Independent Observation Mission to the Trial of President Desiré Delano Bouterse and Others in Relation to Extrajudicial Executions That Took Place in December 1982 at Fort Zeelandia, Paramaribo, Suriname

Paramaribo and Boxel, Suriname

REPORT

ICJ, Geneva, 29 May 2012

1 Executive Summary

This is a report from an independent trial observation mission carried out by the International Commission of Jurists (ICJ), based in Geneva, Switzerland. The purpose of the mission, which took place between 8 and 12 May 2012, was to observe the trial of President Bouterse and 24 Others by a Military Court in Boxel, Suriname, and surrounding context.

In accordance with rigorous methods of assessment, the ICJ independent trial observer, a lawyer/academic of British nationality, made an assessment of the social and political context in which the trial has been taking place. Based on numerous interviews and separate, independent sources of information, it gradually became clear that the atmosphere in the country had a certain bearing on the trial. This atmosphere certainly had positive dimensions, but there were also aspects of concern.

Following a brief summary of the judgement, the ICJ evaluated the Court's judgement handed down on 11 May 2012, in order to assess compliance with judicial guarantees of fair trial and due process, in accordance with internationally recognised standards. The ICJ also considered the procedural implications and associated human rights consequences of the judgement itself.

Finally, in light of the ICJ's assessment of facts, and its legal assessment of the 11 May 2012 judgement, the ICJ offers conclusions, as well as recommendations to the Government of Suriname, the Judiciary, the media and diplomatic delegations.

Geneva, 29 May 2012

1.1 Samenvatting, Conclusies en Aanbevelingen

Dit is een verslag van een onafhankelijke waarneming missie, uitgevoerd door de Internationale Commissie van Juristen te Geneve, die heeft plaatsgevonden van 8 tot en met 12 mei 2012 in Suriname. Het doel van de missie was om het strafproces voor de krijgsraad van Boxel tegen president Bouterse en 24 anderen en de omstandigheden waarin dit proces plaatsvond te observeren.

De onafhankelijke waarnemer van de ICJ, een Britse advocaat en academicus, heeft de sociale en politieke context waarbinnen het proces plaatsvond geëvalueerd volgens strikte evaluatiemethoden. Op basis van diverse interviews, in samenhang bezien met daarvan losstaande andere informatiebronnen, komt de waarnemer tot de conclusie dat het maatschappelijke klimaat in Suriname van invloed is op het proces. Er werden positieve aspecten van dit maatschappelijke klimaat waargenomen, maar er zijn ook redenen voor zorg.

De ICJ geeft in dit verslag een samenvatting van het vonnis van 11 mei 2012 en een analyse aan de hand van internationaal-rechtelijke waarborgen voor een eerlijk proces. De ICJ geeft ook een analyse van de te verwachten procedurele en mensenrechtelijke consequenties van het vonnis.

Tenslotte trekt de ICJ op basis van deze feitelijke en juridische analyse de volgende conclusies en brengt zij de volgende aanbevelingen uit:

De ICJ erkent dat de **Surinaamse regering** volledige medewerking heeft verleend aan de onafhankelijke waarnemingsmissie. De ICJ ziet dit als een zeer positief teken van transparantie en vertrouwen in de rechtsstaat.

De ICJ vraagt de Surinaamse regering haar constitutionele en internationale verplichtingen serieus te nemen en de Amnestiewet slechts toe te passen in overeenstemming met deze verplichtingen.

De ICJ heeft veel respect voor de **Surinaamse Rechtspraak** en is nog steeds van oordeel dat er in Suriname ruimte is voor een eerlijk proces. Mede door de nu ontstane vertraging staat deze ruimte in dit proces wel onder druk.

De ICJ vraagt de Surinaamse rechtspraak om zijn judiciële verantwoordelijkheden te nemen en snel een oordeel te geven over de vraag of de Amnestiewet in strijd is met de Grondwet van Suriname en Suriname's internationale verplichtingen.

De ICJ ziet het belang van **vrije en onafhankelijke media** en is zeer onder de indruk van professionele werkwijze van vele Surinaamse en internationale journalisten die dit proces volgen. De ICJ vraagt onafhankelijke media om over deze zaak te blijven rapporteren.

