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FIJI:

**LEGAL SUBMISSION ON THE PROMOTION OF
RECONCILIATION, TOLERANCE AND UNITY BILL 2005**

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LEGAL SUBMISSION ON THE PROMOTION OF RECONCILIATION, TOLERANCE AND UNITY BILL 2005

INTRODUCTION

The Promotion of Reconciliation, Tolerance and Unity Bill 2005 (Unity Bill) raises a number of issues from an international human rights perspective. The ICJ is concerned that some of the provisions of the Bill, if enacted without amendment, will constitute a violation of Fiji's international obligations. In this brief, we will concentrate on two specific aspects of the Bill:

1. Article 18(2), which restricts claims for reparation to legal rights of the victims and excludes his or her dependents.
2. Article 21, which sets out the conditions for amnesty.

To analyse the international law with regard to these provisions, the ICJ will submit in this legal analysis that:

1. Fiji has an obligation under customary international law, through positive and negative action, to prevent violations and to respect, protect, ensure and promote human rights.
2. Fiji has an obligation under customary international law to provide reparation for victims of gross human rights violations and to provide assistance and a right to justice to victims of crime. Victims are not merely direct victims, but also other persons who have suffered harm as a consequence of the violation or crime.
3. Fiji has an obligation under customary international human rights law to prosecute and punish gross human rights violations and crimes of private persons that impede the enjoyment of fundamental human rights.
4. An unconditional amnesty provision covering gross human rights violations or serious crimes that impair the enjoyment of human rights would be in breach of Fiji's obligations under international law.

FIJI'S OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

Fiji is bound by customary international human rights law, as reflected in the 1948 Universal Declaration of Human Rights and subsequent international human rights treaties and their interpretation, as well as in general state practice accepted as law.¹ Among these customary international human rights are the right to life, the right to respect for the dignity of the person, the right to physical and mental wellbeing including the right not to be torture or submitted to cruel, inhuman or degrading treatment or punishment, and the right to security of the person.

Furthermore, Fiji is a party to the following international human rights treaties: the International Convention on the Elimination of All Forms of Racial Discrimination (since 1973), the Convention on the Rights of the Child (since 1993), and the Convention on the Elimination of All Forms of Discrimination against Women (since 1995).

Fiji has also ratified the Rome Statute of the International Criminal Court (since 1999), which recognises “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.²

International human rights law not only recognises the individual human rights of every human being, it also puts obligations on states to ensure the effective enjoyment of human rights within their jurisdiction. This obligation is enshrined in so many international human rights treaties³ and confirmed in international jurisprudence and practice⁴ that it can be considered to be an obligation of customary international law. The duty to ensure human rights entails both negative and positive obligations of states. It implies, amongst others, that the state must adopt all necessary legislative and other measures to give effect to the rights guaranteed in international law,⁵ an obligation confirmed unanimously by international human rights bodies.⁶ It also means that the state has a duty to prevent violations, to respect, protect, and promote human rights, and to guarantee reparation in case of a violation.

Since it is bound by customary international human rights law, Fiji has to comply with its negative and positive obligations with regard to human rights.

The following argumentation concentrates in particular on some aspects of these multidimensional duties: the duty to protect all persons from human rights violations and the duty to guarantee reparation.

THE RIGHT TO REPARATION FOR VICTIMS OF HUMAN RIGHTS VIOLATIONS AND OF CRIME

Section 18 of the Unity Bill makes provision for reparation for victims of gross violations of human rights.⁷ However, it is not clear to whom reparations will be awarded.

Indeed, section 18(1) speaks of “any person who claims that he or she has suffered harm or damage to property or personal injury or death as a result of a gross violation of his or her human rights.” In other words, it guarantees reparation only to victims of human rights violations. On the other hand, section 18(11) defines “victim” as “a person who suffered harm [...] as a result of gross violation of human rights [sic] or as a result of an act associated with a political objective for which amnesty has been granted”. This definition appears to comprise both victims of human rights violations committed by the state and victims of crimes committed by non-state actors, since it refers to acts eligible for amnesty in the sense of section 21(4) of the Bill. It is not clear, therefore, whether reparation is guaranteed only to victims of violations of human rights or also of crimes committed by private parties.

Secondly, according to Section 18(2) of the Bill, “claims made for reparation under this section shall relate only to the legal rights of the victim and shall not extend to his or her dependents”. This would appear to be too restrictive from the point of view of international law.

