ex Parte Pinochet (Respondent); Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others (Appellants) Ex Parte Pinochet (Respondent) (On Appeal from a Divisional Court of the Queen’s Bench Division). In [http:// www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm](http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm).

international law and the states that ratified the Convention Against Torture have given universal jurisdiction to national courts, no matter where the crime is committed. As Lord Hutton explained in his judgment, "... since the end of the second world war there has been a clear recognition by the international community that certain crimes are so grave and so inhuman that they constitute crimes against international law and that the international community is under a duty to bring to justice a person who commits such crimes." He states further, "In my opinion he [General Pinochet] is not entitled to claim such immunity. The Torture Convention makes it clear that no state is to tolerate torture by its public officials or by persons acting in an official capacity. ... The alleged acts of torture by General Pinochet were carried out under colour of his position as head of state, but they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime."

In addition, the Chilean Supreme Court decided in 2000 to lift the immunity to which Pinochet was entitled as a Member of Congress, because there was a possibility that he committed crimes which deserved to be investigated in the criminal courts. These decisions in the Pinochet case demonstrate that immunities which may impede the prosecution of heads of state – for the most serious crimes – cannot be applied under international law.

It is significant that developments in international law have favored fundamental human rights over the protection of public authorities in official capacities. Immunity provisions or special procedures to hold accountable heads of state, government officials, members of parliament or congress and others are often included in constitutions around the world. However, it is unusual to find immunities that completely absolve an official from criminal responsibility regardless of the crime that was committed. In most cases, immunities are restricted and are only applied for certain acts, such as expressing one's opinions as a parliamentarian, or to certain crimes. On the other hand, immunities may consist of procedural rules that prevent the arrest or prosecution of an official before a waiver is granted by an institution. These kinds of immunities can be applied in general – for all types of crimes or conduct – or can have a more restricted application, such as to crimes committed while carrying out public functions.

Articles 93, 99 and 117 of the Peruvian Constitution provide for immunities and define the procedure required to bring the President, Members of Congress and other officials to trial. Article 27 of the Rome Statute does not prohibit states from maintaining immunities in their national legislation. However, it is clearly stated that any kind of immunity shall be irrelevant when the case is before the ICC. Given the irrelevance of immunities at the international level, the fact that the Peruvian Constitution has provisions for immunities does not mean that *prima facie* they are in contradiction with the Rome Statute or that Peru would not be able to comply with its obligation to cooperate with the ICC.

Therefore, it is necessary to analyze the structure of the immunity provisions in light of both the complementarity principle that underlies the Rome Statute, and the obligation to cooperate with the ICC. Given the complementary nature of the ICC, it is necessary to analyze whether the Peruvian legislation has mechanisms that permit the investigation and prosecution of public officials before national courts in the event Rome Statute crimes are committed. It is also necessary to analyze whether the immunities provided in the Peruvian constitution could prevent Peru from complying with its obligations to cooperate, in the event that the ICC exercises its jurisdiction.

#### The complementarity principle

According to the complementarity principle, the ICC has jurisdiction over genocide, crimes against humanity and war crimes when a state is unwilling or unable to carry out an investigation or prosecution itself. Although the Rome Statute does not explicitly prohibit the existence of immunities in domestic legislation, nevertheless its Preamble states clearly that it is the duty of states to exercise jurisdiction over perpetrators of international crimes. Where a state does not prosecute those crimes, using immunities as a justification, the ICC may interpret this as indicating that the State is unable or unwilling to prosecute an alleged criminal. Therefore, if a state wants to ensure that it will always be able to exercise jurisdiction over a case, it is necessary to eliminate immunities for Rome Statute crimes in its national legislation.

Article 117<sup>11</sup> of the Peruvian Constitution states that the President can be brought to trial only if he commits certain procedural crimes relating to elections, but the Constitution makes no mention of Rome Statute crimes. In the event that the President commits these Rome Statute crimes, there would be no way to prosecute him before national courts, and therefore the ICC could have a basis for exercising its jurisdiction because Peru would be unable to do so.

Members of Congress in Peru, under Article 93<sup>12</sup> of the Constitution, cannot be prosecuted without Congressional authorization until a month after their term is finished.<sup>13</sup> This is a procedural immunity which occurs before a judicial action can begin. No crimes – including Rome Statute crimes – can be investigated without a prior waiver by the Congress. In a situation where a Rome Statute crime may have been committed by a Member of Congress and no waiver of immunity is granted, the ICC could again exercise jurisdiction.

