Case of Barrios Altos and La Cantuta v. Peru

Inter-American Court of Human Rights – presidential pardon – anti-impunity – conventionality control

CASE OF BARRIOS ALTOS AND LA CANTUTA V. PERU, Monitoring Compliance with Judgment*
Inter-American Court of Human Rights, May 30, 2018.

On May 30, 2018, the Inter-American Court of Human Rights ("the Court") ordered Peru to review the presidential pardon granted to former president and dictator Alberto Fujimori, who had been convicted and imprisoned for his role in serious human rights violations.[1] The Peruvian Supreme Court obliged and, after examining the merits of the presidential pardon through a special procedure set up to assess the pardon's conformity with international human rights law, invalidated the pardon, effectively reinstating Fujimori's imprisonment for crimes against humanity.[2]

The Inter-American Court rendered its order against Peru under its jurisdiction to monitor compliance with the Court's merits judgments. In this case, the Court was monitoring Peru's compliance with two of the Court's most important decisions: *Barrios Altos* and *La Cantuta v. Peru*, both concerning the massacres carried out by the *Grupo Colina*, a death squad that operated under the Fujimori regime.[3] The Inter-American Court's judgment is significant for at least two reasons: First, it reaffirmed the doctrine on the incompatibility with the American Convention on Human Rights of domestic measures that promote impunity. Second, it introduced a novel approach to the Court's engagement with domestic courts: the Court, rather than ordering a specific remedy, instead set parameters within which the Peruvian courts were to review the presidential pardon. The Court's method of engagement with the Peruvian domestic courts' authority recognized the regional human rights regime's complementarity to national jurisdictions in a way that could set a precedent for future decisions by the Court.

In April 2009, Alberto Fujimori was convicted and sentenced to twenty-five years in prison for his role in crimes against humanity carried out by security forces under his government's command. The conviction was remarkable as it "mark[ed] the first time an elected head of state has been tried and convicted of a human rights crime after extradition back to his home country."[4]

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* Available at http://www.corteidh.or.cr/docs/supervisiones/barriosaltos_lacantuta_30_05_18.pdf.

[1] *See* Case of Barrios Altos and La Cantuta v. Peru, Inter-Am. Ct. H.R., Monitoring Compliance with Judgment (May 30, 2018).

[2] Following the Inter-American Court's decision, the Supreme Court of Peru opened a "conventionality control procedure" to review Fujimori's pardon. In October 2018, the Superior Criminal Court ruled that the pardon lacked legal effect, pursuant to the Inter-American Court's May 2018 decision, and in February 2019, the Supreme Court upheld the decision. *See* Supreme Court of Peru, Special Criminal Chamber, Exp. No. 00006-2001-4-5001-SU-PE-01, *Control de convencionalidad Alberto Fujimori Fujimori o Kenya Fujimori* (Feb. 13, 2019). Alberto Fujimori returned to prison. He is scheduled to be released in February 2032.

[3] *See* Barrios Altos v. Peru, Merits, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001) and La Cantuta v. Peru. Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006).

[4] *See* Jo-Marie Burt, *Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for*

Fujimori's conviction followed two decisions by the Inter-American Court finding that states have an obligation "to investigate, prosecute and punish" those responsible for serious human rights violations, and that states must remove any domestic obstacles—such as statutes of limitations, *res judicata*, or even the prohibition on *ex post facto* laws—to carry out that obligation.[5] In both *Barrios Altos* and *La Cantuta*, the Inter-American Court declared that the Peruvian amnesty laws lacked any legal effect.[6] These decisions crystallized the Court's influential jurisprudence on the incompatibility of amnesty laws with inter-American human rights law—a jurisprudence that the Court has affirmed in several subsequent decisions.[7]

Almost nine years later, however, in December 2017, Peru's former president Pablo Kuczynski announced a presidential pardon of Alberto Fujimori on "humanitarian grounds."[8] The decision came only three days after Kuczynski avoided an impeachment vote thanks to the abstention of lawmakers affiliated with Fujimori's son, Kenji. Public outcry followed the decision. Human rights organizations, pundits, and citizens alike denounced the measure as a kickback to the *Fujimorismo*.[9]

The petitioners in the *Barrios Altos* and *La Cantuta* cases asked the Inter-American Court to hold "monitoring hearings in response to Fujimori's humanitarian pardon" (p. 2) to determine "whether the granting of a humanitarian pardon … is compatible with the fulfillment of said obligation to investigate, try and punish" (p. 5).[10] The Court, in turn, ordered Peru to explain why the pardon did not violate Peru's international obligations under the American Convention on Human Rights, as well as the Court's specific orders in both cases. The Court held a public hearing where all interested parties could offer their views on the matter.

