The Fujimori Judgment

A President’s Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus

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Abstract

In 2009, former Peruvian president Alberto Fujimori was convicted by the Peruvian Supreme Court to 25 years’ imprisonment as an indirect perpetrator of serious human rights violations amounting to crimes against humanity committed under his presidency in 1991 and 1992. The conviction is based on the theory of control/domination of the act by virtue of an organized power apparatus (autoría mediata por dominio de la voluntad en aparatos de poder organizados/mittelbare Täterschaft kraft Willensherrschaft in organisatorischen Machtapparaten) demonstrating once again that this theory is a serious option to hold criminal leaders to account. The article gives a brief overview of the background of the case and then moves on to analyse Fujimori’s responsibility from a national and international criminal law perspective, focusing in particular on the evidentiary issues and the five requirements of Organisationsherrschaft set out by the Peruvian Supreme Court.

1. System Criminality and Selectivity in the Fujimori Case

A. Historical and Political Background

In 1990, Alberto Fujimori was elected president of Peru in the midst of both a general economic and political crisis.1 Immediately following his election Fujimori concentrated his governmental politics on economic reforms and the fight against the insurgent groups Sendero Luminoso (SL) and Movimiento...
Revolucionario Tupac Amaru (MRTA), which had emerged in 1980 and were intensifying their fight in the late 80s and early 90s.\(^2\) Between 1980 and 2000, the armed conflict caused the death of approximately 69,200 persons.\(^3\) Shortly after his election, Fujimori started to restructure and centralize the activities of the intelligence agencies, the armed forces and the police, thereby placing such organs under his direct command.\(^4\) At the same time, he relied on a sophisticated system of corruption, embezzlement and bribery to finance secret military operations and to secure political support for his government.

Since the beginning of his presidency, Fujimori created a clandestine and well equipped special unit, later called the Colina group, which was integrated into the intelligence structure of the armed forces and was designated in accordance with state policy to undertake secret operations consisting in the identification, control and elimination of those suspected of belonging to insurgent groups or opposed to the government.\(^5\) The Colina group formed part of the Army Intelligence Service (Servicio de Inteligencia del Ejército, SIE), which was itself a part of the General Staff's Intelligence Directorate (Dirección de Inteligencia del Ejército, DINTE). The Intelligence Directorate was formally subordinated to the Joint Command of the Armed Forces (Comando Conjunto de las Fuerzas Armadas), but in practice received orders from the highest intelligence agency, the National Intelligence Service (Servicio de Inteligencia Nacional, SIN), led by Fujimori's ally and closest adviser, Vladimiro Montesinos.\(^6\) The Colina group had its origin in a special intelligence group (grupo de análisis) created in 1990 to conduct strategic intelligence operations, but was endowed in 1991 with operative tasks to realize special operations (operaciones especiales de inteligencia) consisting in the physical execution of alleged members of terrorist organizations and political opponents. Between 1991 and 1992, the Colina group committed at least 11 operations involving extrajudicial executions and forced disappearances, before it was dissolve in late 1992.\(^7\)

One of the first operations, in November 1991, was the extrajudicial killing of 15 persons erroneously suspected to be SL members. The killings took place in the Barrios Altos district of Lima. Another operation of the Colina group consisted of the kidnapping, execution and forced disappearance of nine students and a professor of the La Cantuta National University of Lima in July 1992, as a reaction to a bomb attack of Shining Path. These two incidents

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3 TRC, supra note 1, § 2.
6 See Corte Suprema de Justicia (‘CSJ’), infra note 33, § 275 et seq., 324 et seq. and 301 et seq.
7 Ibid., § 576.
were part of a number of crimes committed by the Colina group as part of Fujimori’s secret anti-terrorism policy to execute alleged members of terrorist groups.\(^8\)

On 5 April 1992, in response to the parliament’s previous rejection of the governments new anti-terrorism decrees, Fujimori — in alliance with the military and the assent of most of the population — carried out a ‘self-coup’ (auto-golpe) and dissolved the Congress, suspended the Constitution and took over the judiciary in order to transfer legislative control to the executive branch and weaken judicial independence.\(^9\) Due to international pressure, a new Constitution was adopted by popular referendum in 1993 and a new Congress dominated by supporters of Fujimori was elected.\(^10\) In 1995, thanks to his success in the fight against hyperinflation and the elimination of terrorism, Fujimori was re-elected. Finally, on 28 July 2000, Fujimori assumed his third term in office, but shortly after, in September 2000, the eruption of an enormous corruption scandal, implicating Fujimori’s adviser and closest ally, Vladimiro Montesinos, in the bribery of Congressmen in exchange for their political support of Fujimori, caused Fujimori to leave Peru. On 14 November 2000, he fled to Japan and sent his resignation via fax to the Congress, which declared him morally incapacitated to carry out the presidency.

B. Political and Legal Framework for Fujimori’s Prosecution

Several factors have paved the way for the investigation, prosecution and conviction of Fujimori in the five cases of corruption and two cases of human rights violations, which formed part of the extradition request of Peru and were approved by the Chilean Supreme Court of Justice.

1. First Attempts of National Prosecution

Initial investigations of the Barrios Altos killings of 1991 by a parliamentary investigating committee were interrupted by Fujimori’s self-coup and the closure of the Congress. In 1995, as a response to new judicial investigations of the killings in the Barrios Altos case and the disappearances in the La Cantuta case, the government pushed the Congress to pass two amnesty laws in order to avoid further investigations.\(^11\) On 15 June 1995, Congress passed

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Law No. 26479\textsuperscript{12} granting a blanket self-amnesty to all members of the security forces and civilians for crimes committed during the period of 1980 to 1995 in the fight against terrorism. The few convictions of members of the security forces for human rights violations were immediately annulled. Consequently, eight members of the Colina Group who had been convicted and imprisoned for the \textit{La Cantuta} case, some of whom were also being prosecuted in the \textit{Barrios Altos} case, were set free. When a judge in the \textit{Barrios Altos} case questioned the constitutionality of Law No. 26479 and intended to continue with the investigations, a second amnesty law, Law No. 26492 of 2 July 1995,\textsuperscript{13} was adopted with the aim to prevent the judiciary from determining the legality or applicability of the first. This law extended the amnesty to offences not yet investigated and decreed that the amnesty could not be ‘revised’ by the judiciary instance and that its application was obligatory.\textsuperscript{14} These measures made further investigations impossible until the end of Fujimori’s government.

