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SIGNIFICANCE OF THE *FUJIMORI* TRIAL

JUAN E. MENDEZ*

The conviction and sentencing of Alberto Fujimori Fujimori for human rights crimes in Lima, Peru deserves more attention than it gets from international public opinion. For this reason, the *American University International Law Review* is to be commended for bringing to its readers an excerpt¹ in English of this remarkable

* Visiting Professor, American University Washington College of Law. Juan E. Méndez is an advisor on crime prevention to the Prosecutor, International Criminal Court, as well as Co-Chair of the Human Rights Institute of the International Bar Association. A native of Argentina, Mr. Méndez has dedicated his legal career to the defense of human rights and has a long and distinguished record of advocacy throughout the Americas, for which he has been internationally recognized. As a result of his involvement in representing political prisoners, the Argentinean military dictatorship arrested him and subjected him to torture and administrative detention for more than a year. During this time, Amnesty International adopted him as a "Prisoner of Conscience." After his expulsion from his country in 1977, Mr. Méndez moved to the United States. Since that time, he has served as the general counsel of Human Rights Watch, the Executive Director of the Inter-American Institute of Human Rights in Costa Rica, and president of the Inter-American Commission on Human Rights of the Organization of American States. Until May 2009 he was the President of the International Center for Transnational Justice ("ICTJ") and in the summer of 2009 he was a Scholar-in-Residence at the Ford Foundation in New York. Concurrent with his duties at ICTJ, the Honorable Kofi Annan named Mr. Méndez his Special Advisor on the Prevention of Genocide, a task he performed from 2004 to 2007. Mr. Méndez was Professor of Law and Director of the Center for Civil and Human Rights at the University of Notre Dame, has also taught international human rights law at Georgetown Law School and at the Johns Hopkins School of Advanced International Studies, and he also teaches regularly at the Oxford Master's Program in International Human Rights Law in the United Kingdom. Mr. Méndez is a member of the bar of Mar del Plata and Buenos Aires, Argentina, and the District of Columbia, U.S., having earned a J.D. from Stella Maris University in Argentina and a certificate from the American University Washington College of Law. Mr. Méndez would like to thank Kavita Kapur and Nayna Malayang for their research assistance.

1. The original Spanish language document constitutes "a selection of paragraphs from the judgment" that the Special Criminal Chamber of the Supreme Court made available to the public shortly after the Court rendered its decision. *The Judgment Against Fujimori for Human Rights Violations*, 25 AM U. INT'L L.

decision. The successful conduct of the trial and the exemplary treatment by Peruvian judges of highly complex issues of criminal law and procedure is pathbreaking in more ways than one. While the decision is a “first” in some significant ways, it is not completely isolated or unique in the arena of global legal developments. In fact, perhaps the most salient feature of the decision is that it reflects a trend amongst democratic states to break the cycle of impunity for major human rights crimes.

Fujimori is not the first former head of State to be prosecuted for human rights violations, but he is probably the first one who was, at the time he committed his crimes, an *elected* head of State and one who enjoyed broad popular support in his time.² In Argentina, Generals Jorge Videla and Roberto Viola, who had been Presidents at different times during the military dictatorship, were convicted and sentenced in the celebrated “trial of the Juntas” in the 1980s.³ But both of them—and their co-defendant Junta members—had seized power by force, not through elections. In addition, their sentences were cut short by Presidential pardons issued a few years later. Videla is back in custody and facing trial for other crimes in the new wave of prosecutions in Argentina, and Viola died on September 30, 1994. Another former head of State, Maria Estela (“Isabel”) Martinez de Peron, is facing trial for crimes committed by paramilitary forces acting under her government before the military coup of 1976.⁴ Peron, who has not yet been convicted, had been elected Vice-President and had assumed the presidency after the

REV. 657 (Aimee Sullivan trans., 2010) [hereinafter *Judgment Against Fujimori*].

