

ICTJ WRITTEN SUBMISSION: LEGALITY OF TRUTH AND RECONCILIATION COMMISSION

The International Center for Transitional Justice (“ICTJ”) hereby submits that the legislation establishing the Indonesian Truth and Reconciliation Commission (“TRC law”) contravenes international law. Specifically, the ICTJ contests the legality of the provisions of the TRC law which allow for the granting of amnesty and the provisions of the TRC law which condition a victim’s right to reparation upon the granting of amnesty. The TRC law contravenes a number of conventions, including the International Covenant on Civil and Political Rights and the Convention against Torture. The TRC law also conflicts with non-treaty sources of international law such as Reports and Statements of Principle. Further, it is interesting to note that a number of domestic courts have handed down decisions overturning local amnesty laws.

The Indonesian Constitutional Court has, in previous cases, held that the Court may invoke and have regard to international law, including treaties which Indonesia has not ratified and unbinding declarations. In the Indonesian Constitutional Court’s *General Elections* case the Constitutional Court invoked both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) (which Indonesia had not yet ratified but which it has subsequently acceded to) as persuasive sources.¹ The Court specifically invoked the Universal Declaration’s prohibition on various forms of discrimination to bolster its interpretation of Articles 28D(1) and 28I(2) of the Constitution. The Court also made statements approving of the ICCPR and quoted sections of the ICCPR relating to equality and non-discrimination. Therefore, it is apparent that the Indonesian Constitutional Court has on previous occasions employed aspects of international law, which have not strictly speaking been incorporated into domestic law, to reach its conclusions regarding aspects of domestic law.

In addition, the Indonesian House of People’s Representatives (DPR) has passed legislation specifying that international law provisions which Indonesia has ratified are

¹ Constitutional Court Decision, Case No. 011-017/PUU-I/2003, 24 February 2004. Decision on Art. 60g of Law No 12 of 2003.

binding in domestic law. Law Number 39 of 1999 Concerning Human Rights is a comprehensive statutory bill of rights. It supplements the Constitutional Bill of Rights. Article 7 states:

- (1) Everyone has the right to use all effective national legal means and international forums against all violations of human rights guaranteed under Indonesian law, and under international law concerning human rights which has been ratified by Indonesia.
- (2) Provisions set forth in international law concerning human rights ratified by the Republic of Indonesia, are recognized as legally binding in Indonesia.

Article 7 is complemented by Article 71 which states that “the government shall respect, protect, uphold and promote human rights as laid down in this Act, other legislation and international law concerning human rights ratified by the Republic of Indonesia”. Together, Articles 7 and 71 oblige the government to protect and promote the human rights contained in the Law and in international law. Such protection and promotion includes positive measures such as investigating, prosecuting and providing reparations when rights contained in the Law are breached. Moreover, the Law clearly recognizes that treaties ratified by Indonesia are binding in domestic law.

It is also important to note that Indonesia is not only a member of the United Nations, whose charter requires States to promote respect for human rights and to cooperate with the United Nations in promoting human rights,² but is also a member of the Human Rights Council and as such has the additional responsibility of meeting the “highest standards” of human rights protection.³ It is with this in mind that we proceed to consider the status of the TRC law under international law.

I THE TRUTH AND RECONCILIATION COMMISSION LEGISLATION CONTRAVENES TREATY LAW

A *The International Covenant for Civil and Political Rights (“ICCPR”)*⁴

² UN Charter, 26 June 1945, entered into force, 24 October 1945. Article 55 (c) provides that the UN “shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.” By article 56 all member States “pledge themselves to take joint and separate action in co-operation” with the UN to achieve the purposes set forth in article 55.

³ Members of the Human Rights Council “shall uphold the highest standards in the promotion and protection of human rights ... and be reviewed ... during their term of membership ...” UN General Assembly Res. 60/251, 15 March 2006, UN Doc. A/RES/60/251, 3 April 2006, para. 9.

⁴ 16 Dec. 1966, 999 U.N.T.S. 171.

The ICTJ submits that the provisions of the TRC law which allow for the granting of amnesty and which condition the award of reparations upon the granting of amnesty contravene Articles 2(3), 6(1), 7, 9(5) and 14(6) of the ICCPR. On 23 February 2006, Indonesia acceded to the ICCPR. This brief focuses on the breaches of Articles 2(3), 6(1) and 7 of the ICCPR as they are the most relevant Articles for this purpose. However, it should be noted that there are also strong arguments to support the proposition that the TRC law contravenes Articles 9(5) and 14(6) of the ICCPR. For example, given that in General Comment 21 the HRC stated that “arrested or detained persons [should] have access to... obtain adequate compensation in the event of a violation”⁵ it is logical to conclude that Article 27 TRC law contravenes Article 9(5) ICCPR which provides victims of unlawful arrest or detention with a right to compensation. Similarly, Article 14(6) ICCPR provides anyone whose criminal conviction is overturned where there has been a miscarriage of justice with a right to compensation. Once again, it is logical to conclude that Article 27 TRC law contravenes Article 14(6).

1. *Article 2(3) ICCPR*

Article 2(3) ICCPR states that:

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an *effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

⁵ ICCPR General Comment No. 21 (Forty-fourth session, 1992): Article 10: Replaces General Comment 9 Concerning Humane Treatment of Persons Deprived of Liberty, A/47/40 (1992) 195 at para. 7.

(c) To ensure that the competent authorities shall enforce such remedies when granted.

It is submitted that Article 27 of the TRC law breaches Article 2(3) of the ICCPR. Article 27 states that: "Compensation and rehabilitation, as within the meaning of article 19, may be awarded when a request for amnesty is granted." The explanatory memorandum attached to the TRC law states that: "If the request for amnesty is refused then compensation will not be awarded by the State and the case shall be settled based on the resolutions contained under the Law on Human Rights Court No. 26 of 2000." It should be noted that there is no guarantee that the Human Rights Court will hear a case where a request for amnesty has been refused. Therefore, there is no guarantee that a victim of human rights violations will receive compensation.

By making the award of compensation conditional upon the granting of amnesty, Article 27 infringes upon the right to an effective remedy, which the Human Rights Committee ("HRC") has found to be an unconditional right.

(a) General Comments

In General Comment No. 31 the HRC reinforced the importance of the right to an effective remedy and defined this right as including the right to adequate compensation. The HRC stated that Article 2(3) "requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy...is not discharged...the Committee considers that the Covenant generally entails appropriate compensation."⁶ It is clear that individuals who will appear before the Indonesian Truth and Reconciliation Commission will be individuals whose Covenant rights have been violated. Consequently, these individuals have a right to compensation irrespective of whether or not amnesty is granted.

(b) Concluding Observations

⁶ ICCPR General Comment No. 31 [80] on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13. (2004), para. 16.

In its Concluding Observations on El Salvador, the HRC stated that the El Salvador Amnesty Act “infringes the right to an effective remedy set forth in article 2 of the Covenant, since it prevents the investigation and punishment of all those responsible for human rights violations and the *granting of compensation to the victims*.”⁷ Similarly, in its Concluding Observations on Peru, the HRC found that “...an amnesty prevents appropriate investigation and punishment of perpetrators of past human rights violations... and is thus in violation of article 2 of the covenant. ... the Government is urged to ... establish an effective system of compensation for the victims of human rights violations.”⁸ In 2000, the HRC included the following recommendation in its Concluding Observations on Argentina: “Gross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with applicability as far back in time as necessary to bring their perpetrators to justice. The Committee recommends that rigorous efforts continue to be made in this area.”⁹

(c) Jurisprudence

The HRC has handed down numerous decisions reiterating the point that that Article 2(3) of the ICCPR requires that victims of violations of the ICCPR be adequately compensated.

In *Cagas v Philippines* the HRC found that the Philippines was in violation of Articles 9 and 14 of the ICCPR, based on the fact that the authors had been detained for more than four years without trial. The HRC decided that in accordance with Article 2(3)(a) “the State party is under an obligation to provide the authors with an effective remedy, which shall entail adequate compensation for the time they have spent unlawfully in detention.”¹⁰

In *Brok v Czech Republic* Robert Brok, a Jew whose family’s property was confiscated during World War II, took the matter to the HRC claiming that the State had violated his

⁷ HRC, *Concluding Observations on El Salvador*, UN. Doc. A/58/40 Vol. I (2003) 61, para 84(6).

⁸ HRC, *Concluding Observations on Peru*, UN. Doc. A/51/40 Vol. I (1996) 48, paras 347, 358.

⁹ HRC, *Concluding Observations on Argentina*, UN. Doc. CCPR/CO/70/ARG (2000), para 9.

¹⁰ *Cagas v Philippines*, CCPR/C/73/D/788/1997. para. 9.

right to equality before the law and to equal protection of the law when it refused to return the stolen property. The HRC found that there had in fact been a violation of the ICCPR and that the right to an effective remedy in this instance included “restitution of the property or compensation, and appropriate compensation for the period during which the author and his widow were deprived of the property.”¹¹

In *Ashby v Trinidad and Tobago* the State proceeded to execute Ashby despite a request by the HRC that the execution be stayed pending the HRC’s final decision of the matter. The HRC expressed the view that ignoring its request in such a way clearly undermined the ICCPR. As such, the HRC held that under Article 2(3) “Mr. Ashby would have been entitled to an effective remedy including, first and foremost, the preservation of his life. Adequate compensation must be granted to his surviving family.”¹²

In *Lantsova v Russian Federation* the HRC found that the State was in breach of Article 6(1) of the ICCPR on account of the fact that the appalling nature of its prison conditions resulted in the death of a prisoner. Consequently, the HRC decided that the deceased’s wife was entitled to appropriate compensation.¹³ Similarly, in *Francis et al. v Trinidad and Tobago* the HRC found that the deplorable prison conditions violated the rights of the authors to be “treated with humanity and with respect for the inherent dignity of the human person.” Therefore, the HRC found that the authors were entitled to an effective remedy, including adequate compensation.¹⁴

In *Bondarenko v Belarus* the author claimed that the State had violated the ICCPR by failing to inform her of her son’s execution. The HRC found that:

complete secrecy surrounding the date of execution, and the place of burial and the refusal to hand over the body for burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities’ initial failure to notify the author of the scheduled date for the execution of her son, and their subsequent persistent failure to notify her of the location of her son’s grave

¹¹ *Brok v Czech Republic*, CCPR/C/73/D/774/1997, para. 9.

¹² *Ashby v Trinidad and Tobago*, CCPR/C/74/D/580/1994, para. 12.

¹³ *Lantsova v Russian Federation*, CCPR/C/74/763/1997, para. 11.

¹⁴ *Francis et al. v Trinidad and Tobago*, CCPR/C/75/D/899/1999, paras. 5.7 – 7.

amounts to inhuman treatment of the author, in violation of article 7 of the Covenant ... In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including information on the location where her son is buried, and compensation for the anguish suffered. The State party is also under an obligation to prevent similar violations in the future.¹⁵

The above decisions of the HRC are merely a few of the many decisions which the HRC has handed down affirming that the right to compensation is inherent in the right to an effective remedy enshrined in Article 2(3) of the ICCPR. It is clear that by making the right to compensation conditional upon the granting of amnesty, rather than automatic where violations have occurred, Indonesia is in breach of its obligations under Article 2(3) of the ICCPR.

2. Article 6(1) ICCPR

Article 6(1) of the ICCPR states that “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

It is submitted that both Article 1(9) and Article 27 of the TRC law contravene Article 6(1) ICCPR.

(a) Article 1(9) TRC law

Article 1(9) of the TRC law states that Amnesty “means the clemency bestowed by the President as Head of State upon the perpetrator of a gross violations of human rights, taking into consideration of the People’s Legislative Assembly.[sic]”

It is submitted that Article 1(9) TRC law contravenes Article 6(1) ICCPR on the basis that Article 6(1) ICCPR requires that perpetrators of human rights abuses be brought to justice.

(i) General Comments

¹⁵ *Bondarenko v Belarus*, CCPR/C/77/D/886/1999, paras. 10.2 and 12.

In General Comment 6 on the implementation of Article 6 ICCPR the HRC stated that “States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent killing by their own security forces.”¹⁶ The granting of amnesty pursuant to Article 1(9) TRC law prevents the punishment of those who have engaged in the deprivation of life by criminal acts and is therefore contrary to Article 6(1) ICCPR.

