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CHILE

Fujimori Case: the Supreme Court of Justice must comply with obligations of international law contracted by Chile

I. INTRODUCTION

On 11 July 2007, Chilean Supreme Court Judge Orlando Álvarez Hernández ruled on the extradition request made by Peru with regard to its former president, Alberto Fujimori. As is well known, Judge Álvarez rejected the request in relation to the twelve cases on which it was based. Two of the twelve cases in particular related to serious human rights violations: the "Sótanos SIE" and "Barrios Altos-La Cantuta" cases.

Amnesty International considers that Judge Álvarez' decision, which is currently pending appeal in the Criminal Chamber of the Supreme Court, is defective and mistaken, as it fails to take into account – among other things — obligations of international law that are binding upon Chile.

Amnesty International is confident that the Supreme Court will come to a very different conclusion and will order the extradition of Alberto Fujimori to Peru. It should be noted that the Chilean Supreme Court has established high standards of human rights protection on a number of occasions, basing its rulings not only on conventional law but also on customary international law. Nonetheless, should the Supreme Court decide, for any reason, to refuse to extradite him to face serious human rights charges, it is required under international law to submit the case for investigation and, where there is sufficient admissible evidence, prosecution through the Chilean courts, in accordance with the principle of *aut dedere aut judicare* (extradite or prosecute). Such referral to the local courts, as explained below, would need to take place with all guarantees of due process, including Alberto Fujimori's right to the presumption of innocence.

II. THE RULING OF JUDGE ALVAREZ AND ITS FAILURE TO OBSERVE INTERNATIONAL LAW

A) Refusal to extradite due to the statute of limitations for criminal offences

In section 98 of his decision Judge Orlando Álvarez concludes that, for the cases in Extradition File No.14-05 ("Sótanos SIE"), the requirements of the bilateral extradition treaty, the Bustamante Code and Chilean law are satisfied with regard to extradition. He acknowledges that Peru has jurisdiction to try the crimes that are the grounds for the request and that the requirement for dual criminality of the charges is also met. The Judge also adds

that all crimes in the file are subject to a sentence greater than that demanded by the treaty; that they are not political crimes; that they have not been tried previously in Chile and that they have not formed the object of an amnesty or pardon. Finally, the Judge finds that all necessary requirements have been duly fulfilled. However, in section 104 of his decision, Judge Álvarez argues that although the background to the case enables the kidnappings of Gustavo Gorriti and Samuel Dyer to be incontrovertibly proven, "criminal action is however subject to statutory limitations" and without further explanation refuses extradition in relation to the said kidnappings.

Judge Álvarez' assertion on the statutory limitation period for these crimes is unfounded and in contravention of international law.

Over the period 1990 to 2000, Amnesty International gathered incontrovertible evidence enabling it to state that the crimes committed in Peru by agents of the armed and security forces and individuals operating with their consent, tolerance or acquiescence in the context of suppressing the actions of Shining Path (*Sendero Luminoso*) and other armed opposition groups were crimes under international law. The serious deprivation of the physical freedom of Gustavo Gorriti and Samuel Dyer, committed within the context of generalised and systematic attacks against the civilian population, makes these kidnappings crimes against humanity[1] and hence requires application of the appropriate standards, namely international law.

In addition, the assertions of Judge Álvarez with regard to the suspension or expiry of statutory limitation periods, also made in the case of Extradition File No.15-05 (Barrios Altos-La Cantuta cases), are unfortunate. Such assertions might be appropriate if it was a matter of assessing the applicability of this procedure to common crimes, specific to national legislation, but they are mistaken when applied to crimes under international law, which by virtue of their nature are not subject to statutory limitations. In fact in such cases, where the interests of the international community as a whole are impaired, as in the case of genocide, crimes against humanity, war crimes, torture, enforced disappearance and extrajudicial executions, states are obliged to investigate and bring those allegedly responsible to justice. This obligation – that of investigating and prosecuting serious human rights violations – is an obligation imposed on states by conventional international law and is already a customary rule that has the consequence, among other things, of making it impossible to rely on national law to avoid this obligation. This has been repeatedly recognised in the jurisprudence of international courts and the national courts of other states in the region. A few examples follow, merely by way of illustration.

[1] Article 7(1)(e), Rome Statute of the International Criminal Court. Chile has been a signatory since 11 September 1998. To date, 105 states have ratified the Rome Statute.

