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IFujimori Extraditable!: Chilean Supreme Court Sets International Precedent for Human Rights Violations

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¡Fujimori Extraditable!: Chilean Supreme Court Sets International Precedent for Human Rights Violations

Megan Haas*

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I. INTRODUCTION

The recent Chilean Supreme Court decision to extradite Alberto Fujimori,¹ former President of Peru, sets international precedent in the human rights arena. According to international

* J.D./LL.M.-TAX Candidate, University of Miami, 2009 I would like to acknowledge Professor Edgardo Rotman for his endless help and encouragement in writing this casenote. I would also like to thank my parents, Donna and Glenn, for their continuous support, as well as my family, friends and the members of the Inter-American Law Review.

1. Corte Suprema de Justicia [CSJN], 21/9/2007, "Extradición de Fujimori," (3744-07) (Chile), available at <http://www.andina.com.pe/edpespeciales/especiales/fallofujimori.pdf>.

reports,² this is the first time that a court has ordered a former Latin American President back to his country to stand trial for grave violations of human rights committed during his mandate. After seven years of self-imposed exile and nearly two years since his initial arrest in Chile, the Chilean Supreme Court finally seals Fujimori's fate with this unappealable decision. On September 21, 2007, the Court reversed a Chilean magistrate's original decision rejecting the Peruvian extradition request³ and granted the request for seven of the thirteen charges, putting special emphasis on the human rights violations because those atrocious acts were ordered by Fujimori himself.⁴ The Court carefully follows the process set forth in a 1932 Extradition Treaty between Chile and Peru,⁵ in addition to applying Chilean procedural law and international principles to determine if extradition should be granted. According to the bi-lateral treaty between the two countries, Fujimori can only be tried in Peru for the charges for which he is extradited⁶—five charges of alleged corruption and two charges of alleged crimes against humanity.

While some remember Fujimori for his triumphs in defeating hyperinflation and terrorism in Peru, others remember him for his authorization of a secret death squad and massive corruption.⁷ Consequently, this case is important because it serves as a lesson to other heads of states that grave crimes will not go unpunished no matter where you are or what you do. In addition, it also serves as a model for Latin American courts faced with similar cases. Overall, the fight against impunity for grave violators of human rights in Latin America should be fought at the domestic level using international law, and the role of courts in this fight is to hold violators accountable, even if they are former heads of states. While Fujimori's ultimate trial will be in front of a Peru-

2. E.g., ANDINA, *Caso Fujimori es una lección para los presidentes de todo el Mundo, sostiene Soberón*, ADONDE (Lima), Sept. 21, 2007, available at <http://www.adonde.com/peruhoy/070921soberon.htm>.

3. Corte de Primera Instancia [CPI], 11/7/2007, "Extradición de Fujimori / negando extradición," (5646-2005) (Chile), available at <http://www.emol.com/noticias/documentos/pdfs/FalloMinalvarezFujimori.pdf>.

4. Andrés López, *Los fundamentos de la Suprema para extraditar a Fujimori*, LA NACIÓN, (Santiago, Chile), Sept. 22, 2007, available at http://www.lanacion.cl/prontus_noticias_v2/site/artic/20070921/pags/20070921234319.html.

5. See Extradition Treaty, Chile – Peru, Nov. 5, 1932, available at http://www.oas.org/juridico/MLA/sp/traites/sp_traites-ext-chl-per.pdf.

6. See Extradition Treaty, *supra* note 5, at art. VIII.

7. E.g., Jonathan Franklin & Lucien Chauvin, *Fujimori Ordered Back to Peru to Face Charges*, WASH. POST, Sept. 22, 2007, at A09, available at <http://www.washingtonpost.com/wp-yn/content/article/2007/09/21/AR2007092100528.html>.

vian court of justice, this decision exemplifies the Chilean court's obligation to facilitate that process.⁸

This casenote first reflects on the case of Pinochet, which ended the practice of immunity for former heads of state, and its effects on the recent prosecutions of government officials throughout Latin America for human rights violations. Next it will focus on the Chilean Court's obligation to apply international law in the extradition process, before briefly touching on Fujimori's reign of terror and the legal maneuvers that landed him in a Chilean courtroom. From there, this casenote argues that despite the politically charged nature of the case, the Court correctly granted the extradition request following the proper procedure set forth in the extradition treaty between Chile and Peru. Also, the Court did not overstep its bounds by applying international law as it had a duty to apply international human rights law in a case that involves international crimes. Finally, this article will explore the institutional changes in Chile that have led to this landmark decision and the impact they may have on other countries' decisions to prosecute human rights violators.

II. FUJIMORI FOLLOWS IN THE FOOTSTEPS OF SO MANY BEFORE HIM

A. *The Pinochet Effect*

From the late 1960s through the early 1980s countries in Latin America experienced political turmoil and repressive regimes.⁹ During that time, a military junta led by General Augusto Pinochet governed Chile for seventeen years. Pinochet is a symbol of the dictatorships that plagued Latin America during those years. There were no elections, no congress and strict control of the press. Similar to the case at hand, 2,603 people were

8. See, e.g., Int'l Fed'n for Human Rights, *Fujimori: ¡Extradición al Perú o Juicio en Chile!*, n°476/3 (May 2007) [hereinafter FIDH]. In accordance with international law, the Chilean courts may only decide if Peru has followed the correct extradition procedure, they cannot decide the merits of the case. *Id.* at 7. Once extradited to Peru, Fujimori will be tried in front of the Permanent Criminal Chamber of the Supreme Court that, after considering the evidence, will decide the degree of Fujimori's criminal participation in the matters. Fujimori also enjoys the right of appeal to a separate court. Human Rights Watch, *HRW World Report 2001: Peru*, available at <http://hrw.org/backgrounder/americas/peru-qna-1030.htm> [hereinafter HRW World Report].

9. See NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* vii-x (University of Pennsylvania Press 2005).

tortured and executed or disappeared.¹⁰ After Chile reverted back to a democracy these crimes were left unpunished, largely due to an amnesty law that was enacted by the military government itself.¹¹ Although the United Nations and the Inter-American Commission on Human Rights found this to be incompatible with Chile's international obligation to punish those responsible for human rights violations, things in Chile did not change until the 1998 arrest of Pinochet in London.¹² On October 16th, Pinochet was arrested pursuant to a warrant issued by a Spanish judge. Spain requested his extradition to stand trial for international crimes of genocide and terrorism pursuant to the principle of universal jurisdiction.¹³ For seventeen months Pinochet tried to avoid extradition, but the House of Lords ruled that he could not claim head-of-state immunity.¹⁴ Even though Pinochet was never extradited to Spain because he was sent back to Chile for health reasons, the House of Lords' decision set in motion the idea that accountability for crimes against humanity is the business of courts everywhere.¹⁵

While Pinochet's arrest did not lead to a conviction, it significantly advanced human rights law, particularly in Latin America, creating a ripple effect of prosecutions of military officials and ex-heads of states in national and international courts.¹⁶ Ex-leaders

10. Human Rights Watch, Briefing, *Discreet Path to Justice?: Chile, Thirty Years After the Military Coup*, 1, (Sept. 2003) [hereinafter HRW Discreet Path to Justice]. The final report from the Truth Commission determined that 2113 deaths and disappearances occurred under Fujimori's government. FIDH, *supra* note 8, at 5.

11. HRW Discreet Path to Justice, *supra* note 10, at 1.

12. *Id.*

13. Reed Brody, *Pinochet: Justice and the General*, INT'L HERALD TRIB., Dec. 11, 2006 at 8, available at <http://www.iht.com/articles/2006/12/11/opinion/edbrody.php>. Universal jurisdiction eliminates the requirement that the defendant be present in the jurisdiction or have some tie (nationality) to the jurisdiction because their alleged crimes are international in nature and of concern to all states. See ROHT-ARRIAZA, *supra* note 9, at 191-92.

14. The British judges analyzed the case in relation to a British law that governed the immunity of diplomats and stated that diplomats had immunity for official acts performed as part of their function. Here however, they found that Pinochet had no immunity from extradition because his conduct constituted international crimes, which are not considered official acts. See ROHT-ARRIAZA, *supra* note 9, at 51.

15. See ROHT-ARRIAZA, *supra* note 9, at 214-16, 223-24.

16. Brody, *supra* note 13. In Argentina, the judiciary renewed an interest in the fate of the "dirty war" victims and began prosecuting lower level military officials again. In later cases, the courts brushed aside the amnesty laws as a violation of Argentina's international obligation to persecute crimes of such nature. See ROHT-ARRIAZA, *supra* note 9, at 113-16. The issue of impunity was reopened in Uruguay as well. The newly elected President of Uruguay, Jorge Batlle, created a Peace Commission in 2000 to look into the Uruguayan disappearance cases. *Id.* at 154-55.

would no longer find refuge from atrocious crimes in their official positions. We have come a long way from the days when leaders acted as they wished, secure in the notion that they would never be held accountable. In Latin America, victims of human rights violations were finally getting justice.¹⁷ Chile especially has made significant progress in recent years; prosecuting former military personnel accused of committing grave human rights violations during Pinochet's reign.¹⁸ One of the major cases the Chilean Supreme Court mulled over was the decision to prosecute Pinochet himself after his return to Chile. With the myth of Pinochet's head-of-state immunity shattered abroad, the Chilean Supreme Court decided to strip Pinochet of his parliamentary immunity as well.¹⁹ As a result, hundreds of criminal cases were filed against him. Only humanitarian considerations could save the former dictator now, and in July of 2001 an appeals court suspended the proceedings against him, ruling that moderate dementia disqualified him from standing trial.²⁰ Towards the end of his life, the Chilean state was able to indict Pinochet for other human rights violations including torture,²¹ however, Pinochet died without standing trial. Nonetheless, the stripping of Pinochet's immunity was an important victory for holding human rights violators accountable.²²

Since 1998 Chile has undergone landmark developments in the prosecution of human rights crimes.²³ Advances in prosecutions for violators during the Pinochet era are largely owed to the work of the judiciary, many of whom devoted themselves full time to the human rights cases. According to a local organization that provides legal assistance to the victims, "this judicial initiative has constituted the most efficient, appropriate and productive

The commission's investigations eventually lead to several criminal prosecutions of Uruguayan authorities as well as a setting aside of the amnesty laws. *Id.* at 156-57.