2. \textit{Overcoming Peru’s Amnesty Laws: The Role of the Inter-American Court of Human Rights}

An important role in overcoming Peru’s amnesty laws and in setting the standards with regard to the duty to prosecute serious human rights violations was played by the Inter-American Court of Human Rights (IACtHR).\textsuperscript{15} At the end of Fujimori’s government, more than 300 cases were pending before the Inter-American Court and the Inter-American Commission of Human Rights. Between 1995 and 2007, the IACtHR found the Peruvian state to be in breach of its international obligations in 22 cases, 18 of them dealing mainly with arbitrary killings, disappearances, torture and inhumane treatment, arbitrary detention and violations of the right to fair trial under the government of Fujimori since 1990.\textsuperscript{16} In its landmark decision on the killings in the \textit{Barrios Altos} case, the IACtHR ruled on 14 March 2001 — only four months after Fujimori’s fall — that all amnesty and other provisions ‘designed to eliminate responsibility’ are ‘inadmissible’ because they violate, inter alia, the right to an effective remedy and the state’s obligation to investigate and punish

\textsuperscript{16} In 1999, an attempt by the government to withdraw from the contentious jurisdiction of the Court was rejected by the Court arguing that it is only possible to denounce the Convention as a whole (\textit{Ivcher-Bronstein v. Peru Case}, Judgment of 24 September 1999, IACtHR (Ser. C) No. 54 (1999), at § 56; \textit{Constitutional Court v. Peru Case}, Judgment of 24 September 1999 (Ser. C) No. 55 (1999), at § 55.)
those responsible. Furthermore, the Court made it clear that the ‘laws lack legal effect and may not continue to obstruct’ the investigation and punishment of the responsible.

3. The Peruvian TRC, Reopening Criminal Investigations Against Fujimori, and the Extradition Proceedings in Chile

The collapse of ‘Fujimorismo’ and the weakness of the insurgency at the end of the 1990s facilitated an expeditious transition from Fujimori’s authoritarian regime to the reestablishment of democracy without having to deal with a serious armed challenge against the new political rulers or to rely on peace talks with the rebel groups. Thus, with the Peruvian Supreme Court of Justice endorsing the Barrios Altos judgment of the IACtHR, new investigations against members of the armed forces were quickly (re-) opened. Under the interim president Valentín Paniagua, a Truth and Reconciliation Commission (TRC) was established on 2 June 2001 and entrusted with ‘clarifying the process, the facts and the responsibilities of the terrorist violence and human rights violations produced from May 1980 to November 2000’. The TRC was entrusted with providing an interpretation of the historical period and the investigation of serious crimes like murder, kidnapping, enforced disappearances, torture and other serious injuries. On 28 August 2003, it presented its final report containing 73 representative cases of human rights violations and recommending criminal proceedings in 43 cases.

However, with Fujimori’s voluntary exile to Japan in 2000, the chance to bring him back to Peru for trial seemed slim as his Japanese nationality protected him from extradition. The situation changed with Fujimori’s surprising trip to Chile in September 2005 where he was detained by the Chilean...
authorities on grounds of an (internationalized) arrest warrant issued by Interpol on behalf of Peru. Peru then requested his extradition\footnote{26} with regard to 13 cases, three of them dealing with human rights violations (including Barrios Altos and La Cantuta, arbitrary detention of five persons by the SIE, and the forced disappearances of several persons) and 10 dealing with corruption-related crimes.\footnote{27}

On 11 July 2007, the extradition request was rejected by a first instance judge of the Chilean Supreme Court invoking lack of evidence concerning Fujimori’s responsibility and statutory limitations.\footnote{28} Yet, two months later, on 21 September 2007, a Chamber of the Chilean Supreme Court overruled the first instance ruling, rejecting the arguments of Fujimori’s defence team and granting the extradition in seven cases. This included the case of the extrajudicial killings of Barrios Altos and the forced disappearances of La Cantuta, the arbitrary detentions of a journalist and a businessman in April and July 1992, and five of the seven corruption cases.\footnote{29} The Chamber held that the evidence provides a probable cause for an indictment of Fujimori as an indirect perpetrator.\footnote{30} However, due to the double criminality requirement and the absence of forced disappearance within the Chilean Criminal Code,\footnote{31} the Chamber limited the extradition to the offences of aggravated homicide and bodily injury in La Cantuta, thereby precluding Fujimori’s later conviction for the crime of forced disappearance under Peruvian criminal law.

\footnote{26} The extradition proceedings in the case were governed by the 1932 Extradition Treaty between Peru and Chile, Art. 644–656 of the Chilean Code of Criminal Procedure and international instruments and principles of law, like the Montevideo Convention on Extradition (26 December 1932, O.A.S.T.S. No. 34) and the Convention on Private International Law, known as the Bustamante Code (20 February 1928, O.A.S.T.S. No. 34); see M. Haas, ‘Fujimori Extraditable! Chilean Supreme Court Sets International Precedent for Human Rights Violations’, 39 University of Miami Inter-American Law Review (2007–2008) 373–408, at 387.

\footnote{27} The corruption cases referred to personal enrichment, secret intelligence operations as part of his anti-terrorism politics, the spying on political opponents, the bribing of politicians, see also infra note 32.


\footnote{30} Ibid., at §§ 4–5.