In 2001, the Inter-American Court of Human Rights, in the now famous *Barrios Altos* case, concluded that "serious human rights violations" were not subject to statutory limitations. The Court held:

> This Court considers inadmissible the provisions for amnesty or statutory limitation periods and the establishment of exemptions from responsibility that attempt to impede the investigation and punishment of those responsible for serious human rights violations such as torture, summary, extrajudicial or arbitrary executions and forced disappearances, all prohibited because they contravene inalienable rights recognised in international human rights law.[2]

In 2002, in the case of *Trujillo Oroza v. Bolivia*, the Inter-American Court of Human Rights repeated its conclusion in the case of *Barrios Altos* with regard to the non-applicability of statutory limitations to acts related to the investigation and prevention of serious human rights violations.[3]

One year later, the Inter-American Court extended this prohibition on statutory limitations to "human rights violations" in a case against Argentina. In *Bulacio*, the Court stated:

> With regard to the stated applicability of a statute of limitations to the case pending in domestic law, this Court has indicated that the stipulation of statutory limitation or any obstacle of domestic law that attempts to prevent the investigation and punishment of those responsible for human rights violations is inadmissible.[4]

In 2005, in the case of *Blanco Romero v. Venezuela*, the Inter-American Court of Human Rights reaffirmed once more that,

> "as the Court has indicated in its ongoing jurisprudence, no law or provision of domestic legislation - including amnesty laws and statutes of limitations - can prevent a State from complying with an order from the Court to investigate and punish those responsible for human rights violations. In particular, amnesty provisions, rules for

[2] Inter-American Court of Human Rights, *Barrios Altos* case (*Chumbipuma Aguirre and others vs. Peru*), ruling of 14 March 2001, para.41 (unofficial translation).

[3] *Trujillo Oroza v. Bolivia*, Ruling against Reparations dated 27 February 2002, para.106.

[4] Inter-American Court of Human Rights, case of *Bulacio v. Argentina*, Ruling of 18 September 2003, para.116 (unofficial translation). And also the case of the *Gómez Paquiyauri Brothers vs. Peru*, ruling of 8 July 2004, para.151.

> statutory limitation periods and the establishment of exemptions from responsibility that attempt to impede the investigation and punishment of those responsible for serious human rights violations – such as, in this case, enforced disappearances - are inadmissible as these violations are in contravention of inalienable rights recognised by international human rights law".[5]

The jurisprudence of the region's national courts has followed much the same approach.

Some years before Argentina became a state party to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the country's courts had already established the non-applicability of statutory limitations to genocide, crimes against humanity and war crimes.

In the *Schwamberger* case, regarding an extradition request made in 1972 by a Stuttgart court, the La Plata Federal Court of Appeals found that, in accordance with international law, the crimes this person was accused of were not subject to a statutory limitation period. In its ruling, the federal court decided that the Argentine State had to recognise the primacy of international law and that, in this regard, "crimes against humanity are not subject to a statute of limitations".[6]

In 1995, in the *Priebke* case[7] in which Italy called for the extradition of a German citizen for crimes committed during the Second World War – the deaths of 225 people in the "*Fosse Ardeatine*" -, the Argentine Supreme Court decided to grant the extradition, stating the non-applicability of statutory limitations was no bar. In its ruling, the Court overturned a previous ruling of a federal appeals court which had found that, given that they were not codified in the criminal law at that time, the crime for which Priebke's extradition was requested was merely the common crime of murder under Argentine law, and thus subject to a statutory limitation period, in application of the respective Criminal Code rules. The Supreme Court overturned this decision stating that although genocide, crimes against humanity and war crimes were not at that time specifically codified in Argentine criminal legislation, as a state party to the Convention on Prevention and Punishment of the Crime of Genocide and the

[5] Case of *Blanco Romero and others v.* Venezuela, Ruling of 28 November 2005, para.98.

[6] "*J.F.S.L. s/ Extradición"*, La Plata Federal Court (Division III), ruling of 30 August 1989, in: Revista El Derecho, 135-326, Buenos Aires, 1990, para.50 of the opinion of Judge Leopoldo Schiffrin.

[7] Supreme Court of Justice of the Nation, P. 457. XXXI, R.O., "*Priebke, Erich s/ solicitud de extradición"*, case No.16.063/94 dated 2 November 1995. See: José Alejandro Consigli, "The *Priebke* case before the Argentine Supreme Court", 1 YHIL (1998) 341 at 344 and Raúl Emilio Vinuesa, Lecciones y Ensayos, Gabriel Pablo Valladares (compiled by), La Aplicación del Derecho Internacional Humanitario por los Tribunales Nacionales: a propósito del caso "Priebke", p.311-347.

Geneva Conventions of 12 August 1949, Argentina had recognised the criminal nature of such conduct. A majority of the Court also found that "classification as a crime against humanity is not dependent upon the wishes of the petitioning or petitioned States in the extradition process but upon the principles of *jus cogens* in international law" and ruled the non-applicability of statutory limitations to these crimes, on the basis of international custom and general principles of international law.[8] This was the conclusion reached by the Supreme Court, despite the fact that the statutory limitation period in the Criminal Code for the murders for which Erich Priebke was accused had already been far exceeded.

Some years later, in the *Arancibia Clavel*[9] case in which the statute of limitation for the murder of the Chilean General Carlos Prats in Buenos Aires was considered, the Argentine Supreme Court asserted that the ban on non-retroactivity of criminal law did not apply with respect to the retrospective application of the non-applicability of statutory limitations, as this constituted a rule of customary international law that was already in force when the acts were committed in 1974.[10] The Supreme Court found that the 1968 Convention, which was not in force in Argentina at the time the murder took place but was when the ruling was passed, was merely of declaratory effect and did no more than affirm an already existing principle in international law. Subsequently, the Supreme Court reiterated this interpretation

[8] Recitals 4 and 5 of the ruling of 2 November 1995. In contrast, a minority of the court believed that the crime Priebke was accused of was murder, as defined in the Argentine Criminal Code and, consequently, subject to a statutory limitation period.