Article 99<sup>14</sup> of the Constitution lays out the authorization process for prosecution of certain official persons, including Members of Congress and the President, when they commit constitutional infractions or acts considered crimes within their institutional functions, for up to five years after the conclusion of their terms. Article 99 is complemented by Article 100 which provides that where Congress authorizes an official to go to trial, the Supreme Court would hear the case. Apart from the President and Members of Congress – who have stronger immunities granted to them in other articles – the remaining official persons mentioned in Article 99 must undergo the congressional authorization process in cases of constitutional infractions or crimes inherent to their institutional functions. Rome Statute crimes are neither constitutional infractions nor crimes inherent to institutional functions. Therefore, if these other official persons commit Rome Statute crimes, they will not be covered by the immunities provided by Article 99.

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<sup>11</sup> Constitution of Peru, Article 117: “The President of the Republic may be impeached only during his term of office for treason to the country; for blocking presidential, parliamentary, regional, or municipal elections; for dissolving Congress except in those cases provided for in Article 134 of the Constitution; and for impeding its meeting or the functioning of the National Board of Election and other organs of the electoral system.”

<sup>12</sup> Constitution of Peru, Article 93: “Congressmen represent the Nation. They are not subject to an imperative mandate or to interpellation. They are not responsible before any authority or court for opinions held and votes cast in the exercise of their functions. They may not be prosecuted or arrested without prior authorization of the Congress or its Standing Committee [*Comisión Permanente*]. Congressmen have tenure from the time of their election to a month after terminating their functions, except for an offense caught in the act, in which case they are placed at the disposal of the Congress or its Standing Committee within 24 hours to determine whether their imprisonment and trial may be authorized or not.”

<sup>13</sup> Congressmen may be prosecuted if they are found *in flagrant delicto* in which case the Congress has 24 hours to grant authorization to prosecute.

<sup>14</sup> Constitution of Peru, Article 99: “It is the responsibility of the Standing Committee to impeach any of the following before Congress: the President of the Republic; members of Congress; Ministers of State; members of the Constitutional Court; members of the National Council of the Magistracy; members of the Supreme Court; senior public prosecutors; the Public Defender of the People, and the Controller-General for violations of the Constitution and for any offense that they may commit in the exercise of their functions and up to five years after they have relinquished them.”

Consequently, immunities for the President and Members of Congress require more attention. The exercise of these immunities could result in the state being considered unwilling to prosecute the President and hence, the ICC could take the case invoking the complementarity principle. If the Peruvian state wants to avoid that situation, it is recommended that immunities for the President and Members of Congress be amended. In the case of immunity for the President, this can be done by adding the Rome Statute crimes to the list of crimes in Article 117 for which he can be brought to trial. In the case of immunities for Members of Congress, an addition can be made to Article 93 to the effect that congressional authorization to prosecute Members of Congress is not required when a Rome Statute crime is allegedly committed.

In addition, it is recommended that a provision be included that establishes, in general, the inapplicability of immunities or special procedures for official persons when Rome Statute crimes are committed. This provision will provide a general framework for addressing immunities in the Constitution. It will cover any case, not only the President and Members of Congress, and will therefore prevent any contradictory interpretation of the Rome Statute provisions.

#### The obligation to cooperate

Regarding the obligation to cooperate, states are obliged to cooperate fully with the ICC in the investigation, arrest and surrender of persons, the enforcement of sentences and other matters. It is important to mention that cooperation obligations arise only when the ICC decides to exercise jurisdiction over a case. Therefore, it is pertinent to analyze whether the immunities in the Peruvian Constitution prevent Peru from complying with its obligation to cooperate with the ICC.

According to Article 86 of the Rome Statute, states have to cooperate fully with the ICC in the process of investigation and prosecution. Article 88 provides that states must ensure that there are procedures available under their national law for full cooperation. The procedure for the surrender of persons to the ICC is established in articles 89 to 92 of the Rome Statute.

As mentioned above, when the ICC exercises jurisdiction, immunities (at the national or international level) are irrelevant and cannot limit the cooperation obligations of states. In this regard, the immunities that completely eliminate criminal responsibility or the ones that provide no possibility of waiver are directly in conflict with the obligations under the Rome Statute. These immunities may not only prevent prosecution of the official before national tribunals, but may also limit the possibility of arrest or surrender required by ICC.