(ii) Concluding Observations

In its 1993 Concluding Observations on Senegal the HRC stated that “[p]articular concern is expressed over the danger that the amnesty laws might be used to grant impunity to officials responsible for violations, who had to be brought to justice.”¹⁷

In its 1993 Concluding Observations on Niger the HRC was adamant that State agents responsible for human rights abuses should be punished and should “in no case enjoy immunity through an amnesty law”.¹⁸ Similarly, in its 2002 Concluding Observations on Togo the HRC disapprovingly noted that “the adoption of laws such as the December 1994 Amnesty Act is likely to reinforce the culture of impunity in Togo”.¹⁹ Evidently, there are numerous instances in which the HRC has, in its Concluding Observations, expressed the view that the granting of amnesty may be viewed as a violation of the right to life enshrined in Article 6(1) ICCPR.

(iii) Jurisprudence

The jurisprudence of the HRC is clear in its sentiments that those who violate Article 6(1) ICCPR must be brought to justice. The logical conclusion of such sentiments is that amnesties violate Article 6(1) ICCPR. For example, in the case of *Barbato v Uruguay*²⁰ the HRC was of the view that Uruguay was under an obligation to take effective steps to bring to justice any persons found to be responsible for Hugo Dermitt’s death. It reached

¹⁶ ICCPR General Comment 6 (Sixteenth session, 1982): Article 6: The Right to Life, A/37/40 (1982) 93, para. 3.

¹⁷ HRC, *Concluding Observations on Senegal*, UN. Doc. A/48/40 Vol. I (1993) 23, para. 103.

¹⁸ HRC, *Concluding Observations on Niger*, UN. Doc. A/48/40 Vol. I (1993) 88, para. 425.

¹⁹ HRC, *Concluding Observations on Togo*, UN. Doc. A/58/40 Vol. I (2002) 36, para. 77(9).

²⁰ *Barbato v Uruguay*, CCPR/C/17/D/84/1981.

the same conclusion in the cases of *Barboeram et al v. Suriname*²¹ and *Miango v Zaire*.²² In the case of *José Vicente et. Al v Columbia* the HRC stated that “the State party has a duty to investigate thoroughly alleged violations of human rights, particularly enforced disappearances and violations of the right to life, and to criminally prosecute, try and punish those deemed responsible for such violations.”²³

(b) Article 27 TRC law

As stated above, Article 27 of the TRC law states that: “Compensation and rehabilitation, as within the meaning of article 19, may be awarded when a request for amnesty is granted.”

It is submitted that Article 27 of the TRC law contravenes Article 6(1) ICCPR on the basis that Article 6(1) ICCPR has been interpreted to require that victims of human rights abuses have a right to compensation (which should not be conditioned on the granting of amnesty).

(i) Concluding Observations

In many of its Concluding Observations the HRC has found that the requirement that victims or their families be compensated for fundamental human rights violations falls within the realm of Article 6(1) ICCPR. In its 2002 Concluding Observations on Egypt the HRC concluded that the “State party should ensure that all violations of articles 6 and 7 of the Covenant are investigated and, depending on the results of investigations, should take action against those held responsible *and make reparation to the victims*.”²⁴ The HRC has asserted that victims of torture should receive compensation.²⁵ It has also decided that the relatives of victims of extrajudicial executions should receive compensation.²⁶

²¹ *Baboeram et al. v Suriname*, CCPR/C/24/D/148/1983.

²² *Miango v Zaire*, CCPR/C/31/D/194/1985.

²³ *José Vicente et. Al v Columbia*, CCPR/C/60/D/612/1995.

²⁴ HRC, *Concluding Observations on Egypt*, UN. Doc. A/58/40 Vol. I (2002) 31, para. 77(13).

²⁵ See for example: HRC, *Concluding Observations on Niger*, UN. Doc. A/48/40 Vol. I (1993) 88, para. 425; HRC, *Concluding Observations on Cameroon*, UN. Doc. A/49/40 Vol. I (1994) 36, para. 203; HRC, *Concluding Observations on Togo*, UN. Doc. A/49/40 Vol. I (1994) 44, para. 250.

²⁶ See for example: HRC, *Concluding Observations on Niger*, UN. Doc. A/48/40 Vol. I (1993) 88, para. 425; HRC, *Concluding Observations on Mexico*, UN. Doc. A/49/40 Vol. I (1994) 33, para. 172; HRC,

Further, the Commission has stated that compensation should be awarded in cases of enforced or involuntary disappearances.²⁷ The same conclusion has been applied to victims of illegal detention;²⁸ rape;²⁹ disproportionate use of force by police officers³⁰ and other human rights violations.

(ii) Jurisprudence

In *Barbato v Uruguay*³¹ the HRC was of the view that the State party was under an obligation to pay appropriate compensation to Barbato's family for Barbato's death while in custody. In the case of *Barboeram et al. v. Suriname*³² the HRC concluded that Suriname was obligated to pay compensation to the families of people killed by the military police. The HRC reached a similar conclusion in the case of *Miango v Zaire*³³ which essentially involved a person being tortured to death by members of the armed forces.

3. Article 7 ICCPR

Article 7 ICCPR states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...”

It is submitted that both Article 1(9) and Article 27 of the TRC law contravene Article 7 ICCPR.

(a) Article 1(9) TRC law

Concluding Observations on Cameroon, UN. Doc. A/49/40 Vol. I (1994) 36, para. 203; HRC, *Concluding Observations on Togo*, UN. Doc. A/49/40 Vol. I (1994) 44, para. 250.

²⁷ See for example: HRC, *Concluding Observations on Mexico*, UN. Doc. A/49/40 Vol. I (1994) 33, para. 172; HRC, *Concluding Observations on Togo*, UN. Doc. A/49/40 Vol. I (1994) 44, para. 250.

²⁸ See for example: HRC, *Concluding Observations on Cameroon*, UN. Doc. A/49/40 Vol. I (1994) 36, para. 203; HRC, *Concluding Observations on Togo*, UN. Doc. A/49/40 Vol. I (1994) 44, para. 250.

²⁹ HRC, *Concluding Observations on the Russian Federation*, UN. Doc. A/59/40 Vol. I (2003) 20, para. 64(13).

³⁰ HRC, *Concluding Observations on Portugal*, UN. Doc. A/58/40 Vol. I (2003) 56, para. 83(8).

³¹ *Barbato v Uruguay*, CCPR/C/17/D/84/1981.

³² *Barboeram et al. v Suriname*, CCPR/C/24/D/148/1983.

³³ *Miango v Zaire*, CCPR/C/31/D/194/1985.

It is submitted that Article 1(9) TRC law violates Article 7 ICCPR on the basis that it contravenes the duty to investigate acts of torture and to hold the perpetrators responsible.

(i) General Comments

In General Comment 20³⁴ on the implementation of Article 7 ICCPR the HRC commented that “[t]hose who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible.”³⁵ In addition, it observed that “[a]mnesties are generally incompatible with the duty of States to investigate such acts, to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.”³⁶ Consequently, it is clear that in the view of the HRC, amnesties are incompatible with Article 7 ICCPR.

(ii) Concluding Observations

In its 1993 Concluding Observations on Senegal the HRC condemned the granting of amnesty to perpetrators of human rights abuses, especially torture.³⁷ Similarly, in its 1995 Concluding Observations on Haiti the HRC commented that it “is of concern that...the Amnesty Act might impede investigations into allegations of human rights violations such as...torture.”³⁸ Thus it seems that the granting of amnesty pursuant to Article 1(9) TRC law contravenes Article 7 ICCPR.

(iii) Jurisprudence

The case of *Rodríguez v Uruguay* is illustrative of the HRC’s view that amnesties should not be granted for violations of Article 7 ICCPR.³⁹ In this case, Rodríguez was tortured by State officials. The State subsequently enacted an amnesty law absolving the

³⁴ ICCPR General Comment 20 (Forty-fourth session, 1992): Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment, A/47/40 (1992) 193.

³⁵ ICCPR General Comment 20 (Forty-fourth session, 1992): Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment, A/47/40 (1992) 193 at para. 13.

³⁶ ICCPR General Comment 20 (Forty-fourth session, 1992): Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment, A/47/40 (1992) 193 at para. 15.

³⁷ HRC, *Concluding Observations on Senegal*, UN. Doc. A/48/40 Vol. I (1993) 23, para. 112.

³⁸ HRC, *Concluding Observations on Haiti*, UN. Doc. A/50/40 Vol. I (1995) 46, para. 230.

³⁹ *Rodríguez v Uruguay*, CCPR/C/31/D/194/1985.

perpetrators of this violation from being prosecuted. The HRC found that this amnesty law was “incompatible with the obligations of the State party under the Covenant.”

(b) Article 27 TRC law

It is submitted that Article 27 TRC law violates Article 7 ICCPR on the basis that the prohibition against torture includes the obligation to compensate victims of torture. This obligation is not adequately fulfilled where the payment of compensation is conditioned on the granting of amnesty.

(i) General Comments

In General Comment 20⁴⁰ the HRC expressed the view that “States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.”⁴¹ Consequently, it seems that the conditioning of compensation on the granting of amnesty may be viewed as a violation of Article 7 ICCPR.

(ii) Concluding Observations

The HRC has repeatedly observed that there is an obligation to compensate victims of torture. For example, in its 1995 Concluding Observations on Paraguay, the HRC stated that the “State Party should...provide proper compensation to the victims, particularly with respect to continuing occurrences of torture and ill-treatment by the police and security forces.”⁴² In its 1999 Concluding Observations on Mexico, the HRC was especially emphatic as regards the prohibition against torture and the requirement to provide remedies, including compensation. It stated:

It is of the gravest concern that not all forms of torture are necessarily covered by law in all Mexican states, and that there is no independent body to investigate the substantial number of complaints regarding acts of torture and cruel, inhuman or degrading treatment. *It is also a matter of concern* that the acts of torture,

⁴⁰ ICCPR General Comment 20 (Forty-fourth session, 1992): Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment, A/47/40 (1992) 193.

⁴¹ ICCPR General Comment 20 (Forty-fourth session, 1992): Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment, A/47/40 (1992) 193 at para. 15.

⁴² HRC, *Concluding Observations on Paraguay*, UN. Doc. A/50/40 Vol. I (1995) 42, para. 216.

enforced disappearances and extrajudicial executions which have taken place have not been investigated; that the persons responsible for those acts have not been brought to justice; and *that the victims or their families have not received compensation*. The State party must take the necessary measures to attain full compliance with articles 6 and 7 of the Covenant, including measures to provide remedies against torture in all the states of Mexico.⁴³

(iii) Jurisprudence

The committee has adopted the same position in its jurisprudence as it has adopted in its General Comments and Concluding Observations, that being that victims of torture must be compensated. For example, in the case of *Muteba v Zaire*⁴⁴ the HRC found that the State was obliged to pay compensation to Mr. Muteba as part of the remedy for the torture to which he was subjected. Similarly, in *Rodríguez v Uruguay*⁴⁵ the HRC was of the view that Mr. Rodríguez was entitled to be compensated for the torture which he was forced to endure.

B *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”)*⁴⁶

The ICTJ submits that the provisions of the TRC law which allow for amnesty and condition the award of reparations upon the granting of amnesty contravene CAT. Indonesia signed CAT on 23 October 1985. Pursuant to Article 18 of the Vienna Convention on the Law of Treaties, when a State has signed a treaty it “is obliged to refrain from acts which would defeat the object and purpose” of that treaty. Therefore, from 1985 onwards Indonesia was obligated to refrain from acts which would defeat the object and purpose of CAT. Indonesia ratified CAT on 28 October 1998. The ICTJ submits that the TRC law violates CAT.

⁴³ *Concluding Observations on Mexico*, UN. Doc. A/54/40 Vol. I (1999) 61, para. 318. See also the following examples: HRC, *Concluding Observations on Niger*, UN. Doc. A/48/40 Vol. I (1993) 88, para. 423; HRC, *Concluding Observations on Cameroon*, UN. Doc. A/49/40 Vol. I (1994) 36, para. 203; HRC, *Concluding Observations on Argentina*, UN. Doc. A/50/40 Vol. I (1995) 35, para. 161; HRC, *Concluding Observations on Bolivia*, UN. Doc. A/52/40 Vol. I (1997) 35, para. 218.

