

## The Extradition of Nationals: Comments on the Extradition Request for Alberto Fujimori

By Arnd Düker\*

### A. Introduction

On 31 July 2003 Peru submitted an extradition request to the Japanese authorities requesting the extradition of former President Alberto Fujimori.<sup>1</sup> Along with the establishment of a truth and reconciliation commission,<sup>2</sup> and the numerous penal proceedings against the former presidential councilor and head of the secret service Vladimiro Montesinos Torres,<sup>3</sup> the extradition request is another important effort of the Peruvian government to bring human rights violators to justice.<sup>4</sup> Since Peru's

---

\* Arnd Düker is a PhD-candidate at the University of Frankfurt (Rechtsassessor, Licencié en Droit (Université Paris X)).

<sup>1</sup> Alberto Fujimori was President of the Republic of Peru between 1990 and 2000. During his two terms in office, Peru's security forces committed grave human rights violations. See Amnesty International, AMR 46/017/2001, 26 October 2001.

<sup>2</sup> The Commission of Truth and Reconciliation was formed by former president Paniagua in June 2001 after Fujimori fled to Japan. Its mandate was to provide an official record of human rights violations and violations of international humanitarian law committed in Peru between May 1980 and November 2000, and to recommend measures to strengthen human rights and democracy. It presented a final report of its findings on 28 August 2003. The commission has held numerous public hearings, collected over 17,000 testimonies, and has developed a unified register of "disappeared" persons. It reported that previous estimates of abuses committed by the terrorist group Shining Path were far too low. The 12-member commission has identified by name some 32,000 people who died during the violence. It also documented grave human rights violations, including disappearances, extrajudicial executions, and torture, committed by official security forces during the three successive governments of presidents Fernando Belaúnde, Alan García, and Alberto Fujimori.

<sup>3</sup> Montesinos also fled the country but was arrested in June 2001 in Venezuela and returned to Peru where he was convicted of charges related to human rights violations, corruption and money laundering. He still faces more than 50 trials.

<sup>4</sup> The Supreme Court of Spain held that Peru was in the process of initiating criminal investigations over claims of genocide, terrorism, torture and illegal detention alleged to have been committed by Peruvian ex-Presidents Alan García, Alberto Fujimori and other government and military officials from 1986 to the present. Therefore, the Supreme Court held that "for the present time" there was no need for the Spanish courts to intervene on the basis of universal jurisdiction. See ASIL insights, 8 August 2003 <http://www.asil.org/ilib/ilib0614.htm>. The decision *Judgment on the Peruvian Genocide Case*, Judgment

legal system does not allow trials in absentia, Fujimori will escape prosecution if he is not extradited or tried in Japan.<sup>5</sup>

The Japanese government has consistently taken a negative stance toward extradition. Following Fujimori's arrival in Japan in November 2000, the Japanese government announced that Fujimori has retained Japanese nationality. Thus, Japan said it could not extradite Fujimori because the former head of state has Japanese nationality and that Japan and Peru have not concluded an extradition treaty.<sup>6</sup> Furthermore, when an international warrant was issued in March 2003, the Ministry of Foreign Affairs of Japan said that the warrant issued by Interpol does not amount to a Japanese arrest warrant.<sup>7</sup> This negative stance toward extradition has been criticized. Other countries, Germany among them, have declared that they would arrest Fujimori if he enters their territories.<sup>8</sup>

The focus of this article is to examine Japan's position with regard to the extradition of nationals who are accused of having committed crimes against humanity. This article will also examine similar situations with regards to the extradition of German nationals.

### *B. Allegations Against Fujimori*

Since fleeing Peru in November 2000, Fujimori has been in exile in Japan. In 2001 the Peruvian Attorney General formally charged Fujimori before the Peruvian Supreme Court of Justice for the 1991 murder of 15 people at *Barrios Altos* in Lima, and for the 1992 forced disappearance and murder of nine students and a professor from *La Cantuta University*. A judge of the Peruvian Supreme Court of Justice ordered the detention of Fujimori because there was strong evidence to suggest that Fujimori had full knowledge of the existence of the death squad *Colina*. *Colina* was attached to Peru's Intelligence Service and was allegedly responsible for these

---

No. 712/2003 of 20 May 2003 is obtainable in Spanish at [www.derechos.org/nizkor/peru/doc/tsperu.html](http://www.derechos.org/nizkor/peru/doc/tsperu.html).