The immunities contained in the Peruvian Constitution do not completely eliminate criminal responsibility for public officials. However, in the case of the President, he may only be accused of certain acts, which do not include Rome Statute crimes. This may result in an obstacle for the ICC in the event it requires the arrest or surrender of the President because the state could use the immunities provided for under national law to prevent an arrest. If that happens, the state would be failing to fulfill its obligations to cooperate with the ICC.

In the case of Members of Congress, the conflict does not arise immediately because their immunities have a waiver procedure and could be lifted through authorization by the Congress. The problem arises only when the Congress does not authorize the prosecution. In this case, the state would be failing to fulfill its cooperation obligations to the ICC.

In order to ensure that Peru's obligations to cooperate are fulfilled, and without prejudice to the recommendations related to the complementarity principle, it is recommended that a generic provision is included in the Constitution that recognizes the jurisdiction of the ICC under the conditions specified by the Rome Statute. Similar provisions were included in constitutional amendments in France, Luxembourg and Colombia.

France decided to amend its Constitution by adding a generic clause to avoid isolated modifications to the immunity provisions in the French Constitution. An article was added providing that the French Republic recognizes the ICC's jurisdiction under the terms of the treaty (the Rome Statute), signed on July 18, 1998.<sup>15</sup>

Luxembourg also amended its Constitution by including an article that establishes that no constitutional provision shall be an obstacle to the ICC or to the fulfillment of the obligations under the Rome Statute.<sup>16</sup>

The Colombian Constitution underwent an amendment process before Colombia ratified the Rome Statute.<sup>17</sup> An article was added recognizing the jurisdiction of the ICC under Rome Statute terms. Then, the Constitutional Court<sup>18</sup> approved the law that executed the Rome Statute. After that, Colombia ratified the Rome Statute on August 5, 2002.

The inclusion of a generic provision of this nature would strengthen Peru's ability to fulfill its obligations under the Rome Statute, including the cooperation obligations. Furthermore, it would resolve the dilemma regarding the hierarchy of the Rome Statute within Peruvian legislation.

Another benefit of including such a generic provision is that it clarifies that official capacity is irrelevant in cases involving foreign official persons. If foreign officials who enjoy immunities find themselves in Peru and are requested by the ICC, Peru would be obligated to cooperate with the ICC because it has recognized its jurisdiction under the conditions specified by the Rome Statute.

Although the original purpose of a generic article of this nature was to avoid having to amend immunities provisions in the Constitution,<sup>19</sup> those concerned with the process of reforming the Peruvian Constitution can consider both the modification of the immunity provisions and the inclusion of a generic article that recognizes ICC jurisdiction under Rome Statute terms.

#### Other treaties to which Peru is a party

With the amendment of the immunity provisions, Peru can ensure that its legislation has sufficient elements to bring to trial the perpetrators of Rome Statute crimes. Also, the inclusion of a generic article that recognizes ICC jurisdiction in Rome Statute terms guarantees the fulfillment of the obligations relating to cooperation.

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<sup>15</sup> Loi Constitutionnelle 99-568. « Article 53-2.- La République peut reconnaître la juridiction de la Cour pénale internationale dans les conditions prévues par le traité signé le 18 juillet 1998 ». Journal Officiel de la République française (lois et décrets), p. 10175.

<sup>16</sup> Loi A-83 (25 août 2000), « Article 118.- Les dispositions de la Constitution ne font pas obstacle à l'approbation du Statut de la Cour Pénale Internationale, fait à Rome, le 17 juillet 1998, et à l'exécution des obligations en découlant dans les conditions prévues par ledit Statut »

<sup>17</sup> Legislative Act N. 2, 2001 enacted article 93, recognizing ICC jurisdiction.

<sup>18</sup> Colombian Constitutional Court, Judgment C-578, 2002.

<sup>19</sup> Venice Commission, Report on Constitutional Issues raised by the ratification of the Rome Statute of the International Criminal Court, adopted by the Commission at its 45<sup>th</sup> Plenary Meeting, Venice, 15-16 December 2000, pg.3, in [www.venice.coe.int/docs/2001/CDL-INF\(2001\)001-e.html](http://www.venice.coe.int/docs/2001/CDL-INF(2001)001-e.html).