[9] Supreme Court of Justice of the Nation, A. 533. XXXVIII, Appeal on points of fact, *"Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros",* causa No.259, dated 24 August 2004. See also: Federal Court No.1, Sec. No.2., record Nº 19.338 , ruling of 18 December 2001 in Case No.18.062 "*Espinoza Bravo, Pedro Octavio s/ procesamiento*", ("The reference to this concept [enforced disappearance of persons] must obviously be considered in the category of crimes against humanity, which this Court has recognised in the case, and as such is not subject to a statute of limitations"). National Federal and Correctional Court of the Capital, 7 August 2003, "*Santiago Omar Riveros*, ("evolutions in law have led to substantial modifications through the incorporation of international law into the considerations of each nation's domestic law and, in line with this, crimes against humanity are undoubtedly not subject to a statutory limitation period"). National Federal Criminal and Correctional Court No.8, caso No.11.807/05, ruling of 10 January 2006, "*Milan Lukic s/ capturat*" ("Moreover, it must be noted that both crimes against humanity and violations of the law and customs of war are, for the whole international community, not subject to a statute of limitations").

[10] Recital 28 of the "Arancibia Clavel" ruling and 33 ("*Whereas consequently the actions for which Arancibia Clavel was sentenced were already not subject to a statutory limitation period in international law when they were committed, and so retroactive application of the Convention is not taking place* (...)".)

in the "*Simón*" case, in which it also concluded that people suspected of having committed crimes under international law could not benefit from the amnesty laws.[11]

For its part, the Bolivian Supreme Court, in the case known as *Masacre de la calle Harrington* in 1981 in La Paz, found former de facto presidents Luis García Meza and Luis Arce Gómez and others responsible, and asserted the non-applicability of statutory limitations to the crime of genocide and crimes against humanity, thus rejecting the defence of the accused.[12]

In Costa Rica, two rulings of the Constitutional Chamber of the Supreme Court of Justice illustrate this point. In 1996, when ruling on the mandatory consultation of constitutionality formulated in relation to the Inter-American Convention on Forced Disappearance of Persons, which includes a ban on the application of statutory limitations, the Constitutional Chamber concluded that the crime of enforced disappearance of persons constituted a crime against humanity and thus had to be exempted from the general rules on statutory limitations applicable to common crimes. It further stated that the non-applicability of statutory limitations "is not unreasonable in response to the codification of this category of crime".[13] This opinion was repeated in identical terms by the Constitutional Chamber four years later when issuing its ruling on the constitutionality of the Rome Statute of the International Criminal Court.[14]

In the case of *Heliodoro Portugal,* the Supreme Court of Justice of Panama concluded in 2004 that the forced disappearance of Heliodoro Portugal, which took place in 1970, was

[11] CSJN, S. 1767 XXXVIII, recurso de hecho, *"Simón, Héctor Julio y otros s/ privación ilegítima de la libertad",* causa No.17.768, dated 14 June 2005.

[12] Supreme Court of Justice of the Nation, Ruling given in the liability trials brought by the Department of Public Prosecution and contributors against Luis García Meza and his collaborators, 21 April 1993, Sucre – Bolivia. www.derechos.org/nizkor/bolivia/doc/meza.html ("Given that genocide was always considered a crime against humanity not subject to statutory limitations, according to the UN Convention dated 27 November 1968, the UN having declared it punishable, moreover, conspiracy to commit crimes against humanity, their direct and public incitement, attempted crimes against humanity and complicity . . .").

[13] Constitutional Chamber of the Supreme Court of Justice, Exp.6543-S-95, Vote No.0230-96, dated 12 January 1996, para.II (b) (2). Available at: http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&nValor1=1&nValor2=83830&strTipM=T&strDirSel=directo

[14] Constitutional Chamber of the Supreme Court of Justice, File 00-008325-0007-CO, Res. 2000-09685, dated 1 November 2000, para.VI. The ruling is available at: http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=1&nValor1=1&nValor2=141162&strTipM=T&lResultado=3&strLib=LIB

not subject to statutory limitations. The Supreme Court based its decision on both domestic and international law. It thus noted the provisions of the 1922 Criminal Code in force at that time; the fact that - at the time of Heliodoro Portugal's disappearance - a political regime was governing the country that prevented free access to justice; and Panama's position as state party to the Inter-American Convention on Forced Disappearance of Persons, which establishes the non-applicability of statutory limitations to this crime. In addition, the Supreme Court stated:

> "Hence the importance and the right of society to know what happened to the people who disappeared from around them, as a consequence of their political ideas. Thus in this regard, under no circumstances can criminal principles such as the principle of legality and non-retroactivity of criminal laws apply"[15]