Peru submitted four main arguments defending the pardon of Fujimori. First, Peru pointed to international human rights system's subsidiary character, arguing that the Court must allow domestic judges to examine any alleged illegality under the doctrine of conventionality control (¶11.a).[11] Second, and related to the previous point, Peru argued

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Human Rights Violations, 3 INT'L J. TRANSITIONAL JUSTICE 384 (2009); *see also* Juan E. Mendez, *Significance of the Fujimori Trial*, 25 AM. U. INT'L L. REV. 649 (2010); and *Peru: Fujimori Convicted*, HARV. INT'L L.J. DIGEST (Apr. 12, 2009), http://www.harvardilj.org/2009/04/conviction-of-former-president-of-peru/.

[5] La Cantuta v. Peru, ¶ 226.

[6] In 1995, the Fujimori-controlled Congress adopted Law No. 26,479 which "granted an amnesty to all members of the security forces and civilians who had been accused, investigated, prosecuted or convicted, or who were carrying out prison sentences, for human rights violations." *See* Barrios Altos v. Peru, Merits, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 2(j) (Mar. 14, 2001).

[7] *See Almonacid Arellano v. Chile* (2006), *Gelman v. Uruguay* (2011), *Gomes Lund et al. v. Brazil* (2010), *Massacres of El Mozote and Nearby Places v. El Salvador* (2012).

[8] Resolución Suprema No. 281-2017-JUS/CGP, published in the official gazette *El Peruano* (Dec. 24, 2017).

[9] Ultimately, Kuczynski resigned in March 2018 amid a corruption scandal and before Congress held a second impeachment vote against him. The term "*Fujimorismo*" refers to a political movement created by the rise to power of Alberto Fujimori and his family, that generated a culture of strong presidentialism and even authoritarian rule that eventually bred influential political parties in Peru.

[10] Previously, the Court had issued eight compliance judgments on the *Barrios Altos* and *La Cantuta* cases. Case of Barrios Altos and La Cantuta v. Peru, Inter-Am. Ct. H.R., Monitoring Compliance with Judgment ¶ 1 (May 30, 2018).

[11] Pursuant to the doctrine of conventionality control, national judges examining a legislative or

that petitioners had several judicial avenues available to them at the domestic level, and that the Peruvian Constitutional Court has ruled that humanitarian pardons are subject to judicial review (¶11.b & c). Third, Peru argued that humanitarian pardons realize the "essence of humanitarian law" (¶11.e) and thus are compatible with international criminal law and international human rights law (¶11.f). Finally, Peru asserted that the pardon was based on a medical report (¶11.i), and that Fujimori's rights to life, health, and dignity outweighed petitioners' right to reparations (¶11.e).

The petitioners responded to each of the state's arguments. First, they argued that victims do not have a duty to exhaust domestic remedies in the compliance monitoring phase of a case (¶15.a). Second, they claimed that domestic judicial proceedings, although available, are not suitable, both because they do not guarantee that the Inter-American Court's orders will be implemented in an efficient and timely fashion, and because they take on average six years before reaching the Constitutional Court (¶15.g). Third, they argued that the presidential pardon failed to adequately balance the interests at stake: Fujimori's right to dignified treatment and the rights of victims of his crimes (¶15.h). Finally, petitioners argued that under a "rigorous analysis of international law," an individual convicted of crimes against humanity may not be pardoned because such pardon renders the punishment ineffective (¶15.b & c).

Based on these arguments, petitioners submitted two pleas to the Inter-American Court: (1) to order that Peru remove all obstacles impeding effective reparations to the victims (according to the Court's caselaw, the criminal convictions against Fujimori are such reparations), and (2) to declare that the presidential pardon "lacks legal effect" (¶15). Similarly, the Inter-American Commission on Human Rights asked the Court to issue "an express order revoking the humanitarian pardon" on behalf of Fujimori (¶17).[12]

In response, the Inter-American Court addressed the general question of whether Fujimori's pardon violated *Barrios Altos* and *La Cantuta*, which granted victims the right of access to justice. The Court did this by examining five issues. First, the Court reviewed Peru's domestic regulations on pardons. Under the Peruvian Constitution, the granting of pardons is a presidential prerogative carried out pursuant to an executive order creating a special Commission on Pardons and Commutations for Humanitarian Reasons (¶ 25). The Commission had approved the presidential pardon on the grounds that Fujimori suffered from a "non-terminal grave disease in an advanced, progressive,

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administrative measure's compatibility with the country's international human rights obligations must not only apply their national constitution, but also the American Convention of Human Rights. In conducting this assessment, the doctrine establishes, national judges must also follow the Convention as interpreted by the Inter-American Court. *See* Jorge Contesse, *The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights*, 15 INT'L J. CONST. L. 414 (2017).