<sup>5</sup> Former president Alan Garcia was charged with political corruption and theft after he fled to Colombia and France where he remained in exile. In 2001 he returned and he was allowed to run for president. Peru's Supreme Court ruled that the crimes came under a statute of limitations.

<sup>6</sup> Mainichi Shimbun, Japan, 31 July 2003.

<sup>7</sup> See, Press conference Ministry of foreign affairs of Japan, 27 March 2003, <http://www.mofa.go.jp/announce/press/2003/3/0327>.

<sup>8</sup> This isn't very surprising since the international warrant is valid in all of these countries and the problem of the Japanese nationality wouldn't arise.

crimes, which resulted in 25 deaths.<sup>9</sup> Fujimori was accused of offences against life, body, and health in the form of qualified murder. There are other allegations against Fujimori, including corruption and bribery, but the extradition request only deals with the murder charges.

### C. *The Extradition Request*

The extradition request<sup>10</sup> is based on two arguments. First, the Peruvian government asserts that Fujimori's Peruvian nationality prevails over his alleged Japanese nationality. Second, the extradition request is based on the argument that Japan has the duty to extradite or try persons suspected of committing crimes against humanity.

#### I. Nationality

In December 2000, Japan confirmed that Fujimori is a Japanese citizen. This conclusion was reached based on a family register that contained the former president's familial details. This register exists in Japan, from where Fujimori's parents emigrated in the thirties. In 1938 Fujimori's parents, once in Peru, notified the Japanese Consulate of their son's birth.<sup>11</sup> In light of these facts the Japanese Foreign Ministry declared that Fujimori has been a Japanese citizen since the day he was born in Peru.

---

<sup>9</sup> Fujimori refused to allow *Colina* members to testify before a congressional committee investigating the crimes and ensured that a military court retained jurisdiction over the case. In 1995 Congress approved a comprehensive amnesty. Those in detention at that time were immediately released, and the charges against them were dropped. On 14 March 2001, the Inter-American Court of Human Rights decided that these are self-amnesty laws, incompatible with the American Covenant on Human Rights, and as a consequence lacking legal effects. The same court asserted the *erga omnes* effect in the subsequent interpretative ruling of the sentence. *See*, Judgment of March 14, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 75 (2001).

<sup>10</sup> *See*, the unofficial English translation of the Diplomatic Note requesting the extradition of former President Alberto Fujimori, obtainable at [www.rree.gob.pe/domino/nsf/Enlaces.nsf/0/f69d524e0aaf7e1205256d7900782199?OpenDocument](http://www.rree.gob.pe/domino/nsf/Enlaces.nsf/0/f69d524e0aaf7e1205256d7900782199?OpenDocument).

<sup>11</sup> Some Peruvians support the rumour that he may have actually been born in Japan. This seems unlikely, as Peru did not allow Japanese immigration after 1936 until the 1950s.

## 1. Japanese Nationality Law<sup>12</sup>

Experts question this conclusion.<sup>13</sup> Whether the Japanese Government correctly interpreted its relevant laws is beyond the scope of this article. However, I will point out Article 1 of Law No. 66 (1899), which was in force when Fujimori was born. According to that section, a child shall be a Japanese national when at the time of birth his father is a Japanese national.

Despite this rule, the 1916 and 1924 amendments to Law No. 66 stipulate that a Japanese national, who is born in a foreign country, receiving that country's nationality and residing there, could renounce his Japanese nationality with the permission of the Minister of Justice. Additionally, an Imperial Ordinance of 1924 stipulated that, in cases involving certain countries (Peru among them), when a foreign-born Japanese citizen acquires the nationality of the foreign country he or she shall lose Japanese nationality retroactively as from the time of birth. Furthermore, an official document that was issued in 1937, a year before Fujimori was born, established that those born in Peru were Peruvian and not Japanese citizens.

