

# THE TRIAL OF ALBERTO FUJIMORI: NAVIGATING THE SHOW TRIAL DILEMMA IN PURSUIT OF TRANSITIONAL JUSTICE

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*Alberto Fujimori is the first democratically elected leader to be tried and convicted of human rights violations in the domestic courts of his own country. As satisfaction with foregoing prosecution and granting amnesty in exchange for more peaceful democratic transition has fallen increasingly out of favor, Fujimori's trial comes at an opportune time to reevaluate the role of criminal trials in national reconciliation and transitional justice. In this Note, I argue that Fujimori's human rights trial demonstrates that head-of-state trials, particularly domestic ones, can valuably contribute to larger transitional justice projects, despite their inherent limitations and challenges. Situating my analysis within the transitional justice and show trial literature, I analyze both procedurally and substantively how effectively Fujimori's human rights trial has navigated its "constitutive paradox," or tension between strict adherence to the rule of law and the extrajudicial objective of delivering a coherent moral message, inherent in transitional criminal proceedings. I conclude that the trial demonstrates that courts can effectively navigate these paradoxes, even in the midst of institutional weakness and societal cleavages. Moreover, I suggest that domestic tribunals may be particularly well suited to navigate the constitutive paradox of transitional trials.*

## INTRODUCTION

Alberto Fujimori is the first democratically elected head of state convicted of human rights violations in the domestic courts of his own country.<sup>1</sup> Beginning on International Human Rights Day 2007,<sup>2</sup> Fujimori attended trial at a military base about an hour outside of Lima; the sound of military chants filled the afternoon sessions as a chilling reminder of the military's residual power. The layout of the

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<sup>1</sup> Tim Padgett & Lucien Chauvin, *Fujimori's Last Stand: Peru's Ex-President Found Guilty*, TIME, Apr. 7, 2009, available at <http://www.time.com/time/world/article/0,8599,1889946,00.html>.

<sup>2</sup> Before the Trials: News and Political Context, <http://fujimoriontrial.org/?p=26#more-26> (Dec. 9, 2007).

courtroom symbolized the polarized state of Peruvian civil society: Fujimori sat facing the Justices of the Tribunal, with loyal supporters nostalgic for his rule to his right and members of the human rights community, including the victims' families, to his left.<sup>3</sup>

The trial sought to determine Fujimori's criminal liability for human rights violations committed by the Colina Group, a secret intelligence group intimately involved in waging Peru's internal war against the Maoist terrorist insurgency, the Shining Path, during his tenure as head of state.<sup>4</sup> Fujimori faced charges of kidnapping,<sup>5</sup> homicide, and aggravated battery stemming from forced disappearances and murders.<sup>6</sup> On April 7, 2009, the Tribunal found the former President guilty on all counts and sentenced him to twenty-five years in prison.<sup>7</sup> In addition, the Tribunal found him guilty of crimes against humanity under international law, although it was technically not one of the charges for which he stood trial.<sup>8</sup> On January 2, 2010, the reviewing tribunal unanimously ratified and finalized the sentence and

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<sup>3</sup> This description of the courtroom and the military's presence is drawn from the author's experiences while attending sessions of the trial in Lima during the summer of 2008. See also Antonio Zapata, A Chronicle About the Fujimori Trial, [http://fujimoriontrial.org/?page\\_id=120](http://fujimoriontrial.org/?page_id=120) (last visited Apr. 7, 2010) (recounting personal observations of trial testimony and procedures).

<sup>4</sup> See *General Conclusions in FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF PERU* ¶ 100 (2003) [hereinafter TRC], available at <http://www.cverdad.org.pe/ingles/ifinal/conclusiones.php> (last visited Mar. 31, 2010) (attributing responsibility for Colina's activities to Fujimori); see also Jo-Marie Burt, "Quien Habla es Terrorista": The Political Use of Fear in Fujimori's Peru, 41 *LATIN AM. RES. REV.* 32, 45-49 (2006) (discussing role of Colina death squad in "instrumentalization of fear"). See generally UMBERTO JARA, *OJO POR OJO: LA VERDADERA HISTORIA DEL GRUPO COLINA* (2007) (providing journalistic account of activities and operations of Colina Group).

<sup>5</sup> The kidnapping charge concerned two journalists held by the Colina Group in the basement of Peru's secret intelligence headquarters. For an account of the Colina Group's clandestine activities that took place in this basement, see RICARDO UCEDA, *MUERTE EN EL PENTAGONITO* (2004).

<sup>6</sup> The homicide and aggravated battery charges arose from two incidents. The first took place at a block party in the impoverished Lima suburb of Barrios Altos and the second at a university popularly known as La Cantuta. Segunda Sala de la Corte Suprema de Justicia de la República [CSJ] [Second Chamber of the Supreme Court], 9/21/2007, "Juzgamiento al Ex Presidente Alberto Fujimori/Resolución de Extradición," Rol N° 3744-07 (Chile), available at <http://www.pj.gob.pe/transparencia/documentos/extradicion21092007.pdf>.

<sup>7</sup> Sala Penal Especial de la Corte Suprema de Justicia de la República [CSJ] [Special Penal Chamber of the Supreme Court], 07/04/2009, "Casos Barrios Altos, La Cantuta y sótanos SIE/Sentencia," Exp. N° A.V. 19-2001 (Peru), at 706, available at [http://www.pj.gob.pe/CorteSuprema/spe/index.asp?opcion=detalle\\_noticia&codigo=10409](http://www.pj.gob.pe/CorteSuprema/spe/index.asp?opcion=detalle_noticia&codigo=10409) [hereinafter *Casos Barrios Sentencia*].

<sup>8</sup> *Id.*

ordered that monetary reparations be paid to the victims and their families.<sup>9</sup>

When Fujimori came to Chile in 2005 from exile in Japan—with an eye toward a political comeback in Peru—this was not the fate he expected.<sup>10</sup> Fujimori's successful elimination of the hyperinflation and terrorist insurgency plaguing Peru when he came to power in 1992<sup>11</sup> garnered him substantial popularity despite the widespread corruption and human rights abuses committed during his regime.<sup>12</sup> After Fujimori abdicated office and fled to Japan in 2000,<sup>13</sup> the interim government established a Truth and Reconciliation Commission,<sup>14</sup> which found that the battle against the Shining Path from 1980 to 2000 led to the extrajudicial execution and disappearance of approximately 70,000 Peruvians, including 20,000 at the hands of the State.<sup>15</sup> The Commission concluded that these human rights abuses constituted crimes against humanity<sup>16</sup> and that national reconciliation was necessary.<sup>17</sup>

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<sup>9</sup> In the Final Appeal, the Supreme Court Ratifies Alberto Fujimori's Twenty-Five-Year Sentence, <http://fujimoriontrial.org/?p=796> (Jan. 4, 2010). The decision was issued by the Peruvian Supreme Court's Transitory Criminal Court, which was presided over by a senior magistrate and three other judges. *Id.*

<sup>10</sup> Danna Harman, *Imprisoned in Chile, Peru's Fujimori Sets Sights on a Political Comeback at Home*, CHRISTIAN SCI. MONITOR, Dec. 14, 2005, at 12.

<sup>11</sup> Burt, *supra* note 4, at 44. Fujimori initiated a military coup in 1992 during which he suspended Congress, various provisions of the Constitution, and the judiciary. See TRC, *supra* note 4, ¶¶ 68–104.

<sup>12</sup> See *Sube la popularidad de Fujimori en Perú*, EL SIGLO DE TORREÓN, Dec. 2, 2003, available at <http://www.elsiglodetorreon.com.mx/noticia/62901.sube-la-popularidad-de-fujimori-en-peru.html> (reporting thirty-eight percent approval rating just three years after Fujimori fled to Japan).

<sup>13</sup> Fujimori fled to Japan in 2000 amidst a corruption scandal. Eduardo González Cueva, *The Contribution of the Peruvian Truth and Reconciliation Commission to Prosecutions*, in TRUTH COMMISSIONS AND COURTS: THE TENSION BETWEEN CRIMINAL JUSTICE AND THE SEARCH FOR TRUTH 55, 56 (William A. Schabas & Shane Darcy eds., 2004). For a discussion of the 2000 election and popular resistance, see CATHERINE M. CONAGHAN, FUJIMORI'S PERU: DECEPTION IN THE PUBLIC SPHERE 189–219 (2005).

<sup>14</sup> Jemima Garcia-Godos, *Victim Reparations in the Peruvian Truth Commission and the Challenge of Historical Interpretation*, 2 INT'L J. TRANSITIONAL JUST. 63, 71 (2008).

<sup>15</sup> PATRICK BALL ET AL., AM. ASSOC. FOR THE ADVANCEMENT OF SCI., HOW MANY PERUVIANS HAVE DIED? 6–7 (Aug. 28, 2003), available at [http://shr.aaas.org/peru/aaas\\_peru\\_5.pdf](http://shr.aaas.org/peru/aaas_peru_5.pdf); TRC, *supra* note 4, ¶¶ 5, 9, 24, 59 (noting overwhelmingly disproportionate number of disappeared Peruvians were Quechua-speaking residents from rural regions); see also Lisa Magarrell & Leonardo Filippini, *La justicia penal y la verdad en la transición democrática*, in EL LEGADO DE LA VERDAD: LA JUSTICIA PENAL EN LA TRANSICIÓN PERUANA 33, 41 (Lisa Magarrell & Leonardo Filippini eds. 2006) (noting severity of violence from both state and terrorist actors).

<sup>16</sup> TRC, *supra* note 4, ¶ 55 (noting human rights abuses perpetrated by State were at some places and moments systematic and widespread).

<sup>17</sup> *Id.* § 153 (stating that civil society weakened and country's moral fabric decayed because “[t]he breadth and intensity of the conflict accentuated serious national imbal-

Fujimori's arrest, extradition,<sup>18</sup> and trial are arguably part of the "reconciliation" recognized as essential to the nation's healing.<sup>19</sup> This historic proceeding has garnered international attention not only for its unprecedented nature, but also for its prospective contribution to transitional justice.<sup>20</sup> It presents an opportunity to better understand

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ances; destroyed the democratic order; worsened poverty and deepened inequality; aggravated forms of discrimination and exclusion; weakened social and emotional networks and fostered a culture of fear and distrust"); *see also* Burt, *supra* note 4, at 38–41 (discussing psychological impact of dual violence perpetrated simultaneously by both Shining Path terrorist insurgency and Peruvian government).

<sup>18</sup> Fujimori was extradited by Chile to Peru to stand trial in three separate criminal proceedings, one of which related to human rights abuses. Segunda Sala de la Corte Suprema de Justicia de la República [CSJ] [Second Chamber of the Supreme Court], 9/21/2007, Rol N° 3744-07 (Chile) *available at* <http://www.pj.gob.pe/transparencia/documentos/extradicion21092007.pdf>; Simon Romero, *Chile Court Approves Peru Exile's Extradition Decision on Fujimori Could Ease Other Cases*, INT'L HERALD TRIB., Sept. 22, 2007, at 2. *See generally* Ronald Gamarra Herrera, *A Propósito de la Histórica Extradición de Alberto Fujimori*, 5 JURISPRUDENCIA 57 (2007) (discussing process of securing extradition). Before the human rights trial, Fujimori had already been sentenced to six years in prison for breaking and entering into the home of his aide Vladimir Montesinos's wife to destroy intelligence. Sala Penal Especial de la Corte Suprema de Justicia de la República [CSJ] [Special Criminal Chamber of the Supreme Court], Nov. 12, 2007, "Caso Allanamiento/Sentencia," Exp. N° 0013-2003 (Peru), *available at* [http://www.pj.gob.pe/CorteSuprema/spe/Documentos/Sentencia\\_exp\\_0013-2003\\_111207.pdf](http://www.pj.gob.pe/CorteSuprema/spe/Documentos/Sentencia_exp_0013-2003_111207.pdf); *see also* Peru's Fujimori Accepts Charges, Effectively Avoids Retelling of Crimes, PERUVIAN TIMES, Sept. 29, 2009, <http://www.peruviantimes.com/peru%E2%80%99s-fujimori-accepts-charges-effectively-avoids-retelling-of-crimes/293930>.

<sup>19</sup> The Commission identified "justice" as a "necessary condition for and result of national reconciliation," defining it as "an ethical principle that 'expresses an ideal of human coexistence where fundamental rights are respected and constitutionally guaranteed'" and "encompasses moral, judicial, reparatory, and socio-political dimensions." Garcia-Godos, *supra* note 14, at 73–74. It also rejected amnesty and instead saw its work as instrumental to securing justice through criminal prosecutions. *See Objectives in TRC*, *supra* note 4 (noting Commission's objectives include "[c]ontributing with the administration of justice" and identifying victims and "corresponding responsibilities" while asserting that it is not "[a] substitute for the Judiciary or the Prosecutor's Office"); *see also* González Cueva, *supra* note 13, at 58 (acknowledging role of prosecutions in "justice component of the mandate").

<sup>20</sup> This is particularly true in light of the fact that, arguably, satisfaction with foregoing prosecutions in exchange for a peaceful transition has increasingly waned. *See* Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915, 919–20 (2009) (arguing amnesties are largely discredited and "criminal justice must be done"); *see also infra* notes 33–35 and accompanying text.

While there is not one settled definition for the term "transitional justice," it typically refers to responses to past abuses made in the interest of transitioning a society from a period of political turmoil into a period of more stable, peaceful existence. It is often associated with democratic transitions. *See, e.g.,* RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 3–7 (2000) (noting that contemporary understandings of "transitional justice are generally framed by . . . prospects for democracy"); International Center for Transitional Justice, *What Is Transitional Justice* (Dec. 2008), <http://www.ictj.org/en/tj> ("Transitional justice is a response to systematic or widespread violations of human rights . . . [that] seeks recognition for victims and to promote possibilities for peace, reconciliation and democracy.").

the challenges and limitations of domestic head-of-state trials, particularly those relating to the maintenance of the proceedings' legal legitimacy while simultaneously pursuing transitional justice objectives. Moreover, given the sharp divisions in Peruvian civil society,<sup>21</sup> Fujimori's trial presents an opportunity to examine whether such trials ultimately exacerbate or aid in mending social cleavages.