At the start of 2007, with the old Criminal Code that established a statutory limitation period for all crimes still in force, the Panamanian Supreme Court reaffirmed its conclusion in the case of *Cruz Mojica Flores,* in which the statutory limitation period for a murder committed in 1968 was considered. The Court concluded that the perpetrators of this crime knew at the time that the murder they were committing was just one more crime within the generalised wave of crimes being committed against political opponents in Panama and thus rejected the defence of a statutory limitation period put forward by the defence counsel. In so doing, it stated that the murder of Mr. Mojica Flores constituted a crime against humanity and thus "it was bound to declare the criminal action in this type of crime as not subject to statutory limitations".[16]

In Paraguay, in the *Duarte Vera* case, a Judge at the Asunción Lower Court rejected the defence of a statutory limitation period offered by the accused, a former Chief of Police during the time of Alfredo Stroessner, stating that: "The prohibition on torture and other cruel, inhuman or degrading treatment now forms an imperative norm in international law" and he concluded that statutory limitations did not apply in this regard. The judge also rejected a statutory limitation period for the remaining charges, including attempted murder and the unlawful deprivation of freedom. It should be noted that all the crimes of which Duarte Vera

[15] Appeal lodged by the Third Higher Public Prosecutor's Office against the decision dated 13 June 2003 pronounced by the Second Higher Court of the First Judicial District. Deponent: César Pereira Burgos. Panama, 2 March 2004 (unofficial translation). Available at: http://bd.organojudicial.gob.pa/registro.html

[16] Corte Suprema de Justicia, Sala Segunda de los Penal, Expediente 636-E, Ruling dated 26 January 2007. Deponent: Aníbal Salas Céspedes.

was accused were committed prior to the adoption of a constitutional clause prohibiting a statutory limitation period for certain crimes.[17]

In Peru, for its part, in the *Genaro Villegas Namuche* case – where the enforced disappearance of this person was being investigated – the Peruvian Constitutional Court stated:

> A knowledge of the circumstances in which human rights violations were committed and, in the case of death or disappearance, the fate of the victim, by their very nature cannot be subject to statutory limitations. People directly or indirectly affected by a crime of this magnitude always have the right to know, however much time may have lapsed since the date when the crime took place, who the perpetrator was, where and when the crime took place, how it was caused, why, where the remains are to be found, and so on.

In addition, the Court declared:

> "It is for the State to bring to justice those responsible for crimes against humanity and, if necessary, adopt restrictive measures to avoid, for example, the statutory limitation of crimes that are in serious violation of human rights. The application of these rules ensures the effectiveness of the legal system and is justified by the prevailing interests of the war on impunity".[18]

Finally, it should be noted that jurisprudence in Chile – even prior to the ruling of the Inter-American Court in the case of *Almonacid Arellano* – rejected statutes of limitations for crimes under international law.

In 2004, the Santiago Appeals Court, in the *Sandoval* case, found that the kidnapping in 1975 of Miguel Ángel Sandoval by intelligence (DINA) officers was not subject to a statutory limitation period as this crime was a continuing crime and had still not ceased. In addition, the Court indicated that as Chile was a signatory State to the Rome Statute and a party to the Vienna Convention on the Law of Treaties, it was required not to defeat the object

[17] *Ramón Duarte Vera s/ homicidio frustrado, torturas, privación ilegítima de la libertad y otros*, 29 October 1997, Juez Bogarín González (copy of the decision in Amnesty International's files).

[18] Corte Constitucional, caso *Genaro Villegas Namuche*, File N°2488-2002-HC/TC, Ruling of 18 March 2004 paras 9 and 23 respectively (unofficial translation).

and purpose of these treaties; in other words, it had a duty to prevent the impunity of certain crimes.[19]

Two years later, in a case in which the disappearance in 1973 of twelve collaborators and advisors to President Salvador Allende was being investigated, the Santiago Appeals Court found that: "the non-applicability of statutory limitations to crimes against humanity is now emerging as an important norm in general international law (*ius cogens*)". This Court also found that, as Chile was a State Party to the Vienna Convention on the Law of Treaties, it had to recognise "the primacy of international law over domestic law, being unable to invoke any legitimate reason to ride roughshod over the fulfilment in good faith of the contracted obligations".[20]

For its part, in 2006, in the ruling on the *Villa Grimaldi* case regarding the withdrawal of legal immunity from Augusto Pinochet, accused of crimes under international law, the Supreme Court of Chile concluded that the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, to which Chile is not yet a State Party, was of declaratory and not constitutive effect.[21] Two months later, the Supreme Court repeated its opinion in the case of *Fundo Molco*, in relation to the murders of Hugo Rival Vázquez Martínez and Mario Edmundo Superby Jeldres, committed a day after the 1973 military coup, considering that such crimes – having been committed in the context of an internal armed conflict – in actual fact constituted war crimes and were thus not subject to a statutory limitation period. In arriving at this conclusion, the Court considered that the non-applicability of statutory limitations to crimes against humanity and war crimes was

> "a universally accepted principle, which the Convention in reference was limited to stating as a simple formal expression of pre-existing customary norms".