\footnote{31} So far, Chile has not ratified the Inter-American Convention on Forced Disappearance of Persons which stipulates in its Art. 5 that the forced disappearance shall be deemed to be included among the extraditable offences in every extradition treaty concluded between States Parties. See generally J-L. Guzmán, ‘Capítulo III-Chile’, in K. Ambos (ed.), Desaparición Forzada de Personas, Análisis Comparado e Internacional (Bogotá: GTZ/Temis, 2009) 55–73.
2. Fujimori’s Criminal Responsibility as a Senior Political and Military Commander

Since his extradition to Peru in 2007, Fujimori has been convicted in all seven cases for which the extradition request was granted. As to the corruption cases, Fujimori avoided public trials by accepting the charges and was convicted three times as a direct perpetrator. However, in the two human rights cases (the ‘Barrios Altos/La Cantuta case’ and the case of arbitrary detentions, called ‘Sótanos SIE case’) Fujimori denied any responsibility for the extrajudicial executions, forced disappearances and arbitrary detentions. On 7 April 2009, one and a half years after the opening of the public trial and after more than 60 trial sessions, the Special Criminal Chamber of the Supreme Court of Justice of Peru convicted Fujimori to the maximum prison sentence of 25 years for aggravated homicide/murder (homicidio agravado/asesinato) in 25 cases and serious bodily injury in four cases concerning the events of Barrios Altos and La Cantuta, and aggravated kidnapping in the two cases of arbitrary detentions. On 30 December 2009, the First Transitory Criminal Chamber of the Supreme Court confirmed the conviction, essentially following the Special Chamber.

A. The Imputed Conduct From an International and National Perspective

The Supreme Court explicitly qualifies the crimes of Barrios Altos, La Cantuta and Sótanos SIE as state crimes and — in so far following the IACtHR — crimes against humanity. In the appeals judgment, the Chamber makes clear that despite the missing incorporation of crimes against humanity in the Peruvian Criminal Code, this classification neither violates the principle of legality (especially in its variant of non-retroactivity) nor the principles of double criminality and the specialty of extradition law since Fujimori was prosecuted pursuant to the Peruvian Criminal Code, i.e. for aggravated homicide/murder, serious bodily injury and aggravated kidnapping, as set out in extradition


35 La Cantuta, supra note 17, § 225.

36 CSJ, supra note 33, § 653, 675, 717.
decision of the Chilean Supreme Court.37 With the recourse to the term ‘crimes against humanity’ the Court did not, as alleged by Fujimori’s defence team, pretend to introduce the International Criminal Court (ICC) Statute into the Peruvian domestic legal order in a ‘self-executing’ manner, but only characterize the international nature and dimension of the crimes committed by the Fujimori regime.38 While thereby a violation of the above-mentioned principles was avoided, the crime of forced disappearance had to be excluded from the proceedings due to its nonexistence in Chilean domestic law39 pursuant to the double criminality and specialty principles.

B. Evidentiary Issues in the Context of System Criminality

One of the key issues of the proceedings against Fujimori was how to deal with evidence regarding Fujimori’s individual criminal responsibility in the crimes committed by the Colina group. The events of the Barrios Altos and La Cantuta cases had obtained broad media coverage, were part of the investigations of the TRC,40 had been dealt with before by the IACtHR (demonstrating the systematic and widespread character of the crimes committed by the Fujimori regime and suggesting, at least, negligent ignorance on the part of Fujimori), and prepared the ground for the convictions of several low rank members of the Colina group.

To prove Fujimori’s criminal responsibility, the Supreme Court relied on indirect or circumstantial evidence which it found as reliable as direct evidence and, in addition, considered as the more appropriate form of evidence to demonstrate criminal responsibility of high ranking officials who use a clandestine power structure to commit such crimes.41 Indeed, it is true that circumstantial evidence is commonly used in national and international criminal proceedings.42 It requires a multiplicity of circumstances which — based on criteria of

37 CSJ, supra note 34, at 111–113, 124.
38 CSJ, supra note 34, at 124.
40 The TRC considered Fujimori and his close allies responsible for the crimes committed by the Colina group, see TRC, supra note 1, § 100.
41 CSJ, supra note 33, §§ 658–659. CSJ, supra note 34, at 137.
experience, logic and rationality and the absence of contradictions or possible differing conclusions — allow to consider a certain fact as existing, even if no direct evidence pointing to that fact can be established.\(^43\) In other words, the fact to be proven must be the only possible conclusion to be drawn on the basis of the existing circumstantial evidence.\(^44\) Due to the lack of direct evidence regarding Fujimori’s role in the establishment and supervision of the military operations of the Colina group,\(^45\) the Chambers relied on the following proven facts to infer Fujimori’s responsibility:\(^46\)

(i) the crimes occurred during the presidency and were directed by members of the armed forces against political opponents or supposed members of terrorist organizations;

(ii) the operations were planned by the central intelligence agency SIN which was run de facto by Vladimiro Montesinos, the closest ally and adviser of Fujimori during the 1990s, who regularly informed Fujimori about the operations of the SIN;

(iii) like in the case of Montesinos, persons close to Fujimori were assigned as high ranking state and army officials;

(iv) the Colina group had its origin in a special intelligence group established by Fujimori and received since 1991 a broad logistical, material and financial support;

(v) any intent of denouncing or investigating the crimes attributed to the Colina group was opposed by Fujimori denying the responsibility of state forces in the events, defending the officials suspected of the crimes, impeding the work of the judiciary and issuing amnesty laws to avoid further criminal investigations.

These circumstances allowed the Chambers to conclude that the crimes committed by the Colina group did not occur behind Fujimori’s back, but were part of his anti-terrorism strategy to establish a clandestine group of army members to execute civilians suspected of terrorist activities.

C. Indirect Perpetration by Virtue of an Organized Power Apparatus

1. Theoretical Starting Point

The conviction of Fujimori as indirect perpetrator\(^47\) is based on the theory of control/domination of the act by virtue of a hierarchical power apparatus.\(^48\) The ‘man in the background’ dominates the direct perpetrator’s will and acts

\(^43\) CSJ, supra note 33, § 659, CSJ, supra note 34, at 136.