Having analyzed the structure of immunities in Peru in light of the complementarity principle underlying the Rome Statute and the obligation to cooperate with the ICC, it is important to highlight the immunity provisions included in other international treaties to which Peru is a party that define crimes other than those that are in the Rome Statute. For example, the Inter-American Convention on Forced Disappearances establishes the irrelevance of immunities in national processes.<sup>20</sup> Also, the Convention against Torture does not provide any exception for extradition or prosecution of persons accused of torture. These treaties regulate random or isolated acts of disappearance or torture that do not fit in the definition of crimes against humanity in the Rome Statute.

Therefore, we also recommend that the Constitution be amended so as to establish the non-application of immunity provisions in the cases of crimes included in other treaties that contain provisions regarding the irrelevance of official capacity. This is especially important if the provisions of these other treaties require the non-application of immunities within the national legislation of each state. This would ensure that Peru will comply with its obligations under the Rome Statute as well as under other international agreements to which it is party.

In sum, Lawyers Committee recommends:

- The modification of the immunities provisions in the Constitution concerning the President (Article 117) and Members of Congress (Article 93). In the case of the President, it is recommended that the Rome Statute crimes be added to the list of crimes for which he can be brought to trial, as well as adding other crimes included in treaties to which Peru is a party that contain provisions regarding the irrelevance of official capacity. Regarding Members of Congress, it is recommended that Article 93 specifies that congressional authorization is not needed when a Rome Statute crime is committed nor when other crimes included in treaties to which Peru is a party that have provisions regarding the irrelevance of the official capacity are committed.
- In addition, the inclusion in the Constitution of a provision that establishes, in general, the inapplicability of immunities or special procedures for official persons when Rome Statute crimes are committed, and also when other crimes included in treaties to which Peru is a party that have provisions regarding the irrelevance of the official capacity are committed.
- The inclusion of a generic provision in the Constitution that establishes that Peru recognizes the jurisdiction of the ICC under the conditions specified in the treaty adopted in Rome, on July 17 1998 (Rome Statute).

### **Non-applicability of Statutes of Limitation**

Article 29 of the Rome Statute provides that crimes within the jurisdiction of the ICC shall not be subject to statutes of limitation. In light of the principle of complementarity that underlies the

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<sup>20</sup> Inter-American Convention on Forced Disappearances. "Article IX.- Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions."

Rome Statute, it is necessary to analyze the provision regarding the non-applicability of statutes of limitation in two aspects: its application in domestic courts and its application by the ICC.

In accordance with Article 29, it is clear that even if, according to domestic law, the time limit for the prosecution or the sentence has passed, this will not prevent the ICC from exercising its jurisdiction.

Regarding the non-applicability of statutes of limitation at the domestic level, the provisions contained in the Convention of Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (Convention) should be noted.<sup>21</sup> The first article of this Convention provides for the non-application of statutes of limitation regardless of when the crime may have been committed. Also, it provides that states must adopt provisions ensuring that statutes of limitation will not apply for these crimes within their national legislation.

The Convention provides for the non-applicability of statutes of limitation for war crimes and crimes against humanity, including, as part of the latter category, the crime of genocide. The Rome Statute – which is more recent – includes the majority of the crimes in the Convention, although genocide is considered an independent category of crime.

In accordance with both rules – the Rome Statute and the Convention – the non-applicability of statutes of limitation for the crimes must be recognized at the national and international levels. Therefore, states must adapt their legislation so that the statutes of limitation will not apply to those crimes and hence, cannot prevent the ICC from prosecuting them.

The non-applicability of statutes of limitation is premised on the need to deter and punish the most serious crimes and to protect human rights. The Preambles of both the Convention and the Rome Statute confirm the international community's desire to ensure accountability for the most serious crimes.

It is necessary for national legislation to recognize the non-applicability of statutes of limitation for Rome Statute crimes in order for national courts not to have any limitation in bringing alleged perpetrators to trial. Otherwise, according to the complementarity principle, the ICC could exercise its jurisdiction.

In cases where the ICC decides to exercise jurisdiction, the state must ensure that there are procedures available under national law for all forms of cooperation (Article 88 of the Rome Statute) and must also fully cooperate with the ICC in investigation and prosecution of crimes under the Statute (Article 86 of the Rome Statute). If the ICC requires an arrest or surrender of a person, the state cannot use the statutes of limitation in its internal legislation to prevent the ICC from exercising its jurisdiction. If this situation occurs, that state is violating its obligations under the Rome Statute.