17. Brody, *supra* note 13.

18. HRW Discreet Path to Justice, *supra* note 10, at 6. As of July of 2003, over twenty defendants had been convicted and over 300 individuals were facing charges for kidnapping and murder. *Id.*

19. *Id.* at 4-5. Pinochet had the benefit of extra immunity because as former President he occupied a lifetime seat in the Senate following his retirement as army commander.

20. *Id.* at 5.

21. See Human Rights Watch, *Chile: Pinochet Held on Torture Charges* (Oct. 31, 2006).

22. See generally ROHT-ARRIAZA, *supra* note 9; Brody, *supra* note 13.

23. See HRW Discreet Path to Justice, *supra* note 10, at 6. During the first half of 2003 120 members of the armed forces were charged in thirty-eight separate cases. *Id.* See also *supra* note 18.

mechanism ever created in our judiciary to tackle a challenge of this nature. . . ."²⁴ Other factors contributing to this phenomena include recent constitutional and institutional changes to the judiciary that have increased judicial independence vis-à-vis the executive.²⁵ A weak and partisan judiciary during the Pinochet regime and right after was the initial reason that trials for human rights violations were not often held.²⁶ Although initial attempts to hold violators of human rights accountable came from the executive branch and President Aylwin's success in setting up a truth commission, the Supreme Court took the first steps in 1995. Two ex-generals, Manuel Contreras and Pedro Espinoza were condemned for the murder of a Chilean foreign minister and his secretary.²⁷ Nevertheless, resistance to these types of trials remained strong in Chile until the military gradually lost control of Chilean politics and a change in the structure of the Supreme Court took place. New and younger judges replaced the older, more military-friendly ones. These judges were more sensitive to human rights violations and greatly influenced by the work of their European counterparts.²⁸ For the first time in years the judiciary was free to enforce the rule of law without executive pressure or military threat.

B. *The Chilean Court's Obligation to Follow International Law*

The incessant instability in Latin America, which led to continuous coup d'états, general political crisis and gross violations of human rights, has wrecked havoc on the stability and confidence of the rule of law. As such, Latin American constitutions and jurisprudence rely on international instruments and the decisions

24. HRW Discreet Path to Justice, *supra* note 10, at 7 n.14.

25. Elin Skaar, *Judicial Independence and Human Rights Policies in Argentina and Chile* 1-2 (Chr. Michelsen Institute Development Studies and Human Rights, Working Paper No. 2001: 15, 2001). The initial failure of courts to hold trials reflected a weak and partisan judiciary that favored whoever was in power at the time. *Id.* at 2. Even as the transition to democracy was made in several Latin American countries in the early 1980s, the institutional legacies of executive control and domination carried over into human rights policy. The executive still saw the military as a major threat to their new democratic regime and as a result human rights prosecutions were scarce. *Id.*

26. *See id.* at 2. Although Chile moved to democratic rule in 1990, the military's influence over the courts remained strong and the amnesty laws barred any prosecutions. *Id.* at 16.

27. *Id.* at 15-16.

28. *Id.* at 16-19.

interpreting them to punish human rights violations. Unfortunately, years later, after “democracy” has come to many Latin American states, crimes against humanity remain unpunished; largely because many states have enacted amnesty laws to protect the perpetrators of the acts. Grave violations of human rights are considered crimes against humanity according to international laws.²⁹ Therefore, international law imposes an obligation upon each state to investigate and sanction violations of human rights in an effort to combat one of the most flagrant problems international human rights law faces today, impunity.³⁰ What occurred in Peru under Fujimori’s control is considered a gross violation of international humanitarian law. The crimes committed during Fujimori’s reign are international crimes that violate the principle of *jus cogens* as established in international jurisprudence from the trials at Nuremberg, Rwanda and ex Yugoslavia.³¹ Without a doubt, crimes against humanity are the most flagrant violations of human rights that exist today, and authors of these crimes must be punished according to international principles that are pre-emptive in this area of law.

As for Latin America courts, these same obligations have been imposed on domestic courts through the diverse cases of the Inter-American Court of Human Rights (Inter-American Court).³² In the *Barrios Altos* case, the Court held that any amnesty law or law impeding the prosecution for crimes against humanity such as torture or forced disappearances was prohibited. The Court considered such crimes in contravention of international humanitarian law.³³ In that case, the Court also established that Peru had an

29. See Juan Antonio Rosas Castañeda, *El impacto de la justicia internacional: el deber de justicia penal y la relativización de la cosa juzgada, especial referencia al caso peruano*, Introduction, (Sept. 28, 2006), <http://www.derechopenalonline.com/derecho.php?id=14,331,0,0,1,0>.

30. See *id.*

31. See *id.* at *1. *Jus cogens* is a principle of international law so fundamental that no nation may ignore it or attempt to contract out of it through treaty. It also preempts any domestic law. *Id.*

32. See Enrique Castillo Barrantes, *El sistema Interamericano de protección de los derechos humanos y su incidencia en el derecho penal y procesal penal internos*, in JUSTICIA PENAL Y ESTADO DE DERECHO, 77-78 (Javier Llobet Rodríguez ed., Editorial Jurídica Continental 2007). In Latin American, the Inter-American Court of Human Rights only has power over the states when each state recognizes its jurisdiction over them. *Id.* at 75. Also, the Court’s decisions are only binding on the parties to the litigation; however, its opinions carry great weight in Latin American courts and throughout the years have influenced domestic criminal law and process. *Id.* at 75-76.

33. See *Barrios-Altos v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, at ¶ 41 (Mar. 14, 2001).

international obligation to investigate and sanction those responsible for the terrible acts, including Fujimori himself.³⁴ In the 2006 *La Cantuta* case the Court reiterated the same requirements of the *Barrios Altos* case and insisted that in order to eradicate impunity, interstate cooperation constitutes an *erga omnes* duty for Latin American countries. States are required to adopt measures to guarantee that violations are not left unpunished, whether by domestic or international venues that will judge and eventually sanction those responsible, be it alone or in cooperation with other states acting in pursuit of the same goal.³⁵ In *Almonacid-Arellano v. Chile*,³⁶ the Court found that extrajudicial executions of civilians were crimes against humanity for which international law has long imposed a duty to investigate, prosecute and punish the perpetrators. The Court also stated that in compliance with international law, as well as its own case law, the enforcement of any amnesty law would prevent compliance with the international duty to punish perpetrators of such crimes.³⁷ As a result, Latin American states have an international obligation to remove all internal obstacles that would prevent them from fulfilling their obligation to investigate and prosecute grave violators of human rights.

Included within this international obligation to pursue and punish grave violators of human rights is the obligation to extradite. This obligation was explored in the Inter-American Court case, *Goiburú v. Paraguay*.³⁸ There, in addition to the duty to investigate and prosecute crimes against humanity, the Court found that the duty also included the obligation to request the extradition of alleged violators if they were not currently found within the state's jurisdiction.³⁹ The Court further expressed that the lack of an extradition treaty between the two states should not prevent either from properly complying with their duties under

34. *See id.*

35. *See La Cantuta v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, at ¶ 225 (Nov. 29, 2006).

36. *Almonacid-Arellano v. Chile*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006).

37. *See id.* at ¶ 119.

38. *See Goiburú v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153 (Sept. 22, 2006).

39. *Id.* at ¶ 130. In that particular case the family of the victims repeatedly requested that Paraguay ask for the extradition of General Alfredo Stroessner (the former President) and Sabino Augusto Montanaro (former Minister of Interior), the alleged perpetrators, from Brazil and Honduras. Paraguay made no efforts to request extradition and the Inter-American Court noted that neither Brazil nor Honduras (where Montanaro was exiled) initiated any criminal investigations against them. *Id.*

the American Convention on Human Rights (American Convention). Furthermore, access to justice is a *jus cogens* norm and creates an *erga omnes* obligation upon States to cooperate and ensure that these crimes don't go unpunished. The parties to the American Convention cannot grant protection to those accused of crimes against humanity. The Court stated that:

...the mechanisms of collective guarantee established in the American Convention, together with the regional and universal international obligations on this issue, bind the States of the region to collaborate in good faith in this respect, either by conceding extradition or prosecuting those responsible for the facts of this case in their territory.⁴⁰

The Court concluded that the American states have an obligation to eliminate impunity through which collaboration in good faith with each other, whether for extradition or prosecution purposes, is essential.⁴¹

In addition to the Inter-American Court, which is the principal institution for the protection of human rights in Latin America, other instruments heavily influenced by international law form the Inter-American system of human rights protection. These instruments include the American Declaration for the Rights and Duties of Man (American Declaration), the American Convention on Human Rights and the Inter-American Convention Against Corruption (American Corruption Convention).⁴² The American Convention on Human Rights, for those states who have ratified it, is binding in the area of human rights laws and is also the central instrument around which human rights law in Latin America has developed.⁴³ Similar to the international obligation to prosecute violators of *jus cogens* crimes, article 1(1) of the American Convention sets forth an obligation to investigate and punish grave human rights violations.⁴⁴ Article 2 of the American Convention⁴⁵ imposes a legislative duty to revise any domestic laws or practices that are in breach of the article 1(1) obligation.

40. *Id.* at ¶ 132.

41. *Id.* at ¶ 192.

42. Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Organization of American States, American Declaration of the Rights and Duties of Man, Mar. 30 – May 2, 1948, available at <http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm>.

43. Chile and Peru are both signatories. See Barrantes, *supra* note 32, at 71-72.

44. American Convention on Human Rights, *supra* note 42, at art. 1(1).

45. American Convention on Human Rights, *supra* note 42, at art. 2.

The Inter-American Court has indicated that if the legislature fails to carry out this duty, the judiciary must step in to ensure that domestic laws and practices are in compliance with the American Convention.⁴⁶ The American Corruption Convention imposes a duty to investigate and sanction acts of corruption like bribing government officials, embezzlement of public monies, and illegally benefiting from duties as a government official.⁴⁷ As evidenced by the case at hand, there is a correlation between grave violations of human rights and corruption.⁴⁸ Internationally, aside from human rights violations, corruption has become an important concern supported by endless treaties calling for the cooperation between nations in the fight against corruption.

The previous cases demonstrate that the Inter-American Court tends to interpret the states' obligations under the Inter-American Conventions in light of international law. While the Court's decisions are not binding upon all states, they do carry great weight in national courts. Consequently, these decisions create a sense of truth and accountability for those states that have taken the initiative to prosecute perpetrators of such horrible crimes and provide hope to the victims who have not yet been able to find justice and judicial protection. Chile, as a party to the Inter-American system and its respective treaties and conventions, has an obligation to extradite Fujimori in order to accommodate Peru's obligation to prosecute those who took part in the atrocious acts condemned in the *Barrios Altos* and *La Cantuta* cases of the Inter-American Court.