[12] The Inter-American Commission referred to pronouncements by international bodies establishing the incompatibility of amnesties and pardons for individuals convicted of crimes against humanity with international law (¶17.b). It also noted that there are alternative measures a state could adopt to preserve an individual's dignity that are less harmful to the victims' rights than a presidential pardon which renders punishment ineffective (¶17.d). The Commission also argued that Fujimori's pardon was "illegitimate" as it was granted "in a context of political crisis caused by the impeachment process" (¶17.e). The Commission also noted that the "supposedly humanitarian pardon … does not only disincentivize the ongoing reconciliation process, but it also affects the process of rescuing civic trust of human rights victims in their state, who one day offers them justice and the next one takes justice away from them" (¶17.f).

degenerative and incurable stage," and that the "prison conditions could place him in grave risk for his life, health and integrity" (¶27). Pursuant to Peru's Penal Code, the granting of a pardon "extinguishes the criminal sentence" (¶26).

Second, the Court noted that the state's duty to investigate, try, and convict those responsible for human rights violations includes the sentencing stage, and that such function is "a constitutive part of victims' right to access to justice" (¶30). Here, the Court reiterated its doctrine that sentence reductions can be compatible with international law, but only under strict circumstances, such as where the individual effectively cooperates with investigations and prosecutions, and that in any case, the state must ensure that such reductions do not constitute "a form of impunity" (¶31).[13] The Court rejected Peru's argument concerning the petitioners' failure to exhaust domestic remedies, observing that the American Convention does not contemplate such a requirement for monitoring compliance with merits judgments (¶33). Therefore, the Court had the competence to review the presidential pardon as part of its (self-asserted) compliance monitoring jurisdiction (¶32).[14]

Third, the Court reviewed the international standards regulating measures that extinguish, suspend, reduce, or modify criminal sentences in cases of human rights violations or crimes against humanity. Both petitioners and the Inter-American Commission had argued that pardons in cases of serious human rights violations are incompatible with international law. The Court reviewed the statutes of the international criminal tribunals for the former Yugoslavia, Rwanda, Sierra Leone, and Lebanon (¶40), the International Criminal Court (¶41), along with two decisions by the European Court of Human Rights (¶39), final observations by UN treaty bodies (¶43), and the domestic legislation of several Organization of American States members, all of which showed a "trend towards the express prohibition of the Executive's and Legislative's power to extinguish, commute or pardon criminal sentences imposed for serious human rights violations or international crimes recognized by the Rome Statute of the International Criminal Court" (¶44). The Court concluded that "convictions imposed for the types of crimes that fall under the jurisdiction of said international criminal tribunals may not be pardoned or reduced by states' discretionary decisions" (¶42).

The Court then conducted a proportionality analysis to determine whether Fujimori's pardon unnecessarily and disproportionately infringed upon the victims' and their next of kin's right to access to justice. While the Court acknowledged that Peru has a duty to protect all persons serving prison time regardless of the type of crimes for which they have been convicted (¶49), in cases of serious human rights violations, the state must ensure that the release of such an individual is a measure of last resort (¶53).

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[13] The Court articulated this doctrine in prior compliance monitoring judgments in the *Barrios Altos* case and in other judgments. *See* Barrios Altos v. Peru, Inter-Am. Ct. H.R., Monitoring Compliance with Judgment, ¶¶ 55-57 (Sep. 7, 2012); Furlan and Family v. Argentina, Inter-Am. Ct. H.R., Preliminary Objections, Merits, Reparations and Costs (Ser. C) No. 246, ¶¶ 209-210 (Aug. 31, 2012); Constitutional Tribunal (Camba Campos et al.) v. Ecuador, Inter-Am. Ct. H.R., Preliminary Objections, Merits, Reparations and Costs (Ser. C) No. 268, ¶ 228 (Aug. 28, 2013); Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia, Inter-Am. Ct. H.R., Preliminary Objections, Merits, Reparations and Costs (Ser. C) No. 270, ¶ 405 (Nov. 20, 2013).