In this Note, I argue that Fujimori's human rights trial demonstrates that head-of-state trials, particularly domestic ones, can valuably contribute to the larger transitional justice objective of national reconciliation while simultaneously maintaining legal legitimacy. In Part I, I build on existing transitional justice and show trial literature discussing the potential for effective navigation of the "constitutive paradox"—tension between strict adherence to the rule of law and the extrajudicial objective of delivering a coherent moral message.<sup>22</sup> While much of this literature has been skeptical and hesitant to draw general conclusions about the transitional justice capacity of head-of-state trials, I push the discussion further by making normative assertions as to when and how such trials are capable of navigating the constitutive paradox and furthering transitional justice objectives. In particular, I propose a two-element inquiry for evaluating whether a transitional trial has successfully navigated this tension: (i) whether the show trial aspects are merely ancillary to larger commitments to legitimate judicial values, and (ii) whether there is strict adherence to due process protections. I also emphasize that domestic trials are uniquely suited to achieve successful navigation.

In Part II, I use this theoretical framework to analyze Fujimori's trial. In Part III, I conclude that the trial was not a show trial due largely to the trial's commitment—facilitated in part by its domestic execution—to both requirements of my proposed framework, and furthermore that it was able to navigate the constitutive paradox effectively despite institutional weaknesses and societal cleavages. Thus, the trial's success makes it a model for future proceedings that generates confidence in the capacity of domestic head-of-state trials to contribute to transitional justice.

## I

### THE ROLE OF CRIMINAL TRIALS IN TRANSITIONAL JUSTICE

There is vigorous debate as to the value of criminal trials in modern transitional contexts. While some commentators argue that

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<sup>21</sup> See *supra* note 3 and accompanying text.

<sup>22</sup> See *infra* Part I.B.

prosecutions are an essential element of the reconciliation process,<sup>23</sup> others criticize their use as wasteful and potentially destabilizing.<sup>24</sup> In order to assess the role of Fujimori's trial in the Peruvian transitional context, it is useful to begin with a theoretical framework.

It is not surprising that criminal prosecutions have assumed a dominant role in transitional justice, as they are the most familiar justice-seeking mechanism.<sup>25</sup> Prosecutions can satisfy retributive instincts, break cycles of violence, and deter similar criminal conduct in the future.<sup>26</sup> Specifically, in transitional contexts, prosecutions can strengthen the rule of law, thereby aiding in the consolidation of democratic institutions and values.<sup>27</sup> Thus, there is often a strong prosecutorial preference that gives way only to practical limitations that undermine achievement of the aforementioned values, such as when institutional structures are simply too weak and susceptible to corruption to support legitimate criminal proceedings.<sup>28</sup>

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<sup>23</sup> See, e.g., MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 13–23 (1997) (discussing role trials play in unifying society through establishment of narrative for collective memory); Juan E. Méndez, *Accountability for Past Abuses*, 19 *HUM. RTS. Q.* 255, 255, 267–75 (1997) (arguing prosecutions are “necessary and even desirable ingredient in any serious effort at accountability” and that truth is not always preferable to justice); Diane F. Orentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537, 2541–44 (1991) (detailing how prosecutions can strengthen rule of law and contribute to democratic and societal consolidation).

<sup>24</sup> See, e.g., Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 *INT'L SECURITY* 5, 15 (2004) (“[T]rial[s] are likely to increase the risk of violent conflict and further abuses.”); Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 *EMORY L.J.* 205, 209–13 (2000) (doubting whether limited resources are best spent on criminal prosecutions). *But see* Kathryn Sikkink & Carrie Booth Walling, *The Impact of Human Rights Trials in Latin America*, 44 *J. PEACE RES.* 427, 440 (2007) (“There is not a single transitional trial case in Latin America where it can be reasonably argued that the decision to undertake trials extended or exacerbated conflict.”).

<sup>25</sup> TEITEL, *supra* note 20, at 27–28; see Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 *CAL. L. REV.* 75, 91 (2005) (“Historically, domestic legal systems have regularly used criminal trials to mark political transitions and discredit prior regimes.”).

<sup>26</sup> See, e.g., Gloria Cano & Karim Ninaquispe, *El papel de la sociedad civil en la demanda y promoción de justicia*, in *EL LEGADO DE LA VERDAD: LA JUSTICIA PENAL EN LA TRANSICIÓN PERUANA* 75 (Lisa Magarrell & Leonardo Filippini eds., 2006) (trans. by author) (noting that criminal justice serves both “preventative” and “reparatory” roles).

<sup>27</sup> TEITEL, *supra* note 20, at 28–30; Juan E. Méndez, *In Defense of Transitional Justice*, in *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES* 1, 6–8 (A. James McAdams ed., 1997).

<sup>28</sup> Even skeptics of the overall utility of criminal prosecutions in transitional justice seem to at least concede their theoretical value. See, e.g., Snyder & Vinjamuri, *supra* note 24, at 5–7 (attacking trials from purely pragmatic and consequentialist standpoint).

Although the theoretical value of prosecutions in transitional justice is not necessarily controversial, many realists have identified grave practical limitations in their application.<sup>29</sup> Given that criminal justice is designed to operate within a framework where disobedience of the law “is the exception and not the rule,”<sup>30</sup> many realists suggest that in transitional settings where institutional structures are weak and political cleavages profound, prosecutions can reignite conflict and violence, and therefore impunity—trading truth for justice—is essential to the broader aim of national reconciliation.<sup>31</sup> In addition, given the financial expenditures associated with fair trials, societies with scarce resources are wise to invest in more viable transitional justice mechanisms, such as truth commissions or victim reparations schemes.<sup>32</sup>

Despite these critiques, criminal prosecutions have assumed an increasingly dominant role in democratic transitions since the 1980s.<sup>33</sup> While the proliferation of trials in this context largely reflects international efforts,<sup>34</sup> the trend is paralleled in domestic contexts, suggesting that circumstances are more conducive to or demanding of their use generally.<sup>35</sup> In light of this so-called “justice cascade,”<sup>36</sup> it is necessary

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<sup>29</sup> See *supra* note 24 (citing various critiques of utilization of trials in transitional contexts). *But see* Méndez, *supra* note 27, at 13–17 (suggesting that practical challenges are not enough to discount value of trials and that overcoming these challenges can enhance democracy).

<sup>30</sup> Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 52–53 (2002) (quoting Paul van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa’s Truth and Reconciliation Commission*, 52 J. INT’L AFF. 647, 661 (1999)).

<sup>31</sup> Snyder & Vinjamuri, *supra* note 24, at 5–7 (critiquing use of criminal prosecutions for “pay[ing] insufficient attention to political realities”). *But see* Méndez, *supra* note 27, at 3–5 (suggesting impunity may produce similar destabilizing effects by failing to establish rule of law leading to future violence and conflict).

<sup>32</sup> Villa-Vicencio, *supra* note 24, at 206–09; *see also* Aukerman, *supra* note 30, at 52 (noting expensive nature of trials).

<sup>33</sup> See generally Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHI. J. INT’L L. 1 (2001) (discussing impetus for this trend and its subsequent effects).

<sup>34</sup> For example, the various international and hybrid criminal tribunals established by the international community include the International Criminal Court, the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda, and the hybrid tribunal established in Sierra Leone. See generally Global Policy Forum, *International Criminal Tribunals and Special Courts*, <http://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts.html> (last visited Apr. 22, 2010) (discussing and describing various tribunals).

<sup>35</sup> See Shane Darcy, *Imputed Criminal Liability and the Goals of International Justice*, 20 LEIDEN J. INT’L L. 377, 402 (2007) (noting widespread demands and expectations that trials will contribute to transitional justice goals such as social reconciliation); Sikkink & Walling, *supra* note 24, at 429–33 (providing empirical data for increased prominence of domestic trials in transitional contexts).

<sup>36</sup> See *supra* note 33.

to ask whether criminal trials, especially domestic trials, are a desirable means of promoting transitional justice goals.<sup>37</sup> Consequently, it is worth reconsidering the fundamental normative principles surrounding the usefulness of trials in transitional justice, particularly in light of arguments that other mechanisms are better suited to achieving its objectives.<sup>38</sup>

### A. *The Purposes of Criminal Law*

#### 1. *Retribution and Deterrence*

The two classical justifications for criminal justice are retribution and deterrence; however, there is a broad consensus that both are insufficient justifications for criminal prosecutions in transitional settings.<sup>39</sup> First, true retribution, which requires proportionality,<sup>40</sup> is often unattainable given the gravity of the wrongs. This ultimately makes retribution an insufficient justification<sup>41</sup> even though it is better achieved through prosecutions than through other mechanisms like truth commissions.<sup>42</sup>

Second, the effectiveness of deterrence is limited by the extraordinary nature of the crimes and the likelihood that complex

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<sup>37</sup> See, e.g., Laplante, *supra* note 20, at 5–7 (arguing amnesties are largely discredited and “criminal justice must be done”). Recent empirical findings also suggest that traditional arguments regarding trials’ destabilizing potential may be unfounded. See Sikkink & Walling, *supra* note 24, at 440.

<sup>38</sup> For arguments that other transitional mechanisms are better suited to transitional justice goals see, for example, MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 88 (1998), which argues for truth commissions when societal goals include “reconciliation across social divisions.” See also PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* 86–106 (2002) (discussing truth commissions).

<sup>39</sup> See, e.g., MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 149 (2007) (concluding that transitional trials do not meaningfully serve goals of retribution or deterrence).

<sup>40</sup> See *id.* at 53–54 (discussing desert theorists and their focus on proportionality as principle governing appropriate amount of punishment).

<sup>41</sup> This insufficiency occurs both because legal principles often make it difficult to convict those most blameworthy—that is, those orchestrating the crimes—and because limitations on the severity of punishment mean the sentence often pales in comparison to the crime. See DRUMBL, *supra* note 39, at 154–61 (noting empirical disparities between reprehensibility of crime and severity of sentence for “extraordinary international crimes”); MINOW, *supra* note 38, at 121 (noting that when horrendous crimes are at stake “there is no punishment that could express the proper scale of outrage”). *But see* Donald L. Hafner & Elizabeth B.L. King, *Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability Can and Should Work Together*, 30 B.C. INT’L & COMP. L. REV. 91, 92 (2007) (quoting critics of international tribunals who suggest trials are nevertheless “cathartic . . . for society as a whole”).

<sup>42</sup> This is due to truth commissions’ incapacity to legitimately impose severe punishment. Aukerman, *supra* note 30, at 56.

social and political factors contributed to effectuating the harm.<sup>43</sup> Certainty and severity of punishment—the two strongest predictors of deterrence potential—are often lacking in transitional contexts due to the difficulty of proving and prosecuting crimes.<sup>44</sup> This calls into question the adequacy of deterrence as a justification for transitional trials.<sup>45</sup>

## 2. *Rehabilitation and National Reconciliation*

If the costs and risks of transitional trials must be justified by more than retribution or deterrence, we must turn to criminal law's rehabilitation potential.<sup>46</sup> Rehabilitation must take a different form in the transitional criminal justice context<sup>47</sup> and be understood more broadly to encompass two distinct projects: (1) developing a shared societal moral consensus<sup>48</sup> and (2) reestablishing the rule of law.<sup>49</sup>

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<sup>43</sup> See Villa-Vicencio, *supra* note 24, at 210 (“More is required than the heavy hand of the law . . . to deter those driven by the ideological factors that have either destroyed these nations or threatened to bring them to their knees.”); *cf.* MINOW, *supra* note 38, at 49–50 (expressing skepticism about deterrence in Nuremberg context).

<sup>44</sup> See Aukerman, *supra* note 30, at 67–69 (discussing factors contributing to difficulty of both achieving and measuring deterrence with respect to mass atrocities).

<sup>45</sup> *Id.* at 71 (“[I]f the goal is to deter future human rights abuses . . . , the international community has bigger sticks to shake than the threat of trial.”). The lack of any “systematized or conclusive evidence” as to the deterrent effect of transitional trials only further supports this point. DRUMBL, *supra* note 39, at 169–73 (concluding that international and hybrid criminal proceedings do not meaningfully serve goals of deterrence). *But see* Danner & Martinez, *supra* note 25, at 148 (arguing command liability may have enhanced deterrent effects).

<sup>46</sup> *Cf.* Martti Koskeniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. UNITED NATIONS L. 1, 9 (2002) (“[S]tudies on the transformation of authoritarian regimes into more or less liberal democracies . . . have suggested a much more complex understanding of the role of trials as not merely about punishment or retribution, nor . . . deterrence.”).

<sup>47</sup> Rehabilitation in the traditional criminal law context typically refers to individual rehabilitation; that is, the individual's reformation and reintegration into society. In the transitional justice context, however, individual rehabilitation is often impossible or ignored, and thus rehabilitation instead refers to rehabilitation of society as a whole; that is, the reformation and reestablishment of society's moral and democratic values. Aukerman, *supra* note 30, at 72–76.

<sup>48</sup> Even Mark Drumbl, who is particularly skeptical of trials' capacity to contribute to transitional justice, sees potential for trials to serve an “expressive function.” DRUMBL, *supra* note 39, at 176.

<sup>49</sup> *E.g.*, MINOW, *supra* note 38, at 57; TEITEL, *supra* note 20, at 66; *see also* Aukerman, *supra* note 30, at 72 (“[S]upport for societal rehabilitation—the idea that prosecutions can change a society's moral values by ‘foster[ing] respect for democratic institutions and thereby deepen[ing] a society's democratic culture’—is widespread.” (quoting Orentlicher, *supra* note 23, at 2543) (second alteration in original)); *id.* at 87–91 (discussing effect of trials on reconstructing societies' social and moral solidarity in wake of atrocities); Magarrell & Filippini, *supra* note 15, at 45–46 (discussing role of trials in facilitating democratic consolidation).