⁴⁴ *Muteba v Zaire*, CCPR/C/22/D/124/1982.

⁴⁵ *Rodríguez v Uruguay*, CCPR/C/22/D/124/1982.

⁴⁶ G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984).

1. Articles 1(9) and 44 TRC law violate Articles 4, 7, 12 and 13 of CAT

As stated above, Article 1(9) TRC law states that Amnesty “means the clemency bestowed by the President as Head of State upon the perpetrator of a gross violations of human rights, taking into consideration of the People’s Legislative Assembly.[*sic*]”

Article 44 TRC law states that “[t]he case of gross violations of human right that has been resolved by the commission cannot be brought before The Ad Hoc Court of Human Rights. [*sic*]”

Pursuant to Article 4 CAT, each State must “ensure that all acts of torture are offences under [their] criminal law” and must “make these offences punishable by appropriate penalties which take into account their grave nature.” Pursuant to Article 7 CAT, each State must “submit the case to its competent authorities for the purposes of prosecution.” Article 12 CAT takes the matter further, asserting that each State must “ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed”. Finally, Article 13 CAT asserts that each State must “ensure that any individual who alleges ... torture... has the right to complain to, and to have his case promptly and impartially examined by, competent authorities”. Thus CAT obliges States to investigate, prosecute and provide an effective remedy with respect to instances of torture. The ICTJ submits that Article 1(9) and 44 TRC law violate these core obligations.

In its 2002 Concluding Observations on **Indonesia**, the Committee against Torture (“Torture Committee”) expressed its concern about “the failure of the State party to provide in every instance prompt, impartial and full investigations into the numerous allegations of torture... as well as to prosecute alleged offenders as required under articles 12 and 13 of the Convention.”⁴⁷

⁴⁷ CAT, *Concluding Observations on Indonesia*, UN. Doc A/57/44 (2002) 22, para 43.

In a discussion relating to Peru's amnesty laws, the Torture Committee cited disapprovingly "the amnesty laws which preclude prosecution of alleged torturers who must, according to articles 4, 5 and 12 of the Convention, be investigated and prosecuted." According to the Torture Committee, "Amnesty laws should exclude torture from their reach."⁴⁸

Similarly, in its 2000 Concluding Observations on Azerbaijan the Torture Committee observed that "[i]n order to ensure the perpetrators of torture do not enjoy impunity, the State party should ensure the investigation and, where appropriate, the prosecution of those accused of having committed the crime of torture, and ensure that amnesty laws exclude torture from their reach."⁴⁹

Further, In *Hajrizi Dzemajl et al. v. Serbia and Montenegro*⁵⁰ the Torture Committee confirmed that States have an obligation to investigate, prosecute and punish those responsible for acts of torture. In *M'Barek v Tunisia*⁵¹ and *Blanco Abad v Spain*⁵² the Torture Committee held that a State violates Article 13 when it fails to proceed with an impartial investigation of alleged acts of torture within its territory.

Consequently, it is clear from the Concluding Observations and jurisprudence of the Torture Committee that laws such as Articles 1(9) and 44 of the TRC law, which stymie effective investigation, prosecution and punishment of violations of CAT, are themselves in violation of the Convention.

2. Article 27 TRC law violates Article 14(1) of CAT

As stated above, Article 27 TRC law states that "[c]ompensation and rehabilitation, as within the meaning of article 19, may be awarded when a request for amnesty is granted."

Article 14(1) CAT states that

⁴⁸ CAT, *Concluding Observations on Peru*, UN. Doc A/55/44 (2000) 13, paras 59, 61.

⁴⁹ CAT, *Concluding Observations on Azerbaijan*, UN. Doc A/55/44(2000) 16, para 69.

⁵⁰ *Hajrizi Dzemajl et al. v. Serbia and Montenegro* UN Doc CAT/C/29/D/161/2000

⁵¹ *M'Barek v Tunisia* (60/1996), U.N. Doc. CAT/C/23/D/60/1996 (2000) para. 12.

⁵² *Blanco Abad v Spain* (59/1996), UN Doc CAT/C/20/D/59/1996 (1988).

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

It is submitted that Article 27 TRC law violates Article 14(1) CAT as, by rendering compensation conditional on the granting of amnesty, it contravenes the unconditional nature of the right to compensation.

In numerous Concluding Observations the Torture Committee has highlighted the State's absolute obligation to provide compensation to victims of torture. For example, in its 1995 Concluding Observations on Italy the Torture Committee observed that "the State party should: Better guarantee the right of a victim of torture to be compensated by the State and provide some programme of rehabilitation for him".⁵³ Similarly, in its 1998 Concluding Observation on Peru the Torture Committee asserted that "[t]he State party should consider, pursuant to articles 6, 11, 12, 13 and 14 of the Convention, taking measures to ensure that victims of torture or other cruel, inhuman or degrading treatment, and their legal successors, receive redress, compensation and rehabilitation in all circumstances."⁵⁴

The Torture Committee's jurisprudence is also emphatic as to the obligation to provide compensation. For example, in the case of *Hajrizi Dzemajl et al. v. Serbia and Montenegro* the Torture Committee urged Serbia and Montenegro "to conduct a proper investigation into the acts that occurred on 15 April 1995, prosecute and punish the persons responsible for those acts and provide the complainants with redress, *including fair and adequate compensation*."⁵⁵

C *International Convention for the Protection of All Persons from Enforced disappearance*

⁵³ CAT, *Concluding Observations on Italy*, UN. Doc A/50/44 (1995) 21, para 157.

⁵⁴ CAT, *Concluding Observations on Peru*, UN. Doc A/53/44 (1998) 22 at para. 205.

⁵⁵ *Hajrizi Dzemajl et al. v. Serbia and Montenegro* (161/2000), CAT, A/58/44 (21 November 2002).

On 25 September 2005 the International Convention for the Protection of All Persons from Enforced disappearance (“Disappearance Convention”) came into being. The Working Group on Enforced and Involuntary Disappearances has called for the General Assembly to adopt the draft Convention at its 61st session. Article 6 of the Disappearance Convention requires States to hold perpetrators of enforced disappearances criminally responsible for their actions. Article 24 of the Disappearance Convention states that “[e]ach State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.” Consequently, it is clear that Articles 9(1), 27 and 44 of the TRC Law are all in breach of this draft Convention.

II THE TRUTH AND RECONCILIATION COMMISSION LEGISLATION CONTRAVENES NON-TREATY SOURCES OF INTERNATIONAL LAW

A *United Nations Declarations and Resolutions*

1. *Torture Declaration*⁵⁶

Article 10 of the Torture Declaration, adopted by the United Nations General-Assembly in 1975, states that “[i]f an investigation ... establishes that an act of torture ... appears to have been committed, criminal proceedings shall be instituted”. Pursuant to Article 11 of the Torture Declaration “[w]here it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation in accordance with national law.” Consequently, pursuant to the Torture Declaration it is clear that the amnesty provided for in the TRC law contradicts fundamental aspects of international law. Further, whilst the Declaration provides some leeway for States to act in accordance with national law, it is also clear that some form of compensation or redress is required with respect to all acts of torture. The conditioning of compensation on the granting of amnesty in Article 27 TRC law appears to conflict with this requirement.

⁵⁶ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975).

2. Disappearances Declaration⁵⁷

The Declaration on the Protection of all Persons from Enforced Disappearances (“Declaration on Disappearances”) was adopted on 18 December 1992. The Declaration on Disappearances obliges States to institute legal mechanisms for the prevention and punishment of enforced disappearances. Article 14 of the Declaration on Disappearances states that “[a]ny person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial”. Further, Article 18 specifically states that “[p]ersons who have or are alleged to have committed offences referred to in article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.” Consequently, it is clear that amnesties for enforced disappearances are outlawed by the Declaration on Disappearances and that prosecution for this offence is mandatory. In addition, Article 19 of the Declaration on Disappearances states that

The victims of acts of enforced disappearance and their family shall obtain redress and shall have the *right to adequate compensation*, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependents shall also be entitled to compensation.

This explicit recognition of the right to compensation as an absolute right is contradicted by the TRC law.

3. Security Council Resolution 1325 (2000)⁵⁸

In resolution 1325 the United Nations Security Council recognized the importance of prosecution for the attainment of both justice and peace. The Security Council emphasized

⁵⁷ Declaration on the Protection of all Persons from Enforced Disappearance (Adopted by General Assembly resolution 47/133 of 18 December 1992)

⁵⁸ Adopted by the Security Council at its 4213th meeting, on 31 October 2000

the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard *stresses* the need to exclude these crimes, where feasible from amnesty provisions.

Given that, pursuant to Article 25 of the United Nations Charter, “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council”, Indonesia should take no steps which violate this resolution.

B Reports

1. *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*

In his Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone the Secretary-General stated that the “United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.”⁵⁹ Consequently, it seems that the Indonesian TRC law flies in the face of a clear and unambiguous statement of law expressed by the current United Nations Secretary-General.

2. *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*

In his seminal report on transitional justice issues, the United Nations Secretary-General stated that “United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights”.⁶⁰ He concluded by recommending that peace agreements and Security Council resolutions and mandates “[r]eject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based

⁵⁹ Security Council, Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, para. 22.

<http://daccessdds.un.org/doc/UNDOC/GEN/N00/661/77/PDF/N0066177.pdf?OpenElement>

⁶⁰ Security Council, *Report On The Rule Of Law And Transitional Justice In Conflict And Post-Conflict Societies*, The Secretary-General, UN. Doc. S/2004/616, (3 August 2004) para. 10.

<http://daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>

international crimes, ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court”.⁶¹ Thus it is clear that the United Nations as an institution is opposed to the granting of amnesties for gross violations of human rights. Further, the Secretary-General went on to state that “in the face of widespread human rights violations, States have the obligation to act not only against perpetrators, but also on behalf of victims – including through the provision of reparations.”⁶² Thus it seems that the United Nations, as well as taking a strong stance against amnesties, is also taking a strong stance in favor of the provision of reparations to victims of human rights violations.

3. *Report of Independent Expert on Principles of Impunity*

On 18 February 2005 Diane Orentlicher, independent expert appointed to update the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, submitted her report to the United Nations Commission on Human Rights.⁶³ In a resolution passed on 21 April 2005 the Commission took “note with appreciation of the report of the independent expert and the updated Set of Principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102 and Add.1) as a guideline to assist States in developing effective measures for combating impunity”.⁶⁴ The Commission on Human Rights has been succeeded by the Human Rights Council, which is charged with carrying over all the Commission's mandates and responsibilities and which assumes the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the High Commissioner. Given that Indonesia is a member of the Human Rights Council,

⁶¹ Security Council, *Report On The Rule Of Law And Transitional Justice In Conflict And Post-Conflict Societies, The Secretary-General*, UN. Doc. S/2004/616, (3 August 2004) para. 64.

<http://daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>

⁶² Security Council, *Report On The Rule Of Law And Transitional Justice In Conflict And Post-Conflict Societies, The Secretary-General*, UN. Doc. S/2004/616, (3 August 2004) para. 54.

<http://daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>

⁶³ Commission on Human Rights, *Promotion and Protection of Human Rights: Impunity, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher*, E/CN.4/2005/102, (18 February 2005), available at

<http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.102.pdf>

⁶⁴ Commission on Human Rights, 60th meeting, UN Doc. E/CN.4/2005/L.10/Add.17 (April 21, 2005).

there is clearly a compulsion for it to abide by resolutions of the Human Rights Committee.

On the subject of amnesties, the report states that “recent decisions have reaffirmed the incompatibility of amnesties that lead to impunity with the duty of States to punish serious crimes under international law”.⁶⁵

On the subject of reparations, the report states that:

As the jurisprudence of human rights treaty bodies has repeatedly affirmed, “if the violation ... is particularly serious”, victims must have recourse to judicial remedies. Without prejudice to this right, recent experience has affirmed the important role of national programmes of reparation in the aftermath of mass atrocity. In these circumstances, where the universe of victims is typically very large, administrative programmes can facilitate the distribution to victims of adequate, effective and prompt reparation.

Thus the report clearly reaffirms the necessity of prosecuting perpetrators of human rights abuses and the importance of establishing comprehensive reparations schemes.