Tenslotte is de ICJ content dat **diplomatieke vertegenwoordigers** van onder meer de Verenigde Staten, de Europese Unie (EU) en Brazilië belangstelling voor deze zaak tonen en in sommige gevallen de zittingen bijwonen als waarnemer. Gelet op de "politieke dialoog" die op 30 mei 2012 zal plaatsvinden tussen de EU en Suriname en waar de Amnestiewet op de agenda staat, roept de ICJ alle deelnemers aan deze dialoog op om over de verenigbaarheid van de Amnestiewet met internationale verplichtingen te praten, en hiertoe in het bijzonder aandacht te besteden aan de jurisprudentie van het Mensenrechten Comité van de Verenigde Naties en het Inter-Amerikaanse Hof voor de Mensenrechten.

Geneve, 29 mei 2012.

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2 Mandate of the Mission

Between 8 and 12 May 2012, the International Commission of Jurists (ICJ), based in Geneva, Switzerland,[1] organised an independent trial observation mission to Suriname. The purpose of the mission was to observe the trial of President Bouterse and 24 Others by a Court Martial (Military Court), who are accused of the murder on 8 December 1982 of thirteen civilians and two military officials in Fort Zeelandia, Paramaribo. The trial has been taking place since 2007 in a specially-constructed courtroom located on a military base in Boxel, a short distance away from the country's capital, Paramaribo.

Dr. Jeff Handmaker, a British lawyer and Senior Lecturer at the International Institute of Social Studies of Erasmus University was requested to lead the mission. Dr. Handmaker was instructed to remain in Suriname until all necessary information in relation to this case was collected, and to report directly to the ICJ on the outcome of the mission.

The specific objectives of the trial observation mission were: (1) to make known to the judges of the Military Court, the parties to the proceedings, the authorities of the country and to the general public the interest in, and concern for, the fairness of the trial; (2) to make the participants aware that they were under scrutiny and thereby encourage them to act according to fair trial standards; (3) to collect more information about the political and legal circumstances possibly affecting the outcome of the trial and (4) to assess compliance with judicial guarantees of fair trial and due process, in accordance with internationally recognised standards.

[1] Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists (ICJ) promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. The ICJ was established in 1952 and is active on all five continents. The ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; to secure the realization of civil, cultural, economic, political and social rights; to safeguard the separation of powers; and to guarantee the independence of the judiciary and legal profession.

3 Methods of Assessment

During the week preceding the mission, the ICJ issued advance notification of the purposes of the mission to the Suriname consulate in Amsterdam, to various government ministries[2] and media outlets in Suriname and to international media. Permission was obtained without any difficulty from the government of Suriname to enter the country on a business visa and from the military police to attend the hearing in Boxel on 11 May 2012. During the course of the on-site mission, conducted by the independent trial observer, further notification of the mission was made to lawyers acting on behalf of the accused and lawyers acting on behalf of the victims and their families as well as the prosecutor (Auditeur-Militair) and judges of the civilian and military chambers in the Court in Boxel.

In advance of the mission, a background literature review and preliminary legal research were done. For part 5 of the report (Findings of Fact), qualitative data was gathered by way of structured and semi-structured interviews, held in Paramaribo and Boxel with government officials, judges, legal scholars and practitioners as well as NGOs, journalists, diplomats and other interested parties who have been following the trial closely. These interviews were correlated with separate and independent sources of data. For part 6 of the report (Legal Assessment of the Judgement), ICJ consulted with a number of recognised scholars and practitioners, with expertise in Dutch and Suriname criminal law and procedure, international criminal law, military law, international human rights, legal sociology and the inter-American human rights regime.

Based on preliminary research and especially on-site interviews, as well as physical presence by the independent trial observer at the 11 May 2012 hearing in Boxel, where the Court's judgement was read out in public by the Judge President, the ICJ decided to issue a preliminary press release that same afternoon from Geneva on 11

[2] These included the Ministry of Justice and Police, Attorney General's Office, Human Rights Bureau, Court of Justice and Public Prosecutor's Office.

May 2012, expressing its concern.[3] Following release of the Court judgement on 15 May 2012, the ICJ began to compile its full report.

