

Excerpts from Judge Orlando Álvarez Hernández's decision regarding the extradition of Alberto Fujimori from Chile to Peru

“Extradition request N°. 14-05

Case: SIE Basements

Judicial Document N°. 45-2003

The defendant is accused of having ordered, known of, and permitted the kidnapping and torture of people considered to be members of the opposition to his regime – the same people who were detained and, on occasions, tortured in the installations of the Army Intelligence Service, the precise location where Fujimori made his residence during the year 1992.

“The following cases of kidnapping and torture are brought forth.

“Susana Higuchi Niyagawa, former First Lady.

“The defendant is accused of the commission of the crimes of kidnapping and causing grave wounds (*lesiones graves*) to the detriment of First Lady Susana Higuchi, acts that occurred when Fujimori resided in the installations of the Army Intelligence Service during 1992.

“The aggrieved was kidnapped and brought to the basements of the SIE, where she was violently beaten, kept semi-nude, blindfolded, and drugged.

“Once she was freed, she told Fujimori what had happened. Fujimori did not order the commencement of investigations and attempted to convince her that what had happened never took place.

“Leonor La Rosa Bustamante: Former intelligence agent.

“The defendant is accused of the crime of causing the grave wounds of Leonor La Rosa. The acts occurred in January 1997, when La Rosa was brought to the basements of the SIE, where she was brutally assaulted and, as a consequence, permanently disabled.

“Gustavo Andrés Gorriti Ellenbogen, journalist.

“The defendant is accused of the kidnapping of Gustavo Gorriti, which occurred in the early morning hours of April 6, 1992 when military personnel carrying firearms broke into his house and took him to the installations of the SIE, where he remained kidnapped for seven days until he was transferred to the offices of the Prefectura Marina.

“Hans Hilmmler Ibarra Portilla, former intelligence agent.

“The defendant is accused of the kidnapping of Hans Ibarra, which occurred on January 22, 1997, when he was suspected by his superiors of having been involved in the leak of classified or secret information concerning intelligence plans to the media.

“Samuel Edward Dyer Ampuria, manager.

“The defendant is accused of the kidnapping of Samuel Dyer, which occurred on July 27, 1992 when Dyer was at Jorge Chávez International Airport. Dyer was getting ready to take a plane to the United States when he was detained by General Carlos Domínguez under the pretext of a supposed arrest warrant for terrorism. Dyer was later brought to the installations of the SIE where he remained for some days. The detention was brought about under orders from Montesinos, who testified that the order originated with Fujimori.

“Crimes:

“Double incrimination. These criminal acts are described and sanctioned both in the Peruvian and Chilean criminal codes.

“Penalty: These crimes carry sentences of more than one year.

“*Prescripciones*: (legal deadlines similar to statutes of limitations): The *prescripción* applies to none of these crimes.

“The crimes of causing grave wounds and kidnapping are found in articles 121 and 152 of the Peruvian Criminal Code. The crimes of causing corporal wounds and crimes against liberty and security (*lesiones corporales y los cometidos contra la libertad y seguridad*) are found in articles 387 and 141 of the Chilean Criminal Code.

“Extradition Request N°.15-05

“Barrios Altos – La Cantuta Case.

“Judicial Document N°.19-2001

“The defendant is accused of the Barrios Altos and La Cantuta massacres, actions that formed part of the anti-subversive strategy conducted by his government and executed by the so-called Grupo Colina. This group which had a military detachment staffed by SIE agents had as its mission the selective elimination of people that were suspected of belonging to terrorist organizations.

“Barrios Altos Case:

“On November 3, 1991, members of Grupo Colina carrying pistols and machineguns with silencers violently entered the house at Jirón Huanta 840 in the district of Barrios Altos, where a group of people, identified as presumed terrorists, were conducting a social event to raise funds to fix up their houses. After making those present lie on the floor, the members of Grupo Colina shot them, arbitrarily executing 15 people, and leaving another four gravely wounded.