For a democracy to endure there must be a *demos*, or a group unified around a common set of values.<sup>50</sup> Thus, national reconciliation,<sup>51</sup> and the attendant construction of a moral consensus, is a fundamental element of any transitional justice project.<sup>52</sup> In transitional contexts, a first step toward developing a moral consensus can be acceptance of a shared historical understanding of past atrocities.<sup>53</sup> Trials, which have historically been understood as truth-eliciting instruments, can assist in constructing historical truths by gathering evidence, recording testimony, and ultimately forming authoritative conclusions through the application of accepted legal principles.<sup>54</sup>

However, there are limitations to a trial's truth-eliciting potential.<sup>55</sup> First, criminal prosecutions are inherently individualist, which is problematic when constructing a shared historical understanding that requires a broad, contextualized understanding of complex societal interactions.<sup>56</sup> Second, the procedural rules necessary to legitimize a

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<sup>50</sup> See Villa-Vicencio, *supra* note 24, at 207, 219 (discussing Lon Fuller's, Ronald Dworkin's, and Shimon Peres's suggestions of this societal-consensus view of democracy).

<sup>51</sup> The meaning of reconciliation in transitional justice literature is not always clear. For the purposes of this Note, reconciliation is the acceptance of a fundamental set of moral values that can unify society. For a discussion of the meaning of reconciliation, see HAYNER, *supra* note 38, at 154–63.

<sup>52</sup> See *id.* at 154–69 (discussing need for “political reconciliation” in which tensions are eased by acceptance and acknowledgment of certain truths and facts); José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 3, 6 (Neil J. Kritz ed., 1995) (identifying “a measure of national unity and reconciliation” and “build[ing] or reconstruct[ing] institutions that are conducive to a stable and fair political system” as transitional justice goals).

<sup>53</sup> Many have characterized a nation's collective need for a shared historical understanding as the need for “truth.” See, e.g., HAYNER, *supra* note 38, at 30 (“[M]any proponents of truth-seeking assert that forgiveness and reconciliation will result from airing the full truth.”); Koskeniemi, *supra* note 46, at 4 (“Recording ‘the truth’ and declaring it to the world through the criminal process has been held important . . . [to] the healing process . . . .”); Méndez, *supra* note 23, at 274 (“[R]econciliation requires knowledge of the facts.”). For a general discussion of the role of trials in building social solidarity through shared historical understanding, see Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 466 (1995).

<sup>54</sup> See Koskeniemi, *supra* note 46, at 3 (describing historical truth-finding functions of Adolf Eichmann's trial); Méndez, *supra* note 23, at 278–79 (suggesting that due process protections and adversarial format lend legitimacy to truth elicited by trial). Moreover, one can argue that trials are particularly useful in a transitional context where political emotions run high, as they offer a nonviolent context in which to achieve a determinative dispute resolution. See Osiel, *supra* note 53, at 493–501 (discussing trials' role in facilitating constructive “deliberative” democratic discourse through established procedures when disagreements are particularly hostile).

<sup>55</sup> E.g., Magarrell & Filippini, *supra* note 15, at 45 (noting both that trials are limited in their ability to obtain truth due to their formal mechanisms and focus on single individuals and that their ultimate statements will carry great moral weight).

<sup>56</sup> HAYNER, *supra* note 38, at 101 (quoting author's interview with Paul van Zyl); MINOW, *supra* note 38, at 46–47.

trial conflict with any pure truth-finding function, as they require that truth sometimes be traded for judicial integrity and respect for individual due process rights.<sup>57</sup> Finally, the scrutiny of facts during a trial can make those facts appear more “fragile,” and thus undermine the findings of other truth-seeking enterprises.<sup>58</sup> These limitations have led philosophers like Hannah Arendt to doubt the capacity of trials to fully “conserve the ‘truth’ of a complex series of events”<sup>59</sup> and have caused other political theorists to characterize criminal trials as “relatively blunt tools for achieving many transitional justice goals.”<sup>60</sup>

However, these critiques need not foreclose trials’ utility<sup>61</sup>: Even if a trial cannot definitively establish the larger historical narrative of a nation, it can still contribute to the development of a moral consensus by identifying certain conduct as morally abhorrent.<sup>62</sup> Punishment has communicative force<sup>63</sup> and, consequently, trials can teach moral lessons and reaffirm fundamental values in the interest of social solidarity.<sup>64</sup> Given that a “society cannot be cured of a condition that it

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<sup>57</sup> Zalaquett, *supra* note 52, at 7 (“How to reconcile the need to know the full truth while observing the norms for a fair trial has proven very difficult in practice.”). It is precisely because truth commissions are free from these procedural constraints that many argue they are a superior truth-eliciting mechanism. *See, e.g.*, Hafner & King, *supra* note 41, at 101 (noting that future courts will have to address deviation from truth commission’s narrative for decisions to be legitimate and that commissions can proceed “more swiftly than tribunals”). The Peruvian Truth and Reconciliation Commission debated extensively at the outset whether its mission should be to discover “historical” or “judicial” truths. González Cueva, *supra* note 13, at 61–63.

<sup>58</sup> Koskenniemi, *supra* note 46, at 33; *see also* HAYNER, *supra* note 38, at 101–02 (providing example of El Salvador trial which only “succeeded in further discrediting the judiciary”).

<sup>59</sup> Koskenniemi, *supra* note 46, at 1; *see* Darcy, *supra* note 35, at 379 (“[T]he purpose of a criminal trial ‘is to render justice, and nothing else; even the noblest of ulterior motives . . . can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out punishment.’” (quoting Hannah Arendt, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 253 (1963) (ellipsis in original))); *see also id.* (“[T]he primary purpose of international criminal justice is to hold individuals accountable for their crimes, and any other objectives should remain subordinate to that principal aim.”).

<sup>60</sup> Danner & Martinez, *supra* note 25, at 94.

<sup>61</sup> *See, e.g.*, MINOW, *supra* note 38, at 47–51 (declining to discount value of trials despite some “cynicism”).

<sup>62</sup> *See* OSIEL, *supra* note 23, at 65–72 (positing that “liberal show trials” can be used as political events to reinforce liberal values); Méndez, *supra* note 27, at 20 (acknowledging that while trials cannot “settle” history, they can establish historical records of closed universe of facts).

<sup>63</sup> Aukerman, *supra* note 30, at 85–89 (discussing Durkheimian theories).

<sup>64</sup> *See, e.g.*, DRUMBL, *supra* note 39, at 173–76 (discussing communicative philosophy of punishment); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT’L L. 39, 42 (2007) (recognizing communicative potential of punishment as best

does not regard as a disease,”<sup>65</sup> the need to establish the wrongness of certain conduct can be important enough to justify a role for prosecutions despite their other shortcomings.<sup>66</sup>

Leigh Payne suggests that, in attempting to achieve moral consensus on a particular issue, it is not necessary to silence or dispel all dissent and opposition.<sup>67</sup> She suggests that the instigation and reopening of the public debate is equally if not more valuable than achieving societal consensus because democracy is not about manufacturing a uniformity of viewpoints but rather creating public space for “competition over ideas,” which provides the “possibility of building consensus around democratic values.”<sup>68</sup> Thus, trials can be discussion-forcing mechanisms that bring diverse viewpoints into the political arena where there are better prospects for legitimate democratic resolution.<sup>69</sup>

As such, incorporating Payne’s writings provides new insights to the transitional justice and show trial literature by suggesting that the success or value of a trial must be evaluated within a broader temporal continuum. One need not discount or criticize a trial that spurs controversy or exacerbates existing societal cleavages in the short term because, ultimately, this immediate aftereffect can be a necessary first step toward achieving a long-term, stable societal moral consensus.<sup>70</sup> Payne’s work suggests that patience is paramount and that those looking to trials for a quick fix miss the very point and prospective value of trials in transitional contexts.<sup>71</sup> Moreover, gradually

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avenue for international criminal law “to make a difference given the legal, political, and resource constraints”).

<sup>65</sup> Aukerman, *supra* note 30, at 76.

<sup>66</sup> *See id.* at 75–76 (“Perhaps the most distinctive contribution prosecution can make to societal rehabilitation is in establishing the wrongfulness of past atrocities.”); Magarrell & Filippini, *supra* note 15, at 41 (“The transition to democracy signifies a fundamental change in values.” (trans. by author)).

<sup>67</sup> *See* LEIGH A. PAYNE, *UNSETTLING ACCOUNTS: NEITHER TRUTH NOR RECONCILIATION IN CONFESSIONS OF STATE VIOLENCE* 279, 281, 285–92 (2008) (describing theory of “contentious coexistence”).

<sup>68</sup> *Id.* at 285.

<sup>69</sup> Payne’s work focuses on the role of perpetrators’ confessions in national reconciliation inasmuch as they are “dramatic stories” that unsettle society and spur political debate rather than contribute to societal consensus. *Id.* at 2–4, 281. As trials are also arguably dramatic storytelling events that unsettle society, her confessions analysis is similarly applicable.

<sup>70</sup> *Id.* at 285 (noting that “unsettling accounts” or events that spur national political debate and disagreement put “into practice the art of competition over ideas and the possibility of building consensus around democratic values”).

<sup>71</sup> *See id.* at 285–87 (noting complex nature of consolidation process and that, while opposition often remains, it is possible to achieve “consensus around the importance of protecting human rights, even as [parties] diverge on how to define those rights and who has historically abused them”).

developing a moral consensus through a democratic process can solidify the legitimacy of that consensus, creating greater prospects of long-term sustainability.<sup>72</sup> Thus, as I will further discuss, incorporating Payne's work into the existing show trial discussions provides reasons for optimism as to the reconciliatory potential of head-of-state trials.

It is important to emphasize that the prospects of a criminal prosecution effectively serving this function are best when implemented in domestic courts, where society is constructing the moral consensus for itself.<sup>73</sup> Not only does domestic construction more closely align with democratic principles by allowing the *demos* to participate in the development of its own governing values,<sup>74</sup> but it simultaneously avoids the various complications and imperialist undertones that threaten to undermine the legitimacy and effectiveness of international proceedings.<sup>75</sup> For this reason, I will argue that the domestic execution of Fujimori's trial, as compared to execution in an international or hybrid tribunal, offered significantly better prospects of contributing to societal rehabilitation from the outset.<sup>76</sup>

The second contribution that criminal prosecutions can make to national rehabilitation or reconciliation is the reestablishment of the rule of law.<sup>77</sup> In many transitional societies, the previous judicial institutions were incapable of functioning effectively or were so fraught with corruption that they emerged from the conflict devoid of legitimacy.<sup>78</sup> By trying human rights violators, judicial institutions can establish that they are fully functioning and recommitted to the rule of law.<sup>79</sup> This demonstration may increase public confidence, supplying

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<sup>72</sup> See *id.* at 281 (arguing that competition and political debate, or "contentious coexistence," is "healthy for democracies").

<sup>73</sup> See Mark J. Osiel, *Modes of Participation in Mass Atrocity*, 38 CORNELL INT'L L.J. 793, 804 (2005) (noting international tribunals are "unaccountable to domestic publics and therefore free to override democratic will").

<sup>74</sup> See *supra* note 50 and accompanying text.

<sup>75</sup> Osiel, *supra* note 73, at 804 (noting democratically unaccountable nature of international tribunals); see also TEITEL, *supra* note 20, at 20 (discussing debate over post-World War II Nuremberg and Tokyo trials' legality); *infra* note 182 and accompanying text (noting Peterson's discussion of critiques of international involvement, influence, and pressure on trial of Saddam Hussein).

<sup>76</sup> See *infra* note 193 and accompanying text.

<sup>77</sup> Aukerman, *supra* note 30, at 72.

<sup>78</sup> This is one reason many are skeptical of trials in transitional contexts. See, e.g., Snyder & Vinjamuri, *supra* note 24, at 14–15 (identifying destabilizing effect of "spoilers," over whom institutions lack sufficient control, on prosecutorial efforts). Even proponents of criminal prosecutions in transitional contexts warn of their destabilizing potential when the judicial institutions are too weak. See, e.g., Magarrell & Filippini, *supra* note 15, at 49 (noting that problems in prematurely instigated prosecutions can lead to more harm than good).

<sup>79</sup> María José Guembe, *Juzgar los crímenes en las transiciones a la democracia*, in LOS CAMINOS DE LA JUSTICIA PENAL Y LOS DERECHOS HUMANOS 197, 199 (Francisco Macedo

the new government with political capital that it can reinvest into reestablishing the rule of law.<sup>80</sup> Moreover, when domestic courts prosecute those high in the chain of command of political or military institutions, they can establish new norms of accountability by dispelling the notion that some individuals are above the law.<sup>81</sup>

### B. *The Show Trial Dilemma*

In theory, prosecutions have the potential to contribute to national reconciliation by aiding in the reconstruction of a societal moral consensus and the rule of law. In practice, however, further complications arise due to tension between the goals of rehabilitation: ensuring conveyance of a specific message to aid in the construction of a moral consensus inherently conflicts with the procedural due process guarantees essential to establishing the rule of law.<sup>82</sup> A transitional trial that errs too far toward presenting a specific message is often called a show trial.<sup>83</sup> The work of Martti Koskenniemi and Jeremy Peterson provides a framework for understanding exactly what constitutes a show trial and how the above tensions lead to temptations toward creating them. Koskenniemi suggests that show trials are best understood as the polar opposite of impunity on a continuum that situates an equal chance of conviction or acquittal in the middle.<sup>84</sup> Peterson further unpacks Koskenniemi's conceptualization of show trials by identifying their two distinct elements. The first is the risk, or lowered probability of conviction resulting from decreased planning and control of the trial.<sup>85</sup> The second is the show, or the "extent to which the trial is designed or managed for the benefit of external observers rather than for securing justice for the defendant."<sup>86</sup> A lack of risk combined with the presence of show creates a show trial, or a

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ed., 2007) (discussing how tribunals can simultaneously increase their importance and reaffirm their legitimacy while prosecuting human rights abusers); Hafner & King, *supra* note 41, at 96 ("Having the capacity to try perpetrators is evidence of a functioning judiciary and helps introduce the rule of law, and . . . may also have the effect of increasing public confidence in the new government.").