In light of the lack of clarity in the text of the Bill, the ICJ wishes to recall the following international law principles on the right to reparation for victims of human rights violations and of crime:

Victims of human rights violations

Victims of human rights violations have a right to reparation. International human rights law on reparations is reflected in the UN Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, adopted by the Commission on Human Rights in Resolution 2005/36 of 19 April 2005. Their content is so firmly enshrined in international treaties,⁸ and in international state practice supported by *opinio juris* that the Principles are an embodiment of customary international law. Indeed, it is well-established in international law that the breach of an international obligation entails the duty to make reparations. This principle, already recognized by the Permanent Court of International Justice,⁹ has been upheld by international jurisprudence and reaffirmed as a general rule of international law by the International Law Commission.¹⁰

Victims of crimes

While states have no comparable obligation to provide full reparation to victims of crimes committed by private parties, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in resolution 40/34 of 20 November 1985, nevertheless provides substantial guarantees to victims of crime. Amongst others, they are entitled to access to justice, to be informed of the progress of proceedings against perpetrators, to present their views and concerns, to receive assistance throughout the legal process and to be treated with respect for their dignity.¹¹ States should ensure that victims may receive restitution from offenders or compensation.¹² If compensation is not available from the offender, States should endeavour to provide financial compensation for bodily injury or impairment of physical or mental health as a result of serious crimes.¹³ The Principles also encourage national funds for compensation of victims. Victims should also receive the necessary material, medical, psychological and social assistance, amongst others through governmental means.¹⁴ If the Unity Bill excludes victims of crime from its provisions on reparation, it would be in contravention to the UN Declaration, adopted by the General Assembly.

Family members of direct victims and other indirect victims

Both in cases of victims of crime and in cases of victims of human rights violations, international law recognises that the term victims encompasses not only the direct, but also indirect victims. According to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the term victim “includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation”.¹⁵ Similarly, the UN Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and

serious violations of international humanitarian law stipulate that, “where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”¹⁶ International jurisprudence has also clearly recognised that persons entitled to reparation for human rights violations are not only the direct victims, but also other persons who have suffered physical, material or mental harm as a consequence of the violation or crime (often designated as “indirect victims”).¹⁷ For example, it is clear that the relatives of a victim of a human rights violation who are materially dependent on the victim will suffer material damage if the victim is unable to continue to support the family as a consequence of physical or mental harm suffered because of the violation. Or, family members may suffer considerable mental harm because of the anguish caused by a violation committed against the victim.

Conclusion

International law finds that victims of crime should be guaranteed access to justice and assistance by the state and that the term victim should cover all persons who have suffered material, physical or mental harm as a consequence of human rights violations or crimes. Section 18 of the Unity Bill should be reviewed to ensure it is in compliance with international law.

THE DUTY OF THE STATE TO INVESTIGATE, PROSECUTE AND PUNISH SERIOUS HUMAN RIGHTS VIOLATIONS AND CRIMES

Article 21(9) of the Unity Bill provides that the Reconciliation and Unity Commission shall recommend amnesty for crimes committed with a political objective in the period of the coup d'état against the Fijian government from 19th of May 2000 to 15th of March 2001.

From Article 21(6), (8), (11) and (12) of the Bill, it appears that amnesty will be granted both to persons who have already been convicted and to persons who have not been brought to justice at all. Post-conviction pardons are not necessarily incompatible with international law, provided that they do not undermine justice by turning it into a mere appearance of justice. Amnesties for gross human rights violations, however (and by analogy to serious crimes impairing human rights) are in violation of international human rights law, if they lead to complete impunity by shielding perpetrators from investigation into the facts, from being brought to justice and appropriately punished, and impede victims from access to justice.

The following analysis will show that:

- States have a duty to investigate, prosecute and punish gross human rights violations;
- Amnesties for gross human rights violations are prohibited by international law;
- Amnesties are also prohibited under international law for crimes committed by non-state actors that impair the enjoyment of fundamental human rights.

The obligation to prosecute and punish gross human rights violations

States have an obligation under international human rights law to investigate human rights violations and to prosecute and punish perpetrators of gross violations of human rights.¹⁸ This obligation is now recognised unanimously by all international human rights bodies and is so firmly enshrined in state practice as an emanation of a legal obligation that it can be deemed an obligation of customary international law. This is accepted by the highest organs of the United Nations, such as the Security Council¹⁹ and the General Assembly²⁰. It has been repeatedly reaffirmed by the UN Commission on Human Rights²¹ and its Special Rapporteurs.²² There can be no doubt that states have accepted this duty as a legal obligation. Further, there is unanimity amongst international human rights bodies at universal and regional level. Indeed, the duty to prosecute and punish has been recognised by the UN Human Rights Committee,²³ the Inter-American Court and Commission of Human Rights,²⁴ the European Court of Human Rights²⁵ and the African Commission on Human and Peoples' Rights²⁶.

The obligation to prosecute and punish is often described as a correlative to the 'right to justice'²⁷ of victims and as a fundamental duty of the state to combat impunity. The international community, especially in the practice of the General Assembly and Security Council of the United Nations, has committed itself to combat impunity, which is the denial of justice to victims of gross human rights violations. The General Assembly of the United Nations, for instance, has emphasized this link when it stated that "the accountability of individual perpetrators of grave human rights violations is one of the central elements of any effective remedy for victims of human rights violations and a key factor in ensuring a fair and equitable justice system and, ultimately, reconciliation and stability within a State".²⁸

The UN updated Set of Principles for the protection and promotion of human rights through action to combat impunity, recommended by the UN Commission on Human Rights in Resolution 2005/81 of 21 April 2005, describes impunity as "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims".²⁹

The acceptance of the obligation of states to prosecute and punish gross human rights violations and to combat impunity have subsequently led the international community to reject amnesties for such violations, if they lead to impunity for the perpetrators.