“Cantuta Case:

“The other act attributed to the defendant is the crime of La Cantuta, executed on July 18, 1992 by Grupo Colina, which formed part of an anti-subversive operation carried out in the Universidad Enrique Guzmán Valle (La Cantuta) with the authorization of Fujimori. In this military operation various units of the army, members of the SIE, and members of Grupo Colina intervened in the university and, in the early morning hours, entered the center of said university and proceeded to locate and detain nine students and one professor in an arbitrary manner.

“After being tortured, those detained were brought to the Command School of the Army, where they were not accepted because they presented evidence of having been beaten. Instead, they were transferred to the firing range of Huachipa, where they were executed and buried.

“The students and professor were murdered with gunshot wounds to the head and the nape of the neck.

“Later, part of the remains were burned to avoid identification and transferred in boxes to the district of Cieneguilla, where they were buried once again in clandestine graves.

“Crimes:

“Double Incrimination: These criminal acts are described and sanctioned both in Peruvian and Chilean legislation.

“Penalty: These crimes carry sentences of more than one year.

“*Prescripción*: The *prescripción* applies to none of these crimes.

“The crimes of aggravated homicide, causing grave wounds, and forced disappearance (*homicidio calificado, lesiones graves, y desaparición forzada*) are found in articles 108 and 121 of the Peruvian Criminal Code and in the First Article of Decree Law N°. 25.592. The crimes of aggravated homicide, causing corporal wounds, and aggravated kidnapping are found in articles 391, 397, and 141 in the Chilean Criminal Code.”

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“THE BARRIOS ALTOS – LA CANTUTA CASE

“According to the demand in section 78, Fujimori’s extradition is requested as the author of the crimes of aggravated homicide, inflicting corporal wounds, and aggravated kidnapping (*homicidio calificado, lesiones corporales y secuestro agravado*)

“In this case there is an attempt to attribute criminal responsibility to the defendant in his capacity as the former President of Peru for the tragic death of nine (*sic*) citizens of Peru during military operations that were certainly not in any way known, must less authorized, by Fujimori.

“When Fujimori assumed the presidency, he was completely unfamiliar with the world of the armed forces and intelligence services and, although he held the position of Supreme Chief of said armed forces like all Presidents of the Republic, the operations of the military and the

military command's own professional decisions obviously could not have been handed over to him.

"The only circumstances in the extradition process that have impugned the former President of the Republic are just two cases of attempts on lives which were not carried out at around the same time as one another and which have been distorted into showing the existence of an official and systematic policy of human rights violations.

"Instead, there are statistics that register a drop of nearly 44% of people killed or disappeared during the Fujimori government as a result of the armed conflicts caused by terrorism.

"Such statistics bring one to the conclusion that between the years of 1990 and 2000 the activity of the state was undoubtedly less violent, injurious, and repressive than what was registered between 1980 and 1989.

"In these cases the evidence that shows the lack of participation of the defendant has been consciously and deliberately omitted. The plaintiff has omitted relevant information with the sole intention of presenting the case in a partial and incomplete manner. This is shown by the copies of the testimonial acts of the Barrios Altos and La Cantuta cases that adjoin the document that were only submitted by Fujimori. Other antecedents brought forth during the proceedings are also cited.

"It is definite that no documental evidence that constitutes direct proof of the participation of Fujimori has been brought. Neither does any direct testimony exist, except for mere speculation and hearsay. This is what the state of Japan found in regards to the extradition request sent to that country regarding the Barrios Altos and La Cantuta cases.

"BASEMENTS – SIE

"According to the demand, Fujimori's extradition is requested as the author of the crimes of corporal lesions and crimes committed against liberty and security. In neither of these criminal accusations is the plaintiff state precise in its request, and the legal hypothesis that the text of the cited articles is what is finally attributed.

"One must keep in mind that according to the jurisprudence of our Supreme Court, the acts and their judicial quality are left defined by the extradition demand that starts its respective procedure.