C Principles and Guidelines

1. Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity

In a resolution passed on 21 April 2005 the Human Rights Commission referred approvingly to the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity⁶⁶ (“Impunity Principles”) and encouraged “States, intergovernmental organizations and non-governmental organizations to consider the recommendations and best practices identified in...the updated Principles, as

⁶⁵ Commission on Human Rights, *Promotion and Protection of Human Rights: Impunity, Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher, E/CN.4/2005/102, (18 February 2005), para 50, available at <http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.102.pdf>

⁶⁶ Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN. Doc. E/CN.4/2005/102/Add.1 (8 February 2005) <http://daccessdds.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>

appropriate, in developing and implementing effective measures to combat impunity”.⁶⁷ In the same resolution the Human Rights Commission recognized “that amnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes.”⁶⁸ As stated above, given that Indonesia is a member of the Human Rights Council, the successor body to the Human Rights Commission, it has committed itself to acting in conformity with resolutions passed by the Human Rights Commission.

Pursuant to Article 19 of the Impunity Principles, States must conduct proper investigations of human rights violations and must ensure that “those responsible for serious crimes under international law are prosecuted, tried and duly punished.”⁶⁹ Further, Article 24 of the Impunity Principles states that “Amnesties and other measures shall be without effect with respect to the victims’ right to reparation.”⁷⁰ This principle is particularly pertinent to the Indonesian TRC law, Article 27 of which conditions the award of reparations upon the granting of amnesty. The Impunity Principles confirm the absolute nature of the right to reparations in Article 31 which states that “[a]ny human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.”⁷¹

2. *Basic Principles and Guidelines on Right to a Remedy*

On 21 March 2006 the United Nations General-Assembly passed a resolution adopting the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims

⁶⁷ Commission on Human Rights, 60th meeting, UN Doc. E/CN.4/2005/L.10/Add.17 (April 21, 2005) para. 21.

⁶⁸ Commission on Human Rights, 60th meeting, UN Doc. E/CN.4/2005/L.10/Add.17 (April 21, 2005) para. 21, para. 3.

⁶⁹ Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN. Doc. E/CN.4/2005/102/Add.1 (8 February 2005) <http://daccessdds.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>

⁷⁰ Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN. Doc. E/CN.4/2005/102/Add.1 (8 February 2005) <http://daccessdds.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>

⁷¹ Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN. Doc. E/CN.4/2005/102/Add.1 (8 February 2005) <http://daccessdds.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>

of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law⁷² (“Right to a Remedy Principles”). The Right to a Remedy Principles confirm that States have an obligation to prosecute perpetrators of human rights violations and to provide victims with reparations. Both of these principles are viewed as being fundamental aspects of a victim’s right to a remedy. For example, Article 11 specifically states that a victim has the right to “equal and effective access to justice” as well as “adequate, effective and prompt reparation for harm suffered”.

With respect to the duty to prosecute those responsible for human rights violations, Article 4 of the Right to a Remedy Principles states that

[i]n cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.”

With respect to the rights of victims to receive reparations, Article 3 of the Right to a Remedy Principles states that the obligation to implement international law includes an obligation to provide reparations. Article 15 discusses this obligation in greater detail and states that

Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law.

D *Statements of the Indonesian Representative before the Human Rights Council and Security Council*

⁷² *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*, G.A. Res. 60/147, U.N. Doc. A/Res/60/147 (Dec. 16, 2005).

1. *International Convention for the Protection of All Persons from Enforced Disappearance*

On 23 June 2006 the Human Rights Council passed a resolution recommending to the General Assembly that it adopt the International Convention for the Protection of All Persons from Enforced Disappearance.

According to a United Nations press release, the representative for Indonesia, Wiwiek Setyawati, said it was essential that the Council put the highest priority on non-derogable rights. Extra-judicial killings and enforced disappearances should be put to an end. Nobody should be subjected to enforced disappearance, and there should be zero tolerance for the act. The Convention would be an important standard-setting document which provided for protection from enforced disappearance.⁷³

The Convention contains a number of Articles which clearly support the proposition that perpetrators of enforced disappearances should be prosecuted (see section I:C above). In light of Indonesia's support of the Convention, it seems that Indonesia has committed itself in the international legal arena, at least as regards the offence of enforced disappearance, to prosecution of perpetrators of the offence.

2. *Secretary-General's Report on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*

In his comments on the Secretary-General's report discussed in section II:B:2 above, Rezlan Ishar Jenie, Indonesia's Ambassador to the United Nations, stated that

The international community and the United Nations need to redouble their efforts to assist member states in *fulfilling the objectives of justice and the rule of law*... For example, the United Nations can play a more active role in enhancing general awareness and understanding of internationally agreed principles that are essential to the realization of justice and the rule of law... any proposals for strengthening United Nations support for transitional justice and the rule of law in any society must be with a view to *promoting and fulfilling the principles enshrined in the United Nations Charter and international law*... Another

⁷³ Press Release, Human Rights Council, Council Concludes Discussion On Report Of Working Group On Draft Convention Against Enforced Disappearance (June 27, 2006).

important process, as recognized in the report, is the use of Truth and Reconciliation Commissions, an instrument that has been helpful to the recovery process in some post-conflict societies. Although it is *not a substitute for the judicial process*, we cannot undervalue its contributions.⁷⁴

III THE TRUTH AND RECONCILIATION COMMISSION LEGISLATION IS IN CONFLICT WITH DECISIONS OF OTHER NATIONAL COURTS

The highest courts of Chile, Argentina, Peru and Colombia have all handed down decisions invalidating provisions which provide for impunity on the basis that such provisions conflict with international obligations as established by international treaties and as interpreted by authoritative international courts and other treaty bodies. Consequently, in all of these countries, the highest courts have given domestic effect to international law.

It is also worth noting that, with the exception of Colombia, all of these countries established truth commissions as one of the mechanisms for dealing with human rights abuses. Nevertheless, the courts treated the issue of amnesty separately from the obligation to discover and disclose the truth. This approach accords with the abovementioned statement of Rezlan Ishar Jenie, Indonesia's Ambassador to the United Nations, that "[a]nother important process, as recognized in the report, is the use of Truth and Reconciliation Commissions, an instrument that has been helpful to the recovery process in some post-conflict societies. Although it is *not a substitute for the judicial process*, we cannot undervalue its contributions."⁷⁵ It is submitted that the Indonesian Constitutional Court should follow the approach of other national courts and the approach intimated by Indonesia's Ambassador to the United Nations and should insist that the Truth and Reconciliation Commission is important but is not a substitute for prosecutions.

A *Supreme Court of Chile*

⁷⁴ Rezlan Ishar Jenie, Indonesia's Ambassador to the United Nations, Statement before the Security Council on the agenda item "Justice and the Rule of Law: The United Nations' Role (6 October 2004).

⁷⁵ Rezlan Ishar Jenie, Indonesia's Ambassador to the United Nations, Statement before the Security Council on the agenda item "Justice and the Rule of Law: The United Nations' Role (6 October 2004).

In a recent decision, the Supreme Court of Chile found that, because enforced disappearance is an ongoing crime until proof of the direct victim's death has been established, a 1978 amnesty decree covering human rights crimes committed between 1973 and 1978 did not apply in the *Miguel Angel Sandoval Rodríguez* case.⁷⁶ In this case, the Supreme Court upheld the conviction and sentence of a number of people in a case of enforced disappearance that occurred in 1975. This decision is the first Supreme Court ruling on the non-applicability of the Chilean amnesty law to a conviction and sentence. While in the past the Supreme Court made clear that amnesty is no bar to investigation, it has now also maintained that amnesty is no bar to the application of criminal sanctions.

Further, as recently as 17 July 2006 Chile's Supreme Court upheld a ruling that stripped Gen. Augusto Pinochet of his immunity, paving the way for him to be tried for the murders of two body guards of Salvador Allende. The ruling affirms a lower court decision to remove Pinochet's immunity as a former President and allows the judge handling the case to try him on homicide charges.⁷⁷

B *Supreme Court of Argentina*

On 14 June 2005, in the *Simón* decision,⁷⁸ the Argentine Supreme Court declared unconstitutional and void two laws whose object was to render the majority of prosecutions for "Dirty War" crimes (crimes committed between 1976 and 1983) impossible. The Supreme Court confirmed the role of international human rights principles in dealing with egregious human rights abuses committed on national soil. Essentially, the Supreme Court confirmed the precedence of Argentina's treaty obligations above ordinary statutes, resulting in a ruling prohibiting the application of national legal provisions which prevent perpetrators of egregious human rights abuses from being prosecuted. In practice, the decision opens the way to prosecution of

⁷⁶ *Juan Contreras Sepúlveda y otros (crimen) casacion fondo y forma*. Corte Suprema, 517/2004. Resolución 22267.

⁷⁷ Eduardo Gallardo, *Chilean Court Pinochet's Loss of Immunity*, Associated Press, July 17, 2006.

⁷⁸ *Simón, Julio Héctor y otros s/privación ilegítima de la libertad*. Supreme Court, causa No. 17.768 (14 June 2005) S.1767.XXXVIII.

perpetrators of serious human rights abuses after almost two decades of slow progress. As a matter of fact, Mr Simon, a notorious torturer and killer from the Federal Police, is currently on trial and several other well-known cases are approaching trial stage.

C *Constitutional Court of Peru*

The Peruvian Constitutional Court has established the State's duty to investigate and sanction human rights violations and the inadmissibility of using procedural mechanisms to impede investigation and punishment of serious violations. In the ruling of 18 March 2004 on the *Villegas Namuche case*⁷⁹, the Court declared that:

it is the State's responsibility to try those accused of crimes against humanity, and, if necessary, to adopt restrictive rules to avoid, for example, exemption from prosecution for serious human rights crimes. Applying these rules allows the legal system to work effectively and is justified by the overriding interest in combating impunity. The goal, obviously, is to prevent certain legal mechanisms from being used with the repugnant intent of achieving impunity. This must always be prevented and avoided, since it encourages criminals to repeat offenses, acts as a breeding ground for revenge and erodes the fundamental values of democratic society: truth and justice.

It should be noted that a number of lower courts have also handed down decisions dismissing challenges to prosecution on the grounds of amnesty.⁸⁰

D *Constitutional Court of Colombia*

On 18 May 2006 the Colombian Constitutional Court handed down a decision confirming the requirement that perpetrators of human rights abuses be prosecuted and that victims of human rights abuses be awarded reparations.⁸¹ The Court struck down several provisions of Law 975/2005 which authorized significant sentence reduction for certain demobilized combatants and did not condition the granting of the sentence reduction benefit on effective contribution to the reparation of victims.

⁷⁹ File No. 2488-2002-HC/TC.

⁸⁰ For example, the *Quinto Juzgado Penal Especial*, 5th Special Criminal Court, in its resolution of 2 July 2003, declared motions for dismissal due to amnesty and double jeopardy groundless on the basis that they contravene the American Convention on Human Rights.

⁸¹ Case No. C-370/2006, (D-6032) Regarding the Law of Justice and Peace, 18 May 2006.

The Court referred to a number of prior decisions to bolster its remarks. For example, when discussing the right to judicial recourse the Court referred to Case C-228 of 2002 which accepted the international community's rejection of internal mechanisms that contribute to impunity.⁸² The Court also referred to Case C-578 of 2002 which cited international law as requiring that States attempting to achieve reconciliation must provide effective judicial protection to victims of criminal conduct.⁸³ In addition, the Court confirmed that "the Court has accepted that multiple international instruments consecrate the right of every person to effective judicial recourse, and that the international community rejects internal mechanisms that contribute to impunity and the concealment of truth in relation to what happened."⁸⁴ When considering the right to reparations the Court referred to Case C-004 of 2003 which concluded that the rights of victims include the right to economic reparation, the right to truth and the right to have justice done.⁸⁵ Consequently, the Court struck down the limitation to economic compensation which had been introduced as a result of Law 975/2005. In considering the right to justice the Court maintained that the State has a duty to seriously investigate punishable acts.⁸⁶

IV CONCLUSION

As a result of the foregoing discussion, the ICTJ hereby submits that the provisions of the Indonesian TRC law which allow for amnesty and condition the awarding of reparations upon the granting of amnesty contravene both treaty and non-treaty sources of international law. Despite the fact that Indonesia has clearly committed itself to abide by both the ICCPR and CAT, the TRC law clearly breaches both of these treaties. In addition, the TRC law violates both the Torture Declaration and the Disappearances Declaration, conflicts with official statements made in a number of authoritative United Nations reports, flouts both the Impunity Principles and the Right to a Remedy

⁸² Case No. C-370/2006, (D-6032) Regarding the Law of Justice and Peace, 18 May 2006 para. 4.9.2.