The prohibition of amnesties for gross violations of human rights and other crimes under international law

Amnesty was prohibited for crimes committed under the Nazi regime in Germany.³⁰ This prohibition was later taken up in numerous texts of the United Nations. Concerning violations of human rights, it can be found in many declaratory texts such as Article 60 of the Vienna Declaration and Programme of Action, Article 18 of the Declaration on the Protection of All Persons from Enforced Disappearance or Principle 19 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.

The practice of states in international bodies, especially in the United Nations, expresses their legal conviction that amnesties for serious violations of human rights and humanitarian law are incompatible with international law. Indeed, there is ample evidence of state practice in this regard in United Nations resolutions. This can especially be seen in UN practice on peace agreements:

The Guatemalan Peace Accords of 1996, concluded with the assistance of the United Nations, excluded from amnesty ‘crimes punishable under international treaties to which Guatemala was a party’.³¹

In 1999, the Lusaka ceasefire agreement, ‘witnessed’ by the United Nations, provided that the parties ‘together with the UN’ shall create conditions favourable to the arrest and prosecution of ‘mass killers’, ‘perpetrators of crimes against humanity’ and ‘other war criminals’. While it acknowledges the possibility of amnesty and political asylum, it excludes ‘genocidaires’ from such exceptions.³²

The Statute of the Special Court for Sierra Leone provides in its Article 10 that no amnesty can bar the prosecution of crimes under its jurisdiction, i.e. crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law.³³ This statute was established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000.³⁴ The Representative of Secretary General of the United Nations clearly affirmed his position “that the amnesty provisions of the Agreement shall not apply to the international crimes of genocide, crimes against humanity, war crimes and other serious violations of humanitarian law”.³⁵ The Appeals Chamber of the Special Court, held in the case *Prosecutor v Morris Kallon* that the Statute was “consistent with the developing norm of international law”.³⁶

In 2000, the Transitional Authority in East Timor adopted Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences. The panels of judges are vested with universal jurisdiction³⁷ over genocide, crimes against humanity, war crimes, torture, murder, and sexual offences.³⁸

The Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea excludes amnesties and pardons for the crimes over which the Chambers have jurisdiction, i.e. homicide, torture and religious persecution, genocide, crimes against humanity, grave breaches of the Geneva Conventions of 12 August 1949, destruction of cultural property during armed conflict, and crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations.³⁹

In its resolution on Haiti of February 2004, the Security Council “reiterates that all parties to the conflict must respect international law, including with respect to human rights, and that there will be individual accountability and no impunity for the violators”.⁴⁰

In its resolution on Côte d’Ivoire, the Security Council emphasized “the need to bring to justice

those responsible for the serious violations of human rights and international humanitarian law”.⁴¹

The UN Commission on Human Rights has repeatedly recognised in its resolutions on impunity “that amnesties should not be granted to those who commit violations of international humanitarian and human rights law that constitute serious crimes and urges States to take action in accordance with their obligations under international law”.⁴² The Commission’s Special Rapporteurs have also condemned amnesties for torture,⁴³ extra-judicial, summary and arbitrary executions,⁴⁴ and other gross violations of human rights.⁴⁵ The UN updated Set of Principles for the protection and promotion of human rights through action to combat impunity, recommended by the Commission on Human Rights, stipulate that amnesties shall not be granted for violations of human rights which amount to serious crimes under international law if the crimes have not been investigated, prosecuted and the perpetrators duly punished.⁴⁶

The practice of intergovernmental bodies is confirmed by international human rights bodies, regional human rights courts, and international criminal courts. The Human Rights Committee has repeatedly held that amnesties are incompatible with the International Covenant on Civil and Political Rights.⁴⁷ The Committee against Torture has also rejected amnesties for acts of torture.⁴⁸ The Trial Chamber of the ICTY has confirmed the unlawfulness of amnesties for torture in the case of *Furundzija*, in which it stated that that “[i]t would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio* and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty. [...]”.⁴⁹ The Special Court for Sierra Leone confirmed the incompatibility of amnesties with international law, as mentioned above.⁵⁰ The Inter-American Court⁵¹ and Commission on Human Rights⁵² and the African Commission on Human Rights⁵³ have equally reject amnesties for gross human rights violations.

The legal argument against the lawfulness of amnesties derives from the legal nature of the human rights protected. Rights such as the prohibition of torture and cruel, inhuman or degrading treatment or punishment or the right to life are non-derogable rights under international law. Therefore, states can invoke no exception to them and no exception to their obligations arising from them, including the obligation to prosecute and punish these acts, not even the exception of a situation of war, let alone the exception of “reconciliation”. The rationale for the prohibition of amnesties therefore derives from the fact that they impede states from complying with their absolute duty to investigate, prosecute and punish gross violations of human rights.