\(^44\) See CSJ, supra note 33, § 658, CSJ, supra note 34, at 81 et seq., 132 et seq.

\(^45\) CSJ, supra note 33, § 662.

\(^46\) CSJ, supra note 33, § 660, CSJ, supra note 34, at 81–87.

\(^47\) Art. 23 of the Peruvian Criminal Code reads in the relevant part: ‘El que realiza por medio de otro el hecho punible ...’.

\(^48\) CSJ, supra note 33, §§ 718–748, CSJ, supra note 34, at 39–52.
by means of an organizational apparatus of hierarchical power, i.e. an organized power structure (Organisationsherrschaft). This theory, in turn, is based on a concept of control or domination of the act (Tatherrschaft) which is used in differentiated systems of participation and now also by the ICC to delimitate forms of perpetration (commission as a principal) from forms of secondary participation (instigation, inducement, aiding, assisting). In fact, the control over the act is the key structural difference between indirect perpetration and joint criminal enterprise, the latter resting in contrast on the shared intent or common purpose of the members of a criminal enterprise.


51 While the unitarian system does not distinguish between different forms of participation at the level of attribution, with the consequence that all persons causing the criminal result are considered as principals/perpetrators (equivalency theory), the differentiated system (participation model) distinguishes between principals/perpetrators and accessories/secondary participants according to his or her relative contribution to the crime. Under the later model, secondary participants (encouraging/abetting or assisting/aiding) can only be held liable if the principal at least attempts the (unlawful) act; the relationship principal/accessory participant is legally/normatively determined. For the distinction between the two systems see G. Fletcher, Rethinking Criminal Law (Oxford: OUP reprint 2002), at 634 et seq.; idem, Basic Concepts of Criminal Law (Oxford: OUP 1998), at 190 et seq.; see also E. van Sliedregt, The Criminal Responsibility of Individuals for Violations of International Humanitarian Law (The Hague: TMC Asser Press, 2003), at 61–64; K. Ambos, Der Allgemeine Teil, supra note 49, at 543 et seq.; idem, La Parte General, supra note 49, at 169 et seq.; idem, ‘Article 25: Individual criminal responsibility’, in O. Trüfferer (ed.), Commentary on the Rome Statute of the ICC (2nd edn., München: C.H. Beck, special print 2008) 743–770, at 745–746. On the unitarian system recently T. Rotsch, ‘Einheitstäterschaft’ statt Tatherrschaft (Tübingen: Mohr Siebeck 2009), at 9 et seq.

52 Warrant of Arrest, Al Bashir (ICC-02/05-01/09), 4 March 2009; Decision on the Confirmation of Charges, Lubanga (ICC-01/04-01/06-803), Pre-Trial Chamber I, 29 January 2007, § 342; Decision on the confirmation of charges, Katanga and Ngudjolo Chui (ICC-0111 04-01107), Pre-Trial Chamber I, 30 September 2008, §§ 480–486.


It is important to understand that the concept of Organisationsherrschaft, as originally developed by Claus Roxin, is intimately linked to the differentiated system’s distinction between (primary) perpetrators and (secondary) participants and, as to the former, direct, indirect and co-perpetrators considering the head of the power apparatus as an indirect perpetrator. While this does not, as a matter of principle, exclude the establishment of an autonomous doctrine of Organisationsherrschaft with a view to the special needs of International Criminal Law — I will return to this in a moment — any further development must not lose sight of this theoretical starting point. Organisationsherrschaft constitutes a unique form of indirect perpetration in that it does not require, as the classical form of indirect perpetration, that the direct perpetrator lacks (full) responsibility and is thus employed as a mere instrument by the indirect perpetrator. This is typically the case when the person who physically carries out the objective elements of the crimes lacks the necessary intent to commit the crime, acts under mistake, duress or has no capacity of culpability and the indirect perpetrator knowingly makes use of this circumstance. In so far it makes sense to speak of perpetration ‘by means’ since the direct perpetrator is ‘a means’ in the hands of the indirect perpetrator, dominated and controlled by the latter’s superior will or knowledge. Yet, in the area of macro-criminality, i.e. systematic or mass criminality planned and organized by high level officials of the state or leaders of non state actors, the direct perpetrators usually act fully responsible, i.e. the traditional ‘perpetration by means’ theory cannot satisfactorily explain the indirect perpetrator’s control over the direct perpetrator. Instead, in this situation of a ‘(indirect) perpetrator behind the (direct) perpetrator’ (Täter hinter dem Täter) the control of the former over the latter does not depend on his responsibility but on the power structure in which they operate.

Despite the recent triumphal arrival of the Organisationsherrschaft at The Hague one must not overlook that it is not at all — even and especially in its mother country Germany — uncontested. Several scholars reject its application in the Fujimori type cases and invoke instead the concepts of co-perpetration or instigation as forms of attribution for the leaders of

55 See supra note 49.
56 Crit. in this regard, however, Rotsch, supra note 51, at 316 et seq. (331) for whom the doctrine breaks with the traditional structures of a differentiated system.
57 Ambos, Art. 25, supra note 51, at 752.
organized power structures. The traditional argument against indirect perpetra-
tion in cases of a fully responsible direct perpetrator (Täter hinter dem Täter) is a naturalistic one: it is inconceivable that the indirect perpetrator controls the will of a fully responsible direct perpetrator. Yet, from a normative perspective, it can well be argued, as will be shown below (infra 2(d)) that the domination of the organization prevails over the individual freedom of the direct perpetrator. Be that as it may, the traditional system of individual responsibility, as applied for ordinary criminality characterized by the individual commission of single crimes, must be adapted to the needs of international criminal law aiming at the development of a mixed system of individual-collective responsibility in which the criminal enterprise or an organization as a whole serves as the entity upon which attribution of criminal responsibility is based. In such a system the indirect perpetrator controls not so much the subordinates, but the apparatus of power and it is through this organizational control that he indirectly controls the conduct of the direct perpetrators. In other words, it is not so much the individual but the global act (the criminal enterprise) that constitutes the central object of attribution (Zurechnungsprinzip Gesamttat).