⁸³ Case No. C-370/2006, (D-6032) Regarding the Law of Justice and Peace, 18 May 2006 para. 4.9.6.

⁸⁴ Case No. C-370/2006, (D-6032) Regarding the Law of Justice and Peace, 18 May 2006 para. 4.9.11.2 (*translated from the Spanish*).

⁸⁵ Case No. C-370/2006, (D-6032) Regarding the Law of Justice and Peace, 18 May 2006 para. 4.9.8.

⁸⁶ Case No. C-370/2006, (D-6032) Regarding the Law of Justice and Peace, 18 May 2006 para. 4.9.8.

Principles, and is at variance with statements made by Indonesia at the United Nations. Further, the Constitutional Court of Indonesia should take note of the reality that a number of national courts have invoked international law to overturn local amnesty laws.

**WRITTEN TESTIMONY OF PROFESSOR DOUGLASS CASSEL
BEFORE THE CONSTITUTIONAL COURT OF INDONESIA, JULY 6, 2006**

Once again I thank the Court for the honor of being permitted to testify as an expert in the matter of the constitutionality of The Law of the Republic of Indonesia Number 27 Year 2004 on the Truth and Reconciliation Commission (hereinafter “Truth Commission Law”)

This written submission to the Honorable Constitutional Court of Indonesia follows the outline of my oral testimony power point, presented to the Court during the public hearing on July 4, 2006. This written submission adds citations to authorities and elaborates on some points, including the important May 18, 2006 judgment of the Constitutional Court of Colombia, which annulled portions of that nation’s Justice and Peace Law. (We will endeavor to provide this Court with an English translation of the operative portions and reasoning of that Judgment as soon as possible.)

SUMMARY:

The Truth Commission Law fails to meet Indonesia’s duties as a State, and fails to respect the rights of victims, families and society under international human rights law to truth, reparations and justice. In particular, the law fails to meet minimum international standards in regard to:

- investigating and disclosing the truth about cases of genocide and crimes against humanity committed in Indonesia before the year 2000,
- providing reparations to victims and families, and
- prosecuting and appropriately punishing perpetrators.

SCOPE OF MY TESTIMONY:

- My testimony is limited to whether the Truth Commission Law is consistent with international human rights and humanitarian law. The ways in which international law may be used to interpret Indonesia’s Constitution are matters within the expertise of Indonesian judges and lawyers. However, I understand that in the General Elections case, this Court referred to the Universal Declaration of Human Rights and to the International Covenant on Civil and Political Rights.
- My testimony focuses on international law concerning gross violations of human rights and serious violations of international humanitarian law, and in particular, genocide and crimes against humanity, because I understand that these are the crimes which are subject to the Truth Commission Law.

- As set forth in the Rome Statute of the International Criminal Court, genocide and crimes against humanity are among the “most serious crimes of international concern.”¹
- As confirmed by international case law,² genocide and crimes against humanity are violations of *jus cogens* norms – “overriding norms” that prevail over any other norms.³ These norms also entail *erga omnes* duties of States, that is, duties owed not merely to the victims or to the citizens of the State, but to all other States and the international community as well.⁴

MAIN SOURCES OF APPLICABLE INTERNATIONAL LAW:

- As a member of the United Nations, Indonesia has obligations under the UN Charter, articles 55 and 56, to promote respect for human rights and to cooperate with the UN in promoting human rights.⁵ The scope and content of these obligations have been elaborated by the subsequent practice of UN member States under the treaty. Under the international law of treaties, this subsequent State practice is relevant to interpreting the meaning of the Charter.⁶ Subsequent practice under the UN Charter includes, among other instruments, the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of*

¹ Rome Statute of the International Criminal Court, adopted 17 July 1998, entered into force, 1 July 2002, art. 1.

² See, e.g., International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, *Prosecutor v. Furundzija*, Case IT-95-17/1, Judgment, 10 December 1998, par. 153 (norm against torture is *jus cogens* “[b]ecause of the importance of the values it protects”).

³ Vienna Convention on the Law of Treaties, 23 May 1969, entered into force, 27 January 1980, UN Treaty Series, Vol. 1155, p. 331 (not joined by Indonesia, but widely recognized as customary international law). Article 53 of the Convention defines a *jus cogens* norm as a “peremptory norm of general international law,” i.e., “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

⁴ UN Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004 (hereinafter “General Comment 31”), par. 2 (“the ‘rules concerning the basic rights of the human person’ are *erga omnes* obligations”). All UN human rights documents cited in this written testimony are accessible on the web page of the UN High Commissioner for Human Rights, www.ohchr.org.

⁵ UN Charter, 26 June 1945, entered into force, 24 October 1945. Article 55 (c) provides that the UN “shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.” By article 56 all member States “pledge themselves to take joint and separate action in co-operation” with the UN to achieve the purposes set forth in article 55.

⁶ Vienna Convention on the Law of Treaties, note 3 above, art. 31.3 (“There shall be taken into account, together with the context: ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;”)

International Humanitarian Law, which were adopted without dissent by the UN General Assembly on 16 December 2005.⁷

- Indonesia is not only a UN member State, but as a member of the new UN Human Rights Council now has added responsibilities to meet the “highest standards” of human rights.⁸ In 2005 the Council’s predecessor body, the UN Human Rights Commission, adopted a Resolution on Impunity.⁹ That Resolution recognized “that amnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes.”¹⁰ The Resolution also took note “with appreciation” of the *Updated set of principles for the protection and promotion of human rights through action to combat impunity*,¹¹ as a “guideline to assist States in developing effective measures for combating impunity.”¹²
- Most articles of the Universal Declaration of Human Rights¹³ -- previously cited by this Court in the General Elections case as relevant to interpreting the Constitution of Indonesia -- are widely considered to be customary international law, binding all States. Among the provisions which are customary law is article 8, which provides, “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.”
- The International Covenant on Civil and Political Rights¹⁴ – also relied on by this Court in the General Elections case -- was acceded to by Indonesia effective February 2006. The Covenant binds not merely the government, but all branches of the State, including the executive, legislative and judicial branches.¹⁵ Article 2 obliges States Parties to:

. . . respect and to ensure respect for the rights of all persons under the Covenant,

⁷ UN General Assembly Resolution 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Annex, adopted 16 December 2005, UN Doc. A/RES/60/147, 21 March 2006 (hereinafter “Basic Principles”).

⁸ Members of the Human Rights Council “shall uphold the highest standards in the promotion and protection of human rights . . . and be reviewed . . . during their term of membership . . .” UN General Assembly Res. 60/251, 15 March 2006, UN Doc. A/RES/60/251, 3 April 2006, par. 9.

⁹ UN Human Rights Commission, Resolution 2005/81, *Impunity*, 21 April 2005.

¹⁰ Resolution 2005/81, par. 3.

¹¹ UN Commission on Human Rights, *Report of the independent expert to update the Set of principles to combat impunity*, Addendum, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, (hereinafter “Impunity Principles”).

¹² UN Human Rights Commission, Resolution 2005/81, *Impunity*, 21 April 2005, par. 20.

¹³ UN General Assembly Res. 217 A (III), 10 December 1948.

¹⁴ UN General Assembly Res. 2200A (XXI), 16 December 1966, entered into force, 23 March 1976, UN Treat Series, Vol. 999, p. 171.

¹⁵ General Comment 31, par. 4.

- . implement Covenant rights through laws and other measures, and
 - . provide an effective remedy to anyone whose rights under the Covenant are violated.
- The Covenant is authoritatively interpreted by the UN Human Rights Committee, a body of 18 experts established by the Covenant to monitor and oversee its implementation by States. The Committee issues General Comments interpreting the Covenant to assist States in reporting to the Committee on their compliance. General Comment 31 interprets Covenant article 2. It is entitled, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*.¹⁶
 - Other UN treaties to which Indonesia is a State Party, notably the conventions on torture,¹⁷ racial discrimination¹⁸ and rights of children,¹⁹ contain provisions requiring reparations for victims of violations.
 - Other customary international law also binds Indonesia. Especially important to the Truth Commission Law are the following:
 - . The UN Convention on Genocide requires States either to prosecute violators or to turn them over to an international criminal court.²⁰ Because

¹⁶ General Comment 31, note 4 above.

¹⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly Res. 39/46, 10 December 1984, entered into force, 26 June 1987, UN Treaty Series, Vol. 1465, p. 85, ratified by Indonesia, 28 October 1998, art. 14.1: “1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.”

¹⁸ International Convention on the Elimination of all Forms of Racial Discrimination, UN General Assembly Res. 2106 (XX), 21 December 1965, entered into force, 4 January 1969, UN Treaty Series, Vol. 660, p. 195, acceded to by Indonesia, 25 June 1999, Art. 6: “States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”

¹⁹ Convention on the Rights of the Child, UN General Assembly Res. 44/25, 20 November 1989, entered into force, 2 September 1990, UN Treaty Series, vol. 1577, p. 3, ratified by Indonesia, 5 September 1990, art. 39: “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”

²⁰ Convention on the Prevention and Punishment of the Crime of Genocide, UN General Assembly Res. 260 A (III), 9 December 1948, entered into force, 12 January 1951, UN Treaty Series, Vol. 78, p. 277, not joined by Indonesia, art. V: “The Contracting Parties undertake to enact, in accordance with their respective

the Convention is customary international law, it binds Indonesia even though Indonesia has not formally joined the treaty.

. The general principle of law, which requires States to make reparation for violations of rights protected by international law. This duty was recognized as long ago as 1927 in the *Chorzow Factory* ruling by the Permanent Court of International Justice.²¹

BEARERS OF DUTIES AND RIGHTS:

When genocide and crimes against humanity have been committed:

States have duties:

- To conduct thorough and effective investigations and to disclose the truth to victims and to society about gross violations of human rights, including genocide and crimes against humanity,²²
- To provide effective remedies to victims, including reparation in the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition,²³ and
- To prosecute and appropriately punish perpetrators and not to grant amnesties to officials or agents of the State unless they have been prosecuted before a court of law.²⁴

Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.” Article VI further provides, “Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

²¹ *The Factory at Chorzow* (jurisdiction), [1927], PCIJ 2 (26 July 1927) at 29.

²² General Comment 31, par. 3; Impunity Principles 1, 2, 4 and 19.

²³ General Comment. 31, Par. 16; Impunity Principles 1; Basic Principles I.2 (c), 11, 15 and 18; Impunity Principles 1. Some authorities – Basic Principles 18 and General Comment 31 par. 16 – treat guarantees of non-repetition as part of reparations. Other authorities, among them the Impunity Principles 34 and 35, treat them as independent obligations of States. In any case, regardless of whether they are treated as a form of reparations or instead as independent obligations, States are required to undertake guarantees of non-repetition.

²⁴ Basic Principles II.3 (b), 4, IX.22 (f); General Comment 31, par. 18; Impunity Principles 1, 19, 22 and 24.

Victims and families have rights:

- To learn the truth about what was done to them and their loved ones, including “full and public disclosure of the truth,”²⁵
- To accessible and effective remedies for violations,²⁶ and
- To justice through prosecution and punishment of perpetrators (although this is primarily an obligation of States, independent of any right of the victims).²⁷

Society has rights:

- To learn the full truth of past violations, why they were committed and by whom, so as to avoid their repetition in the future,²⁸ and
- To effective measures designed to guarantee against repetition of these crimes in the future, including by prosecution and punishment of perpetrators.²⁹

INVESTIGATION AND PUBLIC DISCLOSURE OF THE TRUTH

The State’s duty is two-fold:

- To disclose to victims and families the truth about crimes committed against them and their loved ones, including the causes and conditions that led to the gross violations of human rights.³⁰
- To disclose to society the broader truth about gross violations of human rights, their causes and the circumstances in which they took place, so as to avoid their repetition.³¹

Sources of this obligation (among others):

- State’s duty to “ensure” rights under Covenant article 2.1,³²

²⁵ Basic Principles IX.22 (b); Impunity Principles 4.