<sup>80</sup> See Magarrell & Filippini, *supra* note 15, at 39 (describing confidence-building function trials can serve).

<sup>81</sup> OSIEL, *supra* note 23, at 29 (quoting Carlos Santiago Nino, *Transition to Democracy, Corporatism, and Constitutional Reform in Latin America*, 44 U. MIAMI L. REV. 129, 136 (1989)).

<sup>82</sup> See Koskenniemi, *supra* note 46, at 35 (describing "constitutive paradox" at heart of trials of prominent political leaders).

<sup>83</sup> See *id.* at 19 (comparing two poles of justice—impunity and show trial—to Scylla and Charybdis).

<sup>84</sup> *Id.*

<sup>85</sup> Jeremy Peterson, Note, *Unpacking Show Trials: Situating the Trial of Saddam Hussein*, 48 HARV. INT'L L.J. 257, 260–62 (2007).

<sup>86</sup> *Id.* at 260.

highly visible and public trial conducted with a predetermined outcome: finding the defendant guilty for the purpose of delivering some public message.<sup>87</sup> It is important to note that the parties controlling the prosecution ultimately determine the extent to which a trial will be a show trial; by designing the context and rules of the game, they simultaneously determine the extent of the risk and of the show.<sup>88</sup>

To understand how chosen institutional structures determine whether a particular prosecution is more or less like a show trial, it is useful to identify the main characteristics Peterson identifies as emblematic of a show trial. First, since conviction is essential to teach the desired lesson, the prospect or risk of acquittal must be low or nonexistent.<sup>89</sup> This can be ensured through denial of evidentiary or due process rights, relaxed proof requirements, or biased decisionmakers.<sup>90</sup> In addition, concocting charges and relying on unprecedented legal theories can tailor the crime to the evidence at hand to ensure conviction.<sup>91</sup>

Second, with respect to the show element, it is crucial that the trial plays out in the public spotlight and that the message delivered to the public through the trial is carefully controlled and crafted.<sup>92</sup> To do this, in addition to allowing media exposure, it is often necessary to silence the defendant.<sup>93</sup> As Koskenniemi identifies, the trial itself presumes acceptance of a certain view of the context in which the political struggle is being waged,<sup>94</sup> which means the defendant will often attack the context and proceedings themselves in order to prevail.<sup>95</sup> Even if convicted, a defendant can “escape[ ] the full force of the legal judgment” by effectively challenging the legitimacy of the proceedings and portraying the result as just “one among several

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 263. The prototypical example of a show trial has absolutely no risk of acquittal and is conducted entirely for the purpose of the show. However, there can be varying degrees and permutations of these factors. For example, a trial can have a low risk of acquittal while having no show elements, or a high risk of acquittal but many show elements. *Id.* at 260–61, 263–64.

<sup>89</sup> *Id.* at 261.

<sup>90</sup> *Id.* at 271–74, 276–77.

<sup>91</sup> *Id.* at 274–75.

<sup>92</sup> *Id.* at 269.

<sup>93</sup> Koskenniemi, *supra* note 46, at 35 (“[T]o convey an unambiguous historical ‘truth’ to its audience, the trial will have to silence the accused.”).

<sup>94</sup> *Id.* at 16–17 (noting that this is especially acute when there are competing historical interpretations).

<sup>95</sup> See, e.g., *id.* at 17–19 (describing Milošević’s use of this tactic). For a discussion of Milošević’s courtroom behavior and how it served as a model for Saddam Hussein, see generally Jerrold M. Post & Lara K. Panis, *Tyranny on Trial: Personality and Courtroom Conduct of Defendants Slobodan Milošević and Saddam Hussein*, 38 CORNELL INT’L L.J. 823, 829–36 (2005).

interpretations of the past.”<sup>96</sup> Koskenniemi describes this paradox: In order to convey “an unambiguous historical ‘truth,’”<sup>97</sup> the accused must be silenced. However, doing so implicates that the proceedings become a show trial.<sup>98</sup> To render the trial legitimate, the accused must be allowed to speak, and thus to have the opportunity to cast significant doubts on the prosecutor’s version of the “truth.”<sup>99</sup>

Thus, the goal of establishing the rule of law and the legitimacy of judicial institutions exists in tension with the parallel goal of building a societal moral consensus. We are forced to try to reconcile these competing aims if prosecutions are to have any role in transitional justice.<sup>100</sup>

### C. *Navigating the Show Trial Dilemma in Theory*

Koskenniemi is quite skeptical of the viability of navigating this constitutive paradox, at least in the international criminal context.<sup>101</sup> Peterson has at least acknowledged the possibility of finding the optimal combination of show and risk, or of maintaining the legal legitimacy of a criminal proceeding despite some show trial features.<sup>102</sup> He concedes that it is not necessary to demand absolutes, as trials can have some decrease in the risk without losing legitimacy as a mechanism that fairly determines guilt or innocence, and some amount of show without being an illegitimate show trial conducted solely for the purpose of delivering a specific moral message. His contribution is ultimately limited and cautious, however, as he declines to make any normative assessments as to when and how such accommodation is possible.<sup>103</sup>

I advance this discussion by incorporating Payne’s work and consideration of the value of domestic trials to paint a more optimistic picture of head-of-state trials’ potential to navigate the constitutive paradox.<sup>104</sup> In doing so, I emphasize that there is almost always some

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<sup>96</sup> Koskenniemi, *supra* note 46, at 32.

<sup>97</sup> *Id.* at 35.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* (“Anything more [than the assignment of individual blame and punishment]—truth, lesion, catharsis, reconciliation—depends on how the tribunal will be able to deal with a constitutive paradox at the heart of its job.”).

<sup>101</sup> *See id.* at 32–35 (discussing this paradox in international criminal proceedings).

<sup>102</sup> Peterson, *supra* note 85, at 263.

<sup>103</sup> *Id.* at 290 (“A normative evaluation—which I do not attempt here—requires more than positioning the trial within the proposed show trial space.”). It is worth noting that much of Peterson’s analysis is centered around the trial of Saddam Hussein, which he ultimately concludes is properly characterized as a show trial. *Id.* at 289.

<sup>104</sup> In this Note, I assume that true show trials are undesirable transitional justice mechanisms largely because their lack of legal legitimacy limits the sustainability and effective-

manipulation of the risk and some element of show in any criminal proceeding such that the existence of either feature cannot be per se fatal to a trial's legitimacy. I then push beyond the limits of Peterson's work to propose an analytical framework both for a normative evaluation and a priori guidance as to when these features become so salient as to convert the proceedings into an illegitimate show trial.

### 1. Risk

Manipulation of the risk of acquittal is problematic because the supposed purpose of a trial is to determine the guilt or innocence of an individual. Having a predetermined outcome strips the proceedings of that fundamental purpose, destroying the legitimate reason for its existence and violating a fundamental individual right—the due process right to a fair determination of guilt or innocence by a neutral arbiter.

However, risk manipulation occurs all the time in both transitional and non-transitional contexts. There will always be some manipulation of the risk at the outset of any criminal proceeding through the exercise of prosecutorial discretion. Prosecutors typically do not bring criminal charges when no evidence or viable means of legal imputation of guilt exists. Moreover, in transitional contexts, where there are simply more cases than judicial resources, prosecutorial discretion is of the utmost importance, and the decision whether to prosecute is often dictated by the strength and availability of evidence.<sup>105</sup> To condemn a criminal proceeding wholesale for this initial manipulation of the risk is unwarranted. The exercise of prosecutorial discretion based on the evidentiary strength of a case is a fundamental reality of any criminal justice system; there must be *some* control of the risk in the interest of an effective, functioning judicial system.

This highlights a crucial fact: Not all risk manipulation is problematic. What is important is that ultimately the trial remains about the determination of an individual's guilt and that the outcome has not been completely predetermined. Thus, it is possible to have some manipulation of the risk if there are other procedural protections in place, such as strict adherence to due process rights, or legitimate neu-

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ness of any moral message such a trial delivers. While arguments could perhaps be made to the contrary, this assumption seems consistent with the literature and Koskenniemi's scholarship, which similarly argues that show trials are not desirable transitional justice mechanisms.

<sup>105</sup> See MINOW, *supra* note 38, at 50, 122 (noting that only small percentage of those involved will be prosecuted in most transitional contexts and that selection is dependent on practical realities).

tral justifications for the manipulations of risk, which ensure that a risk of acquittal remains.<sup>106</sup> Moreover, other external factors, such as execution by a domestic tribunal, may mitigate this manipulation of the risk by providing further sources of legitimacy to validate the proceedings.<sup>107</sup> Given that a domestic tribunal is more sensitive to national political idiosyncracies and preexists the initiation of criminal proceedings, it inherently boosts the proceedings' legitimacy.<sup>108</sup>

## 2. *Show*

The same principle applies to the show element. Any show element of a trial is first and foremost dependent on the access of the media and public to the progression of the trial. However, media coverage and public access are often synonymous with transparency, a value that is not only prized in legal proceedings, but also essential to their efficacy and to the democratic process, particularly where the institution in charge seeks to reaffirm its own legitimacy. Since ensuring transparency simultaneously thrusts the proceedings into the public limelight, Koskeniemi's pessimism suggests a potentially fatal conflict, particularly since such public exposure spurs temptations to control the message delivered and a preoccupation with purposes extraneous to the determination of individual guilt. However, such a conclusion is unwarranted because, like the risk element, not all show elements make the proceedings illegitimate, particularly when they ensure transparency.

While transparency is admittedly often not the only goal of public access to a trial, particularly in transitional contexts, this fact is not necessarily consequential. To condemn a trial wholesale because media participation may simultaneously facilitate furthering transitional justice goals is inappropriate so long as that participation remains tightly tethered to a legitimate judicial objective. Holding otherwise would make any element of a trial that simultaneously serves an ancillary transitional justice function illegitimate. Not only would this completely obviate the capacity of criminal proceedings to ever contribute to transitional justice, but taken to its logical conclusion it could undermine the majority of criminal proceedings, which often inevitably and sometimes even inadvertently further goals and objectives apart from the determination of individual responsibility.

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<sup>106</sup> See *infra* Part III.A (describing how to appropriately manage risk while ensuring that legitimacy is maintained through procedural safeguards).

<sup>107</sup> See *infra* Part II.A (discussing examples of external sources of legitimacy such as Peruvian Constitution and Chilean extradition).

<sup>108</sup> See *supra* notes 73–76 and accompanying text.

Given the historical use of trials in transitional settings, such a conclusion seems unwarranted.<sup>109</sup> Condemning wholesale any involvement of the media and public or viewing transparency as an irreconcilable show trial dilemma are not workable approaches. Rather, the role of publicity must be assessed with respect to the primary purpose of the proceedings—adjudication of individual guilt—to determine whether that ultimate goal has been sacrificed. Through a sincere commitment to due process and procedural guarantees, a trial can have some show in the interest of transparency without undermining the legal legitimacy of the proceedings.<sup>110</sup>

### 3. *Analytical Framework for Evaluating Risk and Show*

This discussion demonstrates that trials need not be considered illegitimate merely because of the presence of some risk and show features. It is wrong to condemn the value of transitional justice trials wholesale merely for their attempt to navigate the constitutive paradox. However, navigating this paradox is difficult, and identifying when a trial has become an illegitimate show trial is a complex endeavor.

Consequently, I propose an evaluative framework within which to analyze whether a trial has found the appropriate balance of both risk and show. This approach ensures the legitimacy of the trial while simultaneously accommodating some show trial features, such as some decrease in the risk of acquittal or some presence of show elements through involvement of the public and media. In order to be characterized as legitimate, a trial must meet two criteria. First, these show trial features must remain ancillary to the basic guilt-determination purpose—like the exercise of prosecutorial discretion, or the pursuit of other legitimate judicial objectives, such as transparency. Second, the existence of strict due process procedural protections should be taken as persuasive evidence that the integrity of the judicial process is not unduly undermined by the existence of some show trial features. In effect, this paradigm allows for less manipulation of the risk of acquittal than of the show element, for the inquiry ultimately remains centered on whether the trial has diverged from the function legitimating its existence—the determination of individual guilt.

Allowing for this sort of accommodation facilitates trials legitimately contributing to transitional justice objectives, such as national reconciliation, while remaining within prescribed legal boundaries.

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<sup>109</sup> See TEITEL, *supra* note 20, at 27–28 (noting trials have historically marked periods of transition and that “[p]unishment dominates our understandings of transitional justice”).

<sup>110</sup> See *infra* Part III.A (describing how to navigate show trial dilemma).

This test can guide tribunals toward assurance of legitimacy by forcing the prioritization of due process and procedural guarantees and by ensuring that all show trial features remain secondary to the determination of individual guilt. Moreover, these two prongs are mutually reinforcing and provide clear, useful guidance.<sup>111</sup>

Fujimori's trial, analyzed through this framework, demonstrates that Koskenniemi's implicit pessimism is not necessarily warranted, as the effectiveness and legitimacy of a criminal prosecution can survive even in the presence of some risk or show elements so long as the two elements of my proposed test are met. Given that inherent value conflicts are navigated effectively all the time in other legal doctrines,<sup>112</sup> there is no reason to assume that similar accommodations are not possible in transitional trials.