While the indirect perpetrator as a perpetrator behind the direct perpetrator bears the responsibility primarily for the organizational wrongdoing (Organisationsunrecht), the direct perpetrator is primarily responsible for the individual wrongdoing (Individualunrecht). The doctrine of Organisationsherrschaft thus illustrates quite vividly the aim of attributing the individual crimes committed within the framework of the system, organization or enterprise to the leaders and masterminds who bear the greatest responsibility for controlling the organization or having set in motion and supervised the criminal enterprise. Although these persons are generally far away from the actual execution of the criminal acts and are therefore normally considered indirect perpetrators or even accessories before the fact, they are, from a normative perspective, the main perpetrators while the executors (the direct perpetrators) are merely secondary participants in the implementation of the overall criminal enterprise. The individual criminal contributions of the participants must be assessed in the light of their effect on the criminal plan or purpose pursued by the

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61 See for example Herzberg, Fujimori, supra note 60, at 578.

62 See for a further development of the argument Ambos, supra note 50, at 144 et seq.


64 On this new concept of attribution for collective criminality, see the fundamental work of F. Dencker, Kausalität und Gesamttat (Berlin: Duncker & Humblot, 1996), at 125 et seq., 152 et seq., 229, 253 et seq. and passim.

criminal apparatus or organization. One can speak of a system of 'organizational domination of stages' (stufenweise Organisationsherrschaft), where domination requires, however, at least some form of control over part of the organization. Thus, taking up the distinction between main perpetrators and secondary participants, there are in fact three levels of participation: the first and highest level is composed of those (main) perpetrators who plan and organize the criminal events as a whole and as such belong to the leadership level (Führungstäter); at the second level one can find those (still main) (co-) perpetrators of at least the mid-level of the hierarchy who exercise some form of control over part of the organization (Organisationstäter); the third and last level consists of the low-rank direct perpetrators who merely execute the crimes physically (Ausführungstäter). This three-pronged approach is also reflected in the criminal organisation led by Fujimori. He implemented and supervised, together with his closest aides, an apparatus of power directed against supposed enemies and opponents of his government and supported by mid-level commanders who coordinated the crimes committed by willful direct executors. Thus, the doctrine of Organisationsherrschaft reflects adequately the 'beaurocratic nature of mass atrocity, without going so far as to ground liability on mere organizational membership.' That guarantees the respect for the principle of culpability as a cornerstone of criminal law.

2. Requirements of Indirect Perpetration by Virtue of an Organized Power Structure

Following essentially the great German criminal law scholar Claus Roxin, the Chambers of the Supreme Court set out five requirements for indirect perpetration by virtue of an organized power structure:

(1) the existence of a hierarchical organization (as a general requirement);
and – as specific requirements –
(2) a responsible command (poder de mando, Befehlsgewalt) of the indirect perpetrator;
(3) the detachment of the organization from the law (desvinculación del derecho, Rechtsgelöstheit);

66 See also H. Vest, Genozid durch organisierte Machtapparate (Baden-Baden: Nomos, 2002), at 239–242.
69 The Chambers further quoted the following authors: Kai Ambos, Christoph Grammer, Gerhard Werle (from Germany), Javier Villa Stein, Percy García Cavero, José Urquizo Olachea, José Hurtado Pozo, Felipe Villavicencio Terreros, Ivan Meini Méndez, Luis Alberto Arias Torres, Luis y Bramont Bramont Arias, Raúl Pariona Arana, Yván Montoya Vivanco, José Luis Castillo Alva (from Peru), Carlos Julio Lascano, Eduardo Andrés Bertoni, Matilde Bruera (from Argentina), Carolina Bolea Bardón, Patricia Faraldo Cabana, Eva Fernández Ibáñez (from Spain) and Enrique Bacigalupo Zapater (Argentina/Spain).
(4) the interchangeability or replaceability (fungibilidad, Fungibilität) of the 
direct perpetrator;
(5) the direct perpetrator’s (pre-)disposition (disposición, Tatogeneigheit) to
commit the act.\textsuperscript{70}

(a) Hierarchical structure of the organization

Indirect perpetration by virtue of a hierarchical apparatus presupposes an
organized power structure with different roles assigned to its members that
allow the organization to function autonomously notwithstanding individuals’
contributions.\textsuperscript{71} The assignment of roles through the superior level of the or-
ganization occurs in a vertical direction by giving orders and therefore differs
from the coordinated attribution of tasks, typical for co-perpetration.\textsuperscript{72} The
automatic functioning of the apparatus accounts for the domination of the im-
mmediate perpetration and over the immediate perpetrators by indirect perpetra-
tors at the leadership level. Yet, explicit orders by the leader are not necessary,
as long as the acts of the direct perpetrators are committed within the context
of the objectives established and followed by the organization.\textsuperscript{73} Thus, it is ir-
relevant ‘how’ and by whom the orders will be executed if only the master-
mind(s) can be sure that someone will execute it somehow.\textsuperscript{74} This
hierarchical character of the organization is typical for state-sponsored vio-
lence, but can also be found among non-state armed groups. In the Peruvian
case this has been confirmed in the judgment against Abimael Guzmán, the
Shining Path leader, who has been convicted to a life sentence for indirect per-
petration of murder by virtue of SL.\textsuperscript{75} The ICC accepted it with regard to
African paramilitary groups in the Katanga/Ngudjolo Chui proceedings.\textsuperscript{76}
Thus, it seems as if the theory is, contrary to Mark Osiel’s assertion,\textsuperscript{77} not only
applicable to rigidly formal state bureaucracies but also to less formalized
non-state groups.