In 1984 Japan adopted laws that oblige a person of double nationality to choose between the two nationalities. According to the Ministry, this doesn't apply to the case of Fujimori because he already possessed double nationality before 1984.<sup>14</sup>

## 2. Possible Extradition According to Japanese Law

Having recognized that Fujimori is both a Japanese and Peruvian national, we now turn to Japanese extradition law. Extradition in Japan is regulated by Law No. 68 (1953).<sup>15</sup> Art 2 of the Law N°68 (1953) requires Japan to not extradite its nationals

---

<sup>12</sup> The Japanese Government runs a website with the full text of all law, see <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>. Unfortunately, there is no text of the Japanese extradition law in English. The author is thankful to Mr. Hideki Yamaguchi, lecturer in Japanese sciences, University of Frankfurt, for translation. A comprehensive collection of English translations of Japanese laws is EHS Law Bulletin Series, Japan (EHS).

<sup>13</sup> See, the discussion at [www.fujimoriextraditable.com.pe/english/nacionalidad/html](http://www.fujimoriextraditable.com.pe/english/nacionalidad/html)

<sup>14</sup> Japan's most recent nationality law is Law No. 147 (1950) as amended by Law No. 268 (1952), Law No. 45 (1984) and Law No. 89 (1993). According to these laws, a person of dual nationality shall be obliged to choose between the two nationalities. However, the Ministry of Justice points out that it may validly declare the loss of nationality, even if no declaration of choice exists, in the following cases: (1) If a Japanese national has not lost his/her foreign nationality; (2) If a Japanese national has taken up public office in the foreign country, which would contradict the choice of nationality.

<sup>15</sup> Extradition law (*tōbō hanzainin hikiwatashi hō*), subsequent amended by Law No. 163 (1954), Law No. 86 (1964), Law No. 70 (1978) and Law No. 89 (1993), see <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>. Extradition on the basis of national legislation without treaty essentially imposes a

unless a treaty of extradition provides otherwise<sup>16</sup>. Japan has only one extradition agreement, and it is between Japan and the United States.<sup>17</sup> There is no extradition treaty between Japan and Peru. Furthermore, Japan is not a party to the Rome Statute of the International Criminal Court (ICC).<sup>18</sup>

Peru is considering bringing this case to the International Court of Justice (ICJ) if Japan refuses the extradition request because of Fujimori's Japanese nationality. Fujimori's nationality should be analyzed according to the international law concept of "effective nationality".<sup>19</sup> However, even by doing so this won't likely lead to an extradition of Fujimori. The ICJ applied the principle in the *Nottebohm* case.<sup>20</sup> It held that nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments.<sup>21</sup> It is hard to argue that there is no connection between Fujimori and Japan since his parents were Japanese citizens.

---

condition of reciprocity. It seems that the other conditions listed in Art.2 are fulfilled. This would lead to reciprocity.

<sup>16</sup> Art. 2 No. 9.

<sup>17</sup> See, <http://www.uncjin.org/Laws/extradit/japan.pdf>.

<sup>18</sup> Rome Statute of the International Criminal Court, 17 July 1998, 37 ILM 999 (1998).

<sup>19</sup> The principle of effective nationality is often used to settle conflicts arising out of dual nationality. Multiple nationality can lead to difficulties when it comes to exercising diplomatic protection. In principle diplomatic protection cannot be invoked against a State of which the injured party is also a national, since the person in question is also considered by that State to be its citizen. Furthermore, the rights of citizens with dual nationality can only be defended with regard to third countries if the nationality were predominant. The State against which the claim is being made must be able to rely upon the validity of the nationality claimed by the individual. Therefore the nationality must be effective. This will not be so if naturalisation has been granted in the absence of any link with the applicant State or in the absence of any objective circumstances. The principle of effective nationality is not only used to solve conflicts concerning diplomatic protection. For example, in Germany, it is used to solve civil conflicts if a person has double nationality. If the person possesses the German nationality, German law applies, Art. 5 (1) EGBGB.

<sup>20</sup> ICJ Rep. 1955, 4.

<sup>21</sup> ICJ Rep. 1955, 23. Liechtenstein conferred nationality to Nottebohm without any genuine connection. The ICJ concluded that in cases of conferred nationality "it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national".