Furthermore, through this model, in conjunction with the application of Payne's work, I explain why Fujimori's trial should be considered a success despite some short-term polarizing effects, which are more appropriately understood as part of the democratic process.<sup>113</sup> Since domestic tribunals have pre-established rules and procedures and greater sensitivity to national politics and peculiarities, there is reason to think that these institutions will have considerably more success in striking the right balance and achieving public legitimacy.<sup>114</sup> This fact, in conjunction with domestic trials' superior rehabilitation potential,<sup>115</sup> suggests that domestic tribunals should be the preferred forum for furthering transitional justice goals through criminal prosecution.

## II

### THE TRIAL OF ALBERTO FUJIMORI

The previous Part introduced a framework for analyzing the legitimacy of Fujimori's trial. Given Fujimori's status as a former head-of-state and his residual political popularity, it was inevitable that the

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<sup>111</sup> See *infra* Part III.A.

<sup>112</sup> For example, most American constitutional doctrine revolves around the resolution of tensions between conflicting values. See generally, e.g., Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974) (highlighting tension between values of individual liberty and collective security inherent in Fourth Amendment doctrine).

<sup>113</sup> See *supra* notes 61–69 and accompanying text (describing how trial can contribute to growth of domestic moral consensus).

<sup>114</sup> It is worth noting that Koskenniemi's critiques largely stem from the difficulties of administering criminal justice in international tribunals. See Koskenniemi, *supra* note 46 (focusing discussion on internationally conducted proceedings, such as those in Nuremberg and in ICTY, as well as trial of Milošević).

<sup>115</sup> See *supra* notes 61–69 and accompanying text (describing how trial can contribute to growth of domestic moral consensus).

proceedings would have some political element.<sup>116</sup> Moreover, per the Truth and Reconciliation Commission's mandate and the human rights community's characterization of Fujimori's trial, it is expected to play a role in the transitional justice project,<sup>117</sup> a function which inherently goes beyond the assignment of individual guilt. Both factors spurred temptations to convert the proceedings into a show trial by decreasing the risk of acquittal and controlling the show, or message delivered to the public through this highly visible trial, to ensure the message best suited to the larger transitional justice goals was delivered. To assess the trial's prospective contributions to transitional justice, it is necessary to assess the extent to which it has succumbed to these temptations. To do so, I will consider how the procedural and substantive aspects of the trial have influenced both the risk and show elements.

### A. Risk Analysis

As identified previously, those in charge of the trial have some power to determine the risk, or likelihood of acquittal.<sup>118</sup> Therefore, it is essential to begin by noting that neither the establishment of the Tribunal nor the participation of the Justices who oversaw the proceedings decreased the risk of acquittal. Despite pressure from human

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<sup>116</sup> Fujimori's political party has a substantial presence in Congress and a mainstream periodical, *La Razon*, which openly endorses, supports, and sympathizes with him and his party. See Oficina Nacional de Procesos Electorales, Resultados Elecciones Generales y de Parlamento Andino 2006, Elecciones Congresales de 2006: Barrera Electoral, <http://www.web.onpe.gob.pe/modElecciones/elecciones/resultados2006/1ravuelta/index.onpe> (follow "Resumen Elecciones Congresales" hyperlink; then follow "Distribución Escaños" hyperlink) (last visited Mar. 10, 2010) (stating that Fujimori's party Alliance for the Future won 13 of 120 seats in Congress by receiving over 1.4 million votes); Elecciones Generales 2006, *Elección Presidencial, Congresal y al Parlamento Andino: Resultados*, Jurado Nacional de Elecciones, available at [http://www.jne.gob.pe/informacionelectoral/estadisticaelectoral/1\\_1.pdf](http://www.jne.gob.pe/informacionelectoral/estadisticaelectoral/1_1.pdf) (detailing voting statistics from 2006 elections); see also Juan Forero, *Fujimori's Daughter Polishes Her Jailed Father's Image on the Road to Congress in Peru*, N.Y. TIMES, Apr. 9, 2006, available at <http://www.nytimes.com/2006/04/09/world/americas/09peru.html?pagewanted=all> (discussing successful efforts to enhance Fujimori's image and political legacy); Victor Robles Sosa, *Sala San Martín violó leyes para condenar a Fujimori*, LA RAZÓN, Dec. 17, 2009, available at <http://74.125.93.132/search?q=cache:9TDwjDHAdbkJ:www.larazon.com.pe/online/indice.asp%3Ftfi%3DLROpinion01%26td%3D17%26tm%3D12%26ta%3D2009+site:www.larazon.com.pe+periodico+larazon.com+alberto+fujimori+juicio&cd=10&hl=es&ct=clnk&gl=pe> (accusing tribunal of violating laws in order to find Fujimori guilty). See generally LA RAZÓN, <http://www.larazon.com.pe>.

<sup>117</sup> Lawyers For the Victims' Families Conclude Arguments, <http://fujimoriontrial.org/?p=572> (Feb. 16, 2009) (describing closing statements proclaiming trial's "moral, political and educational" significance).

<sup>118</sup> See *supra* Part I.C.1.

rights activists and the Truth and Reconciliation Commission,<sup>119</sup> the Peruvian Congress did not set up a special tribunal system to try the human rights abuses of the previous two decades.<sup>120</sup> Thus, unlike other head-of-state trials to date,<sup>121</sup> Fujimori stood trial before the Supreme Court's Special Criminal Court as mandated by Peru's Constitution.<sup>122</sup> In this sense, the domestic execution of the trial, predicated on a preexisting set of legal norms, enhanced the legitimacy of the proceedings.

In addition, the three Justices overseeing Fujimori's human rights trial<sup>123</sup> were highly respected in Peru and seen as committed to ensuring that Fujimori received a fair trial.<sup>124</sup> When deciding whether to extradite Fujimori, the Chilean Supreme Court was very concerned with the guarantee that he would receive a fair trial.<sup>125</sup> Given this

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<sup>119</sup> See Final Report of the Truth and Reconciliation Commission of Peru, Summary of Recommendations Section Vol. IX, C.5 (transl. International Center for Transitional Justice) (calling for establishment of "specialized temporary system for trying cases of human rights crimes and violations"), available at <http://www.ictj.org/static/Americas/Peru/TRC.FinalReport.eng.pdf>.

<sup>120</sup> Gamarra Herrera, *supra* note 18, at 222.

<sup>121</sup> See, e.g., Mikhail Wladimiroff, *Former Heads of State on Trial*, 38 CORNELL INT'L L.J. 949, 969–70 (2005) (describing establishment of Iraqi Special Tribunal for trial of Saddam Hussein).

<sup>122</sup> The Peruvian Constitution specifically sets out the procedure for bringing criminal charges against a head of state. Congress first has the power to put forth accusations via its Permanent Assembly. CONST. PERU art. 99, available at [http://www.congreso.gob.pe/\\_ingles/CONSTITUTION\\_29\\_08\\_08.pdf](http://www.congreso.gob.pe/_ingles/CONSTITUTION_29_08_08.pdf) (trans. Juan Gotelli, et al.). The National Prosecutor then has five days to bring charges before the Supreme Court. *Id.* at art. 100; Cód. PROC. PEN. 17; see also James H. Manahan, Legal Analysis: Why the Supreme Court?, [http://fujimoriontrial.org/?page\\_id=77](http://fujimoriontrial.org/?page_id=77) (Feb. 2, 2008) (describing process by which criminal proceedings can be initiated against head-of-state under Peruvian law). See generally Poder Judicial de la República del Perú, Sala Penal Especial de la Corte Suprema, <http://www.pj.gob.pe/CorteSuprema/spe/index.asp?opcion=inicio> (last visited Apr. 7, 2010). The Special Criminal Chamber consists of three Justices from the full Court—the President of the Court and two others he selects—and is charged with hearing cases against high-level public officials. Cód. PROC. PEN. 17; TEXTO ÚNICO ORDENADO DE LA LEY ORGANICA DEL PODER JUDICIAL 30, 76, available at <http://www.justiciaviva.org.pe/normas/lopj.doc>.

<sup>123</sup> The three Justices are Víctor Prado Saldarriaga, Hugo Príncipe Trujillo, and César San Martín Castro, the President of the Court. See sources cited *infra* note 124; see also Poder Judicial de la República del Perú, *Integrantes de Sala Penal Especial de la Corte Suprema*, <http://www.pj.gob.pe/CorteSuprema/spe/index.asp?opcion=integrantes> (last visited Apr. 7, 2010) (describing judges' qualifications).

<sup>124</sup> Apart from some criticism that the Justices favored the prosecution during questioning of witnesses, there were no substantial attacks launched against their impartiality or integrity. See Victor Manuel Quinteros, *La Autonomía de los Jueces* (Oct. 2007), [http://www.pucp.edu.pe/idehpucp/boletin\\_derechos\\_humanos/articulo.php?IdArticulo=0164](http://www.pucp.edu.pe/idehpucp/boletin_derechos_humanos/articulo.php?IdArticulo=0164) (praising independence of Justices overseeing proceedings); Ana Véliz, *La Sala Penal especial que lo juzgará*, LA REPÚBLICA, Sept. 22, 2007, available at <http://www.larepublica.com.pe/content/view/179403/483/> (describing positive reputation of selected Justices).

<sup>125</sup> See Segunda Sala de la Corte Suprema de Justicia de la República [CSJ] [Second Chamber of the Supreme Court], 9/21/2007, "Juzgamiento al Ex Presidente Alberto

antecedent and the high profile and politically sensitive nature of the trial, the Peruvian Justices were hypervigilant in ensuring that the defendant was afforded all due process and procedural protections necessary to make the trial fair and legitimate.<sup>126</sup> From the initiation of proceedings, the Justices gave Fujimori ample opportunity to speak in his own defense while simultaneously respecting his right to remain silent,<sup>127</sup> even permitting him to consult openly with his defense attorney during questioning.<sup>128</sup> This unique and inventive criminal procedure, which seemed much like on-the-stand witness coaching,<sup>129</sup> perhaps best exemplifies the extremes the Tribunal went to in order to ensure that respect for the rights of the accused would not be doubted.<sup>130</sup>

In a similar vein, the Tribunal was highly sensitive to Fujimori's health complications, shortening sessions and even delaying the trial for weeks at a time so that he could receive medical care.<sup>131</sup> This was a

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Fujimori/Resolución de Extradición," Rol N° 3744-07 (Chile), available at <http://www.pj.gob.pe/transparencia/documentos/extradicion21092007.pdf>.

<sup>126</sup> The Peruvian Criminal Procedure Code is currently undergoing reform due to its failures in adequately respecting defendants' rights. Fujimori's trial was executed under the older codes, and the Justices consequently incorporated additional rules and procedures at their discretion, as exemplified by the treatment of lawyer coaching during witness examination. See, e.g., Corte Suprema de Justicia de la República, Reglas Para la Práctica de la Prueba Documental y Documentada, [http://www.pj.gob.pe/CorteSuprema/spe/Documentos/SPE\\_REGLAS\\_PRACTICA\\_PRUEBA\\_DOCUMENTADA\\_030908.pdf](http://www.pj.gob.pe/CorteSuprema/spe/Documentos/SPE_REGLAS_PRACTICA_PRUEBA_DOCUMENTADA_030908.pdf) (last visited Apr. 10, 2010) (establishing rules for presentation and introduction of evidence); *infra* note 129 (describing promulgation of rules guarding defendant's right to silence).

<sup>127</sup> Even though Fujimori agreed to take the stand, he was permitted to invoke his right to silence and did so in the third session when the previous prosecutor was replaced with Avelino Guillén, who was much more direct and aggressive in his questioning. See Day 3 – Fujimori Says He Was Unaware of Paramilitary Group Colina, <http://fujimoriontrial.org/?p=34> (Dec. 14, 2007).

<sup>128</sup> This treatment was extended to the various witnesses testifying who were also standing trial for human rights violations and being represented by Nakazaki, Fujimori's defense lawyer. This meant that, as I observed during the trial, Fujimori's lawyer Nakazaki would at times interrupt questioning, approach the witness stand and whisper into the testifying witness's ear, offering legal advice as to whether or how to respond.

<sup>129</sup> Since the Peruvian Criminal Code does not have any specific provisions on the interrogation of defendants, the Tribunal passed a resolution emphasizing the importance of protecting witnesses' right to remain silent and setting "reasonable" guidelines to that end. See Sala Penal Especial de la Corte Suprema de Perú, Directivas Básicas: Silencio del Coimputado (Feb. 6, 2008), available at [http://www.pj.gob.pe/CorteSuprema/spe/Documentos/06-02-08\\_DIRECTIVAS\\_BASICAS.doc](http://www.pj.gob.pe/CorteSuprema/spe/Documentos/06-02-08_DIRECTIVAS_BASICAS.doc).

<sup>130</sup> The defense's closing arguments admitted the integrity of the proceedings and only attacked pretrial procedures on due process grounds and the excessive influence of the media. Fujimori's Defense Says Certain Judicial Powers Are Weak When Faced with Media Pressure, <http://fujimoriontrial.org/?p=576> (Feb. 20, 2009).

<sup>131</sup> The trial was suspended for two weeks in the summer while Fujimori had a minor lesion on his tongue removed, an incident on which the defense and *fujimorista*, or pro-Fujimori, press seized—headlines reading "Fujimori has cancer" depicted the tribunal as

particularly sticky issue for the Tribunal to navigate, as ignoring Fujimori's alleged health complications could have raised due process concerns; yet such delays also posed a threat to the completion of the trial, as similar health concerns have been a successful impediment to the realization of more than one recent head-of-state trial.<sup>132</sup> The Tribunal's sensitivity to these concerns is evidence that the due process rights of the defendant were prioritized despite any threats possibly posed to the trial's completion.