[19] Fifth Chamber of the Santiago Appeals Court, Roll Nº 11.821-2003, 5 January 2004, para.76 ("Whereas, by virtue of the above, and the fact that the crime of kidnapping is of a continuing nature, having extended over time, the application of the stated Amnesty Law is not appropriate in the proceedings as this refers to crimes committed during the period in question, i.e. between 11 September 1973 and 10 March 1978; nor is the statutory limitation period for criminal action applicable, as the consequences of the illegal action have not ceased for the victim, who is still disappeared") (unofficial translation).

[20] Fifth Chamber of the Santiago Court of Appeals, Roll Nº 24.471-2005, 10 April 2006, sections 11 and 16, respectively.

[21] Corte Suprema de Justicia, *Villa Grimaldi* case, 3 October 2006 ("This Convention has been in force internationally since 11 November 1970, and Chile has signed but not yet ratified it; however, this does not prevent it from being observed that the preliminary recitals note that the convention is of declaratory rather than of constitutive effect...") (unofficial translation).

The Court also emphasised that the non-applicability of statutory limitations to war crimes and crimes against humanity was of "[i]nternational effect, regardless of the entry into force or not of the text [of the 1968 Convention] containing it and even with regard to States that do not form part of the treaty".[22]

This assertion on the part of the Supreme Court enjoys solid backing. The International Committee of the Red Cross, in concluding its lengthy study into norms of customary international law, confirmed the existence of a rule of this nature that prevents the application of statutory limitations for war crimes.[23]

In conclusion, the Court should find that both the kidnappings of Messrs. Gorriti and Dyer, and the crimes included in the Barrios Altos and La Cantuta cases, are not subject to statutory limitations as they constitute – having been committed in the context of a generalised and systematic attack against the civilian population – crimes against humanity.

b) The refusal to extradite through lack of incontrovertible evidence proving Alberto Fujimori's criminal responsibility

In his decision, Judge Álvarez stated repeatedly that Alberto Fujimori's individual criminal responsibility was not incontrovertibly proven. In section 103 of his decision, the judge states that "[t]here is no witness who states having received a direct order from the president [Fujimori] or having witnessed him issuing such an order personally". He also states that the background on which the extradition request is based "is established solely on the basis of indirect testimonial proof or hearsay, an examination of which shows a lack of immediacy and certainty".[24]

Judge Álvarez arrives at a similar conclusion regarding the extradition file on the Barrios Altos-La Cantuta case. In fact, there he states that

> "[w]ith regard to the first of the allegations, that is, the alleged relationship between Fujimori and the Colina group, it has been established in these proceedings that the military actions that resulted in these criminal acts cannot in any circumstances have been authorized far less known by the defendant.

[22] Corte Suprema de Justicia, Sala Segunda, rol N° 559-04, ruling dated13 December 2006.

[23] Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules, ICRC, Cambridge, p.614 (Rule 160. "Statutes of limitation may not apply to war crimes").

[24] Section 102.

These statements on the part of Judge Álvarez are surprising.

Firstly, because this value judgement on the part of the Judge should only have been reached following an open and thorough criminal trial in which the parties were able to make known to the judge a wide range of probative measures, and not in an extradition process where probative measures are necessarily limited. In any case, these must be sufficient to demonstrate the existence of a founded, reasonable and credible assumption of criminal responsibility and it is not feasible to demand – as the Judge has done – sufficient proof for sentencing of the accused, which is not the purpose of an extradition proceeding, but is essential to a criminal prosecution in which the individual criminal responsibility of the defendant is determined.

Secondly, it is noteworthy that Judge Álvarez has failed to make any reference here to the Bustamente Code, which is of supplementary application in the case, and which establishes that, with the final request for extradition, the petitioning State must provide "at least rational indications of the guilt of the person in question" and no more.[25]

Thirdly, the assertion that "[i]t has been established in these proceedings that the military actions that resulted in these criminal actions cannot in any circumstances have been authorized far less known by the defendant" seems disregard a fundamental principle of international law – as rightly observed by Chilean Supreme Court Prosecutor, Ms Mónica Maldonado Croquevielle in her ruling of 7 June of this year -, namely command responsibility. This is a serious omission as it constitutes a norm that is established in customary law and reflected in different conventional instruments to which Chile is a state party in some cases and a signatory in others, as shown below, and is fully applicable to this extradition case.

Chile has recognised the binding nature of this principle – applicable both to military superiors and to heads of state, senior civil servants and political leaders[26] - in a number of conventional instruments. For example, the Protocol Additional to the Geneva Conventions of 12 August 1949 on Protection of Victims of International Armed Conflicts (Protocol I)[27] states:

[25] Bustamante Code, article 395(1). Chile is a state party to the Code of Private International Law since 6 September 1933.

[26] W. Fenrick, in: O. Triffterer (ed.), Commentary on the Rome Statute (1999), article 28, margin Nos. 4 and 16. See also Kai Ambos, La Parte General del Derecho Penal Internacional, Konrad Adenauer-Stiftung, p.295-334.