Currently, the Peruvian Constitution makes no mention of statutes of limitation. However, Article 80 of the Peruvian criminal code – which is also undergoing a review process – provides for statutes of limitation without any exceptions for all crimes, therefore including Rome Statute crimes.

Given that international treaties in Peru do not have a clear superseding hierarchy over national legislation, and given that there is an article in the criminal code that provides for statutes of

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<sup>21</sup> Adopted by UN General Assembly Resolution 2391 on November 26, 1968, entry into force November 11, 1970.

limitation without any exceptions for crimes, a provision is required in the Constitution stating that there would be no statutes of limitation for Rome Statute crimes.

In the latest version of the constitutional amendments, Congress has drafted Article 2.25.d,<sup>22</sup> which provides for the non-applicability of statutes of limitation for war crimes and crimes against humanity, as well as any other crime mentioned in international treaties to which Peru is party. Genocide is not mentioned but it is included among the crimes recognized in international treaties.

It is noteworthy that this proposed amendment will provide for the non-applicability of statutes of limitation not only for Rome Statute crimes, but also for other crimes under international law. However, it is important to maintain genocide as an independent crime as it is in the Rome Statute, the most recent treaty. Genocide is the most serious crime within the category of crimes against humanity. It is pertinent to mention the “Stakic case”<sup>23</sup> before the International Criminal Tribunal for Yugoslavia, where genocide was defined as the “crime of crimes.” This definition was also used by the International Criminal Tribunal for Rwanda in the Kambanda case.<sup>24</sup> Also, due to its distinctive characteristics, genocide was treated independently in a separate treaty, the Genocide Convention (1948). The crime of genocide has a unique element of intent that other crimes do not have, which is the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. It does not need to be part of a widespread or systematic attack, as is the case for crimes against humanity, and it does not need to be perpetrated during a conflict, as is the case for war crimes.

Therefore it is recommended that the crime of genocide be expressly mentioned in Article 2.25.d, regardless of other international crimes which may be covered.

In addition to this recommendation, Lawyers Committee would like to reiterate the advantage of adding a generic article in the Constitution that recognizes the ICC’s jurisdiction under the Rome Statute terms. As included in the previous section on the irrelevance of official capacity and immunities, an article of this kind will strengthen Peru’s ability to comply with its obligations under the Rome Statute.

It is significant to mention separately the law (Resolución Legislativa 27998) approving the adherence of Peru to the Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. This adherence signifies an important step in the fight against impunity for the most serious crimes. However, we must highlight that Peru introduced a declaration stating that the Convention will only apply to crimes committed after its entry into force.

This declaration could cause an inadequacy in the implementation of the non-application of statutes of limitation provisions in Peru for the period between July 1, 2002 (the date on which the Rome Statute entered into force) and November 9, 2003 (the date on which the Convention entered into force).<sup>25</sup>

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<sup>22</sup> Article 2.25.d. “Crimes against humanity, war crimes and other crimes included in treaties to which Peru is party, are subject to non-statutes of limitation. They are to be tried before ordinary tribunals and the benefits that could cause their impunity such as amnesties, pardons or *derecho de gracia*, are excluded.”

<sup>23</sup> International Criminal Tribunal for the Former Yugoslavia (ICTY). Prosecutor v. Stakic, case IT-97-24-T, July 31, 2003 para. 502.

<sup>24</sup> The Prosecutor v. Jean Kambanda, September 4, 1998. Case ICTR 97-23-S, para. 16.

<sup>25</sup> In accordance with Article VIII of the Convention of Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, it entered into force for Peru on November 9, 2003, 90 days after the deposit was made (August 11, 2003).

If a crime covered by both treaties was committed during the time the Rome Statute was in force but the Convention was not, the application of the Rome Statute would take precedence because it would be the only rule in effect. However, since the Convention had not entered into force, the national legislation – containing provisions for statutes of limitation – would prevent the domestic courts from prosecuting the accused if the relevant time period had lapsed. In such a situation, the effect of the provision in the Rome Statute on the non-applicability of statutes of limitation is restricted to the international level.

We encourage the Peruvian government to bring the declaration of adherence to the Convention into conformity with the Rome Statute. It is recommended that Peru withdraws the declaration's interpretation of entry into force, or at least modifies it so that there are no statutes of limitation for crimes committed after July 1, 2002.