²⁶ Universal Declaration of Human Rights, art. 8; Civil and Political Covenant, art. 2 (c); Basic Principles VIII.12; Impunity Principles 31 and 32; General Comment 31, par. 15.

²⁷ Basic Principles IX.22 (f) (victim right to “judicial and administrative sanctions against persons responsible for violations”); Impunity Principles 19 (“Although the decision to prosecute lies primarily within the competence of a State, victims, their families and heirs should be able to institute proceedings, . . . , particularly as *parties civiles* or as persons conducting private prosecutions in States whose law or criminal procedure recognizes these procedures. States should guarantee broad legal standing in the judicial process to any wronged party . . .”)

²⁸ Impunity Principles 2.

²⁹ Impunity Principles 35.

³⁰ Impunity Principles 4; Basic Principles IX.22 (b). X.24.

³¹ Impunity Principles 2.

- State's duty to take measures to implement rights under Covenant article 2.2,
- State's duty to provide effective remedies to victims under Covenant article 2.3.³³

Investigations must be:

- Thorough and effective,³⁴ not only in investigating direct perpetrators, but also those in higher positions who may have ordered or been complicit in the crimes, or known about them and failed to take reasonable actions to prevent or punish them,³⁵ and
- Undertaken by the State on its own initiative, and not dependent on victim initiatives, whenever the State becomes aware of information suggesting possible commission of gross violations of human rights.
- The duty to investigate is a continuing obligation, even for violations long past. Thus Indonesia has a duty under the Covenant to investigate past cases of genocide and crimes against humanity, even when they took place before Indonesia became a party to the Covenant.³⁶
- The failure to conduct an investigation is by itself an independent human rights violation, making the State responsible for the original violation, even if it otherwise might not be.³⁷

³² UN Human Rights Committee, General Comment 20, 10 March 1992, par. 15: "... [S]ome States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible."

³³ General Comment 31, par. 15.

³⁴ General Comment 31, par. 15; Basic Principles II.3 (b); Impunity Principles 19.

³⁵ See Impunity Principles 27(b).

³⁶ In *Acuna Inostroza v. Chile*, Communication 717/1996, Views of 23 July 1999 (and in similar cases against Chile), the Human Rights Committee found inadmissible a complaint for gross violations of human rights in the 1970's, long before Chile, in 1992, ratified the Covenant and accepted the competence of the Human Rights Committee to hear individual complaints. However, in accepting the Committee's competence, Chile attached a written understanding accepting the Committee's competence only for violations taking place after 1990. Views, par. 6.2. In contrast, Indonesia attached no temporal limitation when it acceded to the Covenant in 2006. Thus Indonesia is subject to the ordinary rule of international law, that States remain responsible for continuing violations of human rights. E.g., Inter-American Court of Human Rights, *Blake v Guatemala*, Preliminary Objections, Judgment of July 2, 1996, pars. 39-40.

³⁷ General Comment 13, pars. 8, 18.

Indonesia’s Truth Commission Law fails to meet these standards because:

- The 90 day time limit for investigation is far too short for genocide and crimes against humanity, all the more so for crimes committed in a large country over a period of decades.³⁸
- The law’s definition of truth, as the truth of an “incident,” does not address the broader societal truth of the causes and patterns of violations, their circumstances and context, and their lessons for non-repetition of genocide and crimes against humanity.³⁹
- There will be little incentive for perpetrators to come forward to tell the truth and to apply for amnesty, since there is little real threat of prosecution if they do not.
- There is no clear and express requirement that perpetrators who apply for amnesty fully disclose all they know.⁴⁰
- Victims may feel pressure to “forgive,” even if the truth is not fully told, so that the perpetrator can get amnesty and the victim can then get reparation. Under the law, if the perpetrator does not get amnesty, the victim cannot get reparation.⁴¹

REPARATIONS FOR VICTIMS AND FAMILIES:

Victims have a right to an “effective remedy” (see above).

Persons who “claim” to be victims have the right to access to justice, so that a fair judicial or administrative process can determine whether they are, in fact, victims and therefore entitled to reparations.⁴²

The main sources of the right to an effective remedy are (among others):

- Universal Declaration, article 8,
- Covenant article 2.3, and
- The UN Basic Principles.

An effective remedy includes equal and effective access to justice, access to relevant information concerning violations and reparation mechanisms, and reparations.⁴³

³⁸ Truth Commission Law, art. 24.

³⁹ Truth Commission Law, art. 1.1.

⁴⁰ See Truth Commission Law, arts. 23, 28.2

⁴¹ See Truth Commission Law, arts. 27, 28 and 29.

⁴² Basic Principles II.3 (c).

⁴³ Basic Principles VII.11.

Reparations, in turn, consist of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁴⁴

Indonesia's Truth Commission Law fails to meet these standards because:

- Compensation and rehabilitation may be awarded only when a request for amnesty is granted.⁴⁵
- Compensation and rehabilitation thus may not be awarded in many situations, for example: when perpetrators are not identified, or fail to apply for amnesty, or are not forgiven by victims, or are not deemed worthy by the President or the House of Representatives.⁴⁶
- At least in the unofficial English translation, there is a lack of clarity in the Truth Commission Law as to when restitution – the preferred method of reparation where possible under international law – may be awarded.⁴⁷
- Compensation, restitution and rehabilitation may be delayed for up to three years, even though there is no significant cost or justification for some measures.⁴⁸
- No provision appears to be made for measures of satisfaction, such as public acknowledgments of the facts, acceptance of State responsibility, State apologies, and memorials to victims.⁴⁹
- No provision is made for guarantees of non-repetition, such as measures to protect human rights defenders.⁵⁰

CRIMINAL PROSECUTION AND PUNISHMENT

International law permits and even encourages amnesties for many crimes, but not for genocide or crimes against humanity.

Main Applicable Sources of Prohibition:

- The duty to ensure rights under Covenant article 2.1, as authoritatively interpreted by the Human Rights Committee in General Comment 31, prohibits amnesties for public officials or State agents who commit gross violations of human rights.⁵¹

⁴⁴ Basic Principles IX.18; see also note 23 above.

⁴⁵ Truth Commission Law art. 27.

⁴⁶ Truth Commission Law arts. 25-28.

⁴⁷ Truth Commission Law art. 27.

⁴⁸ Truth Commission Law art. 21.1.

⁴⁹ See Truth Commission Law arts. 1.6, 1.7 and 1.8.

⁵⁰ See Truth Commission Law arts. 1.6, 1.7 and 1.8; compare Basic Principles IX.23.

⁵¹ General Comment 31, par. 18.

- UN practice, as confirmed by the 2000 report of the Secretary-General on the Sierra Leone Special Court,⁵² and reaffirmed by the 2004 report of the Secretary-General on best practices for transitional justice,⁵³ does not accept amnesties for genocide or crimes against humanity, among other gross violations of human rights.
- The State's duty to prosecute or to extradite under the Torture Convention is inconsistent with amnesties for perpetrators of torture.⁵⁴
- The Basic Principles and Guidelines on the Right to a Remedy and Reparation require States to prosecute and punish persons responsible for gross violations of human rights.⁵⁵
- The 2005 UN Human Rights Commission Resolution on Impunity states that "amnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes."⁵⁶
- The Updated set of principles to combat impunity prohibit amnesties for perpetrators of gross violations of human rights, at least until they have been prosecuted before a court.⁵⁷ The principles further provide that any amnesty shall not prejudice the victims' right to reparation, or the right to know the truth of what happened.⁵⁸
- The *jus cogens* nature of the norms against genocide and crimes against humanity is also inconsistent with amnesties for these crimes.⁵⁹

⁵² *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, S/2000/915, 4 October 2000, par. 22: "While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law." See also pars. 23-24.

⁵³ *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 23 August 2004, par. 10: "United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights".

⁵⁴ Convention Against Torture, note 17 above, art. 7.1.

⁵⁵ Basic Principles III.4.

⁵⁶ UN Human Rights Commission, Resolution 2005/81, *Impunity*, 21 April 2005, par. 3.

⁵⁷ Impunity Principles 24(a).

⁵⁸ Impunity Principles 24 (b).

⁵⁹ See International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, *Prosecutor v. Furundzija*, Case IT-95-17/1, Judgment, 10 December 1998, par. 155: "The fact that torture is prohibited by a peremptory norm of international law has other effects . . . It 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, [footnote omitted] and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. [footnote omitted] If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, . . . would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had locus standi before a competent

Indonesia's Truth Commission Law fails to meet these standards because it allows amnesty for persons who commit genocide and crimes against humanity.⁶⁰

AN ALTERNATIVE TO AMNESTIES: REDUCED PUNISHMENT, COMBINED WITH TRUTH, REPARATIONS AND PROPORTIONAL PUNISHMENT

As an alternative to amnesty, States may allow reduced punishments in return for confessions by perpetrators. This alternative has been adopted by the International Criminal Tribunals for the former Yugoslavia and for Rwanda. Those Tribunals grant lighter punishments to defendants who plead guilty, confess fully to their crimes and show remorse.⁶¹ The option of a reduced punishment in return for truth telling is also envisioned by the UN's Updated set of principles to combat impunity.⁶²

However, the punishment cannot be reduced too much. It must remain meaningful and proportionate to the gravity of the crime. Moreover, there must still be full disclosure of the truth, sufficient time for thorough investigation, and adequate reparations for victims.

These are the lessons of the recent judgment of the Constitutional Court of Colombia, issued May 18, 2006, which struck down key portions of Colombia's Justice and Peace Law. That Law allowed reduced sentences for members of illegal armed groups who confess to certain serious crimes. Six of the Court's nine Justices invalidated certain provisions of the law; three other Justices deemed the entire law unconstitutional. Not one Justice voted to uphold the law.

international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act."

See also Special Court for Sierra Leone, Appeals Chamber, *Prosecutor v. Kallon*, Case No. SCSL-2004-15-AR72(E), *Decision on Challenge to Jurisdiction: Lome Accord Amnesty*, 13 March 2004. The Court ruled that a national amnesty for serious international crimes cannot bind an international court, pars. 72, 88; that where treaty obligations (as in the Convention Against Torture) require a State either to prosecute or to extradite an offender, an amnesty for such crimes "is in breach of an obligation of a State towards the international community as a whole," par. 73; and that a norm that governments cannot grant amnesties for serious crimes under international law before their own national courts "is developing under international law," par. 82.

It is noteworthy that the Court reached all these conclusions, even before the Human Rights Committee adopted General Comment 31 later in 2004, the UN Human Rights Commission adopted its 2005 Resolution on Impunity, the Human Rights Commission in 2005 took note with appreciation of the Updated Set of principles on impunity, and the General Assembly in 2005 adopted the Basic Principles on Reparations.

⁶⁰ Truth Commission Law, arts. 24-29.

⁶¹ E.g., International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Plavsic*, Case IT-00-39&40/1, Trial Chamber, Sentencing Judgment, 27 February 2003, pars. 66-81 (accessible at www.un.org/icty).

⁶² Impunity Principles 28.

Unfortunately, the Judgment of the Colombian Court is not, so far as I can find, currently available in English. I am in consultation with the International Center for Transitional Justice and Paul van Zyl, in an effort to supply this Honorable Court with English translations of at least the operative portions and the reasoning of the Colombian Judgment as soon as possible.

In the meantime, the following are some key aspects of the Colombian Court's Judgment:

- **Imprisonment**: The Colombian law would have allowed members of illegal armed groups to confess to crimes against humanity, in return for reduced punishments of five to eight years imprisonment. Up to 1 ½ years spent in demobilization camps could have been counted as part of the period of imprisonment. In other words, the minimum period of imprisonment for massacres and other heinous crimes against civilians might have been as little as 3 ½ years (the five year minimum, minus 1 ½ years in demobilization camps). The Constitutional Court ruled that the demobilization time could not be counted toward the minimum prison time, so that the minimum imprisonment will truly be five years.
- **Truth**: The Court further ruled that the reduction from normal penalties to 5-8 years imprisonment for serious crimes must be conditional on all crimes having been disclosed. If it were later discovered that the perpetrator had not confessed to all his crimes, ruled the Court, additional imprisonment could be imposed, based on the ordinary punishments for the crimes not originally confessed.
- **Investigations**: The law allowed only 60 days for prosecutors to investigate the confession made by the perpetrator, to confirm whether it was true. The Court invalidated this as too short a time to confirm the truth.
- **Reparations**: The law required the perpetrator to pay reparations from any property he had obtained illegally as a result of his crimes. The Court required that the individual perpetrator pay reparations from all his property, not merely his illegally acquired property. In addition, the Court required illegal groups to be collectively liable to pay reparations, and not merely the individual member who had confessed. Only if payments by the perpetrators were insufficient, would the State pay reparations.
- **Victim Participation**: The Court required that extensive victim participation be permitted in the criminal proceedings against the perpetrator.