To stress the point, some judges in Chile, including the Supreme Court justices, have cited international humanitarian law as grounds for reopening cases previously closed because of the amnesty decree. In the *Poblete Córdova* case, the Supreme Court reopened a case for the first time on the basis that international law was superior to the amnesty laws. The Court decided

46. See *Almonacid-Arellano v. Chile*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 154, at ¶ 90 (Sept. 26, 2006).

47. Inter-American Convention Against Corruption, *supra* note 42, at art. 6.

48. See FIDH, *Fujimori: ¿Extradición al Perú o Juicio en Chile?*, n°476/3, at 10 (May 2007) [hereinafter *FIDH Extradición al Perú*]; Human Rights Watch, *Report: Probable Cause Evidence Implicating Fujimori*, 4, Vol. 17, No. 6(B) (Dec. 2005) at 5, available at <http://hrw.org/reports/2005/peru1205/peru1205wcover.pdf> [hereinafter *HRW Dec. 2005 Report*]. In Peru, large-scale corruption not only deprived the third-world country of much needed public resources, but eroded the rule of law, which is essential to the protection of human rights. The government was able to completely subvert the democratic process, eliminating all checks on the branches of government and centralizing power within the executive branch. *Id.*

that international treaties have supremacy in Chilean law under article 5 of the constitution.⁴⁹ In addition, two Santiago courts of appeals argued that pursuant to the Chilean Constitution, international human rights treaty obligations are binding on the courts even when they conflict with domestic law. In fact, some judges advocate interpreting the laws in consonant with humanitarian principles.⁵⁰

C. Fujimori's Reign of Terror and Corrupted Downfall

Alberto Fujimori⁵¹ became President elect of Peru in 1990, after running a campaign centered upon the improvement of the economic and social conditions of the “campesinos” and the elimination of two well-known terrorist groups, the Sendero Luminoso (Shining Path) and the Movimiento Revolucionario Túpac Amaru (MRTA).⁵² Fujimori had inherited a government that was in economic disarray and charged with political violence, but he quickly implemented radical free-market economic reforms, putting a stop to Peru's hyperinflation.⁵³ His next task was to tackle the left-wing rebels who had nearly destroyed peace in Peru. Fujimori's alleged strategy to eliminate suspected subversives involved the

49. Corte Suprema de Justicia [CSJN], 9/9/1998, “Caso de Poblete Córdova / recurso de casación,” (469-98), ¶ 10 (Chile), available at <http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/883d9745593118a94125671a00380ca9!OpenDocument>. *Poblete* was a landmark decision in Chile because it opened the door for the use of international law in the area of human rights prosecutions.

50. Compare HRW Discreet Path to Justice, *supra* note 10, at 8, with HRW Discreet Path to Justice, *supra* note 10, at 8 n.20. In the past the Supreme Court overruled the application of international humanitarian law and upheld the amnesty decrees. These cases however took place in 1991 and 1996, before Pinochet was arrested in London and changed the political and legal landscape in Chile.

51. Fujimori was born in Peru to Japanese parents. At the time of the elections in 1990 he was a political unknown whose previous career consisted of an agricultural engineer. James Read, *Fujimori's Controversial Career*, BBC News, Sept. 18, 2000, <http://news.bbc.co.uk/2/hi/americas/705482.stm>.

52. Int'l Fed'n for Human Rights, Misión Internacional de Investigación, *Informe: La Extradición de Fujimori al Perú: Un Imperativo de Justicia!*, 4, n° 449/3 (Mayo 2006). These terrorist groups were communist insurgents who had control of over 60% of the country when Fujimori took over. They operated in “zonas liberadas” (free zones), making up their own rules, collecting taxes and organizing violent strikes against the government. The previous two governments had ignored them or unsuccessfully launched military campaigns against them. Andean World Unofficial Biography of Alberto Fujimori, <http://www.mundoandino.com/Peru/Alberto-Fujimori> (last visited Feb. 29, 2008).

53. Read, *supra* note 51. While his radical economic reforms initially brought hardship to ordinary Peruvians, they ultimately paved the way for sustainable economic growth throughout the rest of the 1990s. *Id.*

creation of a military intelligence operative, called Grupo Colina,⁵⁴ which combined extrajudicial assassinations with general politics of terror to eliminate terrorist groups and any subversives to Fujimori's government.⁵⁵ On April 5, 1992, Fujimori declared an emergency government which dissolved Congress, suspended the constitution, and purged several members of the judiciary. The effect of this self-coup or coup d'état against his own government was the immediate transfer of all legislative control to the executive branch and the loss of judicial independence.⁵⁶ The newly empowered executive argued that the reorganization of power was necessary to combat the terrorist groups and to restore a climate of peace and order to society.⁵⁷ The international reaction was instant and Fujimori felt the pressure to restore democracy. Consequently, he rewrote the constitution and reopened a Congress dominated by his supporters.⁵⁸

Thanks to his success with hyperinflation and the elimination of terrorism, Fujimori was reelected in 1995 by a congressional majority.⁵⁹ After the 1995 elections, the Fujimori government respected the concepts of democracy as a mere formality while steadily eroding democratic institutions.⁶⁰ One of his first acts under the new Congress was to grant amnesty to all members of the Peruvian police and military for any human rights violations they may have committed during Fujimori's first term in office. Fujimori gave complete control of the National Intelligence Ser-

54. This group of assassins is accused of the brutal massacres that took place in the *Barrios Altos* and *La Cantuta* cases. Members of the group burst into homes and universities in the middle of the night and murdered alleged subversives to Fujimori's cause. Since then, members of this secret military group have been tried and convicted in Peruvian courts. See Asociación Pro Derechos Humanos, *Fujimori Extraditable: Ten Years of Dictatorship, Corruption, and Human Rights Violations* (2007), <http://www.aprodeh.org.pe/fujimori2007/ingles/fujimori.htm>.

55. See HRW Dec. 2005 Report, *supra* note 48.

56. Mensaje a la Nación del Presidente del Perú, Ingeniero Alberto Fujimori Fujimori, (Apr. 5, 1992), available at <http://www.congreso.gob.pe/museo/mensajes/Mensaje-1992-1.pdf>.

57. FIDH *Extradición al Perú*, *supra* note 48. Effectively enough, in September of 1992 the leader of the Shining Path was captured, prosecuted and sentenced to life in jail. *Id.*

58. HRW Dec. 2005 Report, *supra* note 48.

59. *Id.*

60. *Id.* During Fujimori's second term in office executive commissions were placed in charge of reorganizing the courts and the prosecutorial system, ultimately assuming the judiciary branch's powers for itself. Another common practice was to pack the courts in order to ensure a pro-government majority in cases that the government had a special interest in. *Id.* at 5.

vice (SIN) to his close personal advisor, Vladimiro Montesinos,⁶¹ and ordered millions of dollars to be diverted from other departments of government to the SIN. These funds were used to buy politicians, control media sources, and for Fujimori's own personal use.⁶² In addition, the SIN and Army Intelligence were used to tap phone lines of journalists and politicians. They also engaged in undercover operations to intimidate those who tried to criticize Fujimori's government.⁶³

With social tension at an all time high since the early 1990s, Fujimori announced his intentions to run for President for a third term. This announcement was met with opposition from opposing parties, who declared his decision to run a blatant constitutional violation because under the new constitution only two terms were allowed. Fujimori defended his decision, arguing that his first term was technically served under the previous constitution.⁶⁴ In addition, popular tensions began to surmount concerning the excess of repressive national security, human rights violations and the degradation of the economic situation.⁶⁵ Despite international declarations of election fraud,⁶⁶ Fujimori assumed his third term in office on July 28, 2000, only to abandon it a few months later. Fujimori's downfall came on September 14, 2000 when an enormous corruption scandal erupted, implicating the Fujimori government in the payoffs of Congressmen in exchange for their political support.⁶⁷ Despite an announcement by Fujimori to hold

61. Montesinos, who was an ex CIA agent, was Fujimori's right-hand man and executor of his politics. He was also the brain behind the counterterrorism operations. FIDH *Extradición al Perú*, *supra* note 48, at 6.

62. HRW Dec. 2005 Report, *supra* note 48. . The SIN handled a monthly budget of nine million dollars, of which the majority of this money went towards controlling the television stations' editorial content. *Id.* at 5. Furthermore, documents show movement of the funds into Fujimori's closest family members' bank accounts. No records have been found showing that the funds transferred to the SIN monthly were ever used for official purposes. Based on the testimony of the Peruvian government it is estimated that between 43.2 and 59.4 million dollars had been transferred from the SIN between 1992 and 2000. *Id.* at 14-15.

63. *Id.*

64. Brody, *supra* note 53.

65. FIDH *Extradición al Perú*, *supra* note 48.

66. *Id.* at 5. Exit polls showed Fujimori well short of the 50% required to avoid an electoral runoff. However, official results that came out a few days after the election showed Fujimori with 49.8% of the vote, just short of an outright victory. There were also reports of irregularities in the voting process, like soldiers preventing people from voting and stuffing of the ballot boxes. *Id.*

67. *Id.* A cable television station broadcast a video of Fujimori's personal advisor, Montesinos, bribing a member of the opposing political party to join Fujimori's cause. *Id.*

new elections in 2001, public opinion had already personified his government as corrupt violators of human rights, and subsequently, on November 14, 2000, Fujimori fled to Japan. Four days after his arrival he sent his resignation via fax to the Peruvian Congress, which declared him morally incapacitated to carry out his position.⁶⁸

A few months later, in February of 2001, the Peruvian prosecutor formally accused Fujimori of bribery and embezzlement of public monies.⁶⁹ The accusation was followed by additional charges from Congress for usurpation of power and abandonment of office. Later, a legislative decree was enacted that prohibited Fujimori from holding public office in Peru for ten years.⁷⁰ Five days later, the prosecutor officially presented charges to the Peruvian Supreme Court.⁷¹ Later, Congress lifted his immunity as former head of state, followed by the issuance of an international arrest warrant by the Supreme Court of Peru for murder and kidnapping.⁷² Fujimori's extradition was solicited from Japan, but because he enjoys Japanese citizenship they refused to extradite him to stand trial in Peru.⁷³ Since Peru does not allow trials *in absentia*,⁷⁴ Fujimori evaded justice for five more years until he foolishly, or rather intelligently, landed in Chile. On November 6, 2005 Fujimori landed in Santiago, Chile after a short layover in Mexico where he laughed at the international order of capture on the INTERPOL of 189 countries. After learning of his surprising arrival in Chile, former Peruvian President, Alejandro Toledo called Chile's foreign minister to request the arrest of Fujimori as part of the extradition process that was soon to follow. The following day he was arrested.⁷⁵ Peru immediately began the extradi-

68. *Id.*

69. *Id.*

70. Resolución Legislativa del Congreso 017-2000-CR – 018-2000-CR, 7551 N.L. 199.179, 24 de Febrero de 2001 (Peru), available at <http://www.editoraperu.com.pe>.