(b) Responsible command and levels of hierarchy

Indirect perpetrators generally belong to the leadership level of the respective
organization. President Fujimori, who was not only vested with political

\textsuperscript{70} CSJ, supra note 33, §§ 726–727, CSJ, supra note 34, at 42–43.
\textsuperscript{71} CSJ, supra note 33, § 726.
\textsuperscript{72} Ibid., at § 726; for a contrary view, see Jakobs, supra note 59, at 573.
\textsuperscript{73} CSJ, supra note 33, § 726.
\textsuperscript{74} See Ambos, supra note 50, at 145.
\textsuperscript{76} Katanga, supra note 52, §§ 543–544.
\textsuperscript{77} Osiel, supra note 67, at 100 (‘Roxin’s analysis assumes the existence of a rigidly formal bureau-
cracy of the sort contemplated by Webers’s famous ideal-type, developed from his understand-
ing of the authoritarian Prussian army, which in the organizational chart perfectly mirrors
the behavior of the people occupying positions within it’).
powers as President, but exercised at the same time command over the security forces, including the armed forces, the intelligence service and the police, is a paradigmatic example in this regard. The mastermind’s orders must not necessarily, as already said before, be issued formally through instructions; they may also be given, as in the case of SL leader Abimael Guzmán, informally in an encoded manner or they may be taken for granted.78

Another issue dealt with by the Special Chamber is the delimitation of indirect perpetration from co-perpetration along levels of hierarchy with regard to mid rank commanders.79 In fact, the issue of up to what level of hierarchy one can assume an indirect perpetrator’s control over the act by virtue of a hierarchical organization has not been thoroughly analyzed, let alone be solved, by the doctrine.80 The judgment follows a broader understanding of indirect perpetration — similar to Roxin’s concept and the German case law — applying it to mid rank officials who, apart from receiving orders themselves from the leadership level, also possess certain powers to issue orders to their subordinates.81 In such cases, the mid-level commander cannot exclude his responsibility with the argument that if he had not acted, someone else would have forwarded the order since, first of all, such a hypothetical course of causality does not do away with the in fact causal order in the first place and, secondly, such a mid-ranking commander — think of Adolf Eichmann — is not easily replaceable.82 According to the Supreme Court, indirect perpetration is therefore not limited to the leadership level with the possible consequence of a whole chain of indirect perpetrators in a hierarchical organization.83

However, while the possibility of an Organisationsherrschaft at a hierarchical level below the leadership level has been recognized with the Eichmann case,84 one can hardly deny the fact that absolute control through and/or over an organized power apparatus can only be exercised at the leadership level, i.e. at the government level in the case of state violence.85 In addition, the leadership level represents the state in a particular way and as such bears the overall responsibility for possible violations of fundamental human rights; all other power is derived from this highest authority and thus in its exercise attributable to it.86 Only the leader’s power and authority can neither be blocked nor disturbed in any way from above. As a consequence, control over the act by virtue of Organisationsherrschaft can only vest in those persons,
whose orders and instructions cannot be revoked or cancelled without any further ado, i.e. those, who, in this sense, can rule and control without any interference whatsoever.87 This only applies to the leadership level of the formally established government and, in exceptional cases, to the top hierarchy of the military, police and intelligence forces. Obviously, their ability to exercise Organisationsherrschaft is self-evident when they are ruling themselves or form part of the government. As to the Fujimori regime we can say that the leadership level was composed of Fujimori, as President and commander of the armed forces, Montesinos and Salazar Monroe, as de facto and de jure chiefs of the national intelligence service SIN, and Bari Hermoza Rios as commander of the general staff of the armed forces.

In contrast, perpetrators who do not belong to the leadership but only to the mid-level of the organization exercise at most control over their own subordinates within the apparatus. In other words, they do not exercise control over the apparatus as a whole but only over some members of it. While one may consider them as indirect perpetrators at least with regard to the events taking place under their (partial) control, their dependence on and their integration into the organization as a whole rather militates for their responsibility as co-perpetrators on the basis of a functional division of labor.88 Roxin, however, rejects co-perpetration for principled reasons since he neither sees a jointly agreed plan nor a division of labour between the mid-level commander and the direct perpetrator(s) but rather, due to their superior-subordinate relationship, a unilateral imposition of orders by the superior.89 This is not convincing for the following three lines of reasoning. First, as to the joint decision or common plan, an informal consensus or agreement of the persons involved would suffice. While Roxin is right, in that the superior giving orders and the subordinate executing them within the framework of a criminal apparatus, as a rule, neither know each other nor take joint decisions, this is not the decisive issue. For an informal agreement it is enough that the direct perpetrator makes clear, through his belonging to the criminal organization, that he agrees with the organization’s policies as set out by the leaders.90 Secondly, co-perpetration through functional division of labour is not to be interpreted too strictly as to excluding any act of preparation of the mid-level commander.91 The famous gang leader, to take a classical example from ordinary criminality, does not dirty his hands but lets his gang members do the dirty work. Functional control over the acts means nothing else than a division of labour between the persons involved. In the case of a mid-level commander and the direct perpetrator(s) this division consists of the mid-level commander’s ordering, preparing or planning of the act and the subordinate(s) executing it. Both the contribution of the mid-level commander and of the direct perpetrator(s)