"In these proceedings, the plaintiff state has made a flagrant infraction by passing over the requirement of the *prescripción*, which implies the immediate impropriety of the extradition request in this case.

"Inasmuch as the *prescripción* of the supposed crimes of lesions and kidnapping of Susana Higuchi, Samuel Dyer, Gustavo Gorriti, Keneth Anzualdo, Martín Roca, Justiniano Najarro, Leonor La Rosa, and Hans Ibarra is concerned, all of the legal deadlines of the *prescripción* have completely run out.

“In the evidential antecedents that accredit Fujimori with the crime of kidnapping, the defendant never transmitted any order to detain or confine those persons, without prejudice to the questioning about the occurrence of these acts.”

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“REGARDING EXTRADITION REQUEST No 14- 05 CALLED BASEMENTS OF THE S.I.E.

“97) In this case, in the respective diplomatic note which was later broadened, Fujimori’s extradition is sought for the crimes that in Chile are described in Article 397 N° 2 of the Criminal Code (causing grave wounds) and in article 141 of the same code (kidnapping). In the broadening of the extradition request he is further accused of the crime of forced disappearance of people.

“98) That in the type the demands of the bilateral treaty, the Bustamante Code, and Chilean law concerning extradition are satisfied. It is thus that the plaintiff state has jurisdiction to judge the crimes that motivate the extradition request, all of which were committed in Peruvian territory. The requisites for double incrimination concerning the mentioned crimes are also met, described, and sanctioned in both criminal codes. All of them carry a penalty of more than one year of jail time, are not treated as political crimes, nor have they been definitively prosecuted and judged in Chile, nor are they the objects of amnesty or pardon in our country.

“99) In the diplomatic note, which was later broadened, Fujimori’s extradition was requested for acts that constituted the crimes that in Chile are described as causing grave wounds and kidnapping.

“...Fujimori is accused of the kidnapping of a number of people who were brought to the basements of the Army Intelligence Service where they were locked up in order to be tortured with the supposed purpose of gaining information. Likewise Fujimori is accused of kidnapping and causing the grave wounds of his then-spouse Susana Higushi. She was kidnapped and brought to the basements of the SIE where she was violently beaten and kept drugged and blindfolded. Furthermore he is accused of the crime of causing grave wounds harming Leonor de la Rosa Bustamante and the kidnappings of Samuel Dyer, Gustavo Gorriti, and Hans Ibarra.

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“The broadening of the extradition request alleges furthermore that Fujimori committed the crime of forced disappearance as during his government various groups from within the security forces operated with the intention to kidnap, interrogate, murder, and later disappear presumed members of subversive organizations.

“In part 58 the referenced broadening of the instruction dated January 5, 2004, which effected the inclusion of the crime of the forced disappearance of Kenneth Ney Anzualdo Castro, Martín Javier Roca Casas, and Justiniano Najarro Rua.”

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“102) That the background in which the plaintiff state bases the accusations against Fujimori for these acts are constituted only on evidence of indirect or hearsay testimony, examination of which draws attention to the lack of immediacy and certainty concerning the person who supposedly sent the detention order in each one of the cases. In effect, the injured party Gustavo Gorriti, in part 464 expresses that in a conversation with General Vidal, it was established that the president knew what had happened “in the context that everything had.” The same occurred with Samuel Dyer, in part 440 who told of a declaration by Alberto Pinto who heard a conversation between Montesinos and Bari Hermoza expressing, in part 447, that he had signed detention orders are the request of Montesinos.

“103) That in this way, there is no witness who declares having received a direct order from the president of having been present the personal issuance of such an order.”

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“REGARDING EXTRADITION REQUEST No. 15-2005, CALLED BARRIOS ALTOS-LA CANTUTA.