[14] It should be noted that the American Convention also does not establish the Court's power to exercise monitoring jurisdiction.

The Court began its proportionality analysis by declaring that there were two competing interests at stake: on the one hand, the right to access to justice for victims of serious human rights violations, and on the other hand, the rights to life and health of an individual convicted of a crime who is under the care of the state. Here, the Court found that a presidential pardon, insofar as it is a "discretionary measure adopted by the President … directly affects the proportionality principle which has been guaranteed through the work of the courts that issue a reasoned judgment according to the gravity of the crimes committed and other attendant circumstances duly determined by the criminal investigation" (¶55). According to the Inter-American Court, a presidential pardon results in "a greater restriction" of victims' rights because it affects a decision adopted by the courts (¶56). As such, the Court found, victims must be permitted to challenge the executive's decision before the courts, which must not only consider the health condition of the individual being pardoned, but also other relevant factors under international criminal law, such as the portion of the sentence served, any civil reparations paid to the victims, the person's conduct in relation to finding the truth regarding the crimes, her recognition of the seriousness of the crimes, her rehabilitation, and the impact that her early release could have on both society and the victims and their families (¶57).[15]

Finally, the Court analyzed whether Peruvian courts are permitted to exercise judicial review over the presidential pardon granted to Fujimori. The Court noted that the courts have previously found that presidential pardons may be reviewed—and in some cases even annulled—by a judicial order (¶60 and ¶62), and that a lower court that was at the time reviewing a criminal investigation related to *La Cantuta* found that the December 2017 pardon "lacks any legal effect on the present case" (¶61).

The Court concluded by declaring that the competent Peruvian judicial bodies should address the matter "in a timely fashion" (¶66), taking into consideration the international standards set forth by the Court in its monitoring order (¶64).[16] The Court "remind[ed]" domestic authorities that they must engage in conventionality control and that, when states implement a decision by the Inter-American Court, "judicial organs have a duty to give preference to the American Convention and this Court's decisions over domestic law.…" (¶65). The Court noted "serious concerns" regarding the actual satisfaction of legal requirements in granting a presidential pardon in the present case and declared that domestic courts will have to consider those concerns (¶69).[17] Finally, the Court ordered the state and petitioners to report back in five months to evaluate compliance with its order (p. 36).

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[15] These factors are taken from Article 110 of the Rome Statute ("Review by the Court concerning reduction of sentence") and Rule 223 (c) and (d) of the Court's Rules of Procedure and Evidence.

[16] The Court noted that "it is upon domestic authorities to analyze whether Peruvian law contemplates alternative measures that can protect the life and integrity of Alberto Fujimori without resulting in the pardoning of his sentence by the executive" (¶68). It added that "[i]f necessary, this Court will review whether or not the domestic decision observes this Court's order or whether such decision is an obstacle to the State's duty to investigate, prosecute and convict those responsible for human rights violations..." (¶64).

[17] Among these concerns, the Court notes the objectivity of Medical Panel that assessed Fujimori's health condition (¶69.a); the "substantial differences" among the minutes of the Penitentiary Medical Panel adopted on December 17, 2017, and another one adopted two days later (¶69.b); the presidential pardon's failure to explain which "non-terminal grave diseases in an advanced, progressive, degenerative and incurable stage" Fujimori suffers from (¶69.c); and the "context of political crisis" in which Fujimori obtained his pardon (¶69.f).

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The Inter-American Court's decision is significant for at least two reasons. First, the Court reiterated its doctrine on the incompatibility of laws promoting impunity with the American Convention on Human Rights. The Court first articulated this doctrine in the 2001 landmark *Barrios Altos* decision and, since then, has reiterated it again in several subsequent decisions.[18] More significantly, although articulated in a case from Peru, the doctrine has also influenced other Latin American jurisdictions. Domestic courts have adopted the doctrine in human rights decisions, such as the 2005 *Simón* case, decided by the Supreme Court of Argentina,[19] and the 2006 *Molco* case, decided by the Supreme Court of Chile.[20]