2. Joshua Partlow & Lucien Chauvin, *Peru's Fujimori Gets 25 Years*, WASH. POST, Apr. 8, 2009 (“Many people in Peru admire Fujimori for largely defeating the Shining Path insurgency and ending a two-decade war that left about 70,000 people dead.”); see also Oxford Analytica, *Fujimori Ruling Stands*, FORBES.COM, Jan. 8, 2010, available at <http://www.forbes.com/2010/01/07/lima-peru-fujimori-business-supreme-court-oxford.html>.

3. See generally Paula K. Speck, *The Trial of the Argentine Junta: Responsibilities and Realities*, 18 U. MIAMI INTER-AM. L. REV. 491 (1987) (providing background on the trial).

4. *Extradition of Isabel Perón to Argentina Is Rejected by Court*, N.Y. TIMES, Apr. 29, 2008, available at <http://query.nytimes.com/gst/fullpage.html?res=9F03E5D71330F93AA15757C0A96E9C8B63&scp=1&sq=Mar%C3%ADa%20Estela%20Mart%C3%ADnez%20de%20Per%C3%B3n%20extradite&st=cse#> (remarking that Spain’s National Court refused to extradite Perón to Argentina).

death of her husband, Juan D. Peron. In Chile, General Augusto Pinochet was finally stripped of immunity and prosecuted, but he died before the courts could rule on his crimes. In Uruguay, a court recently convicted Jose Maria Bordaberry and his Foreign Minister for human rights crimes committed in the 1970s; but although a civilian, Bordaberry had presided over a military dictatorship and was never elected.

In any event, the fact that Fujimori was elected and popular should not—and did not—shield him from prosecution and trial. In practice, Fujimori had himself run roughshod over the Peruvian Constitution, dissolving Congress and the courts in the infamous “self-coup” of April 5, 1992. He was found responsible for the massacre of civilians in Barrios Altos and the disappearance and murder of students and a professor from La Cantuta University, not for his other violations of the rule of law.⁵ And yet his conviction is an important lesson on what happens to a country when popularly elected leaders turn their mandate into a license for autocracy and break any limit to the exercise of power.

The case against Fujimori was already a landmark in a sense that has mostly been forgotten now: it became possible because the Supreme Court of Chile allowed his extradition to face these charges. After his fall from grace (he had attempted to steal the 2000 elections and his regime entered into a rapid internal decomposition), Fujimori had fled to Japan. Attempts to extradite him from Japan met stiff resistance from the Japanese government that considered him a Japanese citizen. Perhaps in an attempt to make a political comeback in Peru, he had made a surprise landing in Chile, where the courts were considered very conservative on matters of extradition and likely to accept the “political crimes” exception to extradition in his case. In fact, after a well-argued process, the Supreme Court of Chile granted his extradition on all the counts for which he was sought, including the Barrios Altos and La Cantuta episodes and the arbitrary arrest of a journalist and a businessman. Remarkably, during the course of the extradition process the Inter-American Court and Commission on Human Rights had urged all signatories to the American Convention on Human Rights to cooperate with each other

5. *Judgment Against Fujimori*, *supra* note 1, at 834-36, ¶ 823.

in attaining judicial accountability for major human rights crimes. In the past, Latin American judiciaries were more inclined to accept a loose interpretation of the political exception to extradition doctrine, especially when applied to former heads of State. However, beginning in the 1980s, in a climate of change and a trend towards democratization, the Brazilian Supreme Court had granted the extradition to Argentina of Mario Eduardo Firmenich, the head of the Montoneros guerrillas.⁶ The Chilean decision and the positions adopted by the Inter-American organs of human rights protection signal in no uncertain terms that the political character of a criminal offense that constitutes a crime against humanity will be no bar to extradition.