Even if the ICJ rules that Fujimori's Peruvian nationality prevails over his Japanese nationality, it won't help the Peruvian Government. Although the rulings of the ICJ are binding for the parties to the conflict, the question of enforcement remains.<sup>22</sup>

Even if Japan prevails on the question of nationality, the extradition request offers another option. Peru is demanding extradition because Fujimori is accused of murder and torture. These crimes amount to crimes against humanity and international law may provide another solution.

## II. Extradition of Nationals and International Law

The prohibition to extradite nationals is often found in European countries although it is hardly found in the Anglo-American legal system.<sup>23</sup> There is no rule in international law that obliges a state to extradite its nationals without any conditions or restrictions. Whether crimes against humanity demand that a state extradite its nationals when it is unwilling or unable to prosecute them (*aut dedere aut iudicare*<sup>24</sup>) is still controversial.<sup>25</sup>

Crimes against humanity are inhumane acts that attack not just individuals, but humanity itself.<sup>26</sup> The most widely accepted definition of these crimes is found in

---

<sup>22</sup> According to the Peruvian minister of foreign affairs, Allan Wagner, Peru is considering to bring the dispute to the ICC (AFP, 1 August 2003). However, this case wouldn't be admissible since jurisdiction of the ICC exists only for crimes committed after 1 July 2002.

<sup>23</sup> See, Carsten Rinio, *Die Auslieferung eigener Staatsangehöriger*, ZStW 1996, pp. 354-393 for an analysis of the situation in Germany, Austria, France, Netherlands, Switzerland, USA, Canada, Great Britain.

<sup>24</sup> See, M. Cherif Bassiouni / Edward M. Wise: *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Dordrecht/Boston/London, 1995.

<sup>25</sup> See, Amnesty International IOR 53/008/2001. The Anglo-American legal system does not distinguish the *aut dedere aut iudicare* rule with the related principle of universality, see Rüdiger Wolfrum, *The Decentralised Prosecution of International Offences through National Courts*, in Yoram Dinstein/ Mala Tabory, *War Crimes in International Law*, The Hague, Boston, London, 1997, p.235. The principle of universality itself is controversial in the Anglo-American legal system, see Ruth Wedgwood, *National Courts and the Prosecution of War Crimes*, in Gabrielle Kirk McDonald/ Olivia Swaak-Goldman, *Substantive and Procedural Aspects of International Criminal Law. The Experience of International and National Courts*, Volume I, Den Haag, London, Boston, 2000, pp. 399.

<sup>26</sup> See, the judgment of the International Criminal Tribunal for the former Yugoslavia *Prosecutor v. Erdemovic*, Case No. IT-96-22-T (29 November 1996), para 28: Crimes against humanity "are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity. They are inhumane acts that by their very extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity."

Art 7 ICC-Statute, which defines the jurisdiction of the Court over most of these crimes.<sup>27</sup>

A number of scholars and organizations have concluded that states have a duty to extradite or try persons suspected of crimes against humanity.<sup>28</sup> Amnesty International states that:

“Widespread and systematic human rights violations committed in Peru during Alberto Fujimori’s presidency amount to crimes against humanity, over which any state has the ability and responsibility to exercise universal jurisdiction. All states are under the obligation to prosecute and punish anyone responsible for such crimes and to cooperate in their detection, arrest and punishment.”<sup>29</sup>

However, state practice may differ from this principle.<sup>30</sup> For example, in Argentina, a presidential decree prevented extradition of members of the *junta* for crimes against humanity.<sup>31</sup> President Kirchner cancelled his predecessor’s 2001 presidential decree. This was the direct result of an international warrant that Interpol issued on behalf of a request from the Spanish prosecutor Baltasar Garzón. The decree violated the Argentinean Constitution and the principle of equality because

---

<sup>27</sup> According to Art. 7 of the ICC-Statute, crimes against humanity are not linked to an armed conflict. They include the following acts when committed on a widespread or systematic basis: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape and other crimes of sexual violence; persecution; enforced disappearance; the crime of apartheid and other inhumane acts.

<sup>28</sup> See, *inter alia* Ian Brownlie, *Principles of Public International Law*, Oxford, 5th ed. 1998, p.515. The International Law Commission has incorporated the principle of *aut dedere aut judicare* in Article 9 of the 1996 Draft Code of Crimes. But it noted that the duty either to prosecute or extradite would depend on the sufficiency of the evidence. See Report of the International Law Commission on the Work of its Forty-Eighth Session, 51 U.N. G.A.O.R. Supp. (N.10) at 9, U.N. Doc. A/51/10 (1996), paras 4-5.