“107) To ensure that the acts described in the extradition request fulfill the requirements demanded by the bilateral treaty, the Code of Bustamante, and Chilean law, one must observe first that the requesting country has jurisdiction to recognize and judge the crimes that motivate the request. Likewise, one must determine the requirements concerning double jeopardy are fulfilled as the acts described are under Peruvian legislation, constituted by the crimes of aggravated homicide, grave or very grave wounds, and forced disappearance of persons (*homicidio calificado, lesiones graves, o gravísimas y desaparición forzada de personas*), which in Chile are, respectively, the crimes of aggravated homicide, grave or very grave wounds, and kidnapping with homicide (*homicidio calificado, lesiones graves o gravísimas y secuestro con homicidio*). Also, the crimes must be punishable by more than one year of jail time. In both instances aggravated homicide is punishable by life imprisonment, grave or very grave wounds in even its minimal degree is punishable by more than a year in prison, and kidnapping with homicide is punishable by life imprisonment. Furthermore, these crimes are not considered political crimes, nor have the charges been definitively pursued and judged in Chile, nor are the crimes the object of amnesty or pardon.

“108) When referring to the *prescripción* of criminal action emanating from said crimes, one must note that in respect the aggravated kidnapping and aggravated homicide, the *prescripción* time-limit is 15 years, which is reduced to 10 years in respect to the charges of grave or very grave wounds.

“109) The crimes in question were committed on November 3, 1991 (Barrios Altos) and July 16, 1992 (La Cantuta) and the respective time-limits of the *prescripción* are suspended (article 96 of the Criminal Code) for there having been a continuing procedure against the criminal, which first occurred in the respective pre-trial by means of the constitutional accusation interposed by the

Fiscal de la Nación against Fujimori and the formal criminal accusation against the former president by the Public Ministry on September 5, 2001.

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“One must keep in mind that the documents brought in part 296 and the following, that tell of the report in the right to a petition of the Chancellery of Peru by the lawyer Roberto Mac Lean Ugarteche in respect to the extradition request formulated by the government of Peru to Japan.

“The mentioned report had as its objective the examination of the viability of the petition sent to Japan. Professor Mac Lean concluded that the extradition petition was completely unfounded and that it would not hold up to examination by the requested state, which is in the end what happened.

“The fundamental defect of the extradition requests that Peru sent to Japan for three cases: Barrios Altos, La Cantuta, and US \$15,000,000, which today are once again summonsed in the extradition request sent to the Chilean state, is corroborated.

“112) In order to substantiate its theory in this case, the plaintiff state has based its accusation on certain antecedents that permit one to attribute to former president Fujimori punishable participation in the material crimes in these proceedings. It is thus that it attributes to Fujimori the creation of Grupo Colina and having donated human and logistical resources to it. Furthermore it attributes to Fujimori the amnesty given to its members and having dictated laws that aimed to give more power to the intelligence system. Finally it reproaches Fujimori for having politically intervened in the Congress with the end of obstructing judicial investigations into these cases. The defendant, for his part, has alleged that he is impugned by only two cases of attempts on someone’s life, which demonstrate the lack of the existence of a systematic policy of human rights violations. In regards to the first of the accusations, which attempts to tie Fujimori to Grupo Colina, it is established in these proceedings that the military actions that derived from the criminal acts in this case could not have been known, much less authorized, by the defendant.

“The activity of this armed unit answered to a previous division of the Peruvian army that a paramilitary group later derived from and had connections to acts before the period that Fujimori assumed the presidency of Peru. According to the criminal accusation in the Barrios Altos case itself, Barrios Altos was a reprisal for an attack against the military guard that took place before the government of Fujimori. It is thus that this military action with nefarious results was a response to motives originating with the military, and, as the president had recently assumed the presidency, it is held that he did not participate in the actions. The same situation is true in the the La Cantuta case.

“113) The motivation for the acts, according to the declarations of the members of Grupo Colina, was the suppression of a planned attack on a lieutenant of the army and his family. It was also said that the motivation to commit this crimes was the attack on Calle Parata (*sic*) of June 16, 1992. Whichever of these two motivations was the exact and identifiable motive, it originated with the army.