[27] Chile has been a state party since 24 April 1991. There are currently 167 states parties to this Protocol.

> "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."[28]

The Rome Statute of the International Criminal Court, to which Chile is a signatory, establishes that both military and non-military superiors are criminally responsible for crimes that fall within the jurisdiction of the Court (genocide, crimes against humanity and war crimes] and which have been committed by subordinates under their effective command and control, as the case may be, by virtue of not having exerted appropriate control over these subordinates when they knew, or by virtue of the circumstances at the time had reason to know, that the subordinates were committing these crimes or intending to commit them and they did not take necessary and reasonable measures within their power to prevent or repress their commission or make the issue known to the relevant authorities for the purposes of investigation and prosecution.[29]

Chile was one of the first signatories of the recently adopted International Convention on the Protection of all Persons from Enforced Disappearance, which contains a specific rule in this regard. This Convention states that:

> The States Party shall take the necessary measures to consider criminally responsible at least:
>
> a) Any person that commits, orders, or encourages the commission of a forced disappearance, attempts to commit it, is an accomplice or participant in the same.
>
> b) Any superior who:
>
> i) Knew that the subordinates under his effective authority and control were committing or intending to commit a crime of forced disappearance, or consciously ignored information clearly indicating this;
>
> ii) Exerted his effective responsibility and control over the activities to which the crime of forced disappearance was related; and
>
> iii) Did not take all reasonable and necessary measures within his power to prevent or stop the forced disappearance from being

[28] Article 86 (2), Protocol I. See also the obligations imposed on military commanders by article 87.

[29] Article 28, Rome Statute of the International Criminal Court.

committed, or make the action known to the competent authorities for the purposes of their investigation and prosecution.

In addition, the Statute of the International Criminal Tribunal for the Former Yugoslavia[30] and the Statute of the International Criminal Tribunal for Rwanda, both established by the UN Security Council, contain express provisions on command responsibility, in a similar manner to that already indicated.[31] The Statute of the Special Court for Sierra Leone,[32] established by virtue of an agreement reached between the UN and the government of Sierra Leone, and the recently adopted Statute of the Special Tribunal for Lebanon,[33] contain similar provisions on command responsibility.

The jurisprudence of the international tribunals concurs in indicating that command responsibility on the part of a military or non-military superior "is a well-established principle of conventional and customary law".[34] This assertion has also been confirmed in the

[30] Statute of the International Criminal Tribunal for the former Yugoslavia, Res.827 (1993) adopted 25 May 1993, S/RES/827 (1993), Article 7 (Individual criminal responsibility) ("3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof").

[31] Statute of the International Criminal Tribunal for Rwanda, Res.955 (1994), adopted by the Security Council on 8 November 1994, Article 6 (individual criminal responsibility) ("3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.")

[32] Statute of the Special Court for Sierra Leone (Article 6, individual criminal responsibility, ("3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof"). Available at: www.sc-sl.org/scsl-statute.html

[33] Resolution 1757 of the Security Council dated 30 May 2007, Article 3 (2), individual criminal responsibility.

[34] For example, see rulings of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Delalic* case (20 February 2001, para.195) and the rulings of the First Chamber in *Brdjanin* (1 September 2004, para.275) and *Stakic* (31 July 2003, para.458). For an analytical digest of the jurisprudence in this regard, see Human Rights Watch, Genocide, War Crimes and Crimes against Humanity: a topical digest of the case law of the ICTY, p.446-502.

aforementioned study of the International Committee of the Red Cross, which found that the principle establishing that commanding officers and other superiors are criminally responsible for crimes committed by their subordinates - under the terms already explained - forms a norm of customary international law.[35]

Moreover, recently, the Trial Chamber of the Special Tribunal of Sierra Leone not only confirmed the principle of command responsibility in customary international law, but also held that it was not of the utmost necessity to identify the actual perpetrators, but it was sufficient to identify the subordinates as belonging to a unit or group controlled by a superior.[36]

Naturally, the factual points relating to this judicial institution must be widely debated and proven beyond all reasonable doubt in a criminal trial properly speaking and not in the limited and restricted context of an extradition case.

For Amnesty International, the above analysis demonstrates that it is possible to conclude that a former president, who was commander-in-chief of the national armed forces, could be held responsible, at least under principle of command responsibility, for crimes under international law perpetrated by his subordinates and which form the object of the current extradition request.

In conclusion, although Amnesty International takes no position with regard to the accusations being made against ex – President Alberto Fujimori, it believes that if the factual allegations in the extradition request are proved, he could be held criminally responsible for the crimes committed by the armed forces under his effective command and control, having allegedly failed to exert adequate control over his subordinates when – allegedly – he knew or, by virtue of the circumstances at that time had reason to know, that Peru's armed and security forces were committing those crimes or intending to commit them and he did not adopt all necessary and reasonable measures within his power to prevent or repress their commission. Former President Alberto Fujimori enacted the amnesty that guaranteed impunity for those who actually committed the crimes forming the object of this extradition process. Of course, Alberto Fujimori is presumed innocent unless and until his individual

[35] Henckaerts and Doswald-Beck, supra, note 23, p.558, Rule 153.