This does not mean that all amnesties or pardons after conviction are prohibited by international law. However, amnesties that impede states from investigating, prosecuting and punishing gross human rights violations violate human rights and the right of victims to justice. Similarly, pardons violate international law if they prevent the state from appropriately punishing the violator, with due regard to the gravity of the crime, thereby circumventing and undermining the meaning of the criminal sentence.

The duty to prosecute and punish serious crimes that impair the enjoyment of human rights

The Unity Bill does not explicitly distinguish between crimes committed by agents of the state and private parties.⁵⁴ This means that this brief has to address both types of crimes, for which there are distinct rules of international law. Especially, under traditional international human rights law, human rights violations can only be committed by states. If non-state actors commit similar acts, these constitute crimes and, under certain circumstances, international crimes. Nevertheless, as will be shown in the following, states also have duties with regard to non-state actors, especially a duty to investigate crimes and prosecute and punish criminals.

The duty to investigate human rights violations and to prosecute and appropriately punish the perpetrators, not only applies to acts committed by state agents. As mentioned above, states have not only a duty to respect human rights, but also a duty to protect persons against acts of private parties that impair the enjoyment of human rights. Therefore, all acts by private parties that constitute a threat to fundamental human rights such as the right to respect for the dignity of the person, the right to life, the right to security or the right to physical and mental integrity entail a duty of states to investigate such acts and bring the perpetrators to justice. An example can be found in Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), ratified by Fiji, which stipulates a duty of states to punish incitement to racial hatred, violent acts of racism or the financing thereof.

The duty to prosecute and punish serious crimes affecting human rights has been repeatedly reaffirmed by international human rights bodies and courts. The Human Rights Committee, for instance, has stated that “the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities”.⁵⁵ Similarly, the Inter-American Court of Human Rights,⁵⁶ the Inter-American Commission on Human Rights,⁵⁷ and the European Court of Human Rights⁵⁸ have recognised the duty of states to prosecute and punish private parties who commit violent crimes in order to protect the rights of persons under their jurisdiction. This unanimous interpretation of treaty obligations must logically be transposed to customary international human rights law.

The rationale for this jurisprudence and state practice lies in the parallel situation that victims of human rights violations and victims of comparably serious crimes face. The enjoyment of their human rights can be affected in a similar way by crimes committed by state agents or by non-state actors. While this does not mean that the state is responsible for crimes committed by non-state actors, the duty to protect must nevertheless guarantee to all persons under their control to live in respect for their dignity and their physical and mental wellbeing. If the state does not take all necessary measures to enforce these human rights, it will fail in its duty of care or due diligence.

There is therefore sufficient interpretation of customary international human rights law by international bodies to say that under customary international human rights law, states have an obligation to investigate, prosecute and punish certain crimes committed by non-state actors, if they impair the enjoyment of fundamental human rights.

Application of international principles on amnesties for serious crimes committed that impair the enjoyment of human rights

As was seen above, it can be concluded from international state practice that the duty of states to prosecute and punish gross human rights violations means that amnesties leading to impunity for perpetrators are prohibited under international law.

Considering that the duty of states to prosecute and punish not only applies to gross human rights violations committed by state agents, but also to serious crimes when they affect fundamental human rights such as the right to respect for the dignity of the person, the right to life, the right to security or the right to physical and mental integrity, national laws granting blanket amnesties for such crimes should equally be considered in contravention of international law. Indeed, the rationale behind the prohibition of amnesties is that they violate the obligation of states to investigate, prosecute and punish. Since this obligation is the same whether the crime is committed by state agents and constitutes a gross human rights violation or is committed by a private party, amnesties for both types of crimes must be treated in a comparable manner. As a consequence, amnesties for crimes must never lead to complete impunity for crimes, in violations of the victim's right to justice.

This is not to say, as was mentioned above, that all amnesties for all crimes are incompatible with international law. However, if they undermine effective investigation, prosecution and punishment commensurate to the gravity of the crime, the state will be in violation of its obligations to protect the human rights of victims of crime.

Conclusion

In the light of these obligations under international law, both with regard to gross human rights violations and to serious crimes that impair the enjoyment of human rights, section 21 of the Unity Bill, which (1) indiscriminately provides for amnesties for all crimes regardless of their gravity and (2) completely exempts perpetrators from any investigation of the facts and from all criminal or civil liability, appears to be incompatible with international law.

ICJ RECOMMENDATIONS

The International Commission of Jurists recommends that if the Parliament of Fiji wishes to pass a law on reconciliation, tolerance and unity, it should amend the relevant provisions of the Bill to take into account the following obligations of Fiji under international law:

1. Reparation must be guaranteed to all victims of human rights violations. Victims of crime must be guaranteed access to justice and assistance by the state. Victims are not only the direct victims, but also indirect victims, who have suffered physical, material or mental harm as a consequence of the violation or crime.