Even before this ruling, the Colombian law provided more rights to victims, and came closer to meeting the State's obligations under international law to punish and to provide reparations, than does Indonesia's Truth Commission Law. However, as the Colombian Constitutional Court ruled, the Colombian law did not meet Colombian constitutional standards, which take into account international standards.

Finally, it should be noted that whereas the Colombian law relates to illegal armed groups, Indonesia's Truth Commission Law also covers officials and agents of the State. The State's obligations in regard to investigating and punishing its own officials and agents, and paying reparations to their victims, are, if anything, greater than for illegal armed groups.

Respectfully submitted,

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July 6, 2006

Testimony of Naomi Roht-Arriaza, Professor of Law, University of California, Hastings College of the Law, before the Constitutional Court..

I would like to thank the Court for receiving my oral and written testimony as an expert in the matter of the constitutionality of the Law Number 27 of 2004 on the Truth and Reconciliation Commission (TRC Law). This written testimony largely follows, and amplifies somewhat, my oral presentation.

I understand that Indonesian law allows this court to invoke and have regard to international law, including ratified treaties, unratified treaties, declarations and other international human rights principles. It is for this reason that I wish to testify regarding the compatibility of the TRC legislation with international law regarding the right to a remedy and to reparations. In particular, Art. 27 of the law, which makes a victims' claim to prompt reparation dependent on amnesty being granted to a perpetrator, violates international law standards, including treaties ratified by Indonesia. In addition, by eliminating the victims' right to go to the Human Rights Court in the event the case is heard by the TRC, Art 44 violates the victims' right to access to justice and to redress. It is completely contrary as well to recent international practice of Truth Commissions and reparations programs, which separate the state's obligation to provide reparations from the question of amnesty, and in any case do not allow amnesty for crimes against humanity or genocide. In this sense, then, Art. 1(9) of the legislation is also problematic, in that it allows amnesty for crimes which, under international law, cannot be amnestied.

My comments will focus on the purpose of truth commissions, and the interrelated obligations of right to truth, to justice and to reparations. I will then turn to the definition of "victim" in international law, and why that definition cannot be contingent on the provisions of national law or on identifying and granting amnesty to perpetrators, and must be an independent determination. I will turn last to the practice of recent truth commissions, especially regarding reparations and amnesty.

1. The purpose of truth commissions

Many countries have created truth commissions after periods of dictatorship, massive repression or conflict. These commissions aim, first, to create an authoritative record of the facts. Without shared knowledge of the past, and official acknowledgement of that past, a solid democracy cannot be constructed for the future. Truth commissions are also important to allow victims to tell their stories and to be heard. Many times violations have been unacknowledged, and victims have suffered isolation and stigma, which needs to be broken to reincorporate them into the society. Truth commissions also provide a report, and recommendations for how to avoid a repetition of the violations that occurred. Some truth commissions have the goal of fostering national reconciliation. The idea is that knowledge and acknowledgement of what was done, by who and to whom are necessary in order to have a chance at reconciliation.

2. Independent but interrelated obligations

International law and practice recognize three separate, independent but interrelated obligations of states, and corresponding rights of victims: the right to truth, justice and reparation. Fulfillment of one does not mean the others can be ignored, nor can one be tied to and dependent upon others. These interrelated obligations arise from longstanding international law as well as specific treaty obligations. The state's obligation to repair harms is a cardinal principle of international law.¹ The right to a remedy is enshrined in the Universal Declaration of Human Rights and in the major human rights treaties.² The right to a remedy is a broad concept, including more than monetary compensation. That it includes the rights to truth and justice as well as reparations is borne out by the jurisprudence of international bodies relating to these treaty obligations.

Thus, in *Bautista de Arellana v. Colombia*, the Human Rights Committee, interpreting the International Covenant on Civil and Political Rights (which Indonesia has ratified) found that even though administrative measures were taken against public officials for hrs violations, and compensation paid to the family, this was not enough because the Covenant requires punishment of gross human rights violations. The Committee wrote:

8.2 In its submission of 14 July 1995, the State party indicates that Resolution 13 of 5 July 1995 pronounced disciplinary sanctions against Messrs. Velandia Hurtado and Ortega Araque, and that the judgment of the Administrative Tribunal of Cundinamarca of 22 June 1995 granted the claim for compensation filed by the family of Nydia Bautista. The State party equally reiterates its desire to guarantee fully the exercise of human rights and fundamental freedoms. These observations would appear to indicate that, in the State party's opinion, the above-mentioned decisions constitute an effective remedy for the family of Nydia Bautista. The Committee does not share this view, because purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life. . . . 8.6 The Committee nevertheless considers that the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies a fortiori in cases in which the perpetrators of such violations have been identified. Communication No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993 (1995).

Other international human rights instruments have similar provisions to right to a remedy. The Inter-American Commission on Human Rights has long interpreted the

¹ International Court of Permanent Justice, Chorzow Factory, 1928, Series A No. 17, judgment N° 13.

² Universal Declaration of Human Rights, Article 8; Article 2(3) of the International Covenant on Civil and Political Rights; Article 14 of the Convention Against Torture; Article 13 of the European Convention on Fundamental Rights and Freedoms; Article 25 of the American Convention on Human Rights; Article 7 of the African Charter on Human and Peoples' Rights; International Convention on the Elimination of Racial Discrimination, Article 6;

"right to a remedy" language in the American Convention to include the obligation to investigate and prosecute, calling repeatedly for investigation of the facts and punishment of the responsible individuals in cases of torture or disappearance. Thus, it found in a case involving Chile that the existence of a truth commission did not obviate the need for investigation and, where warranted, criminal punishment of those responsible. It found that an amnesty that protected the perpetrators of grave human rights violations violated the human rights obligations of the state.

Significantly, the government in that case argued that the amnesty question had to be viewed in the political context of reconciliation, as a necessary law conducive to the public good, since "investigating facts that occurred in the past could rekindle the animosity between persons and groups" and thus obstruct the strengthening of democratic institutions. It also argued that the amnesty had been passed by the prior, military regime, and that it was not responsible for the acts of its predecessors. The Commission held that, first, in accordance with the principle of continuity of the State, international responsibility exists independent of changes in government. Second, it held that, despite the National Commission for Truth and Reconciliation and the work it accomplished in gathering information on human rights violations and disappeared detainees, and despite the Reparations Law³, in accordance with Articles 8 and 25, in conjunction with Articles 1(1) and 2 of the American Convention on Human Rights, so long as the right to justice remains unsatisfied, these measures are not sufficient to guarantee respect for the petitioners' human rights, which means rendering justice in the specific case, punishing those responsible, and providing adequate reparations to the family members. *Carmelo Soria Espinoza v. Chile*, Case 11.725, Report N° 133/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 494 (1999).⁴

The European Court of Human Rights has similarly found that different remedies are independent, that one cannot substitute for another, and that the state has an obligation to punish as well as to provide compensation. In the case of *X and Y v. the Netherlands*, 26 March 1985, Series A, No. 91, Dutch law provided that a criminal complaint must be filed within a given time by the victim; Miss Y was sexually assaulted, but because she was mentally handicapped, her father filed the assault charges, which the

³ Chile's reparations law provides victims' families with: (a) a single lifetime pension in an amount no less than the average family income in Chile; (b) a special procedure for the declaration of presumed death; (c) specialized attention given by the State in the areas of health, education and housing; (d) forgiveness of educational, housing, tax and other debts owed to State agencies; and (e) exemption from compulsory military service for victims' children.

⁴ See also, along similar lines, cases involving Argentina, Uruguay, and El Salvador, all of which involved transitional situations from military to civilian rule. See, e.g., cases 28/92 (Argentina) and 29/92 (Uruguay), Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.98 (1997). The obligation to provide justice, and thus not to allow amnesties that violate the rights of victims to a remedy and to fair hearing, was confirmed by the Inter-American Court of Human Rights in the *Barrios Altos case*, Judgment of March 14, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 75 (2001).

prosecutor then dismissed. The government argued that the ability to institute a civil suit against the perpetrator was a sufficient remedy; the court disagreed. The protection afforded by the civil law was insufficient in the case of wrongdoing of the kind in question, which affected fundamental values: only criminal law provisions could achieve effective deterrence and, indeed, these provisions normally regulated such matters. Therefore, there was no adequate means of obtaining a remedy. Thus, for serious criminal law violations, at least the possibility of prosecution may be a requirement under the European Convention; civil remedies may be insufficient.

There are two conclusions to be reached from this uniform view of the treaty bodies that have considered the subject: first, the rights to truth, to justice and to reparations are independent, although linked obligations, and states have an obligation to provide all three to victims. They cannot be tied together and made dependent one on the other, as that would contradict the idea of independent obligations. Because Article 27 of the TRC Law does this, it violates Indonesia's obligations under international law. In addition, by tying prompt reparations to the identification and actions of the perpetrator, it creates arbitrary distinctions among similarly-situated victims, also in violation of the rights to equal protection enshrined in human rights instruments.⁵ Second, providing one right but not the others is insufficient. Thus, by closing off a victim's right to justice through denying access to the Human Rights Court even where a victim does not accept apology and amnesty, Art. 44 violates these obligations. And finally, by curtailing the right to justice in the case of the most serious crimes, as discussed further below, art. 1(9) is also contrary to international law.

2. Who is a victim?

The most precise definition of victim in international law comes from the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 November 1985. The Declaration states that:

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.
2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also 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 victimization.

⁵ Universal Declaration of Human Rights, Article 7; Article 26 of the International Covenant on Civil and Political Rights; Article 14 of the European Convention on Fundamental Rights and Freedoms; Article 24 of the American Convention on Human Rights; Article 3 of the African Charter on Human and Peoples' Rights; International Convention on the Elimination of Racial Discrimination, Article 5.

3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

The Basic Principles, therefore, make clear that status as a victim cannot depend on the perpetrator being identified, much less applying for amnesty. Nor can victims be discriminated against for any reason, such as whether or not “their” perpetrator has been found.

The determination of who is a victim is entirely a question of international law. The same definition of “victim” is used in the subsequent *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* (Basic Principles and Guidelines), approved by the U.N. Commission on Human Rights in 2005. It is important to note that states agreed, in the preamble to Basic Principles, that they “do not entail new obligations but identify...existing legal obligations.” Thus they constitute a restatement of the international law obligations generally accepted by states. According to the Basic Principles, states must not only provide remedies and reparations, but they must:

- Ensur[e] that their domestic law provides at least the same level of protection for victims as that required by their international obligations (Principle 2(d)); and
- Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; (Principle 3(c)) and
- Provide effective remedies to victims, including reparation, as described below (Principle 3(d)).

The Basic Principles and Guidelines reiterate that: “A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.” (Principle 9).