71. FIDH *Extradición al Perú*, *supra* note 48, at 5. Under Peruvian law, accusations against public officials must be adjudicated by the Supreme Court. Human Rights Watch, *HRW World Report 2001: Peru*, available at <http://hrw.org/backgroundunder/americas/peru-qna-1030.htm>.

72. HRW Dec. 2005 Report, *supra* note 48.

73. FIDH *Extradición al Perú*, *supra* note 48, at 6. Japan does not extradite its own nationals, and in addition, Japan and Peru do not have an extradition treaty. HRW, *supra* note 64.

74. HRW Dec. 2005 Report, *supra* note 48.

75. FIDH *Extradición al Perú*, *supra* note 48, at 6. Legal scholars questioned Fujimori's surprise appearance in Chile, considering that he had been so careful to avoid extradition from Japan. Some legal scholars believe that Fujimori's strategy was to test the waters before returning to Peru, taking advantage of the poor

tion process, relying on international treaties and principles to convince Chile that they must extradite Fujimori. On January 3, 2006, Peru officially asked for the extradition of Fujimori for ten counts of corruption and two counts of human rights violations.⁷⁶

III. A HISTORIC DECISION PLAYS OUT IN CHILEAN COURT

A. *The Extradition Standard*

Extradition in this case is governed by a 1932 Extradition Treaty⁷⁷ between the two countries, certain articles of the Chilean Code of Criminal Procedure,⁷⁸ and international instruments and principles of law.⁷⁹ The bilateral treaty between the two countries requires that the following standards are met before extradition can be granted: the crimes being charged must carry a sentence of a year or more in the country requesting extradition,⁸⁰ the crimes must not be political in nature,⁸¹ the statute of limitations must not have run in the country requesting extradition,⁸² and the requested individual must not have been previously convicted of

relationship between the two countries in the hopes that Chile would not extradite him. See Human Rights Watch, *Chile/Peru: Fujimori Arrest Renews Hope for Justice*, (Nov. 7, 2005).

76. See Corte de Primera Instancia [CPI], 11/7/2007, "Extradición de Fujimori / negando extradición," (5646-2005), 10-17 (Chile), available at <http://www.emol.com/noticias/documentos/pdfs/FalloMinalvarezFujimori.pdf>. Peru delivered twelve books of evidence, one for each charge. The ten counts of corruption consisted of crimes such as illegal telephone surveillance, misuse of government funds, bribery, and dereliction of duty. *Id.* at 2-14. The more serious human rights charges comprised the massacres at *Barrios Altos*, where Fujimori's death squad charged into the home of suspected terrorists in the middle of the night and murdered them, as well as *La Cantuta*, where the same death squad entered into a University in the middle of the night, kidnapped and later killed several students and a professor. *Id.* at 11-12. Additional crimes against humanity charges involved the case of *Sótanos SIE*. In that case Fujimori is accused of ordering the kidnapping and torture of "known subversives," including his ex-wife, and falsely imprisoning them in the basement of the SIE. Coincidentally, during that time he also resided in the intelligence agency himself because he feared for his safety. *Id.* at 10-11.

77. Extradition Treaty, Chile – Peru, *supra* note 5.

78. See Código Procedimiento Penal [Cód. Proc. Pen.] arts. 644-56 (Chile).

79. See Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Organization of American States, American Declaration of the Rights and Duties of Man, Mar. 30 – May 2, 1948, available at <http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm>; Montevideo Convention on Extradition, Dec. 26, 1933, O.A.S.T.S. No. 34; The Convention on Private International Law (Bustamante Code), Feb. 20, 1928, O.A.S.T.S. No. 34.

80. Extradition Treaty, *supra* note 5, at art. II.

81. *Id.* at art. III.

82. *Id.* at art. V.

those crimes in the country requesting extradition.⁸³ In addition, article XIII of the treaty requires that Chilean procedural law govern the extradition procedure itself.⁸⁴ Under Chilean law however, an extradition request is far from the mere formality of meeting the bilateral treaty's requirements. Chilean procedural law imposes additional requirements before granting extradition, such as looking at the actual evidence supporting the charges for which extradition is requested to determine if the evidence would have justified bringing charges in Chile had the crimes occurred there.⁸⁵ In other words, extradition will not be granted unless the Court⁸⁶ is convinced that there is probable cause that the accused participated in the extraditable acts, whether directly or indirectly as an accomplice. Finally, the Court must briefly assure that the universal standards of extradition are met, such as the principle of double criminality.⁸⁷ Double criminality ensures that the accused is not tried for a crime that was not in the original extradition request by comparing the requisite crimes in the codes of each respective legislature.⁸⁸ In accordance with the extradition treaty, the Chilean Supreme Court has sixty days to determine if both the international and national requirements are met and to make a decision to extradite.⁸⁹ In this case however, what followed was a formal process of extradition that lasted over a year, during which Fujimori was granted provisional release and enjoyed his freedom while awaiting the decision to extradite.⁹⁰

83. *Id.* at art. VIII.

84. *Id.* at art. XIII.

85. See HRW Dec. 2005 Report, *supra* note 48, at 23. Note the standard of review for examining the evidence here is only that the evidence support an indictment and not that the evidence is sufficient to convict the accused. *Id.*

86. In accordance with the Chilean Code of Criminal Procedure, extradition requests are decided by members of the Supreme Court. *Id.* at 23.

87. Corte de Primera Instancia [CPI], 11/7/2007, "Extradición de Fujimori / negando extradición," (5646-2005), 18 (Chile), available at <http://www.emol.com/noticias/documentos/pdfs/FalloMinalvarezFujimori.pdf>.

88. See Corte Suprema de Justicia [CSJN], 21/9/2007, "Extradición de Fujimori," (3744-07), 6 (Chile), available at <http://www.andina.com.pe/edpespeciales/especiales/fallofujimori.pdf>.

89. After a member of the Court is assigned to the case, both parties submit testimony and evidence, usually in written form. From there, the judge initiates an investigation to determine if the evidence is sufficient to support the charges for extradition. The prosecutor submits her own recommendation, but it is not binding on the judge's final decision. See Fujimori Extraditable Proceso de Extradición, http://www.fujimoriextraditable.org.pe/pro_ext.php?action=2 (last visited Feb. 29, 2008).

90. See *Cronología desde la llegada de Fujimori a Chile*, LA REPÚBLICA, Sept. 26, 2007, available at <http://www.larepublica.com.pe/content/view/179259/661/>.

*B. Erroneous Decision of Court of First Instance
because of Failure to Apply International Law*

After more than a year of formal investigations and testimony, Fujimori's defense counsel responded to the Peruvian extradition request, outlining the reasons that Fujimori should not be extradited to Peru. The defense claims that neither the international nor domestic requirements of extradition have been met by Peru in order to grant the extradition request.⁹¹ The ex-president's main defensive argument is his lack of knowledge of the human rights violations that were committed under his command. He portrays himself as a humble math professor, unversed in the tricky world of military politics. However, he keenly leaves out the self-coup that dissolved Congress and suspended the Constitution fifteen years ago.⁹² Moreover, the pleadings take care not to mention Montesinos, Fujimori's former personal advisor and coincidentally the leader of the squadron of death, Grupo Colina.⁹³ Instead, Fujimori blames the massacres at *Barrios Altos* and *La Cantuta* on the entire Peruvian Armed Forces, portraying himself as a decorative presidential figure and an outsider to the political system.⁹⁴

After the Chilean prosecutor delivered her recommendation to extradite⁹⁵ and as impatience grew around the world, Judge Orlando Alvarez boldly rejects Peru's extradition request for Fujimori.⁹⁶ Oddly enough, he initially invalidates Fujimori's procedural defenses, but denies the extradition request because he claims that either the crimes accused of had the statute of limitations run on them or there was not enough evidence to connect

91. Def's. Resp. to Extradition Req., February 28, 2007, available at http://www.caretas.com.pe/docs/alegato_fujimori.pdf. See also *supra* Part III.A.

92. Patricia Caycho, *Insultante Alegato*, CARETAS (Peru), Mar. 31, 2007 at 12, available at <http://www.caretas.com.pe/Main.asp?T=3082&S=&id=12&idE=716&idSTo=0&idA=25404>.

93. *Id.* at 12, 14-15.

94. *Id.* at 16.

95. The Chilean prosecutor, Monica Maldonado recommended the extradition of Fujimori on June 7, 2007 for two counts of human rights violations and eight counts of corruption. Maldonado concluded that the Peruvian extradition request had provided sufficient evidence to establish probable cause that Fujimori was connected to and participated in the alleged offenses. See Prosecutor's Report, June 7, 2007, http://www.emol.com/noticias/documentos/pdfs/Informe_fujimori_07.pdf.

96. Corte de Primera Instancia [CPI], 11/7/2007, "Extradición de Fujimori / negando extradición," (5646-2005) (Chile), available at <http://www.emol.com/noticias/documentos/pdfs/FalloMinalvarezFujimori.pdf>.

Fujimori to the alleged crimes.⁹⁷ Human rights organizations along with Latin American jurists immediately declared the decision a moral blow to the judicial process and to the battle against impunity for human rights violators.⁹⁸ One of the main arguments formulated against this erroneous decision centered on the fact that aside from Alvarez ignoring key pieces of evidence concerning Fujimori's participation in the crimes, he confused the evidentiary standard for extradition under Chilean law. Under Chilean law, the evidence must be sufficient to establish probable cause to file charges against the defendant and not whether there is sufficient evidence to convict, something that should be determined later by Peruvian courts.⁹⁹ Another factor that may have contributed to such a low blow for the Chilean judiciary is the highly charged political nature of this decision. The President of Chile rejects the notion that the judiciary is anything but independent in their decisionmaking.¹⁰⁰ However, a Chilean congressman, Víctor García Belaúnde, contributed Alvarez's decision to Chile's favorable relationship with Japan.¹⁰¹

Peru immediately appealed Alvarez's decision.¹⁰² In the months to follow, while the world anxiously awaited the final decision of the Chilean Supreme Court, legal analysis surfaced critiquing the lower court's decision and laying out the proper Supreme Court analysis that should follow. A report from the

97. See Poder Judicial, Ministro Orlando Álvarez rechaza solicitud de extradición de Alberto Fujimori (July 11, 2007), www.poderjudicial.cl/txtnews.php?cod=1009.