<sup>29</sup> Amnesty International, AMR 46/016/2003, 31 July 2003.

<sup>30</sup> See, the country-by-country review in Amnesty International, IOR 53/003/2001-IOR 53/017/2001: Universal jurisdiction. The duty of states to enact and enforce legislation, 1 September 2001.

<sup>31</sup> From 1976 to 1983 approximately 30.000 people disappeared. Hundreds of them possessed a nationality of a European country. Germany is requesting the extradition of two generals suspected of having killed the student Elisabeth Käsemann in 1977. One suspect has been detained but the Argentinean government has until now refused to allow extradition.

Argentina recognizes the *aut dedere aut iudicare* principle.<sup>32</sup> However, Spain's government recently overrode the courts and refused to request the extradition of 40 suspected Argentinean torturers to face trial in Spain. The Spanish justified doing so by claiming that the decision of the Argentinean parliament to annul the amnesty laws<sup>33</sup> protecting those who tortured and killed opponents of the military *juntas* meant they could be tried in Argentina.<sup>34</sup> Similarly, Austria recently denied extradition of a former UNMIK (United Nations Mission in Kosovo) official accused of torture to face trial in Kosovo.<sup>35</sup>

The Convention against Apartheid and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)<sup>36</sup> are the only conventions that impose an *aut dedere aut iudicare* obligation on states with regard to any person under their jurisdiction suspected of torture in all cases, not just when the torture amounts to a crime against humanity.

Japan ratified the CAT in 1999.<sup>37</sup> Therefore, Japan has an obligation to extradite

---

<sup>32</sup> In Argentina international human rights treaties have the legal ranking as constitutional provisions, see Helen Duffy/Jonathan Huston, *Implementation of the ICC Statute: International Obligations and Constitutional Considerations*, p.34 in: Claus Kreß/ Flavia Lattanzi (eds.), *The Rome Statute and Domestic Legal Orders*, vol.I, 2000. Argentina enacted in Art. 5 of the extradition law of 1885 an *aut dedere aut iudicare* obligation with regard to foreigners found in its territory suspected of committing ordinary crimes abroad. Argentines though, could not be extradited to a foreign country under any circumstances. In 1997 Law No. 24767 was introduced and the general obligation *aut dedere aut iudicare* of former Art. 5 is no longer found. But the government stated in 1997 that "Argentina applies the principle *aut dedere aut punire*, as laid down in the international agreements that are binding on it. In cases where no agreement exists, the principle applies to nationals, and also in respect of acts having consequences within its territory". See Amnesty International, IOR 53/007/2001.

<sup>33</sup> *Ley de punto final*, No. 23.491 ratified December 23, 1986 and *Ley de obediencia debida*, No.23.521, ratified June 4, 1987.

<sup>34</sup> The Guardian, Saturday 30 August 2003.

<sup>35</sup> After UNMIK waived immunity, an international judge opened process *in absentia*, see <http://www.unmikonline.org/press/2003/wire/Jul/imm020703PM.htm>.

<sup>36</sup> Adopted by the UN General Assembly on 10 December 1984 and enforced 26 June 1987, U.N. G.A. Res. 39/46, U.N. G.A.O.R. Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

<sup>37</sup> Japan ratified this agreement on 29 June 1999. Japan is also signatory to the Anti-Corruption Convention of the Organization for Economic Cooperation and Development (OECD), which was enforced 15 February 1999. Interestingly, Transparency International argued in favour of an extradition based on allegations of corruption, see Press Release 27 August 2003: Transparency International calls on Japanese government to extradite Fujimori, [http://www.transparency.org/pressreleases\\_archive/2003/2003.08.27.fujimori.html](http://www.transparency.org/pressreleases_archive/2003/2003.08.27.fujimori.html).



Fujimori or to prosecute him when the allegations constitute torture.<sup>38</sup> The Peruvian extradition request is expressly based on the provisions of the CAT.<sup>39</sup> The aggravated battery perpetrated in the *Barrios Altos* case<sup>40</sup>, insofar as it consisted of actions that intentionally inflicted pain and serious suffering with the intention of punishing or intimidating victims considered subversive elements, is an act of torture in accordance with the definition contained in article 1 subsection 1 of the CAT.