2. Amnesty either for gross human rights violations or for serious crimes must not violate the obligation of Fiji under customary international human rights law to effectively investigate the facts, to prosecute the authors of the violations or crimes and to punish them appropriately, taking into account the gravity of the acts.

¹ See article 38 (1)(b) of the Statute of International Court of Justice for a definition of customary international law.

² Preambular paragraph 6.

³ Article 2 ICCPR; Article 2 CERD; Article 2 CEDAW; Article 2 CRC, Article 1 ACHR, Article 1 American Convention on the Prevention and Punishment of Torture, Article 1 ECHR.

⁴ Human Rights Committee: *General Comment No 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 21 April 2004, CCPR/C/74/CRP.4/Rev.6, para 12; *Suárez de Guerrero v Colombia*, Communication No. R.11/45 (5 February 1979), U.N. Doc. Supp. No. 40 (A/37/40) at 137 (1982), para 15; Inter-American Commission on Human Rights: Case 10.559, *Chumbivilcas (Peru)*, Report 1/96, 1 March 1996, para V 3; Inter-American Court of Human Rights: *Loayza Tamayo Case (Reparations)*, Judgment of 27 November 1998, Series C No 42, para 164; *Suárez Rosero Case (Reparations)*, Judgment of 20 January 1999, Series C No 44, paras 97-99; European Court of Human Rights: *X and Y v the Netherlands*, 26 March 1985, Series A 91, para 27; *M.C. v Bulgaria*, 4 December 2003, para 153; Recommendation Rec (2004) 5 of the Committee of Ministers of the Council of Europe *on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights* of 12 May 2004 and Recommendation Rec (2004) 6 *on the improvement of domestic remedies*, 12 May 2004; African Commission on Human and Peoples' Rights: *Avocats sans Frontières (on behalf of Gaëtan Bwampamyè) v Burundi*, Communication 231/99 (28th Session, Nov 2000).

⁵ Article 2 (2) ICCPR; Article 2 (c) and (d) CERD; Article 2 (a) CEDAW; Article 4 CRC; Article 2 (1) CAT; Article 2; Article 2 ACHR; Article 6 Inter-American Convention on the Prevention and Punishment of Torture; Article I (d) Inter-American Convention on Forced Disappearance.

⁶ See above, note 4.

⁷ Section 18 (1).

⁸ See the provisions in Article 8 of the Universal Declaration of Human Rights; Articles 2 (3), 9 (5) and 15 (6) of the International Covenant on Civil and Political Rights; Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 39 of the Convention of the Rights of the Child; Article 14 of the Convention against Torture and other Cruel Inhuman and Degrading Treatment; Articles 5 (5) and 41 of the European Convention on Human Rights; Articles 25 and 63 of the American Convention on Human Rights; Article 21 (2) of the African Charter of Human and Peoples' Rights; Article 12 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Article 19 of the Declaration on the Protection of all Persons from Enforced Disappearance; Principle 20 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions; Article 68 of the Third Geneva Convention relative to the Treatment of Prisoners of War; Article 91 of the Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflict.

⁹ Permanent Court of International Law, *Chorzow Factory Case, Poland v. Germany*, P.C.I.J. Series A, No.17 (1928), 47; International Court of Justice: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States of America)*, Judgment of 13 September 1986, I.C.J. Reports 1986, 14, 114; *Corfu Channel Case (United Kingdom v Albania)*, Judgment of 15 December 1949, I.C.J. Reports 1949, 23.

¹⁰ See Report of International Law Commission - 53rd session (23 April - 1st June, 1 June and 2nd July - 10 August 2002) Official document of the General Assembly, 56th Session, Addendum No 10 (A/56/10), Chapter IV.

¹¹ Principles 4-7.

¹² Principles 8-11.

¹³ Principle 12.

¹⁴ Principle 14.

¹⁵ Principle 2.

¹⁶ Principle 8.

¹⁷ UN Working Group on Enforced Disappearances: *General Comments on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance*, 12 January 1998, E/CN.1/1998/43, para 72; Commission on Human Rights resolutions 2003/38 (enforced or involuntary disappearances); 2002/412001/462000/471999/38; Human Rights Committee: *Almeida de Quinteros et al v Uruguay*, 15 October 1982, 21 July 1983, CCPR/C/OP/2, paras 14, 16; *Celis Laureano v Peru*, 16 April 1996, CCPR/C/56/D/540/1993, para 10; *Sarma v Sri Lanka*, 31 July 2003, CCPR/C/78/D/950/2000, para 11 [victim and family]; *Coronel et al. v Colombia*, 29 November 2002, CCPR/C/76/D/778/1997, para 10; *John Khemraadi Baboeram et al. v Suriname*, 4 April 1985, U.N. Doc. Supp. No. 40 (A/40/40) at 187, para 16; *Nydia Erika Bautista v Colombia*, 13 November 1995, CCPR/C/55/D/563/1993; Inter-American Court of Human Rights: *Velásquez Rodríguez v Honduras (Compensatory damages)*, Judgment of 21 July 1989, Series C No 7, paras 50-52; *Garrido and Baigorria v Argentina (Reparations)*, Judgment of 27 August 1998, Series C No 39, paras 62, 63; *Blake Case v Guatemala*, Judgment of 22 January 1999, para 37; *Bámaca Velásquez v Guatemala (Reparations)*, Judgment of 22 February 2002, Series C No 91, paras 33-36; European Court of Human Rights: *Kurt v Turkey*, Judgment of 25 May 1998, Reports 1998-III, para 174; *Orhan v Turkey*, Judgment of 18 June 2002, para 358; *Çakici v Turkey*, 8 July 1999, Reports 1999-IV, para 98; *Çakici v Turkey*, 8 July 1999, Reports 1999-IV, para 130; *Aktas v Turkey*, Judgment of 24 April 2004, para 364; African Commission on Human and Peoples' Rights: *Malawi African Association et al v Mauritania*, Communications 54/91, 61/91, 98/93, 164/97, 196/97, 210/98 (27th Ordinary Session, May 2000), Recommendations.