98. See Human Rights Watch, *Chile: Flawed Decision Not to Extradite Fujimori* (July 11, 2003) [hereinafter HRW Flawed Decision]; Insituto de Defensa Legal, Carlos Rivera Paz: *La extradición que se vuelve absolución* (July 11, 2007), available at <http://www.derechos.org/nizkor/peru/doc/rivera.html>; Amnesty, Int'l, *Caso Fujimori: la Corte Suprema de Justicia debe observar las obligaciones de derecho internacional contraídas por Chile*, AI Index AFR 22/006/2007, Aug. 2007; Instituto de Democracia y Derechos Humanos de la Pontificia Universidad Católica del Perú, *Caso Fujimori: Análisis jurídico de la sentencia del Ministro Orlando Álvarez* (Sept. 5, 2007) [hereinafter idehpucp], available at <http://www.pucp.edu.pe/idehpucp/images/docs/informe%20idehpucp%20extradici%F3n%20de%20fujimori%20final.pdf>.

99. See HRW Flawed Decision, *supra* note 98.

100. *La presidenta de Chile negó presiones al Poder Judicial a favor de Fujimori*, EL COMERCIO, July 11, 2007, available at <http://www.elcomercio.com.pe/EdicionOnline/HTML/olEcPortada/2007-07-11/olEcPortada0414249.html>.

101. *A Chile le interesa ser más amigo de Japón que de Perú, dice García Belaunde*, EL COMERCIO, July 11, 2007, available at <http://www.elcomercio.com.pe/EdicionOnline/HTML/olEcUltimas/2007-07-11/olEcUltimas0414263.html>. Japan originally thought to save Fujimori from the extradition request by allowing him to run for senator in Japan. *Id.*

102. According to article 654 of the Chilean Criminal Code of Procedure, the decision may be appealed before a panel of the same court, and then that decision is final. Cód. Proc. Pen. art. 654 (Chile).

Instituto de Democracia y Derechos Humanos at Pontificia Universidad Catolica del Peru elaborates on the diverse errors made by the court in both Chilean and international law.¹⁰³ According to the report, Judge Alvarez's main error is his failure to apply international law, including the international conventions governing human rights and the decisions of the Inter-American Court of Human Rights.¹⁰⁴ Alvarez's other major error, the issue on appeal in the Supreme Court, is the erroneous interpretation of the article 647 standard. He confuses the term "indicio razonable" (probable cause) with "prueba suficiente" (substantial evidence to convict). Article 647 only requires that the evidence provide probable cause for an indictment, because to the contrary, the Judge would be determining Fujimori's guilt in the matter, something that should be left to a Peruvian court.¹⁰⁵

The expectations of the Chilean Supreme Court on appeal have also been clearly set out in a report from Amnesty International in August of 2007.¹⁰⁶ Of those expectations is the clear obligation of the Court to take into consideration, as they have in various occasions,¹⁰⁷ international law when determining the fate of Fujimori.¹⁰⁸ Amnesty's report points out that Alvarez's determination that the statute of limitations had run on certain crimes contravenes an *erga omnes* obligation in international law, and proceeds to list the Inter-American Court of Human Rights' cases holding that crimes against humanity do not have a statute of limitations.¹⁰⁹ The rationale behind this international principle rests

103. See *idehpucp*, *supra* note 98.

104. See *idehpucp*, *supra* note 98, at 2. In *La Cantuta* case, the Court expressly provided that within Peru's obligations to prosecute the perpetrators of this horrible crime, was the obligation to include Fujimori in those prosecutions because the Court recognized him as a principal actor in the atrocities. See *La Cantuta v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, at ¶¶ 80-81 (Nov. 29, 2006).

105. See *idehpucp*, *supra* note 98, at 2, 12.

106. See Amnesty Int'l, *supra* note 98.

107. See Corte Suprema de Justicia [CSJN], 3/10/2006, "Caso Villa Grimaldi," (Chile) (concluding that an international convention that Chile was not a signatory party to was still persuasive for the courts); Corte de Apelaciones de Santiago [CA], 10/4/2006, "Caso de desaparicion," (24.471-2005) (Chile) (recognizing the supremacy of international law over domestic law, so that domestic law may not impose any barriers to complying in good faith with international obligations).

108. See Amnesty Int'l, *supra* note 98, at 2.

109. See Amnesty Int'l, *supra* note 98, at 3-10. In the *Barrios Altos* case the Inter-American Court concluded that grave violations against human rights, like torture, extra-judicial killings and forced disappearances have no statute of limitations. *Barrios-Altos v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, at ¶ 41 (Mar. 14, 2001); see also *Caso Blanco Romero v. Venezuela*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 138, at ¶ 98 (Nov. 28, 2005); *Hermanos Gomez Paquiyauri v. Peru*, 2004 Inter-Am. Ct.

upon the obligation of all states to investigate and prosecute *jus cogens* crimes like those committed here.¹¹⁰ Additionally, Amnesty's report criticizes Alvarez's determination that the evidence did not support Fujimori's participation in the alleged crimes because not one witness could affirmatively claim that they received orders directly from Fujimori.¹¹¹ Amnesty notes that extradition is a simple process, not a substantive hearing, and therefore, the evidence does not need to support nor does the judge need to determine Fujimori's guilt in the matter. Accordingly, circumstantial evidence is sufficient for an extradition proceeding.¹¹² This standard is also found in the Bustamante Code,¹¹³ although Alvarez fails to make reference to it here.

C. *The Historic Decision*

The Pinochet case in London announced to the world that grave violators of human rights could no longer hide and set the stage for future prosecutions of ex-heads of states. Fujimori's case was the next logical step in the international saga of human rights violations, and what better place for the saga to unfold than in Chile where the Supreme Court could finish what they did not accomplish with Pinochet. The Supreme Court's decision respects and reiterates the international obligation in humanitarian law to facilitate cooperation between nation states in order to bring violators to justice. It is clear that the Court could not deny the extradition of Fujimori without risking the reputation of Chile and forever condemning it as a country of refuge for impunity. This landmark decision in international humanitarian law is divided into two parts. Part one deals with general considerations concerning the extradition process and the requirements needed to grant the request. Part two addresses each charge formulated by

H.R. (ser. C) No. 110, at ¶ 151 (July 8, 2004); *Bulacio v. Argentina* 2003 Inter-Am. Ct. H.R. (ser. C) No. 100, at ¶ 116 (Sept. 18, 2003); *Trujillo Oroza v. Bolivia* 2002 Inter-Am. Ct. H.R. (ser. C) No. 64, at ¶ 106 (Feb. 27, 2002).

110. See Amnesty Int'l, *supra* note 98, at 3.

111. See Amnesty Int'l, *supra* note 98, at 10.

112. See Amnesty Int'l, *supra* note 98, at 10-11.

113. See The Convention on Private International Law (Bustamante Code), art. 395(1), Feb. 20, 1928, O.A.S.T.S. No. 34. The Bustamante Code represents an attempt to unify the various laws of Latin America into one comprehensive body of law. Unfortunately, it lacked the requisite approval of many of the Latin American countries, but it remains the most comprehensive normative framework of Latin American law in the area of private international law. Alejandro M. Garro, *Unification and Harmonization of Private Law in Latin America*, 40 AM. J. COMP. L. 587, 590-91 (1992).

Peru in the extradition request, analyzing the evidence presented to determine if it is sufficient to meet the standards of the Chilean process for extradition,¹¹⁴ allowing Chile to extradite Fujimori. The underlying tone of the decision is clear however, international law is imperative.

In part one of this historic decision Fujimori and his defense dispute the extradition request, alleging that it fails to meet the necessary requirements under international treaties and national law. The defense offers five arguments¹¹⁵ for consideration: Peru did not follow the correct internal process as set forth in the Chilean extradition laws; the extradition request did not comply with the international principle of double criminality; the majority of charges against Fujimori had the statute of limitations run on them; the request was a flagrant violation of Fujimori's rights to due process, presumption of innocence and basic principles of criminal law; the evidence was not sufficient to establish Fujimori's participation in the alleged acts as required by article 647(3) of the Chilean Code of Criminal Procedure.¹¹⁶ In response to these unfounded accusations, the Supreme Court is quick to apply a mixture of domestic procedural law with international substantive law. After all, according to some legal scholars, extradition, which is backed by valid international principles and laws, is really a procedural instrument used by one state to assist another in the search for justice.¹¹⁷

D. The Extradition Standards were Properly Applied

1. Chile's Internal Requirements for Extradition

As the bilateral extradition treaty between the two countries expressly provides that the extradition process must follow the

114. See *supra* Part III.A.

115. Fujimori claimed head-of-state immunity from prosecution as well. The Court of First Instance rejected his claim, noting that neither international nor Chilean law mentioned immunity from extradition for ex-heads of states. See Corte de Primera Instancia [CPI], 11/7/2007, "Extradición de Fujimori / negando extradición," (5646-2005), 53 (Chile), available at <http://www.emol.com/noticias/documentos/pdfs/FalloMinalvarezFujimori.pdf>.

116. See Def.'s Resp. to Extradition Req. 3-4, Feb. 28, 2007, available at http://www.caretas.com.pe/docs/alegato_fujimori.pdf.