87 Ibid., at 154. See also Jessberger and Geneuss, supra note 58, at 861.
88 Ambos, Der Allgemeine Teil, supra note 49, at 604; idem, La Parte General, supra note 49, at 232.
89 For these common arguments against co-perpetration, see Roxin, supra note 83, at 552 et seq.
90 Ibid., at 605.
91 Ibid.
is indispensable for the commission of the crime, so that both can be considered to control the act equally. Thirdly, the — in principle correct — structural difference between vertical indirect perpetration and horizontal co-perpetration does not per se entail a reliable delimitation in the borderline cases of macro-criminality and complex organizations. In fact, the argument of a structural difference is only valid in cases in which the vertical relationship between the indirect and the direct perpetrator is not disturbed, as in the case of mid-level perpetrators, by the existence of a further relationship of this indirect perpetrator to his superior.92 It is worthwhile mentioning in this context that — prior to the conviction of Fujimori — the Lima Superior Court had convicted Salazar Monroe as an indirect perpetrator of the forced disappearances in the *La Cantuta* case arguing that he formed part of the leadership level at the top of the governmental apparatus.93 Yet, in the same judgment several mid level commanders of the armed forces and the members of the Colina group were convicted as co-perpetrators.94 In sum, the gist of the difficult delimitation between indirect perpetration and co-perpetration in the case of mid level members of an organizational power structure comes down to the question whether one is rather prepared to accept a deficiency of leadership on the part of the indirect perpetrator or an unequal ranking of the co-perpetrators. In my view, the latter position is more convincing since indirect perpetration rests on absolute control over the act and as such cannot be reconciled with only partial or even a lack of control because of a lack of undisturbed leadership.95

(c) Detachment of the organization from the law

The second specific prerequisite recognized by the Supreme Court is the detachment of the organization from the law.96 Accordingly the organization, be it part of the state or a non-state actor, must operate outside the national and international law. The detachment must be of a structural nature, i.e., isolated violations of human rights — not forming part of a policy — do not suffice. In the case of state-sponsored mass violence it is not necessary that the whole state apparatus as such functions beyond the limits of national or international law; it suffices that part of the institutions, e.g. the security forces, function like a ‘State within the State’ and implement a policy of human rights violations under the leadership of high-rank officials. The detachment from the rule of law can occur instantaneously through the decision of the leadership level to abandon the rule of law, or gradually through the continuous

deterioration of the democratic structures of the state.97 The degree of culpability is higher when the organization acts under the pretext of formal legality and hides its real intentions behind a façade of legality to avoid that legal steps are being taken against it.98 The Supreme Court convicted Fujimori as indirect perpetrator for crimes committed by the Colina group before the self-coup (Barrios Altos case) and after the coup (La Cantuta case). Thus, the self-coup as such is not considered as a decisive circumstance to assume that Fujimori led an extralegal hierarchical organization.

The underlying premise of this requirement is that in a normal situation, i.e. where an organized power structure acts in accordance with the law, an isolated criminal order from a superior may usually not be sufficient to cause a subordinate to commit a crime for it can be expected that this person will resist or at least hesitate to comply with an unlawful order, not least because of the possible consequences he may have to face. If notwithstanding this, the subordinates executes the unlawful order, the crime will only be committed ‘against the organized power structure’, but not ‘through the organized power structure’.99 It can therefore not be attributed to the organization as such but only to particular superiors within the organization who would thus be considered as mere instigators. In any case, it is not so decisive whether the organization acts in not just exceptional situations beyond the law, but whether its leaders can control it at their will so that its members look like anonymous and interchangeable cogs in the machinery of a criminal apparatus without the capacity to influence the outcome of the events. For this very reason, this requirement cannot be considered a necessary precondition for indirect perpetration.100 The ICC seems to hold the same view since it has not (yet) mentioned this requirement in its decisions on indirect perpetration.

(d) Interchangeability of the direct perpetrator

The third requirement consists of the easy interchangeability or replaceability of the direct perpetrator(s).101 This possibility compensates for the lack of control over a fully responsible direct perpetrator who after all may, at any time, decide to abandon the criminal plan. Only if the organization produces a sufficient number of potential willing and interchangeable executors one may speak of a control by virtue of the organization, i.e., by way of the interchangeable executors. Thus, the indirect perpetrator does not so much or, from a naturalistic perspective, not at all dominate the direct perpetrator (as he is fully

97 CSJ, supra note 33, § 735.
98 Ibid., § 731.
99 Olásolo, supra note 69, at 120.
100 See for more details Ambos, Der Allgemeine Teil, supra note 49, at 606–611; idem, La Parte General, supra note 49, at 234–238; against the relevance of this requirement with regard to the direct perpetrator, see also I. Meini, ‘La autoría mediata por dominio de la organización en el caso Fujimori’, 4 ZIS (2009) 603–608, at 606.
101 CSJ, supra note 33, §§ 737–739; CSJ, supra note 34, at 49–51.
responsible!) but rather the collective of direct perpetrators part of the criminal organization. These direct perpetrators are nothing more than interchangeable cogs in the machine of the organizational power apparatus, which makes their apparent freedom a naturalistic date which from a normative perspective is of no importance.102

With a view to the precise understanding of the concept of interchangeability, the Supreme Court's Trial Chamber distinguishes between negative and positive interchangeability.103 The first one is understood as the classical form and refers to situations in which a potential denial or abstention of the direct perpetrator to commit the crime could be immediately compensated by another direct perpetrator, so that the commission of the crime cannot be frustrated. The positive interchangeability refers to the situation in which the leaders select from a plurality of potential perpetrators the most qualified ones for the execution of the criminal act, so that any failure can be excluded. As to the Fujimori regime this means that the fact that the Colina group was only composed of about 30 persons — compared to the thousands of direct perpetrators of the Holocaust or the Rwanda genocide — does not exclude the interchangeability of the direct perpetrators since the regime's leadership previously selected the most qualified persons and trained them for the specific acts. For this reason, a failure in the commission of the crimes could practically be excluded.