The substantive charges against Fujimori were also narrowly tailored to avoid any accusations of manipulation of the risk. The charges were limited by the Chilean extradition<sup>133</sup> and by the Peruvian-Chilean extradition treaty, which states that an individual can be extradited only for crimes codified in the penal codes of both states.<sup>134</sup> While the Chilean extradition authorized the Peruvian Tribunal to consider applicable international law,<sup>135</sup> the specific crimes for which Fujimori was ultimately extradited were all domestic crimes codified in the countries' respective penal codes: kidnapping, homicide, and aggravated battery.<sup>136</sup> Although this narrow circumscription could be viewed as a limitation in that Fujimori was not explicitly charged with more morally reprehensible international crimes, it was arguably beneficial in terms of the risk portion of the show trial analysis: Limiting the charges to domestic crimes accepted

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coldhearted, ruthless, and cruel for proceeding against an individual not physically fit to stand trial. *Operación en la lengua detiene juicio a Fujimori*, EL COMERCIO, June 4, 2008, available at <http://www.elcomercio.com.pe/ediciononline/html/2008-06-04/operacion-lengua-detiene-juicio-fujimori.html> (last visited Apr. 10, 2010); Fujimori: Victim of his own Health?, <http://fujimoriontrial.org/?p=335> (May 23, 2008) (displaying front page of Fujimorista press depicting this caption).

<sup>132</sup> For example, Slobodan Milošević died just weeks before the conclusion of his four-year-long human rights trial. GIDEON BOAS, *THE MILOŠEVIĆ TRIAL: LESSONS FOR THE CONDUCT OF COMPLEX INTERNATIONAL PROCEEDINGS 1* (2007). The trial of Augusto Pinochet was also never completed due to his health complications. Rebecca Evans, *Pinochet in London—Pinochet in Chile: International and Domestic Politics in Human Rights Policy*, 28 HUM. RTS. Q. 207, 211 (2006).

<sup>133</sup> See *supra* note 18.

<sup>134</sup> Extradition Treaty, Chile-Peru, art. II, Nov. 5, 1932, available at [http://www.oas.org/juridico/MLA/sp/traites/sp\\_traites-ext-chl-per.pdf](http://www.oas.org/juridico/MLA/sp/traites/sp_traites-ext-chl-per.pdf); see *supra* note 6.

<sup>135</sup> Segunda Sala de la Corte Suprema de Justicia [CSJ] [Second Chamber of the Supreme Court], 9/21/2007, Rol N° 3744-07, at 8–11 (Chile), available at <http://www.pj.gob.pe/transparencia/documentos/extradicion21092007.pdf>. Because Chile is not a party to the Rome Statute, the extradition resolution made it clear that the tribunal should consider only the crimes embodied in relevant customary international law as *jus cogens*, to which the Chilean tribunal acknowledged “crimes against humanity” belong. *Id.* at 9.

<sup>136</sup> *Id.* at 202–12; see also Human Rights Watch, Q&A: Trial of Former President Alberto Fujimori of Peru, <http://www.hrw.org/en/news/2009/02/20/q-trial-former-president-alberto-fujimori-peru> (Feb. 20, 2009) (“[W]hether the abuses committed in Peru amount to crimes against humanity is not itself an issue in Fujimori’s trial.”).

not only by Chile and Peru but by almost all domestic legal systems side-stepped the legality and retroactivity problems that have plagued many international transitional trials.<sup>137</sup> While the Tribunal's decision did ultimately find Fujimori guilty of crimes against humanity, a crime under international law, the focus remained, particularly in the sentencing, on the domestic crimes explicitly identified in the extradition.<sup>138</sup> Thus, at least in terms of the risk, the charges did not appear to increase the likelihood of conviction.<sup>139</sup>

Although the domestic crimes for which Fujimori was tried were relatively uncontroversial, the legal theory imputing criminal responsibility to him presented many complications. Given that Fujimori did not personally commit the crimes of which he was accused, liability had to be imputed to him by virtue of his position of authority. The basis for such liability is found in Article 23 of the Peruvian Criminal Code, which allows for the imputation of criminal responsibility under the theory of *autoría mediata*, which translates roughly as “command responsibility.”<sup>140</sup> The Code's text does nothing to illuminate the substantive elements for proving *autoría mediata*,<sup>141</sup> and the doctrine is not well-defined in Peruvian jurisprudence.<sup>142</sup>

The doctrine of “command responsibility,” which allows liability to be attributed to military or civilian leaders for the crimes com-

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<sup>137</sup> See Ruti Teitel, *Transitional Justice: Postwar Legacies*, 27 *CARDOZO L. REV.* 1615, 1619 (2006) (discussing legality problems in Nuremberg such as challenges of *ex post facto* laws and retroactivity, since crimes with which individuals were charged were not yet clearly defined under international law); see also TEITEL, *supra* note 20, at 20–21 (explaining that international law “served as a mediating concept” aiding evaluation of post–World War II Nuremberg and Tokyo trials’ legality).

<sup>138</sup> See *infra* notes 167–72 and accompanying text (describing how trial was ultimately focused on Fujimori’s guilt or innocence under domestic criminal law).

<sup>139</sup> Admittedly, an argument could be made that this narrow circumscription of charges indirectly decreased the risk of acquittal by limiting charges to those that the prosecution knew were unlikely to be controversial and therefore more likely to be successful. However, as previously discussed, such limitations are justified by practical considerations inherent in the exercise of prosecutorial discretion and are not an abuse of the practical exercise of such discretion. See *supra* Part I.C.

<sup>140</sup> CÓD. PEN. 23, available at [http://www.oas.org/Juridico/mla/sp/per/sp\\_per-int-text-cp.pdf](http://www.oas.org/Juridico/mla/sp/per/sp_per-int-text-cp.pdf) (“Autoría, autoría mediata y coautoría: [One who commits a crime himself or through another and those that commit a crime together will be subject to the punishment established for the crime.]” (trans. by author)).

<sup>141</sup> The text simply states one may be assigned liability under the legal theory. *Id.*; see *Casios Barrios Sentencia*, *supra* note 7, at 628–29 (describing history of *autoría mediata* in previous criminal codes).

<sup>142</sup> See Sala Penal de la Corte Suprema de Justicia de La República [CSJ] [Criminal Chamber of the Supreme Court], *Abimael Guzmán Reinoso y otros/Sentencia*, Oct. 13, 2006, 158–67, (Peru), available at <http://www.icj.org/IMG/GuzmanDecision.pdf> (employing doctrine for first time).

mitted by their subordinates,<sup>143</sup> figures prominently, albeit controversially, in international criminal jurisprudence.<sup>144</sup> Yet it is an essential prosecutorial tool for bringing abusive leaders to justice,<sup>145</sup> as it facilitates the assignment of responsibility when it would otherwise be impossible to do so given evidentiary obstacles.<sup>146</sup>

The use of “command responsibility” has serious implications for the show trial analysis because its application can inherently decrease the risk of acquittal<sup>147</sup>—the more expansive the theory applied, the easier it is for the prosecution to secure conviction.<sup>148</sup> The Justices, seemingly acknowledging what was at stake, took an extremely cautious route: They explicitly rejected the importation of the broader, international criminal law formulation of “command responsibility” and relied instead on Argentine jurisprudence, defining *autoría mediata* in a narrower manner, as control over a hierarchical command structure.<sup>149</sup> This modest application of imputed liability

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<sup>143</sup> In international criminal jurisprudence, it must be shown that the leader exercised “effective command, control or authority” over the perpetrators, “knew, or . . . should have known” that crimes had been or were going to be committed, and “failed to take the action necessary to prevent or repress the crimes.” ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 208–09 (2003) (italics omitted).

<sup>144</sup> This is true insofar as its application greatly expands the scope of liability and imposes a relaxed, omission-like mens rea standard for crimes ordinarily requiring some showing of intent or at least gross, reckless negligence, or disregard. Danner & Martinez, *supra* note 25, at 79, 166; see ALEXANDER ZAHAR & GÖRAN SLUITER, *INTERNATIONAL CRIMINAL LAW* 259 (2008) (“Command responsibility is a form of omission liability, for it is based on proof of failure to restrain the actions of others.”).

<sup>145</sup> Given the lack of evidence, which is usually due to a deliberate design, “command responsibility” may in fact be the only way of assigning criminal responsibility to heads of state who are often the most desirable targets for criminal prosecution. See TEITEL, *supra* note 20, at 36 (describing desire to target “those at the highest level of responsibility for the most egregious crimes” but noting limited realistic capacity to do so); Douglass Cassel, *Las mejores prácticas para el procesamiento judicial de las violaciones de derechos humanos in LOS CAMINOS DE LA JUSTICIA PENAL Y LOS DERECHOS HUMANOS* 167, 170 (Francisco Macedo ed. 2007) (noting preference for prosecuting those “most responsible” by applying “command responsibility” (trans. by author)); Danner & Martinez, *supra* note 25, at 95 (“The political role of the transitional trial also naturally leads to an emphasis on prosecuting high-level perpetrators or ‘big fish.’”).

<sup>146</sup> See Darcy, *supra* note 35, at 403 (discussing prosecution’s desire to use imputed liability to secure convictions); Osiel, *supra* note 73, at 808 (“Neither . . . requires any such direct evidence of communication from the defendant to criminal compatriots.”).

<sup>147</sup> Darcy, *supra* note 35, at 403 (identifying “command responsibility” as “safety net” that can “reduce the chances of . . . acquittal”).

<sup>148</sup> See Osiel, *supra* note 73, at 793–97 (arguing that ICTY should apply more expansive theory of “command responsibility” to ease prosecutorial burdens).

<sup>149</sup> See *Casos Barrios Sentencia*, *supra* note 7, at 628–57 (limiting doctrine to control of hierarchical command structure). Many argued for application of the international criminal law standard. See generally Brief for George Washington University Human Rights Clinic as Amici Curiae, *Casos Barrios Sentencia* (AV-19-2001) (arguing for application of international law conception of “command responsibility” to impute responsibility to Fujimori),

allowed the Justices to fill the doctrinal gap and justify a conviction without undermining the legitimacy of the proceedings or unduly decreasing the risk of acquittal.<sup>150</sup> Thus, the Justices were able to strike a balance of utilizing imputed liability while simultaneously excluding the application of some of the more expansive, and hence controversial, elements of the international law formulation of “command responsibility.”

### B. *Show Analysis*

Related to the Justices’ pervasive preoccupation with ensuring the legitimacy of the trial was their commitment to the transparency of the process. This commitment led to the decision to have all sessions of the trial broadcast live on cable television and to have members of the press present in each session to report on its progress.<sup>151</sup> Providing this public access demonstrated a commitment to facilitating intimate oversight by both domestic civil society and the international community. On the other hand, it also necessarily thrust the proceedings into

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*available at* [http://www.law.gwu.edu/Academics/EL/clinics/IHRC/Documents/Amicus\\_AlbertoFujimori\\_GWLaw\\_Junio2008.pdf](http://www.law.gwu.edu/Academics/EL/clinics/IHRC/Documents/Amicus_AlbertoFujimori_GWLaw_Junio2008.pdf).

<sup>150</sup> Although employing imputed liability does arguably decrease the risk of acquittal in one respect by facilitating the imposition of liability where it would not otherwise be possible, given that “command responsibility” as a legal doctrine already has a statutory basis in Peru’s Criminal Code and has been employed by both international and domestic tribunals in similar settings, its application in this trial does not seem per se fatal to the legitimacy of the trial. See *CÓD. PEN. 23*, *available at* <http://www.cajpe.org.pe/rij/bases/legisla/peru/pecodpen.htm> (codifying “command responsibility” in Peruvian penal code); *see, e.g.*, Rome Statute art. 28, July 1, 2002, 2187 U.N.T.S. 3 (importing doctrine of “command responsibility” for use in International Criminal Court); Statute of the International Tribunal for the Former Yugoslavia art. 7(3), May 25, 1993, *available at* [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf) (importing doctrine for use in International Criminal Tribunal of the Former Yugoslavia); Statute of the International Criminal Tribunal for Rwanda art. 6(3), Nov. 8, 1994, *available at* <http://www.ictcr.org/ENGLISH/basicdocs/statute/2007.pdf> (importing doctrine for use in International Criminal Tribunal of Rwanda); Statute of the Special Court for Sierra Leone art. 6(3), Aug. 14, 2000, *available at* <http://www.sc-sl.org/LinkClick.aspx?fileticket=Uclnd1MJeW%3d&tabid=176> (importing doctrine for use in Special Court for Sierra Leone).

<sup>151</sup> There were two separate public audience rooms available onsite to facilitate the daily attendance of victims’ families, members of the domestic human rights community, Fujimori’s supporters, and international observers. For websites providing continual coverage of the trial, see generally Poder Judicial de la República del Perú, Sala Penal Especial de la Corte Suprema, <http://www.pj.gob.pe/CorteSuprema/spe/index.asp?opcion=inicio> (last visited Apr. 7, 2010) (providing coverage and access to materials relevant to trial on government’s website); Fujimori on Trial: Accountability in Action, <http://fujimoriontrial.org> (last visited Apr. 7, 2010) (providing summaries of each trial session as well as commentary from experts, participants in trial, and bloggers).

the public limelight, creating conditions that could have led to a strong show element in the trial.<sup>152</sup>

However, the Tribunal, resisting the temptation to control the show, did not silence the defendant. Rather, through strict adherence to due process and procedural norms, the Tribunal created an environment where both sides had an opportunity to present their respective messages to the public. As predicted in Part I.B, the Tribunal's adherence to the due process and procedural protections essential to establishing institutional legitimacy opened the door for Fujimori to attack the context of the trial, propagate his own political message, and challenge the message presented by the prosecution. Of particular note is the very first session of the trial, during which Fujimori gave a passionate speech in his defense,<sup>153</sup> prompting a standing ovation from his supporters in the courtroom.<sup>154</sup> While Justice Cesar San Martín did his best to contain the outburst, Fujimori succeeded in disseminating his message quite effectively.<sup>155</sup>

It is undeniable that Fujimori's right to competent legal representation also increased his capacity to influence the message conveyed by the trial. Throughout the proceedings, his lawyer, César Nakazaki, was invaluable in helping Fujimori craft a strategic defense that took advantage of the procedural due process rights afforded by the Tribunal.<sup>156</sup> For example, Fujimori's various health concerns were part of a double strategy by the defense to cultivate sympathy for his fragile condition while simultaneously slowing the progression of the trial.<sup>157</sup> Throughout the trial, Fujimori effectively conveyed the message that he was the victim of an unwarranted criminal prosecution given his service, sacrifice, and effectiveness in restoring Peru to a

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<sup>152</sup> See *supra* notes 92–99 and accompanying text (discussing importance of trial publicity and difficulty in maintaining message control).