117. JUAN CARLOS FERRE OLIVE, *CRIMEN INTERNACIONAL Y JURISDICCION INTERNACIONAL* 188 (Tirant lo Blanch 2000); JOSE HURTADO POZO, *MANUAL DE DERECHO PENAL* 260 (Eddili 1987); VICTOR PRADO SALDARRIAGA, *CRIMINALIDAD ORGANIZADA* 271 (Idemsa 2006); ANTONIO QUINTANO RIPOLLES, *TRATADO DE DERECHO PENAL INTERNACIONAL E INTERNACIONAL PENAL* 196 (Madrid 1957).

laws of the country where the accused seeks refuge,¹¹⁸ the standards of Chilean domestic law have to be applied to determine if extradition is proper. First, the defense contends that Peru did not properly follow the procedure laid out in article 274 of Chile's Code of Criminal Procedure,¹¹⁹ which requires that before an indictment can be brought the accused must be allowed to make a statement on his behalf.¹²⁰ This means that before the Peruvian prosecutor could initially bring charges against Fujimori in Peru the ex-dictator had to actually be present in the country to refute the charges.¹²¹ This procedural formality facilitates the satisfaction of Chile's probable cause requirement in article 647(3), which is used to ascertain the accused's participation in the alleged acts.¹²² The defense points out that the original indictment brought by the Peruvian prosecutor failed to follow the article 274 requirement and since Peru is then in noncompliance with the requirements of the bilateral treaty, the extradition request should be blocked.¹²³

The Court cleverly notes that since Fujimori was trying to avoid a potential indictment by fleeing the country, Chile's Code of Criminal Procedure does not require that he be allowed to make a statement before an indictment is brought against him.¹²⁴ Also, the Court invokes the Vienna Convention on the Law of Treaties, which postulates that one party to an extradition request cannot invoke domestic law requirements as a justification for noncompliance with the treaty requirements.¹²⁵ Moreover, the Court notes that the correct evidentiary standard used to assess if article 647(3) is met is probable cause to believe that the accused participated in the alleged crimes, whether directly or as an accomplice, and not conclusive evidence of the person's guilt through actual

118. Extradition Treaty, *supra* note 5, at art. XIII.

119. Cód. Proc. Pen. art. 274 (Chile).

120. See Def.'s Resp. to Extradition Req. 37-38.

121. This argument is completely circular and idiotic as Peru wouldn't even be asking for Fujimori's extradition in the first place if he had been present in the country during the original indictment.

122. See Def.'s Resp. to Extradition Req. 38.

123. See Def.'s Resp. to Extradition Req. 40-43. Failure to comply with Chilean procedural law would violate article XIII of the extradition treaty and block the extradition request.

124. See Corte Suprema de Justicia [CSJN], 21/9/2007, "Extradición de Fujimori," (3744-07), 4 (Chile), available at <http://www.andina.com.pe/edpespeciales/especiales/fallofujimori.pdf>.

125. Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

statements they have made.¹²⁶ A similar standard is found in the Bustamante Code.¹²⁷ Upon reviewing the extradition request, the Court determines that the allegations, despite the absence of a statement from Fujimori, were justly founded. A thorough investigation was performed before formulating each allegation, constituting the basis of what Chile considers a fair process, even if Peru lacks a similar procedural requirement to their article 274.¹²⁸

2. Double Criminality

An international axiom in the law of extradition is that the requirements of the double criminality principle be met.¹²⁹ This principle requires that a crime for which extradition is sought be punishable in both the requested and the requesting states.¹³⁰ It is not necessary that the crime be described with the same name in both countries, but only that the material elements of the crime define a foreseeable punishable act for both countries' legislatures.¹³¹ The defense in turn argues that while Peru sought extradition for crimes that are also punishable under the Chilean legislation, when the actual evidence supporting the charges is examined it clearly defines other crimes that are of a less severe nature.¹³² As a result, many of the less severe crimes for which the evidence actually supports an indictment do not carry a minimum penalty of a year or more of incarceration as required by the extradition treaty.¹³³ Therefore, the defense concludes that the extradition requirements have not been met.¹³⁴ In support of this argument, the defense cites a recent case similar to this one where an extradition request was denied for failure to meet the double criminality requirement. There, the court expressed that the double criminality requirement for extradition goes beyond simply matching the nature of the crime set forth in the extradition request, but demands also matching the exact elements of the

126. *Id.* at 4-5.

127. *See* The Convention on Private International Law (Bustamante Code), art. 365(1), Feb. 20, 1928, O.A.S.T.S. No. 34.

128. *See* CSJN, "Extradición de Fujimori," at 5.

129. *Id.* at 6.

130. *Id.*

131. *Id.* at 7 (citing LUIS JIMÉNEZ DE ASUA, *TRATADO DE DERECHO PENAL* 943 (Editorial Losada 1964); ALDO MONSAIVE MULLER, *DERECHO INTERNACIONAL PRIVADO* 252 (2d ed.) (Santiago 2007)).

132. *See* Def.'s Resp. to Extradition Req. 52-58.

133. *See* Def.'s Resp. to Extradition Req. 58; Extradition Treaty, *supra* note 5, at art. II.

134. *See* Def.'s Resp. to Extradition Req. 54.

crime as expressed by each legislature to make sure that the accused is not tried for a different crime after he is extradited.¹³⁵

While the Court acknowledges their current precedent on double criminality, it also reasons that the principle does not have to be so precise and that an error of this type should not invalidate the extradition request.¹³⁶ Next, as the extradition treaty between the two countries does not specify such a requisite, the Court cites to several regional treaties for support. The Bustamante Code and the Convention of Montevideo simply indicate that the requesting state specify the exact crime of the accused.¹³⁷ Additionally, articles 353 and 354 of the Bustamante Code require the requesting state to perform a mere provisional review of the elements of the crime so that if the Chilean court qualifies it as another type of crime the extradition is still permitted.¹³⁸ In accordance with the Court's obligation to use domestic law, article 647(2) specifies that when determining if a crime is extraditable the Court should follow the present treaties in force, and if that fails it should conform to the principles of international law.¹³⁹ As a result of the duty to conform to international standards, the Court determines that the double criminality principle has not been infringed. The fact that Peru has erred by generally classifying some of the alleged crimes instead of according to the Chilean

135. Def.'s Resp. to Extradition Req. 53-54 (citing Corte Suprema de Justicia [CSJN], 24/05/2005, "Eduardo Martin Calmell del Solar Diaz / rechazo de extradición," (2.139-2004) (Chile)). This also goes towards the principle of specialty, which is another principle of customary international law that prohibits the prosecution for any offence other than that for which the extradition request is granted. The principle of specialty is important because it prevents the requesting state from using the extradition process for an impermissible purpose and in effect protects the rights of the individual being extradited. Gaven Griffith & Claire Harris, *Recent Developments in the Law of Extradition*, MELBOURNE J. INT'L. LAW 1, 10-12 (2005), available at <http://bar.austlii.edu.au/au/journals/MelbJIL/2005/2.html>.

136. See CSJN, "Extradición de Fujimori," at 7.

137. See Montevideo Convention on Extradition art. 5(a) & (b), Dec. 26, 1933, O.A.S.T.S. No. 34; The Convention on Private International Law (Bustamante Code) art. 365(3), Feb. 20, 1928, O.A.S.T.S. No. 34. This requirement is more indicative of the specialty principle that prevents the accused from later being tried for a crime that was not present in the extradition request. See CSJN, "Extradición de Fujimori," at 7-8.

138. See Bustamante Code, *supra* note 136, at arts. 353-54.

139. See CSJN, "Extradición de Fujimori," at 7. In modern practice, the severity of certain international crimes, especially crimes against humanity, point to a more lenient application of the double criminality requirement. The double criminality requirement is really only important when the two legal cultures involved in the extradition vary greatly. Here, Chile and Peru are neighboring countries in South America that have similar civil law systems. See GEOFF GILBERT, *ASPECTS OF EXTRADITION LAW* 48-52 (Martinus Nijhoff Publishers 1991).

legislature's exact definition does not bar the extradition request.¹⁴⁰ Moreover, the court notes that neither the Peruvian law nor the Chilean law on extradition demand such an identical match of the elements of the crime.¹⁴¹

3. Statute of Limitations

Next, the defense claims that extradition is improper because the statute of limitations has run on the alleged crimes. The defense outlines four reasons why the statute of limitations has run. First, Peru erroneously classified several of the offenses as felonies instead of misdemeanors, essentially doubling the statute of limitations.¹⁴² The defense notes that for example, "fraude fiscal" or treasury fraud is a simple misdemeanor in Chile.¹⁴³ Second, Peru argues that the suspension of the statute of limitations in these cases should begin from the day Fujimori abandoned the presidency or the day Congress banned him from holding office in Peru.¹⁴⁴ The defense rebuts that this flies in the face of the express language of article 96 of the Chilean Criminal Code, which says that the statute of limitations continues to run if after three years from the date of its suspension the prosecution has failed to convict the accused.¹⁴⁵ Since Fujimori fled from justice over five years ago, according to the defense, the statute of limitations has run. Third, Peru erroneously applied the statute of limitations rules of article 100 of the Chilean Criminal Code, which count one day for every two days when the accused is outside the jurisdiction of the requesting state. The defense cleverly notes that even if this was the correct interpretation of article 100, many of the cases against Fujimori had the statute of limitations run on them anyway.¹⁴⁶ Finally, they claim that Peru incorrectly listed the dates of the alleged criminal acts that were used to determine if the statute of limitations had run.¹⁴⁷

In compliance with the bilateral treaty, to determine the application of the statute of limitations for the alleged crimes the domestic laws of the requested state should be applied.¹⁴⁸ In

140. GILBERT, *supra* note 139 at 9.

141. *Id.*

142. *See* Def.'s Resp. to Extradition Req. 26.

143. *See* Def.'s Resp. to Extradition Req. 27.

144. *See* Def.'s Resp. to Extradition Req. 28.

145. *See* Def.'s Resp. to Extradition Req. 29.

146. *See* Def.'s Resp. to Extradition Req. 32-34.

147. *See* Def.'s Resp. to Extradition Req. 34.

148. *See* CSJN, "Extradición de Fujimori," at 9.

Chile, the determination of the correct statute of limitations is based on whether or not the accused is still in the territory where the crimes were committed or if he has fled.¹⁴⁹ Article 100 of the Chilean Code of Criminal Procedure proclaims that when the accused is not present in the country where the acts were committed the statute of limitations doubles¹⁵⁰ because his departure from the country makes it difficult to find him and prosecute him.¹⁵¹ On the other hand, the Chilean procedure for extradition also depicts extradition as a process based upon international treaties and judicial assistance from the respective states.¹⁵² The Court elaborates that the purpose of cooperation between states is to avoid a miscarriage of justice by letting a crime go unpunished simply because the accused has fled the state's jurisdiction.¹⁵³ For that reason and in accordance with the Vienna Convention on the Law of Treaties,¹⁵⁴ a treaty should be interpreted in good faith with the purpose of attributing to its terms a reasonable application in light of the ends sought.¹⁵⁵ With that said, while it is true that a court reviewing an extradition request should take into consideration domestic law, that same domestic law should be reconciled with international instruments of extradition so that in conserving the principle of mutual assistance between nations and the conservation of the judicial order, justice will be served and impunity will be avoided.¹⁵⁶ With respect to the claim that the statute of limitations has run, the Court holds that, in this case, the statute of limitations was correctly applied.