“There is an absence of political decisions tending to create a repressive regime that involved a violation of human rights. This is corroborated by the instructions that Fujimori expressly gave to the armed forces in regards to the way to fight against terrorism.

“Numerous declarations by officers and enlisted men of the Peruvian army also confirm the absolute ignorance of President Fujimori about the planning and execution of the acts of Barrios Altos and La Cantuta.

“Between the documents gathered in the petition of the defendant and the testimony of Colonel Julio Alberto Rodríguez Códoba that section 402 of document 28 – 2001, it is precisely known that the presidential instructions ordered the unrestricted respect of human rights.

“Equally, the officials who appeared in court in the oral trials did not fault the acts with the defendant, to the point of pinning responsibility on individual officers.

“114) In regards to the rest of the suppositions, in which it is maintained that there was a systematic policy of against fundamental rights, it can be said that the amnesty law applied to all acts committed by members of the military and civilians from 1980 to 1995 and was furthermore passed by the Congress of the Republic and not by the President, who only promulgated the manifestation of the citizen’s choice as it was represented in their Parliament.

“The plaintiff state has affirmed that has been reliably established that Grupo Colina was an organization within the structure of the army, that this group was organized and supported by the executive, and that the president had plain knowledge of the group’s actions. Nevertheless, the records that are brought forward to accredit these claims simply do not confirm any of them.

“115) Furthermore, no documentation that constitutes direct proof of participation has been brought forward. Neither has there been any precise testimony about this point. There has only been evidence based on mere speculation or hearsay and claims by journalists based on their observations or supposed anonymous sources which have been cited as inculpatory evidence.

“The State of Japan, in regards to the extradition request sent to that country by Peru respecting the Barrios Altos and La Cantuta cases, declared that the documents brought by the plaintiff did not include declarations by direct witnesses and furthermore did not contain a precise description, but merely a supposition. Likewise, it found that each one of the indications cited in the extradition request did not have sufficient force to prove the co-authorship of Fujimori.

“Although, as the accusatory opinion says in section 194, before the killing the criminals were in two trucks that were used officially and one of the trucks was assigned in the Palace of Government to Santiago Fujimori with the other assigned to the Ministry of the Interior, and although the criminals were in a troop-carrying truck with camouflaged canvas from which the army troops that closed the street descended, these facts do not have the intensity and connections necessary to link the former president to the acts.

“The exhibit in the mentioned accusation do not constitute elements of incrimination that could injure the defendant Fujimori either, as one cannot gauge that the exhibit of documents in part

572 in a clear manner that defendant Fujimori had any knowledge of, much less ordered, the killings. Although there is a note of congratulations of the President to some of the soldiers that participated in the criminal acts, corresponding to the memorandums of June 25 and July 30 of 1991, it dates before the crimes committed in Barrios Altos and La Cantuta.

“The fact that after the act the Director of the Military Command School refused to receive as prisoners the professor and students of La Cantuta because of evidence that they had been beaten and mistreated is influential. This demonstrates that not all of the members of the army adhered and this repressive system, much less that it is certain that behind it all was the will or knowledge of the President of the Republic.

“One cannot confuse the relation that Fujimori could have had with Grupo Colina with the aim of fighting the terrorism that, as is publicly and notoriously known, affected Peru for many years with the commission of the acts of Barrios Altos and La Cantuta, considering that only hearsay declarations have been made and that the witnesses were never present at the moment that the President of the Republic ordered the commission of these crimes. Rather there are simply presumptions that the President of the Republic had to have forcibly ordered these killings or consented to carrying them out because of the office he occupied must have ordered these killings or consented to their being carried out (Testimony of Leonor La Rosa fojas 409, Blanca Barreto in part 414 and Nicolás Hermoza in part 463).