[36] Special Court for Sierra Leone, Trial Chamber II, Case No. SCSL-2004-16-T, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, 20 June 2007. (782. The principle that an individual may be held responsible as a superior [for crimes committed by subordinates] in the course of an armed conflict is enshrined in customary international law) (790. Identification of the principal perpetrator, particularly by name, is not required to establish a superior-subordinate relationship. It is sufficient to identify the subordinates as belonging to a unit or group controlled by the superior). Available at www.sc-sl.org/AFRC.html

criminal responsibility is incontrovertibly proven, beyond all reasonable doubt, in a criminal trial.

c) The duty to extradite or prosecute (aut dedere aut judicare): inexplicably omitted from the Ruling of Judge Álvarez

Since its first public statement on the issue, Amnesty International has emphasised the obligation that Chile has under international law to extradite Alberto Fujimori to Peru or submit him to the authority of its own courts for the purposes of investigating the serious accusations made against him.

Indeed, a number of international instruments to which Chile is a party have imposed this duty on it for half a century now. The Geneva Conventions of 12 August 1949, to which there are 194 states parties, including Chile, and which undoubtedly reflect customary law in this regard, state that:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which is legally binding with regard to the acts of torture that form the object of this extradition request, states that:

> The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 ["all acts of torture"] is found (...) shall, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.[37]

The Inter-American Convention to Prevent and Punish Torture contains a similar provision. It states that:

> When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the crime had been committed within its

[37] Article 7(1), Convention against Torture and other Cruel, Inhuman or Degrading Treatment A.G. res. 39/46, annexe, 39 U.N.GAOR Supp. (No. 51) p. 197, UNO Doc. A/39/51 (1984), entry into force 26 June1987. Chile has been a state party to the Convention since 30 September 1988.

> jurisdiction, for the purposes of investigation, and when appropriate, for criminal action, in accordance with its national law.[38]

In the *Furundzija* case, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia indicated that torture could not be subject to statutory limitations and that its perpetration empowers any state to bring the people responsible for this crime to justice through their own courts, if they choose not to extradite them.[39]

The Inter-American Convention on the Forced Disappearance of Persons – to which Chile is a signatory Party – prohibits this crime, which is also the object of the extradition request in question, stating:

> When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the offence had been committed within its jurisdiction, for the purposes of investigation and when appropriate, for criminal action, in accordance with its national law.[40]

For its part, the aforementioned International Convention for the Protection of all Persons from Enforced Disappearance similarly provides:

> The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal

[38] Article 14, Inter-American Convention to Prevent and Punish Torture, adopted in: Cartagena de Indias, Colombia, 9 December 1985. Entry into force: 28 February 1987. Chile has been a state party since 30 September 1988.

[39] ICTY, Trial Chamber, *Prosecutor v. Anto Furundzija*, 10 December 1998 ("156. Furthermore, at the individual level, that is, that of criminal responsibility, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction (...) 157. It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption").

[40] Article VI, Inter-American Convention on the Forced Disappearance of Persons, adopted in Belém do Pará, Brazil on 9 June 1994. Entry into force: 28 March1996. Chile signed this instrument on 10 June 1994.

tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.[41]

In the same way, distinguish scholars agree with this view. For example, Professor M. Cherif Bassiouni has maintained that: "The fact of recognising some international crimes as belonging to the category of *jus cogens* entails a duty to prosecute or extradite, the non-applicability of statutory limitations plus universal jurisdiction over such crimes, regardless of where they may have been committed, the identity of the perpetrator (including heads of state), the category of victim or the context in which they are perpetrated (wartime or peacetime)".[42]

The *Institut de Droit International*, in its Krakow resolution in 2005, expressly recalled that exercise of the principle of *aut dedere aut judicare* was of customary origin and also noted in multilateral conventions.[43]

For its part, Chile – in fulfilment of the provisions of Resolution 61/34 of the UN General Assembly of 4 December 2006 in which, among other things, governments were invited to provide the International Law Commission with information on legislation and practices related to the issue of "The obligation to extradite or prosecute (*aut dedere aut judicare*)" - produced a detailed report on the subject.

Chile informed the UN International Law Commission – as did a number of other states - that there was a long list of regional conventional instruments imposing the duty to extradite or prosecute on it. Amongst these, Chile expressly recognised the Convention on Extradition, signed in Montevideo on 26 December 1933, enacted by Supreme Decree No. 942 of the Ministry of Foreign Affairs, dated 6 August 1935, Official Gazette of 19 August 1935 (with the following states parties: Argentina, Chile, Colombia, Ecuador, El Salvador, United States of America, Guatemala, Honduras, Mexico, Nicaragua, Panama and the Dominican Republic (art. II)) and the aforementioned Code on Private International Law

[41] Article 11(1), International Convention for the Protection of all Persons from Enforced Disappearance. Chile signed this convention on 6 February 2007.