The defense cleverly tries to sidestep the application of article 100's doubling effect by claiming that it is only applicable when Chile is requesting the extradition from another country and not when the extradition is being requested from Chile. The Court employs the basic international principles of equality and reciprocity between nation states to refute the claim, noting that Peru is entitled to the same treatment that it would afford Chile in the

149. *Id.*

150. See Cód. Proc. Pen. art. 100 (Chile).

151. See CSJN, "Extradición de Fujimori," at 9-10. The rationale for this rule is even stronger here when you take into account the fact that in Peru trials *in absentia* are not permitted. See HRW Dec. 2005 Report, *supra* note 48.

152. See CSJN, "Extradición de Fujimori," at 11.

153. *Id.*

154. See Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

155. See CSJN, "Extradición de Fujimori," at 11.

156. See CSJN, "Extradición de Fujimori," at 12. The Court goes on to cite in support of this theory, the bilateral extradition treaty between the two states. *Id.*

area of extradition and Chile should be prepared to facilitate this, especially when, according to Chilean law, the statute of limitations has not run.¹⁵⁷ The Court emphasizes that furthermore, these principles are expressly provided for in the preamble to the extradition treaty between Peru and Chile.¹⁵⁸ In addition, article 4 of the treaty states that if the perpetrator is not extradited, the requested state has the obligation to try him under the laws of that state as if he had committed the alleged acts there.¹⁵⁹ The Court arrives at the conclusion that, in harmony with the treaty's call for reciprocity between nation states, article 100 applies, with the statute of limitations beginning to run from the day the accused sought to evade justice in Peru.¹⁶⁰

4. Substantive Issues

The defense alleges overt substantive violations of Fujimori's rights, such as his right to due process, presumption of innocence until proven guilty and general principles of extradition and criminal law.¹⁶¹ The Court reasons that Fujimori was awarded due process of law because he was aware of the charges against him and was provided with an adequate defense both here and in Peru.¹⁶² With respect to the alleged violations of the general principles of extradition and criminal law, such as proportionality, ultima ratio and specialty, the Court brushes them aside as substantive issues, which can only be determined by the Peruvian court that will try Fujimori for his crimes.¹⁶³ The Court's refusal to address any substantive issues encapsulates the fact that extradition is a mere process to follow before the accused may be tried on the merits.¹⁶⁴ In an extradition proceeding it is not the Court's job to formulate an opinion concerning the guilt of the accused.¹⁶⁵

157. See CSJN, "Extradición de Fujimori," at 10-11.

158. Extradition Treaty, *supra* note 5, at Preamble. "Los Gobiernos de Chile y Perú, con el propósito de asegurar la acción eficaz de la justicia penal en sus respectivos países, mediante la represión de los delitos cometidos en el territorio de cualquiera de ellos por individuos que busquen refugio en el del otro, han convenido en celebrar un Tratado de Extradición que establezca reglas fijas y basadas en principios de reciprocidad . . ."

159. Extradition Treaty, *supra* note 5, at art. IV.

160. See CSJN, "Extradición de Fujimori," at 11.

161. See Def.'s Resp. to Extradition Req. 59, 82.

162. See CSJN, "Extradición de Fujimori," at 5-6.

163. *Id.*

164. See sources cited *supra* note 117. Extradition is a procedural instrument used between nations to assist each other in the area of criminal justice. *Id.*

165. See Extradition Treaty, *supra* note 5, at art. XIII. Article XIII refers to extradition as a procedure.

This basic concept was what seemed to have eluded the Court of First Instance below when it incorrectly applied the evidentiary standard.¹⁶⁶ As far as the alleged infringement of Fujimori's presumption of innocence, the Court once again categorizes this as a substantive issue that should be addressed by the Peruvian court at his trial.¹⁶⁷

5. Evidentiary Findings

After finding that the extradition request meets both the procedural requirements of the extradition treaty in force and international law, the Court individually addresses Peru's thirteen cases¹⁶⁸ in order to determine first, if the nature of the alleged crime is the same in both countries,¹⁶⁹ and then second, if they conform to the article 647(3) requirement of the Chilean procedure for extradition. Article 647(3) requires that the Court look at the actual evidence supporting the charges to determine if there is probable cause to believe that the accused participated in the extraditable acts, either directly, as an accomplice, or as an accessory after the fact.¹⁷⁰ This is the same standard that is required to indict someone if the crime would have been committed in Chile.¹⁷¹ The standard for reviewing such evidence is what is at issue on appeal, as the Court of First Instance found that that evidence did not support a finding that Fujimori participated in the crimes either directly or indirectly.¹⁷² The ex-president's defense vigorously demands that the standard of proof used to assess the evidence in each case be "prueba plena de responsabilidad" or conclusive evidence of his responsibility. Yet the Supreme Court holds strong in accordance with its past precedence that it only need affirm the actual existence of the crime itself and that there be a sound presumption that the defendant participated in the act.¹⁷³ It should also be noted that according to article 365(1) of

166. See HRW Flawed Decision, *supra* note 98.

167. See CSJN, "Extradición de Fujimori," at 12.

168. The original extradition request contained twelve charges, but after the lower court's decision Peru submitted a thirteenth charge called "Ampliación por desaparición forzada" or kidnapping.

169. This is otherwise known as the principle of double criminality in international extradition law. See *supra* Part III.D.ii.

170. See Cód. Proc. Pen. art. 647(3) (Chile).

171. See Cód. Proc. Pen. art. 274 (Chile).

172. See Corte de Primera Instancia [CPI], 11/7/2007, "Extradición de Fujimori / negando extradición," 97-98, (5646-2005) (Chile), available at <http://www.emol.com/noticias/documentos/pdfs/FalloMinalvarezFujimori.pdf>.

173. See CSJN, "Extradición de Fujimori," at 5.

the Bustamante Code, only circumstantial evidence of the person's guilt need be shown.¹⁷⁴ Such circumstantial evidence may include a simple arrest warrant or like document from the requesting state. Neither of these standards requires conclusive evidence of the person's guilt however. The Court emphasizes that the Peruvian extradition request surpasses the Bustamante Code's lenient requirements, evidencing a sound previous investigation concerning the facts before an indictment and arrest warrant for Fujimori were issued.¹⁷⁵ It is clear that the Peruvian request has exceeded the demands of the Chilean procedural requirements for extradition.

Of the seven cases approved for prosecution in Peru, five of them were for gross acts of corruption.¹⁷⁶ The court examined the evidence presented for each case and decided that in accordance with article 647(3)'s evidentiary standard it is sufficient to presume Fujimori's involvement in or instigation of the illicit acts.¹⁷⁷ Despite Fujimori's assertions of innocence and ignorance of the corruption that went on in his government, the evidence against him is extensive and detailed, ranging from witness testimony from top government officials, official documents and taped conversations.¹⁷⁸ The Supreme Court's decision thus constitutes an important step in the fight against corruption in Latin America.¹⁷⁹ This new found pastime of Latin American presidents has led to many international treaties and agreements that advocate international cooperation to combat and repress corruption in a more effective manner.¹⁸⁰ Included among these international mecha-

174. See Bustamante Code, *supra* note 135, at art. 365(1).

175. See CSJN, "Extradición de Fujimori," at 5.

176. Caso Allanamiento, Caso Intercepción Telefónica, Caso Tractores Chinos y Medios de Comunicación, Caso 15 Millones and Caso Congresistas Tránsfugas.

177. See CSJN, "Extradición de Fujimori," at 22-23, 46-47, 72-73, 101-02, 113-14.

178. *Id.*

179. In the last several years corruption has become an international concern, as Latin American presidents rise to power, rob the country blind and slip away to Europe or another Latin American country to enjoy their wealth. See Ronald Gamarra Herrera, *A propósito de la histórica extradición de Alberto Fujimori*, DERECHO PENAL (Chile), December 27, 2007, at 8, available at <http://www.unifr.ch/ddp1/derechopenal/novedades.htm>.

180. *Id.* at 8-9. Of importance here, Chile has signed and ratified the Inter-American Convention Against Corruption, which sets forth in its article XIII that extradition is an appropriate measure to take when dealing with gross acts of corruption. Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724, Art. XIII. More recently, the General Assembly of the Organization of American States approved a resolution that made a call to the international community to stop giving sanctuary to government officials who used their political power to commit acts of corruption and to facilitate the return of these officials to their countries so that

nisms to stop corruption is the cooperation between nation states, specifically the assistance of the judiciary through various judicial procedures like extradition.¹⁸¹

The five corruption cases¹⁸² that were denied illustrate that the additional requirements in Chilean procedural law sometimes frustrate the international cooperation efforts by Latin America to effectively prosecute acts of corruption. In each of these five cases the Court determines that there is not enough evidence to connect Fujimori directly or indirectly to these crimes.¹⁸³ In addition, many of the crimes he is accused of are found not to warrant the granting of an extradition request, as they either do not have jail time as a sanction or are not legally punishable acts at all.¹⁸⁴ Regardless, the Court's careful deliberations before denying several of the charges display attempts to follow the international principles of extradition and apply them fairly to a case that has received great criticism and scrutiny by the international community.

The Court's decision to extradite ultimately rests upon the human rights charges. The two major cases involving grave violations of human rights are the *Barrios Altos* and *La Cantuta* cases.¹⁸⁵ With respect to these cases, Fujimori claims that his title as Chief of the Armed Forces is merely a constitutionally mandated title, and that he never knew of the existence of Grupo Colina, a secret death squad, until after the terrible massacres at Barrios Altos and La Cantuta occurred.¹⁸⁶ In addition, he claims that neither the armed forces nor the national police took orders directly from him as President, and that he was blind to his right hand man's intentions in creating Grupo Colina.¹⁸⁷ The Court controverts, claiming that after his self-coup he possessed the concentrated powers of all three branches of government, including that

they may be tried in front of national courts. Herrera, *supra* note 179, at 9 (citing AG/RES. 2022 (XXXIV-O/04)).

181. See Herrera, *supra* note 179, at 9.

182. Caso pago Sunat-Borobio, Caso Faisal, Caso Medicinas Chinas, Caso Desviacion de Fondos, and Caso Decretos de Urgencia WE NEED CITATIONS

183. See CSJN, "Extradición de Fujimori," at 31-33, 55-56, 65-66, 84-85, 135, 197.

184. *Id.* at 55-56, 65. In the case "Tractores Chinos" Fujimori is accused of circumventing the correct administrative body and directly purchasing agricultural equipment from a Chinese company. To this the Court responds that the acts described in the extradition request may only be thought of as misadministration and do not constitute criminally punishable acts. *Id.* at 65.