In sum, Lawyers Committee recommends:

- That genocide be expressly included as an independent crime in Article 2.25.d of the constitutional amendments. The Constitution should expressly provide for the non-applicability of statutes of limitation for genocide, crimes against humanity and war crimes, as well as for other international crimes included in treaties to which Peru is party.
- As in the previous section on the irrelevance of official capacity and immunities, the inclusion of a generic provision in the Constitution that establishes that the Peruvian state recognizes the jurisdiction of the ICC under the conditions specified in the treaty adopted in Rome, on July 17, 1998 (Rome Statute).
- As regards the declaration of adherence to the Convention of Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, that the Peruvian government bring this declaration into conformity with the Rome Statute.

### **Amnesties and pardons**

The Rome Statute does not have a specific provision in which amnesties and pardons are prohibited. However, the Rome Statute's silence cannot be interpreted as consent or approval of amnesties.

In analyzing the question of amnesties in relation to the Rome Statute, the principles of truth and accountability that underlie the Statute must be considered. Amnesties and other pardons should not be a bar to the application of those fundamental principles.

One of the first references to amnesty laws was included in the UN Principles of International Cooperation for the Detection, Arrest, Extradition and Sentence of Persons that Commit War Crimes or Crimes Against Humanity, adopted by UN Resolution 3074 on December 3, 1973. These Principles provide that states will not pass any law which may jeopardize their obligations related to the detection, arrest, extradition and sentencing of a person that has committed war crimes or crimes against humanity.

In addition, amnesties have been rejected not only by the Inter-American Commission of Human Rights, but also by the Inter-American Court of Human Rights. In the case of Garay Hermosilla

*et al. v. Chile*,<sup>26</sup> the Inter-American Commission held that “the application of amnesty laws renders ineffective and worthless the obligations that States Parties have assumed under Article 1.1 of the [American Convention on Human Rights] and thus constitute a violation of that article and eliminate the most effective means for protecting such rights, which is to ensure the trial and punishment of the offenders.” In *Chumbivilcas v. Peru*<sup>27</sup>, the Commission provided that “with the enactment of amnesty laws 26479 and 26492, the Peruvian state has unilaterally surrendered its obligation to investigate and prosecute crimes against fundamental rights such as the right to life, which violate the American Convention on Human Rights.”

The Inter-American Court, in the *Barrios Altos* case<sup>28</sup>, considered that “all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary, or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized in international human rights law.” Furthermore, the Court added that “owing to the manifest incompatibility of self-amnesty laws with the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated.”

The International Criminal Tribunal for the former Yugoslavia, in the *Furundzija* case,<sup>29</sup> also provided that “it would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio* and then be unmindful of a state say, taking national measures authorizing or condoning torture or absolving its perpetrators through amnesty laws.”

Thus, even though the Rome Statute does not contain explicit provisions regarding amnesties or other pardons, the applicability of these measures would be a factor to be analyzed by the ICC in the determination of its jurisdiction in a given case. The ICC will evaluate whether in the application of amnesties or other pardons the state is unwilling or unable to prosecute.

Article 102<sup>30</sup> of the Peruvian Constitution provides that Congress can approve amnesties, and Article 118<sup>31</sup> allows the President to grant pardons or to exercise the “*derecho de gracia*”<sup>32</sup> with no exceptions. Article 98 of the Criminal Code also provides for the concept of amnesty and pardon.

A conciliatory interpretation between the constitutional provisions and the Rome Statute is to understand that although amnesties or pardons are provided for in the Constitution, this does not mean they would apply in the case of Rome Statute crimes. However, since treaties in Peru do not have a clear hierarchy over national legislation, it would be preferable to include an

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<sup>26</sup> Case 10.843, Report 36/96, October 15, 1996.

<sup>27</sup> Case 10.559, Report 1/96, March 1, 1996.

<sup>28</sup> Judgment of September 3, 2001. (*Chumbipuma Aguirre et al. v. Peru*)

<sup>29</sup> Case IT-95-17/1-T10, December 10, 1998.

<sup>30</sup> Constitution of Peru, Article 102: “The duties of the Congress are as follows: 6. To exercise the right of amnesty.”

<sup>31</sup> Constitution of Peru, Article 118: “It is the responsibility of the President of the Republic: 21. To grant pardons and commute sentences. To exercise the power of pardon in processes where the period of investigation has exceeded twice its maximum deadline.”

<sup>32</sup> Sentence commutation provided if the period of investigation exceeds twice its maximum deadline.

explicit provision in the Constitution to the effect that amnesties and other pardons are not permissible in cases of genocide, war crimes or crimes against humanity.