<sup>153</sup> Fujimori emphasized the disastrous state of the country when he came to power and his tireless work to bring Peru out of the depths of economic and political despair. See Adriana Leon & Patrick J. McDonnell, *Fujimori Rants at His Trial; Peru's Former President Protests the Rights Abuse Charges Against Him*, L.A. TIMES, Dec. 11, 2007, at A4 (“The combative Fujimori argued that he had saved a nation free-falling toward anarchy.”).

<sup>154</sup> Day 1 – Fujimori Reacts to the Charges, <http://fujimoriontrial.org/?p=24> (Dec. 10, 2007).

<sup>155</sup> See Leon & McDonnell, *supra* note 153 (“Fujimori's theatrical soliloquy reached such a fever pitch that the chief judge, Cesar San Martin, warned him to tone it down . . .”).

<sup>156</sup> One strategy was to characterize the trial as putting Fujimori's “political policies” on trial. See Fujimori's Defense “Seeks Justice for Fujimori,” <http://fujimoriontrial.org/?p=574> (Feb. 18, 2009) (“Nakazaki claimed Fujimori is really being tried for his counter-terrorist policy from Nov. 1991 to July 1992.”).

<sup>157</sup> See Fujimori Supporters Request That Trial Be Suspended, <http://fujimoriontrial.org/?p=329> (May 20, 2008) (describing supporters' requests for recesses for health reasons).

state of political and economic stability.<sup>158</sup> He shifted the blame to the Shining Path and even attacked members of the human rights community who challenged his counterinsurgency tactics, accusing them of exposing Peru to the risk of spiraling back into a state of instability and violence.<sup>159</sup> The strength of this message was further fortified by the testimony of Vladimiro Montesinos, Fujimori's right-hand man.<sup>160</sup>

Together, Fujimori and Montesinos provide a stark example of the ways in which a trial can be used as a political soapbox for the accused and his supporters.<sup>161</sup> For nearly three hours, Montesinos gave a lesson in how to manipulate the content of the show of a trial, using his questioning on the witness stand to propagate his political message.<sup>162</sup> He openly attacked the context of the trial—even accusing the prosecutor of corruption and human rights violations—before finally exercising his right to silence.<sup>163</sup> Although the Tribunal excluded his testimony from the record,<sup>164</sup> his rhetoric was broadcast

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<sup>158</sup> See Fujimori's Defense "Seeks Justice for Fujimori," <http://fujimoriontrial.org/?p=574> (Feb. 18, 2007) (noting use of strategy of portraying Fujimori as victim); *supra* note 153 (noting that this was key part of Fujimori's statement).

<sup>159</sup> Cf. Burt, *supra* note 4, at 45–49 (discussing fear tactics used by Fujimori to convince Peruvians his rule and policies were necessary); see Cano & Ninaquispe, *supra* note 26, at 63 (noting how human rights advocates were characterized as impediments to successfully defeating terrorist insurgency).

<sup>160</sup> A substantial portion of those supporting Fujimori view Montesinos as the true source of corruption and illegality. See, e.g., Alegatos de la defensa de Fujimori: Fue Montesinos, no Fujimori, <http://fujimoriontrial.org/?p=579> (Mar. 2, 2009).

<sup>161</sup> Montesinos was standing trial for a variety of human rights abuses at the time; thus, when he was summoned to testify, many assumed he would simply exercise his right to remain silent. See Vladimiro Montesinos Testifies Next Session, <http://fujimoriontrial.org/?p=380> (June 29, 2008) (noting that Tribunal had already identified replacement witness in the event he decided to do so).

<sup>162</sup> Not only did he justify the oppressive activities of the state as necessary for the war on terror—citing current United States practice—he argued that illegal means are perfectly justifiable when employed to serve legal ends, this being the fundamental idea that the prosecution, and the trial itself, sought to eradicate. *Doc atacó a los fiscales Guillén y Peláez que acusan a Fujimori*, EL COMERCIO, July 1, 2008; Interview with Gloria Cano, Lawyer for Victims' Families, APRODEH, in Lima, Peru (June 24, 2008) (claiming primary purpose of trial was to make clear that ends cannot justify means when means consist of severe violations of human rights); Vladimiro Montesinos Says Crimes Can Be Committed for Matters of State, <http://fujimoriontrial.org/?p=381> (July 1, 2008).

<sup>163</sup> See *supra* note 160.

<sup>164</sup> See Sala Penal Especial de la Corte Suprema de Justicia de la República [CSJ] [Special Criminal Chamber of the Supreme Court of the Republic], July 4, 2008, EXP. AV. NRO 19-2001 04.07.08, (Peru), available at [http://www.pj.gob.pe/CorteSuprema/spe/Documentos/exp\\_AV-19-2001\\_2da\\_SPE\\_040708.pdf](http://www.pj.gob.pe/CorteSuprema/spe/Documentos/exp_AV-19-2001_2da_SPE_040708.pdf) (declaring authority of tribunal to exclude testimony under Article 298 of Peruvian Criminal Procedure Code due to Montesinos's "procedural abuse" and giving of testimony not in "good faith") (trans. by author); see also Cód. Proc. Pen. 298 (permitting nullification of evidence or testimony when "serious irregularities or omissions" occur) (trans. by author).

to millions of viewers,<sup>165</sup> and the inability of the Justices and prosecution to rein him in left a lasting impression.

However, the Tribunal did not just sit idly while Fujimori and Montesinos took steps to shape the message of the trial. The final verdict illustrated the Tribunal's concern with the message of the trial as well; it went beyond simply finding guilt on the domestic charges so as to ensure that the larger context within which the trial operated was not forgotten. Limiting the charges to domestic crimes had labeled Fujimori as an ordinary criminal, downplaying the gravity of his offenses. This not only left those seeking retributive justice disillusioned and unsatisfied, but also distorted the larger historical narrative put forward by the Truth Commission's findings of crimes against humanity, which was essential to the goal of national reconciliation.<sup>166</sup> Convinced that such contextualization was therefore imperative, the Tribunal's verdict contained a brief section, some eight pages out of the over seven hundred in the decision, in which it both acknowledged the "systematic and widespread" context in which the domestic crimes were committed and found Fujimori guilty of crimes against humanity, a distinct crime under international law.<sup>167</sup> While not completely unprecedented,<sup>168</sup> this assertion arguably pushed the limits of the legally authorized charges in the Chilean extradition.<sup>169</sup>

Interestingly, though, the Tribunal's acknowledgement of the international criminal law dimension of Fujimori's crimes was cautious insofar as it did not justify the length of the sentence on this finding, explicitly acknowledging homicide as the worst crime for which Fujimori was convicted and then treating all other offenses as

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<sup>165</sup> See sources cited *supra* note 151.

<sup>166</sup> See Cano & Ninaquispe, *supra* note 26, at 75 (arguing importance of applying international law to correctly acknowledge context of crimes within a systematic and widespread campaign). This limitation on generating a historical narrative is part of the limited capacity of trials to serve the retributive goals of transitional justice. See *supra* notes 29–32 and accompanying text (discussing practical obstacles of prosecution in transitional justice setting).

<sup>167</sup> See *Casos Barrios Sentencia*, *supra* note 7, at 617–24 (discussing "systematic and widespread" abuses including Barrios Altos and Cantuta crimes).

<sup>168</sup> Peru's Truth and Reconciliation Commission previously found the Colina Group's actions to have been committed in the context of a widespread, systematic campaign warranting the classification of "crimes against humanity." TRC, *supra* note 4, ¶¶ 28, 55. The prosecution, particularly in their closing arguments, repeatedly accused Fujimori of crimes against humanity even though the formal substance of the charges did not reflect these accusations. See Lawyers for Victims' Families Say Fujimori Bears Greatest Responsibility for Crimes Against Humanity, <http://fujimoriontrial.org/?p=569> (Feb. 10, 2009); *supra* note 136 and accompanying text (listing specific charges for which Fujimori was extradited and noting that they did not include crimes against humanity).

<sup>169</sup> See *supra* notes 134–38 and accompanying text.

aggravating factors in calculating the twenty-five year sentence.<sup>170</sup> Thus, guilt of “crimes against humanity” was never once mentioned in the sentencing portion of the Tribunal’s opinion, nor explicitly treated as an aggravating factor in the sentence’s calculation. Although allusions to it were arguably made in the Tribunal’s treatment of the repetitive nature of Fujimori’s illegal actions and of the abuse of a position of authority over an organized command structure as “aggravating factors,” the Tribunal’s decision not to make the connection explicit suggests that its finding of “crimes against humanity” was not ultimately determinative of the sentence.<sup>171</sup> Thus, while the legality of this finding under the terms of the extradition treaty may be questionable, its inclusion was carefully cabined.<sup>172</sup>

### III

#### NAVIGATING THE SHOW TRIAL DILEMMA IN PURSUIT OF TRANSITIONAL JUSTICE

As the previous Part demonstrated, while Fujimori’s trial was not purely a show trial,<sup>173</sup> some of its elements occupied a gray zone. Rather than viewing this as purely a product of intentional design, however, I argue that it represents the struggle of the Tribunal to deal with the “constitutive paradox at the heart of its job”<sup>174</sup>—simultaneously constructing and preserving the rule of law while pursuing national reconciliation. Thus, as suggested in Part I.C, the trial should not be condemned for a failure to comply with absolutes—an absolute avoidance of any decrease in the risk of acquittal or an absolute avoidance of any public show element. The trial demonstrates that, despite Koskenneimi’s pessimism, the paradox can be effectively navigated such that neither the primary objective of determining individual guilt nor the trial’s national reconciliatory potential is unduly tainted. Moreover, understanding the trial’s exemplary success in doing so provides an opportunity to make normative assessments as to when

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<sup>170</sup> *Casos Barrios Sentencia*, *supra* note 7, at 617–24.

<sup>171</sup> *Id.* at 671–72. One of the defining characteristics of “crimes against humanity” under international law is that they are committed in a “systematic and widespread” manner. *See, e.g.*, Rome Statute art. 7, July 1, 2002, 2187 U.N.T.S. 3 (outlining elements of crimes against humanity). Thus, the emphasis on the repetitive nature through the abuse of a position of authority was arguably an allusion to key elements of “crimes against humanity” under international law.

<sup>172</sup> It is also worth noting that the Chilean judge who wrote the extradition decision that ultimately led to Fujimori’s transfer to Peru praised the Peruvian tribunal’s decision in the press. *Sentencia a Fujimori consideró cargos por los que se aprobó su extradición*, EL COMERCIO, Apr. 8, 2009, available at <http://elcomercio.pe/noticia/270623/sentencia-fujimori-considero-cargos-que-se-aprobo-su-extradicion-afirma-juez-chileno>.

<sup>173</sup> *See supra* Part II.B (discussing ways in which trial was and was not show trial).

<sup>174</sup> Koskenneimi, *supra* note 46, at 35.

and how this navigation is possible, moving beyond Peterson's postulations as to its theoretical possibility.

A. *Navigating the Show Trial Dilemma*

Examining the levels of risk and show present in the Fujimori trial through my proposed framework in Part I.C, it is clear that the Tribunal successfully navigated its constitutive paradox. It did so first by ensuring that any show features remained ancillary to the trial's true purpose—the determination of individual guilt—and second by scrupulously adhering to due process protections.

A close examination of the show element of Fujimori's trial exemplifies how it is possible for show elements to exist without undermining the fundamental legitimacy of the criminal proceedings. As described above, it is undeniable that the trial's structure created the opportunity for some sort of a show by allowing the public and media access to the proceedings. Moreover, in addition to rendering justice, the purposes ascribed to the trial by human rights advocates made it clear that the press coverage and daily television broadcasts were about more than just transparency: The trial was also expected to have a role in the larger transitional justice project and, consequently, the Tribunal was somewhat concerned with the content of the message of the show delivered to the general public.<sup>175</sup> Thus, pursuant to the first element of my proposed framework in Part I.C, the question is whether this preoccupation with the show was pervasive enough to undermine the legitimacy of the proceedings.

In the defense's closing arguments, Nakazaki argued that the involvement of the press and the public in the trial undermined its legitimacy and left the Justices incapable of making an impartial decision.<sup>176</sup> But while the critique seems descriptively accurate in identifying the public participation, it is normatively weak insofar as it asserts this participation undermined the trial's legitimacy.

As noted earlier, the primary reason for having the press, Peruvian public, and larger international community so intimately involved in the trial was to ensure transparency. By allowing outside observers to attend the proceedings, the Justices were first and foremost concerned with distilling critiques as to the fairness or legitimacy

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<sup>175</sup> See *supra* notes 149–50 and accompanying text (discussing how Justices shaped “command responsibility” to better justify proceedings to public). This seems an inevitable characteristic of a trial that has the underlying purpose of aiding in national reconciliation and transitional justice. See Méndez, *supra* note 27, at 18 (suggesting that transparency and public access are key to legitimacy of transitional trial).