The *Fujimori* case demonstrates that highly charged, politically volatile cases can nevertheless be tried with the most scrupulous respect for fair trial and due process guarantees. I had the privilege of observing some of the early proceedings as President of the International Center for Transitional Justice (ICTJ). Later, ICTJ conducted a year-long trial observation mission involving other colleagues and specially invited jurists, as well as local counsel. The mission observed every aspect of every motion and public hearing and concluded that the three-member panel that conducted the trial had lived up to every major principle of due process of law prescribed in international covenants and recognized by all civilized nations. This applies not only to Fujimori's defense, but also to the representation of victims through "private prosecutors" as allowed in Peruvian law. This is remarkable for a judiciary that did not until then enjoy a high measure of confidence among the citizenry and that had traditionally been relegated by successive governments as a minor branch of government attracting limited resources and unable to retain major legal talent. In fact, during the Fujimori dictatorship the judiciary had been manipulated in the crudest ways and its independence and impartiality were severely undermined. And yet the Peruvian courts showed to the world that self-respecting courts

6. José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints*, 13 *HAMLIN L. REV.* 623, 624, 646-654 (1990) (emphasizing the importance of public disclosure and "knowledge of the truth" in carrying out legitimate prosecutions).

can in fact and in law provide guarantees of fair trial even in the most challenging circumstances.

Readers unfamiliar with the present state of Peruvian politics may be forgiven for thinking that this decision is a form of “victors’ justice,” legitimate on its own terms but only possible because the political winds are now unfavorable to Fujimori. That is not so, and the reality highlights the remarkable achievement of the Peruvian judiciary. It is true that the process of accountability started in 2001 during a period of quick democratization and enthusiasm for human rights. As years have gone by, however, the political fortunes have changed. President Alan Garcia and his Aprista party are no big fans of accountability. In the first place, Garcia himself was President previously in the 1980s, and his period was attended by very severe human rights violations in the context of counter-terrorism campaigns.⁷ In addition, representation in Congress is highly fractured and his own bloc depends heavily on an alliance with the remnants of the Fujimori party. The latter represents roughly 20-25% of the electorate, and Fujimori’s daughter was the highest vote-getter in the most recent elections for Congress; she plans to run for President and actively campaigns on the promise to pardon her father.⁸ In such a political climate, the judiciary enjoys respect (some enthusiastic, some reluctant) from politicians and the press; but it is frequently the target of serious misrepresentations and *ad hominem* attacks.

Fujimori was found guilty of these crimes although he did not materially commit them. The evidence showed they were perpetrated by a clandestine group called “Colina,” consisting of officers and non-commissioned officers of the Peruvian Army. The group was constituted by the high command in an official though secret manner. It functioned through irregular channels but under orders and control

7. Lisa J. LaPlante, *Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru’s Political Transition*, 23 AM. U. INT’L L. REV. 51, 70 (2007) (“The highest number of disappearances and extrajudicial killings [in Peru] were associated with the government of Alan Garcia in the 1980s . . .”).

8. Simon Romero, *Peru’s Ex-President Convicted of Rights Abuses*, N.Y. TIMES, Apr. 8, 2009, at A6, available at <http://www.nytimes.com/2009/04/08/world/americas/08fujimori.html>.

of the high command, at which Fujimori occupied the highest position. In this sense, the court found Fujimori guilty of committing these crimes through the authorship of others; Fujimori's is a "mediated authorship" (*autoria mediata*), i.e., by availing himself of the services of actors willing and able to commit the crimes at his behest. The decision takes pains to point out the specific pieces of evidence that establish this form of responsibility, and to bring to bear precedents in other jurisdictions, including international criminal tribunals. It must be noted, however, that "mediated authorship" is the genre of doctrines under which those giving orders are made responsible for the results of their criminal intent. It is not an issue of instigation or complicity but of authorship. In war crimes, the responsibility of the superior is generally established through the notion of "command responsibility," which attributes to the commanding officer a responsibility for overseeing and controlling subordinates. Since the crime was committed by active duty officers and Fujimori was, in law and in fact, the commander in chief of the Armed Forces, this theory could have been applied to him in these cases. The court, however, chose a more demanding standard and one perhaps more appropriate to the defendant's status as a civilian. The decision finds Fujimori criminally liable under a specific form of mediated authorship: the commission through the use of an organized apparatus of power. The German jurist Roxin is credited with the development of the theory, which he based, among others, on the study of the trials of Eichmann and Staschinsky.⁹ Under this doctrine, Fujimori is "the man standing behind" a structure deliberately set up to commit crimes; he has the control of the event (*dominio del hecho*) and the power to produce the result through his control of the apparatus that is answerable to him.