[42] M. Cherif Bassiouni, in *Represión Nacional de las Violaciones del Derecho Internacional Hum*anitario, International Committee of the Red Cross, 1998, p.30 (unofficial translation from Spanish).

[43] Institut de Droit International, Resolution adopted on 26 August 2005, "Universal competence to punish in relation to the crime of genocide, crimes against humanity and war crimes" ("Universal competence is based firstly on customary international law. It can also be established by a multilateral treaty in relations between States Party to that treaty, in particular through clauses anticipating that a State Party on whose territory a suspect is found must extradite or prosecute"). Available at: www.idi-iil.org/idiF/resolutionsF/2005_kra_03_fr.pdf

(whose State Parties are: Bolivia, Brazil, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, the Dominican Republic and the Bolivarian Republic of Venezuela (art. 345).

In its report, the Chilean state also included two multilateral instruments that impose the obligation to extradite or prosecute: the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, approved and signed by Chile in Vienna on 20 December 1988 and enacted by Supreme Decree No. 543 of the Ministry of Foreign Affairs, dated 1990, Official Gazette dated 20 August 1990; and the UN Convention against Transnational Organised Crime and its Protocols, dated 15 November 2000 (Palermo Convention), enacted by Supreme Decree No. 342 of the Ministry of Foreign Affairs, dated 20 December 2004, Official Gazette of 16 February 2005. Finally, the list Chile provided to the International Law Commission was also extensive with regard to bilateral treaties that enshrine the principle of *aut dedere aut judicare*, including current extradition treaties with Australia, Bolivia, Brazil, Colombia, Ecuador, Korea, Mexico, Nicaragua, Paraguay, Peru (1932), Spain and Uruguay.[44]

Chile furthermore informed the Commission with regard to internal regulations adopted and applied that: "Norms followed with the aim of complying with the obligation to extradite or prosecute are derived directly from the treaties signed by Chile. The issue is not addressed in internal regulations of a legal or constitutional nature".[45]

In its report, Chile also mentioned two jurisprudential cases to the International Law Commission in which, in its opinion, application of the *aut dedere aut judicare* obligation had been applied: a) the lower court decision of Supreme Court judge Alberto Chaigneau del Campo, dated 7 February 2006 and approved by the Supreme Court through ruling dated 16 March 2006 regarding the extradition request for Chilean national Rafael Washington Jara Mesías, made by Argentina. This court ruled that it was not in agreement with handing over this person, who should be tried in Chile for the crime with which he was accused; and b) the lower court decision of Supreme Court judge Alberto Chaigneau del Campo, dated 21 August 2006 and approved by the Supreme Court through ruling dated 6 November 2006 regarding the extradition request for Chilean national Juan León Lira Tobar, made by Argentina. This court ruled that it was not in agreement with handing over this person, who should be tried in Chile for the crime with which he was accused.

[44] See: International Law Commission, 59th period of sessions, Geneva, 7 May to 8 June and 9 July to 10 August 2007. The obligation to extradite or prosecute (*aut dedere aut judicare*). Information and observations received from the governments, Addendum 1, A/CN.4/579/Add.1. See: http://daccessdds.un.org/doc/UNDOC/GEN/N07/327/59/PDF/N0732759.pdf?OpenElement

[45] Section 23, in A/CN.4/579/Add.1.

III. CONCLUSIONS

The failure to observe obligations of international law that are binding upon Chile largely explains why Peru's request for extradition was rejected. If conventional international law and norms of customary international law applicable to crimes under international law and human rights violations had been taken into consideration by Judge Álvarez, his decision would undoubtedly have been very different.

In particular, Amnesty International considers that three fundamental principles of international law were overlooked when ruling on this case. They are:

- The non-applicability of statutory limitations to crimes under international law such as genocide, crimes against humanity (including the generalised or systematic practice of serious deprivation of physical freedom in violation of fundamental rules of international law), war crimes, torture, enforced disappearance of persons and extrajudicial executions;

- The criminal responsibility of the commanding officer and other superiors, established by international custom and subsequently codified in different international instruments to which Chile is a State Party or signatory, as applicable; and

- The principle of *aut dedere aut judicare,* which imposes on states the obligation to prosecute or extradite those responsible for crimes under international law.

IV. RECOMMENDATIONS

Amnesty International urges the Judges of the Supreme Court to intervene in the extradition process of Alberto Fujimori in order to respect the obligations of international law that Chile has undertaken to fulfil, and to observe the aforementioned principles and rules of customary international law applicable to the case.

In this regard, Amnesty International recommends that the Chilean Supreme Court:

- Declares, in full compliance with conventional and customary international law, that the crimes under international law forming the grounds for the request to extradite Alberto Fujimori are not subject to the application of statutory limitations;

- Grants the extradition of Alberto Fujimori to Peru to answer the human rights charges that form the grounds for the Peruvian State's request; and

- If, for any reason, it is decided to reject the extradition request, orders the cases of human rights violations to be referred to the relevant judicial authorities in Chile for the purposes of investigation.