185. These two cases were unanimously decided by all the judges.

186. CSJN, "Extradición de Fujimori," at 176-77.

187. *Id.* at 176.

of Chief of the Armed Forces. As a consequence, he is guilty based on the fact that although he did not participate directly in the alleged acts, he is the mastermind behind the plan and had extensive knowledge of the horrific acts being committed by his government's agents.¹⁸⁸ Additionally, there exists clear evidence that Fujimori created the special death squad, Grupo Colina, and gave them orders to carry out operations against subversives.¹⁸⁹

Fujimori's degree of participation in these horrific crimes is that of perpetrator by means.¹⁹⁰ The Supreme Court uses Claus Roxin's theory of criminal participation to determine the responsibility of perpetrators by means who commit crimes against humanity.¹⁹¹ Roxin's theory states that an individual is also a perpetrator of the crime when they have control over the criminal act through their position of power in an organization.¹⁹² The Court notes that while the concept of perpetrator by means is not as hotly a discussed topic as before, a perpetrator by means is one who through the control of another's will commits a criminal act.¹⁹³ Roxin's theory describes the case at hand precisely. Fujimori's hierarchically structured, executive-centered government executed a plan that was devised by Fujimori himself. The existence of a power structure is what Roxin's theory uses to hold the true author of the criminal acts responsible. The Court concludes that the concentration of an organization's power in one actor affirms who the perpetrator by means is, the executor of the organization's power.¹⁹⁴ The Supreme Court's decision thus affirms the

188. *Id.* at 177-178.

189. *Id.* at 177. The Peruvian extradition request contains evidence in the form of testimony from various government officials who saw Fujimori give Montesinos orders concerning Grupo Colina, military achievements and promotions awarded the various members of Grupo Colina from Fujimori as head of the armed forces and testimony from the members of Grupo Colina who carried out the horrific acts. *Id.* at 162-75.

190. "[T]hose who direct the killing are still killers, even if the actions are carried out by responsible agents." GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 199 (Oxford University Press 1998). This degree of criminal participation has been used to find those who use the rank-and-file to commit crimes, like mafia leaders and heads of dictatorial states, liable. *Id.*

191. CSJN, "Extradición de Fujimori," at 178.

192. See Herrera, *supra* note 179, at 11. Roxin's theory has been used by courts throughout Latin America over the years. For example, in Peru, this theory was used to find Abimael Guzman, leader of the terrorist group Sendero Luminoso, responsible for the group's horrific crimes. Also, in Chile, the Court used the theory to override Pinochet's head-of-state immunity for the assassinations of various individuals in several cases. *Id.*

193. CSJN, "Extradición de Fujimori," at 178.

194. See *id.* at 178-79.

responsibility of heads of states in human rights violations as a consequence of their control over the state (the organizational power structure).

Sotanos SIE is another human rights case consisting of individual cases of torture and kidnapping that took place in the basement of the SIE (Army Intelligence Service), where coincidentally Fujimori also lived with his family in 1992 because he feared for his safety.¹⁹⁵ Once again Fujimori denies any knowledge of the torture that was carried out against ex-members of government and journalists in the basement of the SIE.¹⁹⁶ The evidence against him is nonetheless overwhelming in this case. Aside from the fact that Fujimori lived at the SIE, he also converted the intelligence agency into a meeting house for the central government. Fujimori held all of his meetings with top officials from the military there, where they planned the terrible acts to be carried out by Grupo Colina.¹⁹⁷ One of the abused who was kept tied up in the basement of the SIE actually saw Fujimori passing through with a group of Asian men one day. In addition, several employees that worked there claimed to have seen prison cells in the basement with prisoners in them.¹⁹⁸ One employee actually saw a small incinerator with the remains of human parts in it.¹⁹⁹ Fujimori's defense claims that regardless of the evidence, the statute of limitations is said to have run on these crimes. The Court reasons that the statute of limitations has not run because according to article 96 of the Chilean Criminal Code, the statute of limitations is suspended with the commission of a new crime.²⁰⁰ Here, three years into the five year statute of limitations for the crimes committed in the basement of the SIE Fujimori used illegal wiretapping to listen in on journalists and opposing party members' phone conversations, ultimately tolling the statute of limitations on the torture cases.²⁰¹ This maneuvering around the statute of limitations is consistent with international law and the Inter-

195. *Id.* at 135-38. One of the cases involved the kidnapping and torture of his ex-wife, Susana Higushi Miyagawa. Miyagawa testified that she was kidnapped and brought to the SIE basement where she was brutally hit, kept half-naked and drugged. Once she was set free and told Fujimori what they had done to her, he refused to initiate an investigation and spent the rest of their marriage convincing her that none of it had ever happened. *Id.*

196. *Id.* at 152-53.

197. *Id.* at 135-36.

198. *Id.* at 142-45.

199. *Id.* at 144.

200. Cód. Pen. art. 96 (Chile).

201. CSJN, "Extradición de Fujimori," at 152-56.

American Court's jurisprudence on crimes against humanity, which call for the abolishment of the statute of limitations altogether.²⁰²

IV. CONCLUSION

The manner in which Latin America has dealt with gross violations of human rights is a major theme and challenge for the democratic transition project.²⁰³ Over the last few decades, Latin America has shown willingness to prosecute government officials who violate human rights and seek to evade justice.²⁰⁴ The result has been a strong movement against impunity. Surprisingly enough, those who seek justice for victims of human rights violations are not international organizations or courts, but domestic courts. Notably, the Argentine judiciary led the Latin American courts with some of the first trials against military officials for the appalling acts committed during the "dirty war." The Argentine courts were also one of the first to throw out the amnesty laws enacted by the military to shield themselves from prosecution, and to give precedence to international law in human rights trials.²⁰⁵ Similar events are currently occurring in Chile, beginning with the example of Pinochet and more recently with the extradition of Fujimori. One question still remains however, why have other Latin American courts not had the same success as in Argentina and Chile?²⁰⁶

202. See sources cited *supra* note 109.

203. The possibilities for actually achieving justice and accountability for human rights violations in most countries are conditioned on and constrained by the terms and pace of democratic transition. See Edward Newman, *Reconciliation, in DEMOCRACY IN LATIN AMERICA: (RE) CONSTRUCTING POLITICAL SOCIETY* 188, 188 (Manuel Antonio Garreton & Edward Newman ed., 2001). Alternatively, while the deficiencies in dealing with past human rights violations may not threaten the democratic transition in Latin America, the issue is still central to the reconstruction of a political society. See *id.* at 189. In fact, the precise success of this transition is the effective management of past human rights violations. *Id.*

204. See The International Federation for Human Rights 36th World Congress, Lisbon, Port., April 23-25, 2007, *Impunity in Peru and the Extradition of Fujimori to Peru*, ¶ 2. The indictment of Pinochet in Chile and the trials of military officials in Argentina, Paraguay and Uruguay are an example. *Id.*

205. See NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* 97-99 (University of Pennsylvania Press 2005).

206. Unlike other countries that survived past military control, Brazil has never prosecuted those responsible for past atrocities. Instead, the government passed an amnesty law in 1979 pardoning those who had committed abuses. Brazil is finally taking steps to address official impunity for torture that took place in the 1960s and the 1970s. In August the government released a report that detailed the brutal methods the military regime used to dispose of political opponents, as well as

While Latin America has generally been thought of throughout the years as heavily controlled by one branch of government, the executive, a quiet but impactful third branch of government has been making headway since the early 1990s in Argentina and Chile.²⁰⁷ Major constitutional reforms have increased the power of the judiciary and granted it greater independence, which in turn has encouraged victims of human rights violations to come forward and demand justice.²⁰⁸ Until recently, the Chilean judiciary was thought to have zero autonomy. In fact, before the 1997 constitutional amendment requiring congressional approval of the President's nominees to the Supreme Court, the executive was free to fill the Court with as many political puppets as it pleased.²⁰⁹ Aside from constitutional judicial independence,²¹⁰ actual independence vis-à-vis the executive's practices also increases the probability the courts will protect individual rights. Factors that have contributed to a more autonomous judiciary are: the finality of court decisions, the courts' exclusive authority to decide cases, bans against military courts, adequate fiscal resources for the courts, and greater isolation from political pressure.²¹¹ If the same factors are present in other Latin American countries as they are in Chile and Argentina, soon we will see more prosecutions of human rights violators throughout Latin America.²¹²

The notion is that as the judiciary feels less controlled by the other branches of government, they become more comfortable adjudicating cases on the merits. Thus, a strong independent

analyzing reparation claims by victims' families. Human Rights Watch, *Brazil: Report on Past Atrocities a Key Step Forward*, available at http://hrw.org/english/docs/2007/08/31/brazil16783_txt.htm.

207. See Elin Skaar, *Judicial Independence and Human Rights Policies in Argentina and Chile* 1-2 (Chr. Michelsen Institute Development Studies and Human Rights, Working Paper No. 2001: 15, 2001).

208. *Id.* at 1-2. The idea is that with greater judicial independence comes trust in the rule of law, and as victims have more faith in the judiciary, trials for human rights perpetrators are more likely to occur.

209. See Julio Rios-Figueroa, *Judicial Independence: Definition, Measurement, and its Effects on Corruption*, Dissertation at 53, available at <http://homepages.nyu.edu/~jrf246/Papers/PhD%20Diss%20JRF.pdf>. Previous to the 1997 constitutional amendment, the judicial budget, the number of judges, and the jurisdiction of the courts were also at the hands of the executive branch. *Id.* at 55-56.

210. While nearly every Latin American Constitution has a clause guaranteeing an independent judiciary, the reality is that the level of judicial independence in Latin America is very low. *Id.* at 48.

211. See Linda Camp Keith, *Judicial Independence and Human Rights Protection Around the World*, 85 *Judicature* 195, 196-97 (Jan.-Feb. 2002).

212. See Skaar, *supra* note 207, at 19.

judiciary is the key to achieving less government corruption and better protection for human rights.²¹³ Essentially, the more disconnected the judiciary is from political control, the more democratic and fair a nation becomes. Through the case at hand, the Chilean judiciary is paving the way for other Latin American courts to aspire towards achieving greater judicial involvement in human rights and corruption problems, ultimately facilitating the democratic transition in Latin America.

213. See Rios-Figueroa, *supra* note 209 at 1.