Japan might question the application of the CAT because the extradition request is based on allegations which occurred before Japan became a state party to the CAT in 1999. But the CAT does not contain *self-executing* provisions<sup>41</sup>. Prosecution of torture must be based national law. Japan has the ability to prosecute the allegations against Fujimori itself. His offences are criminal according to articles 199, 204, and 220 of the Japanese Penal Code,<sup>42</sup> which were in force in 1991. Thus, there can be no violation of the *principle of retroactivity*. Furthermore, the obligation in article 7 CAT is linked to the fact that the accused is found in the territory of the State Party to the CAT and not to the fact that acts of torture were committed before the concerned state ratified the CAT.

Article 8 para. 2 CAT even states that a State Party which makes extradition conditional on the existence of a treaty and receives a request for extradition from another State Party with which it has no extradition treaty may consider the CAT as

---

<sup>38</sup> Every state that is a party to the Convention against Torture is obliged under article 7(1) of the Convention, to extradite anyone found in its jurisdiction alleged to have committed torture or to submit the case to its competent authorities for the purpose of prosecution.

<sup>39</sup> See, No. 4 and 23 of the Diplomatic Note requesting the extradition of former President Alberto Fujimori.

<sup>40</sup> The death squad killed 15 people and left 4 seriously wounded. One victim remains now permanent handicapped. The Inter-American Court of Human Rights ruled that the actions violated the right of personal integrity. See judgement of 14.3.2001 No. 2 para. b.

<sup>41</sup> Kai Ambos, *Straflosigkeit von Menschenrechtsverletzungen*, Freiburg i. Br., 1997, p.172. Antonio Marchesi, *L'attuazione in Italia degli obblighi internazionali di repressione della tortura*, RDI 1999, p.468, has stated that the CAT does not provide a sufficient basis for a prosecution in Italy of a person suspected of torture since it does not itself define the crime of torture or the appropriate penalties.

<sup>42</sup> Art.3 of the Japanese Penal Codes provides jurisdiction for crimes committed by Japanese nationals abroad. Furthermore, article 4-2 (Crimes committed outside Japanese territory to be governed by treaty) of the Japanese Penal Code provides universal jurisdiction over certain crimes made illegal under Japanese law committed by anyone outside Japan when a treaty requires that they be punished even if committed outside Japan. Art.4-2 states that in addition to those provided for in the preceding three articles, this Code shall also apply to every person who has committed outside Japanese territory those crimes mentioned in Book II (articles 77 to 264) that are considered to be punishable by a treaty even if committed outside Japanese territory, Penal Code of Japan, Law No.45 (1907), last amended by Law Nr.138 of 1 August 2003, <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>.

the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State

If Japan continues to deny trying Fujimori, Peru has the possibility according to Article 30 subsection 1 of the CAT to claim that Japan isn't fulfilling its duties to submit this dispute to arbitration. If, within six months from the date of the request for arbitration, the Parties are unable to agree on the organization of the arbitration, Peru or Japan may refer the dispute to the ICJ by request in conformity with the Statute of the Court.<sup>43</sup> Despite this remedy however, as explained above, it is doubtful whether this would lead to a trial of Fujimori.

#### *D. Extradition and German law*

In Germany there is a constitutional ban on extradition of nationals. Article 16, subsection 2 of the *Grundgesetz* (GG) (German Constitution) states the principle that no German may be extradited to abroad.<sup>44</sup> The purpose of Article 16(2) of the GG is to guarantee an objective and just criminal process, and to protect Germans against unknown foreign criminal process.<sup>45</sup> The Act of 29 November 2000<sup>46</sup> amended this provision by permitting the extradition of Germans to an international court or to another European Union country so long as basic principles of the rule of law are respected.<sup>47</sup> The amendment has created the constitutional basis for extradition by making it possible for Germany to surrender Germans to international courts like the ICC while at the same time, in view of the increasing integration of Member States of the European Union, the constitutional ban on extradition of Germans was repealed in respect to these States.

---

<sup>43</sup> Japan and Peru haven't made the declaration that they recognize according to art. 21 (1) of the Convention the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention.