¹⁸ There is no consolidated definition of the term gross or serious violations of human rights, as it must be a dynamic term to be able to evolve with time. However, many international human rights bodies have pronounced themselves about the crimes that gross human rights violations encompass, and it can safely be said that it covers, amongst others, torture and cruel, inhuman or degrading treatment or punishment, summary, extra-legal and arbitrary executions, enforced disappearances, crimes against humanity, genocide, slavery and slavery-like practices, arbitrary and prolonged detention, and systematic discrimination, among others, are deemed to be gross violations of human rights. See Final Report submitted by the Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, E/CN.4/Sub.2/1993/8 of 2 July 1993, para 13.

¹⁹ Resolution on the question concerning Haiti, S/RES/1529 (2004), 29 February 2004, para 7; Resolution on the situation in Côte d'Ivoire, S/RES/1479 of 13 May 2003, para 8.

²⁰ Resolution 57/228 of 27 February 2002 on Khmer Rouge trials, pp 3; Resolution 57/190 of 19 February 2003, para 11.

²¹ Resolutions 2003/72, paras 2, 10; 2002/79, paras 2, 11; 2001/70, para 2; 2000/68, para 4; 1999/34, para 4; 1998/53, para 4.

²² *Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Guatemala*, 21 December 2001, E/CN.4/2002/72/Add.2, recommendation a); *Report on the independence of judges and lawyers on the mission to Mexico*, 24 January 2000, E/CN.4/2002/72/Add.1, recommendations j), k), p).

²³ *General Comment No 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 21 May 2004, CCPR/C/74/CRP.4/Rev.6, para 18 (references omitted); *Bleier v Uruguay*, 29 March 1982, CCPR/C/15/D/30/1978, para 11; *Almeida de Quinteros et al v Uruguay*, 21 July 1983, CCPR/C/OP/2, para 16 (b); *Dermitt Barbato v Uruguay*, 21 October 1982, CCPR/C/17/D/84/1981, para 11; *Celis Laureano v Peru*, 16 April 1996, CCPR/C/56/D/540/1993, para 10; *Sarma v Sri Lanka*, 31 July 2003, CCPR/C/78/D/950/2000, para 11; *Nydia Erika Bautista v Colombia*, 13 November 1995, CCPR/C/55/D/563/1993, para 8.6, 10; *José Vicente y Amado Villafañe Chaparro v Colombia*, 29/07/1997, CCPR/C/60/D/612/1995, para 8.2; *Coronel et al v Colombia*, 13/10/2000, CCPR/C/70/D/778/1997, para 10. *Concluding Observations on the Libyan Arab Jamahiriya*, 6 November 1998, CCPR/C/79/Add.101, paras 7, 10; - *Mexico*, 27 July 1999, CCPR/C/79/Add.109, para 6; - *Algeria*, 18 August 1998, CCPR/C/79/Add.95, paras 6, 7, 9; - *Argentina*, 3 November 2000, CCPR/CO/70/ARG, para 9, 13; - *the Kyrgyz Republic*, 24 July 2000, CCPR/C0/69/KGZ, para 7; -

Guatemala, 27 August 2001, CCPR/CO/72/GTM, para 12; - *Venezuela*, 26 April 2001, CCPR/CO/71/VEN, para 8; - *Hungary*, 19 April, 2002, CCPR/CO/74/HUN, para 12; - *Colombia*, 5 May 1997, CCPR/C/79/Add.76, para 32; - *Argentina*, 3 November 2000, CCPR/CO/70/ARG, para 9, 13; - *Uruguay*, 5 May 1993, CCPR/C/79/Add.19, para 7; - *Chile*, 30 March 1999, CCPR/C/79/Add.104, para 7; - *Lebanon*, 1 April 1997, CCPR/C/79/Add.78, para 12; - *El Salvador*, 18 April 1994, CCPR/C/79/Add.34, para 7; - *Haiti*, 3 October 1995, A/50/40, paras 224-241, at 230; - *Peru*, 15 November 2000, CCPR/CO/70/PER, para 9; - *France*, 4 August 1997, CCPR/C/79/Add.80, para 13.