This was the doctrine applied in 1985 by the Federal Court of Appeals of Buenos Aires in sentencing Videla and other Junta members for the crimes of the "dirty war." It has been applied also by German courts in relation to crimes committed by high officials of the former German Democratic Republic in connection with the enforcement of the Berlin Wall and more recently by the international criminal courts for the former Yugoslavia and Rwanda.

9. See *Judgment Against Fujimori*, *supra* note 1, at 803-04, ¶ 725.

Interestingly, it had been applied only a few months earlier by another Peruvian court that had found Abimael Guzman, the leader of Sendero Luminoso, guilty of crimes committed by his subordinates. In its decision on Fujimori, the Court established that the doctrine requires several items of factual foundation, all of which are amply documented in connection with the evidence on record: (1) the existence of the organization, in this case the *Grupo Colina*; (2) the “automatic” or “mechanical” functioning of the enterprise so that the leader can expect the result without having to impart a specific order; (3) the functional requirement of a specific power to command and expect obedience; (4) the separation of the organization from the application of the law; (5) the fungible nature of those occupying the operative positions in the apparatus so that Fujimori could expect his order to be performed by these or by other members of the group; and (6) the very high disposition on the part of the operatives to perform the illegal orders they received.¹⁰ It can be readily perceived that this doctrine requires a very detailed gathering and analysis of evidence that is made all the more complex because the apparatus is precisely set up to provide plausible deniability. In fact, clandestineness and denial are of the essence of the crimes of State. For that reason, the decision is all the more impressive because it so persuasively demonstrates the existence of all the elements of Fujimori’s responsibility in the commission of “system crimes” of this nature.

So far we have very rightly lauded the Peruvian judiciary for this remarkable achievement. It is worth noting that it might have never been possible without the contribution of many other persons and institutions in Peruvian society and beyond. The human rights organizations of Peru mobilized public support for the trial and marshaled legal resources in facilitating access by the families of the victims of La Cantuta and Barrios Altos. Much earlier, however, they had presented a formidable challenge to authoritarianism and criminal violence even while under attack from the State and from Sendero Luminoso alike. At the beginning of the current democratic stage, they contributed enormously to the success of another major institution of accountability, the Truth and Reconciliation

10. *Id.* at 802-280.

Commission (“TRC”), which produced a ground-breaking report in 2003. Although most of the recommendations in that report remain unimplemented, the strength of its findings continue to dominate the debates about the years of “dirty war” in Peru, and provide a basis for what can no longer be denied on ideological or political grounds. The report of the TRC and the Fujimori decision should stand as the crowning achievement of the efforts of Peruvian civil society to reckon with a painful past in ways that consolidate democracy and the rule of law.

The readers of *American University International Law Review* have before them the executive summary of the decision of the three-judge panel that sat as a special criminal section of the Peruvian Supreme Court. It conducted the trial over more than a year of open hearings. It is worth noting that last December the conviction was affirmed by a five-member appellate panel of the Supreme Court in a unanimous decision.¹¹ The Supreme Court additionally affirmed the penalties imposed for each of the counts, amounting to a twenty-five year prison sentence.¹²

With this groundbreaking case, the Peruvian judiciary makes an invaluable contribution to the growing trend in domestic and in international jurisdictions to ensure that war crimes and crimes against humanity are not allowed to go unpunished. This is an imperative of international law in effect since Nuremberg. Only in recent decades, however, have there been deliberate efforts to make it a reality. To be sure, the path towards accountability will never be smooth or consistent. There will be inordinate pressures to reverse these gains and to reward torturers and murderers in the name of a misunderstood “national reconciliation” or because of the belief that the necessity of peace should always trump justice. That is why it is of the most urgent priority to analyze the Fujimori decision, to disseminate it and discuss it, and to insist that others in different parts of the world borrow a page from Peru and take on the hard task of redressing human rights violations through accountability.

11. *Analytica*, *supra* note 2.

12. *Id.*