<sup>176</sup> Fujimori's Defense Says Certain Judicial Powers Are Weak When Faced with Media Pressure, <http://fujimoriontrial.org/?p=576> (Feb. 20, 2009).

of the proceedings, largely with respect to the defendant's rights. Thus, given that there was a legitimate justification for the intimate participation of the press and public apart from merely putting on a show—moreover, a compelling justification in light of the concerns of the Chilean Supreme Court's extradition decision<sup>177</sup>—it is difficult to argue that this factor alone undermines the trial's legitimacy. Thus, while the show was a salient feature of the trial, it was ultimately secondary to the trial's main objective, which was the determination of individual guilt. Moreover, the show at all times remained tied to and cabined by legitimate judicial objectives—the assurance of transparency and the fulfillment of the Chilean extradition requirements.<sup>178</sup>

In addition, the conclusion that the Fujimori trial was not a show trial is further evidenced by the second element of the two-prong inquiry proposed in Part I.C: whether there were sufficient due process and procedural guarantees to ensure that, despite any show trial features, the legitimacy of the proceedings remained intact. Throughout Fujimori's trial, commitment to the due process and procedural guarantees for the defendant remained unwavering in spite of the fact that these protections at times put not only the transitional justice message but the completion of the trial itself at risk. For example, both the Tribunal's sensitivity to Fujimori's health complications<sup>179</sup> and its application of a more cautious and conservative brand of "command responsibility" were clearly motivated by a desire to ensure that the legitimacy of the Tribunal's procedure and decision could not be challenged. Specifically with respect to "command responsibility," the Tribunal sought to exclude some of the more controversial features of the international law formulation while still allowing the application of the doctrine to facilitate Fujimori's conviction.<sup>180</sup>

Furthermore, the scrupulous commitment to these legal values, in addition to further validating the legitimacy of the proceedings themselves, is evidence that whatever transitional justice role was played by the trial, it was secondary to the uncontroversial guilt-assigning goal of criminal trials. Thus, Fujimori's trial evidences how both prongs of my

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<sup>177</sup> See *supra* note 18.

<sup>178</sup> The Tribunal was therefore not at liberty to manipulate the show in certain respects; for example, they could not show only those portions of the trial which supported its desired narrative. Transparency required that all aspects of the trial be visible and that the narrative of each side be presented and accessible to the public.

<sup>179</sup> See *supra* notes 131–32 and accompanying text (noting ways in which Tribunal was sensitive to Fujimori's health complications).

<sup>180</sup> See *supra* notes 149–50 and accompanying text (discussing why Justices adopted their specific conception of "command responsibility").

proposed test are mutually reinforcing and work in tandem to ensure that, despite some show trial features, a criminal proceeding need not be considered devoid of legitimacy. In effect, they demonstrate how a commitment to procedural protections and to legally legitimate purposes tends to strike the right balance between show and legitimacy. In this balance, less leeway is given to manipulation of the risk of acquittal so as to ensure that the trial's legitimizing purpose—the determination of individual guilt—remains untainted.

In addition, it bears reemphasizing that the Tribunal's success in striking the right balance, or of maintaining the legitimacy of the proceedings despite some show trial elements, may be largely attributable to its domestic nature. The authorization of the proceedings by the Peruvian Constitution gave them strong *ex ante* legal legitimacy that international tribunals may lack. Moreover, the Tribunal's caution in advancing extrajudicial messages, for example through the doctrine of "command responsibility" or assertion of crimes against humanity, shows its acute sensitivity to the limits on its legal authority and mandate imposed by Peru's national politics and peculiarities. Thus, Fujimori's trial demonstrates that domestic tribunals, truly controlled and directed by internal domestic forces, may be better equipped to navigate Koskenniemi's constitutive paradox than international ones. In many ways, the purely domestic execution of the trial, largely insulated from international pressure and forces—certainly not the case in Saddam Hussein's trial as examined by Peterson<sup>181</sup>—is what sets it apart and makes it such a rich case study.

### B. *Furthering National Reconciliation in Pursuit of Transitional Justice*

The conclusion that Fujimori's trial has maintained its legitimacy despite some show trial features cannot be the end of the inquiry. In terms of the trial's contribution to transitional justice, this successful navigation still rings hollow if the trial fails to contribute (or undermines) the larger transitional justice goal of national reconciliation and societal rehabilitation explained in Part I.A. Thus, it is necessary to examine whether the trial's rehabilitative purpose has been under-

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<sup>181</sup> Peterson, *supra* note 85, at 282 ("One of the most frequent critiques leveled at the IST [Iraqi Special Tribunal] is that it has been controlled by the United States and the United Kingdom . . ."). The IST, which conducted Saddam Hussein's trial, is established under Iraqi law and presided over by Iraqi judges. It could therefore technically be considered a domestic tribunal. However, it is well recognized that international pressure and control, particularly from the United States, was exerted over the course of the proceedings. *Id.* at 282–84; *see also* Law of the Supreme Iraqi Criminal Tribunal, OFFICIAL GAZETTE OF THE REPUBLIC OF IRAQ, Oct. 15, 2005, available at <http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf> (laying out structure and function of IST).

mined in the process of navigating the show trial dilemma. In doing so, it is useful to incorporate Payne's work as an additional layer of analysis.

There is evidence that, throughout the course of the trial, Fujimori effectively disseminated his message. Recent public opinion polls show that Fujimori continues to enjoy substantial popularity in Peru and that his daughter, Keiko Fujimori, remains a viable presidential contender.<sup>182</sup> Moreover, in the days leading up to Fujimori's conviction and the weeks following his sentence, many of his loyal supporters took to the streets in protest and many in Peru criticized the Tribunal's decision, calling for the conviction to be modified on appeal.<sup>183</sup> Thus the trial, at least in the short term, has seemingly further polarized civil society—a prospect that, at first cut, seems to contradict the rehabilitatory goals of national reconciliation and moral consensus-building. In the case of Fujimori, one could argue that respect for the rule of law has come at the cost of national reconciliation.<sup>184</sup>

But as discussed in Part I.A, Payne's work persuasively suggests that such a conclusion is not only premature but analytically shallow, as it fails to appreciate the complexities inherent in the long-term democratic consolidation necessary for national reconciliation. The moral fabric of a society cannot be woven overnight, particularly not if it is to be lasting, durable, and truly embedded in the hearts and minds of its constituents. Thus, this initial polarization may not be a negative, but rather a healthy instigation of the public debate essential to democratic moral consensus-building.<sup>185</sup> By bringing to the forefront the controversial issue of whether the ends can justify the means, Fujimori's trial can be understood as reopening public debate on a difficult but important issue, increasing the prospect that the democratic process will produce a societal consensus. Talking openly about Fujimori's regime may be a crucial step toward unifying Peruvian

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<sup>182</sup> Recent public opinion surveys show that Fujimori continues to enjoy high approval ratings—in fact, higher approval ratings than when he left office in 2000, suggesting that the trial may have served, at least in some respect, to solidify his political prestige and power. *Peru: cerca del 40% cree que Fujimori merece 30 años de cárcel*, LA NACIÓN, Feb. 16, 2009.

<sup>183</sup> Simon Romero, *Peru's Ex-President Convicted of Rights Abuses*, N.Y. TIMES, Apr. 7, 2009, available at [http://www.nytimes.com/2009/04/08/world/americas/08fujimori.html?\\_r=1](http://www.nytimes.com/2009/04/08/world/americas/08fujimori.html?_r=1) (last visited Mar. 31, 2010).

<sup>184</sup> There have been suggestions that *fujimorismo* has gained strength during the trial. CONTEXT: *Fujimorismo: A Rising Power?*, <http://fujimoriontrial.org/?p=287> (Apr. 16, 2008) (noting survey showing that Peruvians sympathized more with Fujimori in 2008 than in 2007 before beginning of trial).

<sup>185</sup> See *supra* notes 61–66 and accompanying text (discussing how transitional justice trials can build moral consensus).

society around a commitment not to let the ends justify the means in the future—a difficult issue with which many nations, including the United States, continue to grapple today.<sup>186</sup> Moreover, as previously suggested, willingness to pursue the riskier path of allowing opposition voices to be heard creates better prospects for true, lasting rehabilitation, as any societal consensus achieved democratically is likely to be more legitimate and sustainable than one imposed externally.

Viewed in this light, the Tribunal's cautious but provocative step of including crimes against humanity in Fujimori's conviction is still arguably problematic, but perhaps more palatable. Ultimately, since the Tribunal entered its verdict into the context of a larger national debate, its validity and legitimacy depends on the strength of its legal analysis. As the riots and marches in the final days of the trial illustrate, although the Tribunal's verdict may be in, the national verdict is still out,<sup>187</sup> and the legacy of the judicial judgment will depend on its acceptance by Peruvians and the international community at large. Thus, the cautious application of "command responsibility" coupled with the more provocative assertion of guilt for crimes against humanity can be understood as the Tribunal's attempt to do what it can to further the transitional justice project within recognized limits. It carefully ensured that the context of the trial was not ultimately forgotten, while simultaneously maintaining that the legal basis supporting the conviction was solid and sound. While one can argue that it went too far, the textual basis for its actions in the Chilean extradition agreement,<sup>188</sup> the findings of the Truth and Reconciliation Commission regarding crimes against humanity,<sup>189</sup> and the lack of reliance on this finding in sentencing serve as evidence to the contrary. The facts ground the Tribunal's actions in an appropriate context and suggest that its approach may prove to be a successful means of broadening the trial's narrative without overstepping the pertinent

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<sup>186</sup> I allude to the recent experience in the United States with respect to torture and detainment in the "war on terror." Arguably, the political and legal struggles surrounding these issues are fundamentally connected to the larger philosophical question of the extent to which the ends are, or should be, sufficient justification for the means. See Payne, *supra* note 67, at 281–84 (discussing role of release of Abu Ghraib prison photographs in spurring national public debate as to appropriateness of Bush administration's tactics for combating terrorism).

<sup>187</sup> See *Fujimori Gets Lengthy Jail Term*, BBC NEWS, Apr. 7, 2009, <http://news.bbc.co.uk/2/hi/americas/7986951.stm> (describing riots and fights between anti-Fujimori activists and Fujimori's supporters in wake of sentencing).

<sup>188</sup> See Segunda Sala de la Corte Suprema de Justicia de la República [CSJ] [Second Chamber of the Supreme Court, 9/21/2007, "Juzgamiento al Ex Presidente Alberto Fujimori/Resolución de Extradición," Rol N° 3744-07 (Chile), at 44–45, available at <http://www.pj.gob.pe/transparencia/documentos/extradicion21092007.pdf>.

<sup>189</sup> TRC, *supra* note 4, ¶¶ 28–55.

legal boundaries. While the historical legacy in Peru remains unknown, the ratification of the full sentence on appeal<sup>190</sup> and the resounding praise from the international community and from the Chilean Justices who granted the extradition suggest that the Tribunal managed to successfully navigate the paradox at hand. Moreover, Fujimori's admission of guilt as to the corruption charges against him in his most recent trial may be further evidence that even Fujimori himself realizes that the tide is turning against him such that he can no longer escape the force of the law.<sup>191</sup>

Finally, it bears emphasizing that the domestic character of the trial not only facilitated the Tribunal's success in navigating the show trial dilemma, but also enhanced the trial's prospects for contributing to national reconciliation. There is something particularly powerful about a moral message emerging from a verdict constructed by Peruvians for Peruvians rather than imposed by external bodies.<sup>192</sup> In fact, prominent members of the human rights communities in Peru view the fact that the trial was held domestically as the single most important factor in its national reconciliation potential.<sup>193</sup> Acceptance of the trial's verdict as an authoritative way forward with respect to the means-versus-ends debate seems much more likely given that the decision came from a domestic tribunal, as it forecloses any critique based on accusations of imperialism or a fundamental misunderstanding of Peruvian society.<sup>194</sup> Given that, to date, most heads of state have been tried by international, hybrid, or ad hoc criminal tribunals,<sup>195</sup> Fujimori's trial provides a unique example of the viability and value of domestic tribunals as transitional justice instruments and serves as a model of what is possible for other nations in the future.

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<sup>190</sup> See *supra* note 9 and accompanying text.

<sup>191</sup> See *Peru: Ex-Leader Admits Illegal Payments*, N.Y. TIMES, July 17, 2009, at A5 (noting Fujimori's admission of guilt in his final corruption trial, but also his attempt to avoid criminal responsibility).

<sup>192</sup> Indeed, there seems to be a demand for this sort of justice by Peruvian society as well. See González Cueva, *supra* note 13, at 62 ("When asked about the four main policies that would contribute to national reconciliation, the public answered in this order: punishing the criminals, 60.1%; anti-poverty programmes, 44.6%; reparations for victims, 41.5%; human rights education, 38.6%.").

<sup>193</sup> Interview with Salomón Lerner Febres, President, Peruvian Truth and Reconciliation Commission in Lima, Peru (June 20, 2008); Interview with Walter Albán, former Ombudsman for Lima, Peru (July 31, 2008).

<sup>194</sup> See *supra* notes 73–76 and accompanying text (noting importance of domestic trials).

<sup>195</sup> For example, Slobodan Milošević and Charles Taylor were both tried in hybrid tribunals, and Saddam Hussein was tried in a domestic "special court" set up under the supervision of the international community. See Wladimiroff, *supra* note 121, at 950–52, 960–65 (discussing Milošević, Taylor, and Hussein trials).

## CONCLUSION

Fujimori's trial and the Peruvian transitional justice experience to date suggest that perhaps a new model of transitional justice is emerging and it is time to start thinking of domestic head-of-state trials less as a dangerous impossibility and more as useful mechanisms that, if navigated correctly, can further transitional justice objectives. Fujimori's trial demonstrates that, while the constitutive paradox Koskenniemi discusses is formidable, it is not impenetrable so long as one is willing to patiently fight the moral consensus battle and to accept that disagreement and political polarization are inherent features of the democratic process.

Fujimori's trial also suggests that perhaps these "paradoxes" are more easily navigated within a domestic judicial setting by pre-established institutions and judges sensitive to the political realities of their legal work. In light of the struggles of the ad hoc and international tribunals, Fujimori's trial should inspire the international community to focus more on encouraging domestic head-of-state trials to further the goals of international criminal law. The international community can remain involved and reaffirm the legitimacy of the proceedings by providing resources and oversight, submitting amicus briefs to help domestic tribunals navigate complex legal issues, and participating in the dissemination of the trial's ultimate message.