<sup>44</sup> The extradition treaty between Germany and the United States of 20 June 1978 provides in article 7 that neither of the Parties shall be bound to extradite its own nationals. The competent executive authority of the requested State, however, shall have the power to grant the extradition of its own nationals if, the law of the requested State does not so preclude. Whereas Germany has a ban on extradition of nationals, the U.S Congress enacted legislation in 1990, which expressly provided for the extradition of U.S. citizens to foreign countries, provided that all other requirements of the applicable extradition treaty were met.

<sup>45</sup> Winfried Bausback, *Art. 16 II GG und die Auslieferung Deutscher an den neuen Internationalen Strafgerichtshof*, NJW 1999, p.3320.

<sup>46</sup> BGBl. 2000 I 1633, in force since 2 December 2000.

<sup>47</sup> The Amendment reads as follows: (translation): "A regulation in derogation of this may be made by statute for extradition to a Member State of the European Union or to an international court provided there is observance of the principles of the rule of law".

Since German constitutional provisions prevail over international rules laid down in treaties or customs,<sup>48</sup> German law permits extradition of a German only to an international court like the ICC or to a Member State of the European Union. Parliament passed the necessary regulation concerning the ICC in 2002.<sup>49</sup> The regulation concerning extradition to Member States of the European Union is still pending.<sup>50</sup> In 2002 Germany passed a law providing that it could exercise jurisdiction over crimes that fall under the Statute of the ICC, including crimes against humanity.<sup>51</sup>

On 13 June 2003 the European Council adopted the framework for a European Arrest Warrant (EAW),<sup>52</sup> which is designed to accelerate and simplify the extradition of criminals within the 15 EU member states. Only the applicable court will decide on the extradition of criminals, leaving no room for the involvement of the minister of justice of the relevant country.<sup>53</sup> The EAW applies to all offences.<sup>54</sup> For a list of 32 serious offences, punishable by deprivation of liberty of at least 3 years, the surrender of the person does not require the verification of the double criminality of the act.<sup>55</sup> All other crimes are dealt with in the usual manner. The German law of im-

---

<sup>48</sup> See, Art. 25 and 59 (2) GG.

<sup>49</sup> Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof - IStGHG, BGBl. I 2002, 2144.

<sup>50</sup> See, the draft "Entwurf eines Gesetzes zur Umsetzung des Rahmenbeschlusses über den Europäischen Haftbefehl und die Übergabeverfahren zwischen den Mitgliedstaaten der Europäischen Union (Europäisches Haftbefehlsgesetz - EuHbG)" at <http://www.bmj.bund.de/images/11623.pdf>.

<sup>51</sup> See Völkerstrafgesetzbuch - VStGB of 26.6.2002, BGBl. 2002 I 2254, entered into force 30 June 2002.

<sup>52</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Official Journal L 190, 18 June 2002.

<sup>53</sup> The idea of a European Arrest Warrant (EAW) system whereby a judge in one member state of the EU could directly enforce a warrant for arrest issued by a judicial authority in another member state has been under consideration as part of the European Union's move towards an "area of freedom, security and justice."

<sup>54</sup> The judiciary of each member state will be able to issue a European arrest warrant when a person is being prosecuted for an offence punishable by a custodial sentence of over a year or when the person has been sentenced to custodial or detention order exceeding four months. When an arrest is carried out on the basis of a European arrest warrant in a member state, the person will be handed over by the judiciary of the state where the arrest has taken place pending minimal control over a maximum period of three months.

<sup>55</sup> Dual discrimination requires that the facts that motivated issuing an arrest warrant are also incriminated in the member state where the surrender is to be carried out. Amongst the 32 crimes are: membership of a criminal organisation, terrorism, slave trade, sexual exploitation of children and child pornography, illegal trading of drugs, illegal trading of weapons, corruption, money laundering, money counterfeiting, cyber criminality, environmental criminality, assisting with illegal entry and residence, mur-

plementation has not yet been passed. Time is running short for Germany however, because the deadline for implementation is 31 December 2003.<sup>56</sup>