The right to a remedy accrues at the moment of the violation to everyone who feels himself or herself to be aggrieved. Thus, the Universal Declaration of Human Rights, in Article 8, provides for a right to effective remedy to “everyone” for acts violating fundamental rights. Article 2(3) of the International Covenant on Civil and Political Rights (which Indonesia has ratified) defines the right-holder as “any person whose rights and freedoms...are violated,” and further requires states to provide effective remedies to “any person claiming such a remedy.” In addition to the remedy provisions of Article 2(3), the Covenant requires compensation for unlawful arrests or deprivations of liberty. Article 9(5) states that “[a]ny one who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.” The drafting history of this provision

reveals that a proposed list of exceptions were defeated. In addition, a majority of drafters understood that compensation was to be made by the state, not simply by the individual officials, especially since the latter interpretation would limit compensation to those cases where the offending official could be identified.⁶

Article 14 of the Convention Against Torture (which Indonesia has ratified) requires redress and an enforceable right to fair and adequate compensation to a “victim of an act of torture.” Article 13 of the European Convention on Fundamental Rights and Freedoms, and Article 25 of the American Convention on Human Rights also require effective recourse for “any person claiming such remedy.” In the European system, “[i]njured party is a synonym for 'victim' . . . , and as such may be considered 'the person directly affected by the failure to observe the Convention'" ⁷

The definition of victim cannot depend on national law. The Inter-American Court of Human Rights, in the case of *Bámaca v. Guatemala*, Feb 22, 2002, Ser. C No. 91, held that:

Reparation of the damage caused by infringement of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), and this consists of reestablishing the previous situation. If this is not possible, as in the instant case, the international court must determine a set of measures that, in addition to guaranteeing the rights that were infringed, should repair the consequences caused by the infringements, as well as establish payment of an indemnification as compensation for damage caused. *This obligation to provide reparation is regulated in all its aspects by international law (scope, nature, manner, and determination of beneficiaries) and cannot be modified by the State nor can it refuse to comply by invoking domestic legal provisions. [emphasis added](para. 39)*

This is consistent with Article 27 of the Vienna Convention on the Law of Treaties, which holds that: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” Thus, in General Comment 31 of the Human Rights Committee, interpreting state obligations under the International Covenant on Civil and Political Rights (29 March 2004) the Committee writes:

4. Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty.

⁶ For more detail, see Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* (Oxford University Press, 1995), Chapter 3.

⁷ . Peter van Dijk, G.J.H. van Hoof., in collaboration with .W. Herring et al, *Theory and Practice of the European Convention on Human Rights*, (Third Edition, Lower Law International, Hague/London/Boston, 1998), p.248.

The most general formulation of what needs to be shown to qualify as a victim allows the individual to claim such status if they feel they fit the definition. Thus, in the *Caracazo v. Venezuela* case, Inter-American Court of Human Rights, 29 Aug. 2002, the Court held that:

All the States party to the American Convention have the duty to investigate human rights violations and to punish the perpetrators and accessories after the fact in said violations. And *any person who considers himself or herself to be a victim of such violations* has the right to resort to the system of justice to attain compliance with this duty by the State, for his or her benefit and that of society as a whole. [emphasis added] (para. 115).⁸

Family members can become victims because of their ties to a person who suffers gross violations of human rights. See, for example, European Court of Human Rights, Case of *Kurt v. Turkey*, (15/1997/799/1002), where the mother of a presumed disappeared man was accepted as being entitled to present a complaint. The Court found a violation of the applicant's son's right to liberty and security established in article 5 of the Convention (para 129), and compensation was awarded in favor of the applicant's son (para 174). Subsequently, the Court found a violation of the applicant's own right not to be subjected to torture or inhuman or degrading treatment or punishment and of her right to an effective remedy, and awarded her a sum of money as a victim, based on the suffering and mental anguish of not knowing her son's fate (para 175). In the jurisprudence of the Inter-American Court on Human Rights, violations of certain rights make other individuals connected to the victim become victims themselves without the need to examine any other circumstance. Arbitrary deprivation of life in the form of extra-judicial executions and presumed deprivation of life, in disappearances and acts amounting to torture or some forms of inhuman treatment would fit in this category. Although usually there are other factors aggravating the violation, because of the irrevocability and finality of death and the terrible ordeal of torture, both produce the suffering needed to make those close to the victim become victims of a human rights violation without any further showing.⁹

Thus, victims are defined broadly in international law. They have that qualification from the moment their rights are violated, irrespective of domestic law and of the process by which their rights to reparation are vindicated. In addition, victims hold such status until their claim has been adjudicated, and states cannot condition or change the moment of

⁸ While the American Convention on Human Rights is obviously not binding on Indonesia, it should be noted that the provision of the American Convention that the Court is interpreting here, article 1.1, requires states to “respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.” The language is almost identical to that of the Civil and Political Covenant art. 2(1), which holds that states must “respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”

⁹ Case of Paniagua Morales et al, judgment on reparations of 25 May 2001, para 142; Case of Trujillo Oroza, judgment on reparations of 27 February 2002, para 85.

acquiring such status without a determination of the victims claim. By making victims' status dependant on the fact of their identifying and forgiving the perpetrator, article 27 of the TRC Law violates the right to remedy and to reparations.

3. The practice of states: how other states have complied with the obligations to provide a right to truth, to justice and to reparation

The TRC Law is out of step with the emerging practice of states around the world. States have, in dozens of countries, created truth commissions not only in order to come to terms with their own past, but also to fulfill their international obligations to investigate and to satisfy victims' right to truth. They have created separate reparations programs to meet their obligations to repair violations of international law. The best practices of states show that states are able to craft programs that respond to and reflect national objectives while fulfilling and not violating their international law obligations. These practices also help interpret, through subsequent state practice, the meaning of treaty provisions like the obligations to ensure rights and to provide a right to remedy.¹⁰

The TRC created by the TRC Law differs in structure and mandate from global practice in at least four ways:

- there is no provision for an overall recounting of the causes, context, and patterns of violations, only for specific "incidents," which does not allow for an understanding of how the incidents are connected or fit together; usually this is done through the compilation of a report;
- there is no requirement for the TRC to make recommendations aimed at preventing the violations from recurring;
- reparations measures are conditioned on a factor external to victims;
- amnesty, albeit a conditional amnesty, is allowed for non-amnestiable crimes.

I will focus my remarks on the last two, although I note that the first shortcoming may well involve a violation of the right to truth as elaborated in international instruments.

Linking amnesty and reparations: South Africa's TRC linked truth-telling and amnesty, but the TRC had a separate committee tasked with recommending reparations to victims, and the government eventually paid interim, individual and collective reparations to everyone who was recognized as a victim through submitting a statement to the TRC or otherwise. Other truth commissions have recommended reparations programs, but these have been set up through separate administrative mechanisms. In some cases, providing a statement or testimony to the truth commission was enough to qualify for reparations, while in others reparations programs used a presumption that being detained without trial during a certain period, or having a family member disappear during a certain era under given circumstances gave rise to eligibility for reparations. In still others the truth commission itself could investigate and, if victims' evidence was borne out, they could provide reparations. In no case has reparations been tied to the

¹⁰ See Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27, Art. 31(3)(b).

identification, confession, apology or any other act by the perpetrator. In no case is the victim forced to choose whether to accept an amnesty for the perpetrator in order to get reparations. This is a cruel choice which violates victims' rights to be treated with respect for their dignity.

States have a great deal of latitude in designing and implementing reparations programs, but these cannot violate their international obligations. International law sets the outer limits of what states can do, and those limits have here been exceeded. Reparations programs should be comprehensive, fair, coherent with other obligations, and the amounts should reflect the gravity of the violations; the obligation to repair violations should be carried out in good faith. Article 27 of the TRC Law, in particular, is not consistent with these norms, nor with international practice.

The limits of amnesty: amnesties are allowed in international law to reintegrate former insurgents and for many crimes under national law. They are not, however, allowed for a certain small group of grave crimes. Foremost among them are the very crimes that the TRC Law allows amnesty for: genocide and crimes against humanity. This has been the position unanimously taken by **international instruments**, including the 1948 Genocide Convention (articles 5, 6), the 1949 Geneva Conventions (Articles 49, 50, 129 and 146, respectively – the grave breaches provisions), the Convention Against Torture (articles 5, 7), the recently-approved International Convention for the Protection of All Persons from Enforced Disappearance (Art. 11), the Updated Set of Principles on the Promotion and Protection of Human Rights Through Action to Combat Impunity (Principles 19, 24); the 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 (article III (4)).

It has also been the position taken by **expert bodies** including the **U.N. Human Rights Committee** in numerous concluding remarks and individual cases as well as in General Comment 20, where, discussing torture, they found that "[a]mnesties are generally incompatible with the duty of States to investigate such acts, to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future." ICCPR General Comment 20 (Forty-fourth session, 1992): Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment, A/47/40 (1992) 193 at para. 15.

The **United Nations Secretary-General** stated that "United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights". He concluded by recommending that peace agreements and Security Council resolutions and mandates "[r]eject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, [and] ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court"

Security Council, Report On The Rule Of Law And Transitional Justice In Conflict And Post-Conflict Societies, The Secretary-General, UN. Doc. S/2004/616, (3 August 2004) para. 10.

In 2001, the **Inter-American Court of Human Rights**, in the Barrios Altos case, found that:

“ This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.” Barrios Altos (Chumbipuma Aguirre y otros vs Peru), March 14, 2001. Peru changed its amnesty law in response to this decisión.

In 1998, a Trial Chamber of the **International Criminal Tribunal for the Former Yugoslavia** observed that a domestic amnesty covering crimes, such as torture, that have attained the status of jus cogens norms would violate obligations erga omnes and "would not be accorded international legal recognition." Prosecutor v. Furundzija, judgement of Dec. 10, 1998, para. 155.

National and hybrid courts have also found that amnesties for international crimes are inconsistent with a state's legal obligations and need not be respected. See, for example, the Ould Dah case, French Court of Cassation Oct. 23, 2002 (no need to respect local amnesty law); Argentine and Chilean cases before the Spanish Audiencia Nacional (Pleno), Nov. 5 1998 (same); Simón, Julio Héctor y otros s/privación ilegítima de la libertad. Argentine Supreme Court, causa No. 17.768 (14 June 2005) S.1767.XXXVIII.(approving annulment of amnesty laws on international law grounds); Juan Contreras Sepúlveda y otros (crimen) casacion fondo y forma, Chilean Supreme Court, 517/2004. Resolución 22267, Jan. 2005 (amnesty not applicable in disappearance cases and contravenes Geneva Conventions); Special Court for Sierra Leone, Indictment and Decision on Review of Indictment and Application for Consequential Orders (May 24, 1999); Prosecutor v Charles Ghankay Taylor, Case No. SCSL-03-01, Indictment (Mar. 3, 2003) (domestic amnesty cannot apply to international crimes).

Truth commissions have in the past allowed for conditional amnesty. The South African TRC created an amnesty-for-full-disclosure scheme that was contingent on prosecution for those who did not apply for amnesty or who did not fully disclose, as well as on reparations being granted to victims. The Indonesian law, in contrast, creates the possibility that amnesty could be denied, and yet the victim would still be unable to go to the Human Rights Court because the case had been heard before the TRC. The South African conditional amnesty + prosecution scheme was largely unsuccessful in getting high-level government and army officers to disclose their knowledge of crimes, and has not been repeated. Since

1996 when it was passed the prohibition on amnesty for such crimes has considerably strengthened.

The next amnesty was passed as part of a peace accord in Sierra Leone, which also created a TRC. At that time, the United Nations representative disassociated the UN from the amnesty provision because it covered crimes which could not be amnestied under international law. Only months later the Sierra Leonean government together with the UN created the Sierra Leone Special Court to try those most responsible for international crimes. That Court has held that a domestic amnesty law only applies to national courts and national crimes. In East Timor, the Commission for Truth, Reception and Reconciliation could, through the Community Reconciliation Procedure, grant amnesty, but only for minor crimes. Serious crimes, and especially crimes against humanity, had to be dealt with through prosecution. Other states have instituted processes not connected to truth commissions, but these too do not allow amnesty for international crimes. In Rwanda, there are local traditional courts called gacaca which can order community service rather than prison for perpetrators who confess, but this constitutes a different form of punishment rather than an amnesty, and in any case the gacaca process cannot be used for leaders and organizers of genocide, or for rapists. In Colombia, as the Court is aware, the Peace and Justice law allows for reduced sentences contingent on reparations, truth-telling and five years in prison, but it is not an amnesty. The Guatemalan Law of National Reconciliation allows for amnesty, but it specifically excludes genocide, disappearances, torture and other international crimes. Truth Commissions in Morocco, Ghana, Peru, Panama and Liberia, all created more recently than the South African, have no provision for amnesty. Liberia has “use immunity” for the statement itself that is given to the TRC, but it is not an amnesty.

All these countries have faced the need for reconciliation after conflict. All of them have found ways consistent with their international legal obligations to encourage reconciliation while respecting victims’ right to the truth and to justice. International law does not prescribe what countries should do in the aftermath of conflict, but it sets the outer limits, the boundaries past which states may not go consistent with their international legal obligations. The challenged provisions of the TRC Law are outside those boundaries. Allowing them to stand would put Indonesia in violation of both its treaty obligations and general international law.