“The above is not changed by the circumstance of having pronounced the Amnesty Laws which benefited all of the soldiers who fought against terrorism. One must keep in mind that the said laws were made by the Congress and not by the President of the Republic, and it is entering the land of presumptions to estimate that the president had exercised political influence for such ends... Marcos Flores in part 540, says that Grupo Colina did not plan the acts as they were carried out, and that he was the first to mourn what was committed in Barrios Altos and La Cantuta.

“The sentence of the Inter-American Court of Human Rights of March 14, 2001 sentenced the Peruvian State and not Fujimori, expressed by the quote ‘the Peruvian State must investigate the act to determine who is responsible for the human rights violations referenced in this sentence, publicly divulge the results of said investigation, and punish those responsible.’

“Another sentence of the human rights court on November 29, 2006 only formally refers to the Peruvian State that and although it demands that it must adopt all means necessary of an official and diplomatic character and continue driving forth the corresponding extradition requests, did not make any reference to Alberto Fujimori, but only to the Executive Branch and to the Presidency of the Republic without personally naming anyone.

“The declaration of Robles Espinosa in section 551 does not contain information about the activities of Grupo Colina because he has no direct experience with it. Testimony that coincides with that of Julio Chuqui in section 462, who said that he heard Martín Rivas say that Fujimori knew about the said criminal acts, but it is difficult to clearly assess the context of said declaration together with the dates and the situations in which they were taken.

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“117) That Article 545 of this legal text establishes that the arrest of the prosecuted subject upon which the extradition request devolves upon, must decree “if the record gives merit” and find out that to decide “if it will proceed in conformance with what is established in Paragraph 2 of Title IV, First Part, Book II.” In turn, the dispositions that contain this paragraph where refer to the detention of an individual, appear that this can be decreed if “the existence of act that presents the characteristics of a crime can be established, the tribunal has founded suspicions to accuse the author, compliance, or accessory whose detention is ordered” in accordance with of Number 1 of Article 255 of the Criminal Procedural Code.

“118) That Article 647 of the same Code expresses that the investigation of the Tribunal that hears the extradition request not only ‘verify the identity of the subject being processed and establish that the crime that he is accused of is one of those for which extradition is authorized by the treaties in force or, failing that, in conformity with the principals of International Law’ just as is set forth in letters a) and b) of this disposition, but also to determine if the accused has committed or not the crime that his is accused of, in accordance with what is signaled in its letter c).

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“121) That this criteria is in agreement with the declaration of this Supreme Court that resolved that ‘extradition is an act exclusively of national jurisdiction exclusively and the petitioned court and is not subject to any opinion of a judge or authority from the petitioner country.’ It corresponds, then, that the Chilean courts, assessing the accompanying evidence sent and produced by the plaintiff state to substantiate its extradition request, determine the existence of the material crimes of the requester and if there is probable cause concerning the guilt of the person to be extradited. As a consequence, it is declared that there is no decisive proof. (Sentence of November 4, 1957, reiterated in the decisions of December 23, 2004 and January 20, 2006, all in this Supreme Court)

“122) That in virtue of what is expressed in the considered precedents and circumstances of each one of the twelve cases, material of this investigation, one may conclude that the participation of Alberto Fujimori Fujimori in the quality that has been attributed to him in the extradition request is not demonstrated in these requests for any of the crimes included in said twelve cases. For these reason it is possible to deduce that in this cause the defendant is not accredited with the crimes that have been attributed to him, in the terms of Letter C of Article 647 of the Chilean Criminal Procedure Code.

“AND TAKE NOTE THAT, furthermore, as it is arraigned in Article 647 and the following of the Criminal Procedural Code, 52 number 3 and 214 of the Organic Code of Tribunals and II; III; V; XII; and XIII of the Extradition Treaty between Chile and Peru of 1993, the extradition of the Peruvian-Japanese citizen Alberto Fujimori Fujimori, solicited in this proceedings by the government of Peru, is denied

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The Secretary of the Tribunal will notify the defendant in the location of his detention.
Number 5646- 2005.

"Decided by Don Orlando Álvarez Hernández *Ministro Instructor* of the Supreme Court of Justice of Chile."