²⁴ *Velásquez Rodríguez v Honduras*, Judgment of 29 July 1988, Series C No. 4, para 166; see also para 175; *Cantoral Benavides v Peru (Reparations)*, Judgment of 3 December 2001, Series C No 88, para 69; *Cesti Hurtado v Peru (Reparations)*, Judgment of 31 May 2001, Series C No 78, para 63; *Villagrán Morales et al v Guatemala, "Street Children" Case, (Reparations)* Judgment of 26 May 2001, Series C No 77, para 100; *Panel Blanca v Guatemala (Reparations)*, Judgment of 25 May 2001, Series C No 76, para 201; *Bámaca Velásquez v Guatemala (Reparations)*, Judgment of 22 February 2002, Series C No 91, para 74; *Loayza Tamayo v Peru (Reparations)*, Judgment of 27 November 1998, Series C No 42, para 168-171; *Castillo Páez v Peru (Reparations)*, Judgment of 27 November 1998, Series C No 43, paras 98-108; *Suárez Rosero v Ecuador (Reparations)*, Judgment of 20 January 1999, Series C No 44, paras 77-80; *Blake v Guatemala (Reparations)*, Judgment of 22 January 1999, Series C No 48, paras 59-65.

Inter-American Commission on Human Rights: Report No. 136/99, *Ignacio Ellacuría S.J et al* (El Salvador), 22 December 1999, paras 170 *et seq*; *Riofrío Massacre* (Colombia), 6 April 2001, paras 77 *et seq*; Case 10.247 *et al, Extrajudicial Executions and Forced Disappearances of Persons* (Peru), 11 October 2001, para 247; Report No 133/99, Case 11.725, *Carmelo Soria Espinoza* (Chile), 19 November 1999, paras 92 *et seq*; Report No 34/96, Cases 11.228 (Chile), 15 October 1996, paras 72 *et seq*; Report No 36/96, Case 10843 (Chile), 15 October 1996, paras 66 *et seq*.

²⁵ *X and Y v the Netherlands*, 26 March 1985, Series A 91; see also the recent Judgment *M.C. v Bulgaria*, 4 December 2003, para 153; *Osman v the United Kingdom*, 28 October 1998, Reports 1998-VIII, para 116; *Aksoy v Turkey*, 18 December 1996, Reports 1996-VI, para 98; *A. v the United Kingdom*, 23 September 1998, *Reports of Judgments and Decisions* 1998-VI, paras 22, 23; *Kurt v Turkey*, Judgment of 25 May 1998, Report 1998-III, para 140.

²⁶ *Malawi African Association et al v Mauritania*, Communications 54/91, 61/91, 98/93, 164/97, 196/97, 210/98 (27th Ordinary Session, May 2000); *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Communication 155/96 (30th Ordinary Session, October 2001).

²⁷ *Revised final report of the Special Rapporteur on the question of impunity of perpetrators of human rights violations (civil and political)*, 2 October 1997, E/CN.4/Sub.2/1997/20/Rev1, Annex II, Section II.

²⁸ Resolution 57/228 on *Khmer Rouge trials* of 18 December 2002.

²⁹ E/CN.4/2005/102/Add.1, 8 February 2005; see also the similar definition of the Inter-American Court of Human Rights in *Panel Blanca Case v Guatemala*, Judgment of 8 March 1998, Series C No 37, para 173; *Bámaca Velásquez v Guatemala*, Judgment of 25 November 2000, Series C No 79, para 211.

³⁰ Article II (5) of Control Council Law N°10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity of 20 December 1945.

³¹ Agreement on the Basis for the Legal Integration of the Unidad Revolucionaria Guatemalteca, UN Doc A/51/776, Doc S/1997/51, Annex II, paras 17 *et seq*.

³² Lusaka Ceasefire Agreement of 10 July 1999, UN Doc S/1999/815 of 23 July 1999, Annex A, Chapter 9.1 and 9.2.

³³ Statute of the Special Court for Sierra Leone of 16 January 2002.

³⁴ SR/RES/1315 (2000) of 13 August 2000.

³⁵ See Seventh Report of the Secretary-General of the United Nations on the Observer Mission to Sierra Leone, UN Doc S/1999/836, 30 July 1999, para 7; see also Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc S/2000/915, para 22.

³⁶ Appeals Chamber, *Prosecutor v Morris Kallon*, Case No SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, para 63; also para 82.

³⁷ UNTAET/REG/2000/15, 6 June 2000, Section 2.1.

³⁸ *Ibid*, Sections 1.3 and 4-9; genocide, crimes against humanity and war crimes are defined exactly as in the Rome Statute, except for Article 7 (2) (a) of the Rome Statute.

³⁹ Article 40 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of crimes Committed During the Period of Democratic Kampuchea, 15 January 2001.

⁴⁰ S/RES/1529 (2004), 29 February 2004, para 7.

⁴¹ S/RES/1479 of 13 May 2003, para 8.