The inclusion of such a provision would make it clear that no amnesty or pardon is possible for persons who could be brought before national courts for ICC crimes, or even for persons who could have been tried by the ICC but are serving sentences in Peru. As regards the latter, it is relevant to mention Article 105 of the Rome Statute, which establishes that sentences of imprisonment imposed by the ICC shall be binding on states, and shall in no circumstances be modified. Also, Article 103.2.a establishes that the state enforcing the sentence shall notify the ICC of any circumstance which could materially affect the terms or the extent of the imprisonment.

The Lawyers Committee is very pleased with the latest version of the proposed constitutional amendment (Article 2.25.d) which mentions that amnesties, pardons and the “derecho de gracia” will not apply to crimes against humanity, war crimes or other crimes mentioned in international treaties to which Peru is party. Genocide is not mentioned but it is included among the crimes recognized in international treaties.

However, as we mentioned before, it is important to maintain genocide as an independent crime as it is in the Rome Statute and the Genocide Convention. Genocide is recognized as the most serious of all crimes and because it has unique elements, it is recommended to keep it as a separate category.

In addition, and despite the above recommendation, we also recommend the addition of a generic article in the Constitution that recognizes the ICC’s jurisdiction under Rome Statute terms. As we mentioned in the section on immunities, this article will oblige Peru to comply with the Rome Statute provisions.

The Lawyers Committee recommends:

- That genocide is expressly mentioned as an independent crime in article 2.25.d of the constitutional amendments. The Constitution should expressly eliminate the possibility for granting amnesties or other pardons for genocide, crimes against humanity and war crimes, notwithstanding that it would be included among international crimes contained in treaties to which Peru is party.
- The inclusion of a generic provision in the Constitution that establishes that the Peruvian state recognizes the jurisdiction of the ICC under the conditions specified in the treaty adopted in Rome, on July 17, 1998 (Rome Statute).

## RECOMMENDATIONS SUMMARY

The Lawyers Committee for Human Rights has analyzed the constitutional treatment of immunities, non-applicability of statutes of limitations and amnesties and pardons, in the light of the principles and provisions contained in the Rome Statute and other treaties related to the same matters. Having done so, we arrive at the following recommendations:

<b>Generic Article</b>
The inclusion of a generic provision in the Constitution that establishes that the Peruvian State recognizes the jurisdiction of the ICC under the conditions specified in the treaty (Rome Statute) adopted in Rome, on July 17 1998.
<b>Irrelevance of official capacity and immunities</b>
To include a provision that establishes the inapplicability of immunities or special procedures for official persons when Rome Statute crimes are committed, and also when other crimes included in treaties -to which Peru is a party- that have provisions regarding the irrelevance of the official capacity are committed.
The amendment of the immunities provisions for the President and Members of Congress <ul style="list-style-type: none"><li>➤ As regards the President (article 117) - it is recommended that the Rome Statute crimes be added to the list of crimes for which he can be brought to trial, as well as adding other crimes included in treaties -to which Peru is a party- that have provisions regarding the irrelevance of official capacity.</li><li>➤ As regards Members of Congress (article 93) - it is recommended that a provision be included establishing that Congressional authorization is not required when a Rome Statute crime is committed or when other crimes which are included in treaties -to which Peru is a party- that have provisions regarding the irrelevance of the official capacity are committed.</li></ul>
<b>Non Statute of Limitations</b>
The Constitution should provide for the non-applicability of statutes of limitations for genocide, crimes against humanity and war crimes, notwithstanding other international crimes included in treaties to which Peru is party. <ul style="list-style-type: none"><li>➤ In case the wording of article 2.25.d is maintained, the recommendation is only to add the express mention of the crime of genocide.</li></ul>
<b>Amnesties or other pardons</b>
The Constitution should expressly eliminate the possibility of granting amnesties or other pardons for genocide, crimes against humanity and war crimes, notwithstanding other international crimes included in treaties to which Peru is party. <ul style="list-style-type: none"><li>➤ In case the wording of article 2.25.d is maintained, the recommendation is only to add the express mention of the crime of genocide.</li></ul>

As a separate recommendation, we encourage the Peruvian government to bring its declaration of adherence to the Convention of Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity into conformity with the Rome Statute. We recommend the withdrawal of the interpretation of entry into force in the declaration, or at least its modification so that there are no statutes of limitation in Peru's national legislation for Rome Statute crimes committed after July 1, 2002.