Second, the Court's decision offers a novel form of engagement between itself and national legal orders. In *Barrios Altos*, the Court declared that amnesty laws "lack legal effect"[21]—a finding that arguably could only be made by an apex domestic court, since it makes legislation devoid of legal effect *on the domestic plane*. While during the mid-1990s, the Court had established that it was not its function to "act as an appellate court or a court for judicial review of rulings handed down by the domestic courts,"[22] ten years later, the Court began to gravitate toward a more intrusive jurisprudence. First, it found that domestic laws lack legal effect (*Barrios Altos*); then it declared that all domestic judges have a duty to apply the American Convention over any domestic provisions (*Almonacid Arellano v. Chile*). Going even further, the Court held that the American Convention supersedes the popular will expressed in a referendum (*Gelman v. Uruguay*). More recently, the Court has used its advisory jurisdiction to rule on issues that had not even been submitted for its consideration.[23]

The petitioners here had asked the Court to declare that Fujimori's pardon lacked any legal effect (¶15). In light of the cases just discussed, commentators anticipated that it would "not be surprising" for the Court to declare the presidential pardon "null and void."[24] Yet, the Court did not do that. Instead, it ordered Peru to set up a process by which Peru was to review the merits of the decision under both Peruvian constitutional norms and inter-American human rights standards. As explained, the Court delineated

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[18] *See infra* note 6.

[19] Supreme Court of Justice of Argentina, *Simón, Julio Héctor y Otros*, Fallos, 328:2056, Jun. 14, 2005. *See* Christina A.E. Bakker, *A Full Stop to Amnesty in Argentina: the Simón Case*, 3 INT'L CRIM. JUSTICE 1106 (2005).

[20] Supreme Court of Chile, *Caso Molco*, No. 559-2004 (Dec. 13, 2006). *See* Gonzalo Aguilar Cavallo, *The Supreme Court and the application of International Law: an encouraging process,* 7 ESTUDIOS CONSTITUCIONALES 91 (2009).

[21] *Barrios Altos*, ¶ 44.

[22] Genie-Lacayo v. Nicaragua, 1997 Inter-Am. Ct. H.R. (ser. C) No. 30, ¶ 94 (Jan. 29, 1997). ("All it is empowered to do ... is call attention to the procedural violations of the rights enshrined in the Convention ... however, it lacks jurisdiction to remedy those violations in the domestic arena …").

[23] *See* Macarena Saez, *In the Right Direction: Family diversity in the Inter-American System of Human Rights*, 44 N.C. J. INT'L L. __ (2019) (explaining how the Court addressed issues that went beyond Costa Rica's request in the Advisory Opinion 24/17, on same sex marriage and gender identity).

[24] Carlos Lopez, *The Pardon of Fujimori: Amnesties and Remedies Before the Inter-American Court of Human Rights*, OPINIO JURIS (Mar. 8, 2018), *available at* http://opiniojuris.org/2018/03/08/the-pardon-of-fujimori-amnesties-and-remedies-before-the-inter-american-court-of-human-rights/.

the standards under which the executive may legally pardon an individual convicted of crimes against humanity. But it did not directly apply those standards itself, as if it were a court of fourth instance; it remanded the case to Peru's domestic courts, ordering them to apply international standards along with constitutional principles when conducting a review of the pardon.

The Inter-American Court's form of engagement with Peruvian law can be understood as "constrained deference." The Court defers to domestic authorities as the proper *locus* to decide the merits of a pardon decision, but it does so in a way that nonetheless constrains what domestic courts may legally do. This method of interaction is different from, and arguably more desirable than, the more intrusive approach that became the norm after the Court's adoption of conventionality control in 2006.[25] In recent years, tensions between domestic authorities and Inter-American human rights law have increased.[26] Some courts—and governments—have adopted more confrontational positions toward the Court. The Court's approach as an apex tribunal vested with the power to impose decisions upon domestic judges may not help it to maintain and enhance its authority. The notion of constrained deference could therefore be a sound method of interaction with states in future cases.

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[25] Commentators have observed that the Court's decision "arguably reflects an increasing awareness of its subsidiary role." *See* Leiry Cornejo Chavez, Juan-Pablo Pérez-León-Acevedo and Jemima García-Godos, *The Presidential Pardon of Fujimori: Political Struggles in Peru and the Subsidiary Role of the Inter-American Court of Human Rights*, 13 INT'L J. TRANSITIONAL JUSTICE __ (2019).

[26] *See* Jorge Contesse, *Resisting the Inter-American Human Rights System*, 44 YALE J. INT'L L. __ (2019).