⁴² Resolutions 2003/72, para 2; 2002/79, para 2;

⁴³ Second Report of the Special Rapporteur the question of torture, E/CN.4/2003/68 of 17 December 2002, para 26 (k), reiterated in his Third Report of 23 December 2003, E/CN.4/2004/56, para 40.

⁴⁴ Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions, 2 July 2002, A/57/138, para 23; Interim report of the Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions, 11 August 2000, A/55/288, para 48.

⁴⁵ Special Rapporteur on the Independence of Judges and Lawyers on the mission to Peru, E/CN.4/1998/39/Add.1, 19 February 1998.

⁴⁶ Principles 24 and 19.

⁴⁷ General Comment 20 on Article 7, 10 March 1992, HRI/GEN/1/Rev.6, para 15; *Concluding Observations on Yemen*, A/50/40, paras 242-265, at 252; - *Lebanon*, 1 April 1997, CCPR/C/79/Add.78, para 12; - *Congo*, 27 March 2000, CCPR/C/79/Add.118, para 12; - *Croatia*, 30 April 2001, CCPR/CO/71/HRV, para 11; - *Colombia*, 25 March 2004, CCPR/CO/80/COL, para 8.

⁴⁸ *Concluding observations on Senegal*, 9 July 1996, A/51/44, paras 102-119, at 117; - *Peru*, 15 November 1999, A/55/44, paras 56-63, at 61; - *Azerbaijan*, 17 November 1999, A/55/44, paras 64-69, at 69; - *Kyrgyzstan*, 18 November 1999, A/55/44, paras 70-75, at 74 (e); - *Croatia*, 17 November 1998, A/54/44, paras 61-71, at 75 (c).

⁴⁹ *Prosecutor v Anto Furundzija*, IT-95-17/1, Judgment of 10 December 1998, para 155.

⁵⁰ Appeals Chamber, *Prosecutor v Morris Kallon*, Case No SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, para 63; also para 82.

⁵¹ *Case of Barrios Altos v Peru*, Judgment of 14 March 2001, Series C No. 75, paras 41, 42; *Barrios Altos Case, Interpretation of the Judgment on the Merits*, Judgment of 3 September 2001, Series C No 83, para 15; *Trujillo Oroza Case (Reparations)*, Judgment of 27 February 2002, Series C No 92, para 106; *Caracazo Case (Reparations)*, Judgment of 29 August 2002, Series C No 95, para 119.

⁵² Report No. 36/96, Case 10,843 (Chile), 15 October 1996, para 27; No 28/92 (Argentina); No 29/92 (Uruguay); Report No. 1/99, Case 10,480 *Lucio Parada Cea and others v El Salvador*, 27 January 1999, paras 112-158; Report No. 136/99, Case 10,488 *Ignacio Ellacuría S.J. and others v. El Salvador*, 22 December 1999, paras 197-232; Report No 37/00, Case 11.481, *Monsignor Oscar Arnulfo Romero y Galdámez v El Salvador*, 13 April 2000, paras 123-151; Report No. 25/98, Cases 11,505, 11,532, 11,541, 11,546, 11,549, 11,569, 11,572, 11,573, 11,583, 11,585, 11,595, 11,652, 11,657, 11,675 and 11,705 (Chile), 7 April 1998, paras 51-97; Report No. 1/99, Case 10,480 *Lucio Parada Cea and others v. El Salvador*, 27 January 1999, paras 112-158.

⁵³ *Malawi African Association et al v Mauritania*, Communications 54/91 et al (27th Ordinary Session, May 2000), para 83; *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle C (d).

⁵⁴ It should be noted that it is not always easy to differentiate between violations committed by state agents and those committed by non-state actors, especially when agents of the State are involved in a rising against their own government. Guidance for this can be drawn from the Draft Articles of State Responsibility elaborated by the International Law Commission (Report of the International Law Commission on the work of its fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1). In general, acts of unsuccessful insurrectional movements are not attributable to the state (ILC, Commentary to Article 10, para 2).

⁵⁵ See Human Rights Committee, *General Comment No 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 21 May 2004, CCPR/C/74/CRP.4/Rev.6, para 8

⁵⁶ *Velásquez Rodríguez v Honduras*, Judgment of 29 July 1988, Series C No 4, para 172;

⁵⁷ *Pedro Peredo Valderrama* (Mexico), 13 April 2000, paras 41 *et seq*; Report No. 54/01, Case 12.051, *Maria Da Penha Maia Fernandes* (Brazil), 16 April 2001, paras 37 *et seq*; *Report on the Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination*, OEA/Ser.L/V/II.117 Doc. 44, 7 March 2003, paras 131 *et seq*.

⁵⁸ *Ergi v Turkey*, Judgment of 28 July 1998, Reports 1998-IV, para 82; see also *Tanrikulu v Turkey*, Judgment of 8 July 1999, Reports 1999-IV, para 103; *Demiray v Turkey*, Judgment of 21 November 2000, Reports 2000-XII, para 50.