In any case, the criterion of interchangeability cannot satisfactorily compensate the lack of factual control over fully responsible direct perpetrators and thus cannot satisfactorily explain the theory of Organisationsherrschaft. From a purely factual, naturalistic or empirical perspective there are always cases where direct perpetrators cannot be replaced without frustrating the completion of the crime as a whole. If, for example, a border guard or a whole border patrol at the East German Border had refused to shoot at an East-German citizen who wanted to flee to the West, there would not have been other guards immediately available to hinder this particular citizen from jumping over the wall. Thus, the doctrine can only be explained through a normative theory which transfers the structure of offences requiring a certain position of duty (Garantenstellung) on the part of the perpetrator (the so called duty-offences, Pflichtdelikte) to the doctrine of control over the act and operates with a material concept of freedom.104 Accordingly, the notion of Pflichtdelikte, which require from a person the protection of others or the prevention of the realization of a risk, can be used to attribute to the Head of State criminal responsibility as a principal if he willfully does not comply with his special duty

102 Ambos, supra note 50, at 144.
103 CSJ, supra note 33, § 738.
to protect his people, be it by action, acquiescence or omission. In this perspective the state appears — as guarantor of basic rights with a resulting duty to protect its citizens — in a specific position of responsibility vis-à-vis its citizens and thus possesses a specific power of violation (Verletzungsmacht) towards these. The state breaches its duty to protect by illegally ordering the direct perpetrator to attack and injure a particular person. The relationship between the state and its citizens is therefore comparable with the situation of a guarantor position in crimes of omission. The guarantor is in this case liable since he does not comply with his particular duty to protect flowing from his position as guarantor. In the case of illegal state orders, the — at least from a normative perspective — dependence of the citizen on the state establishes the state's control over the act. The state exercises this control by ordering the mediator of the act, a citizen, to injure the victim, another citizen. The attribution of the victim's injury to the leaders of the state organization cannot only be considered from the perspective of relationship between the leaders and the mediator of the act, but must also take into account the victim and the special state's duty vis-à-vis its citizen, which provides in all those cases a normative foundation of the control over the act where the notion of interchangeability fails for empirical reasons. With this approach the Organisationsherrschaft is not abandoned, but reinforced by normative, value-based considerations. This normative explanation does not substitute, but complement the naturalistic, empirical perspective.

The normative considerations also explain why the group of indirect perpetrators should be limited to the leadership-level. For only the leaders — as representatives of the state — bear the special duty to protect the state's citizens. Clearly, though, this normative explanation cannot apply in the case of non-state groups, where there is no comparable relationship with the citizens; therefore, in this case, naturalistic considerations must prevail. Indeed, along these lines, it is compelling that the ICC held that with regard to non-state armed groups 'attributes of the organization — other than the replaceability of subordinates — may also enable automatic compliance with the senior authority's orders. An alternative means by which a leader secures automatic compliance via his control of the apparatus may be through intensive, strict, and violent training regimes' using child soldiers. Notwithstanding, in this specific case of the forced recruitment of child soldiers, it would also be possible to consider the commanders as indirect perpetrators since the child soldiers cannot act criminally responsible due to their age and thus are to be considered as mere tools for the commission of the crimes of their adult superiors.

105 See Jakobs, supra note 59, at 574.
106 Katanga, supra note 52, § 518.
(e) Disposition of the direct perpetrator to commit the act

This is an additional requirement which goes beyond the traditional requirements (a)-(d)) which thus far have been considered sufficient to establish an Organisationsherrschaft. It has its origin in Schröders theory about indirect perpetration\(^\text{107}\) and has previously been referred to in the German judgments concerning the killings at the German wall (Mauerschützenvälle).\(^\text{108}\) The Peruvian Supreme Court also adopts this requirement,\(^\text{109}\) but it is controversial whether it is indispensable or not. Roxin himself is not completely clear on the matter. While he recently admitted it as an independent criterion of Organisationsherrschaft,\(^\text{110}\) thus adding to his original criterion of control over the result (Erfolgsherrschaft) one of control by virtue of superior knowledge (Wissensherrschaft),\(^\text{111}\) he then seems to paddle back arguing that the direct perpetrator's disposition can normally be deduced from the other three specific requirements, since the superior's control over the hierarchically structured organization and the direct perpetrator's replaceability limit the later one's capacity for independent manoeuvre.\(^\text{112}\) In a similar sense this requirement is assigned only a symbolic value considering it as mere characteristic of Organisationsherrschaft.\(^\text{113}\) In any case, a typical manifestation of the direct perpetrator's disposition regularly consists in his motivation to commit the crimes not for personal reasons, but for and as part of the organization which exercises control over him.

3. Conclusions

The various trials against former President Fujimori reflect the strong links between corruption in an authoritarian regime and serious human rights violations, especially where a state is dealing with the threat of terrorism and the state's democratic and legal framework is unstable and underdeveloped.\(^\text{114}\) Future prosecutions against Fujimori for other crimes are not excluded, but

\(^{107}\) F.-C. Schröder, Der Täter hinter dem Täter: ein Beitrag zur Lehre von der mittelbaren Täterschaft (Berlin: Dunker & Humblot, 1965), at 221–222.

\(^{108}\) BGHSt 40, 218; see also F.C. Schroeder, 'Tatbereitschaft gegen Fungibilität', 4 ZIS (2009) 569–571, at 569, 570.

\(^{109}\) CSJ, supra note 33, §§ 740–741; CSJ, supra note 34, at 51–52.


\(^{111}\) See crit. Rotsch, supra note 51, at 390 and passim.

\(^{112}\) C. Roxin, 'Bemerkungen zum Fujimori-Urteil des Obersten Gerichtshofs in Peru', 4 ZIS (2009), 565–571, at 567 (‘... nicht ... selbständige Voraussetzung ...’).


would have to be approved by the Chilean Supreme Court because of the specialty principle governing extradition law. In any case, Fujimori’s conviction on the basis of the ‘control over the act’ theory and the theory of Organisationsherrschaft shows once more that this theory must seriously be considered as a tool in the prosecution of high-level criminals. On the other hand, Vladimiro Montesinos and General Hermoza Riós, commander of the Armed Forces, have not been convicted so far for serious human rights violations committed during the Fujimori regime. This shows that criminal prosecutions remain highly selective. Last but not least, the judgments also show how basic principles of criminal law and the exigencies of international human rights law regarding the prosecution of international core crimes can be reconciled and convincing results can be achieved even if international crimes have not been fully incorporated into domestic criminal law.