Currently there is a debate over whether the statutory abolition of the required dual criminality in the case of the 32 serious criminal offences listed in the framework decision is compatible with German constitutional and procedural law.<sup>57</sup> German defense lawyers have adopted the "Frankfurt Appeal". It states that the actors of the European criminal policy are unilaterally emphasizing the concept of security and are selectively interested in protecting institutional interests. The Appeal suggests positioning the consolidation of undisputable legal principles from the centuries-old European legal tradition into the emerging European legal order.<sup>58</sup>

Even if the accelerated extradition process proposed by the European Council is implemented, German courts will not automatically grant future requests for extradition. The extensive jurisdiction of the German courts concerning questions on extradition is still relevant. For example, in 1999 a German court denied extradition because the conditions in the Peruvian prisons were considered incompatible with international standards and would constitute a violation of human rights.<sup>59</sup> However, the Federal Constitutional Court decided in June 2003 that extradition to a country where torture, while officially prohibited, still occurs is permissible if the plaintiff can't bring evidence that he himself faces torture.<sup>60</sup>

#### *E. Conclusion*

Japan at least has to fulfill its obligations to extradite or try Fujimori, which arise from the CAT. The CAT insists that Japan has to open a judicial investigation into

---

der, grievous bodily harm, abduction, unlawful detention and kidnapping, racism and xenophobia, forging and trading official documents, forging of payment, illegal trade of nuclear and radioactive substances, rape and crimes that are subject to the competence of the International Criminal Court of Justice.

<sup>56</sup> See, the draft "Entwurf eines Gesetzes zur Umsetzung des Rahmenbeschlusses über den Europäischen Haftbefehl und die Übergabeverfahren zwischen den Mitgliedstaaten der Europäischen Union (Europäisches Haftbefehlsgesetz - EuHbG)" at <http://www.bmj.bund.de/images/11623.pdf>.

<sup>57</sup> See, Wolfgang Kaleck, *The European arrest warrant from the perspective of a German defence attorney*, Statewatch News Online, [www.statewatch.org/news/2003/jul/18wk.html](http://www.statewatch.org/news/2003/jul/18wk.html).

<sup>58</sup> Ibid. The German text can be found at [http://www.rav.de/download/RAV\\_FrankfurterAppell\\_deu.pdf](http://www.rav.de/download/RAV_FrankfurterAppell_deu.pdf).

<sup>59</sup> OLG Frankfurt/Main., order of 24 February 1999 - 2 Ausl. I 17/95, see StV 1999, p. 264.

<sup>60</sup> Decision of 24 June 2003 - Az. 2 BvR 685/03.

Fujimori's responsibility if he is not returned to Peru. Failure to fulfill this obligation would be a violation of international law. There is no international rule that would prohibit extradition of a national. The ban on the extradition of Japanese nationals is not a constitutional guarantee. Japan could easily change its extradition law or might consider the CAT as a extradition treaty.

However, in Germany, it is only possible to extradite a German national to an international court or to a Member State of the European Union. This derogation from the total ban on extradition of nationals is mainly a result of the ratification of the ICC statute. This again shows the power and importance of the ICC since fewer and fewer safe havens for perpetrators of gross human rights violations exist. It is therefore highly desirable that more states, including Japan, will join the ICC and adopt its legislation regarding extradition of nationals to an international court.<sup>61</sup>

The Peruvian extradition request explicitly made the point that Peru would guarantee Fujimori a *due process*-trial. However, as we have seen with Germany, extradition could fail because prison conditions in the requesting state could violate human rights. Peru therefore, should improve the conditions of its prisons. It should also follow all recommendations given by the truth commission. It seems ironic that while Peru is demanding the extradition of Fujimori, scores of prisoners and possible prisoners of conscience remain imprisoned in Peru, after more than ten years since the anti-terrorism legislation came into effect.<sup>62</sup>

---

<sup>61</sup> See, [www.cicc.org](http://www.cicc.org) for the current status of ratification and national legislation. See for the different practice of states in order to comply with the ICC statute Helen Duffy, *National Constitutional Compatibility and the International Criminal Court*, 11 *Duke Journal of Comparative and International Law* (2001), pp. 5-38.

<sup>62</sup> For a background see Amnesty International: Peru: The "anti-terrorism" legislation and its effects - an unfinished business in the transition to democracy, AMR 46/001/2003 of 12 May 2003.