4 Background to the Trial

The defendants, Desiré Delano Bouterse and 24 others stand accused of the extrajudicial executions of 15 people, 13 civilians and 2 military officials, all opponents of the then military regime, on 8 December 1982. Reports published by various organisations at the time, including by an ICJ affiliate, indicated that several of the victims had also been subjected to torture.[4]

In November 2007, the trial against Bouterse and 24 others began at a specially designed Military Court ("Court"), located in the naval base of Boxel, based on a complaint issued by lawyers acting on behalf of families of the victims. The trial was suspended almost immediately afterwards, but resumed in February 2009.

On 19 July 2010, Desiré Delano Bouterse was elected President of Suriname. He took up office on 12 August 2010.On 4 April 2012, despite contestation, a law was swiftly adopted in Parliament over a period of four days, amending the existing Amnesty Law of 1989, and granting amnesty to President Bouterse and others for the murders that allegedly took place in 1982.

On 13 April 2012, defence lawyers acting on behalf of the abovementioned accused issued a motion to the Court to declare the prosecutor to have no authority ("niet ontvankelijk") in relation to all charges against their clients. The public prosecutor of Suriname requested a suspension of the trial in order for the Court to submit the 'amnesty law' to a Constitutional Court. A Constitutional Court still has to be established in Suriname, despite having been provided for by law in 1992. The Court adjourned the trial until 11 May 2012, indicating that it would take a decision on this date in relation to the requests that were put forward by lawyers acting for the defence and the prosecutor.

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[3] International Commission of Jurists (2012) 'The decision to suspend the trial of Suriname's President Bouterse is of concern – ICJ' Press Release issued on 11 May 2012, Geneva. See Annex, below.
[4] NJCM (1983) *De gebeurtenissen in Paramaribo, Suriname, 8-13 december 1982: de gewelddadigedood van 14 Surinamers en 1 Nederlander*, Leiden 14 February 1983. See also: R. Van Elst (2002) 'Universelerechtsmacht over foltering: Bouterse en de Decembermoorden', *NJCM Bulletin* Vol. 27(3), p. 208-224.

Meanwhile, the ICJ received credible reports that gave serious reasons to believe that the judges hearing the matter were under pressure from various sources, including from within the government of Suriname, to declare the charges inadmissible, and that some judges had concerns regarding their personal safety.

For these reasons, and especially the high-profile nature of the trial where a (sitting) head of state was accused of crimes under international law, the ICJ decided it was important to organise a trial observation mission.

5 Findings of Fact on the Social and Political Context

The ICJ independent trial observer made an assessment of the social and political context in which the trial has been taking place. Based on numerous interviews and separate, independent sources of information, it became clear that the atmosphere in the country had a certain bearing on the trial. This atmosphere certainly had positive dimensions, but there were also aspects of concern.

A particularly positive dimension to note is the openness of the Government of Suriname and the Judiciary to the trial observation mission. Not only were there no efforts on the part of either to impede the mission, but government and judicial officials were welcoming and gracious and accorded every possible courtesy to the independent trial observer. The ICJ regards this as a positive sign that all parties concerned were open to scrutiny.

The ICJ was very positive about the high regard and outspoken support expressed by citizens of Suriname for the Court, and by the outspoken attitude of the Judge President, Cynthia Valstein-Montnor. In addition, the ICJ noted pronounced messages by some of the accused, who expressed a wish for the trial to continue without further delay.[5] Finally, the ICJ was positive about the relatively high level of press freedom in the country and the free exercise of expression by journalists, although also noted that the situation had shifted in recent months, with some journalists reporting they had been threatened and harassed.

[5] Perhaps the most prominent of the accused to have spoken out has been Mr. Ruben Rozendaal, who has expressed his desire for the trial to take place without further delay. See: RNW (2012), 'Rozendaal: 'Bouterse heft ons allemaal misbruikt', *Radio Netherlands*, Published on 2 February 2012, last accessed on 21 May 2012 at: http://www.rnw.nl/suriname/article/rozendaal-bouterse-heeft-ons-allemaal-misbruikt

As a further positive dimension of the trial, the trial observer noted the physical presence of three accused persons and their lawyers[6] as well as several relatives of the victims, a significant number of senior diplomats, including three ambassadors, and several representatives of the victims' families as well as numerous journalists and human rights NGOs, including the outspoken *Committee for the Preservation of Democratic Rule of Law in Suriname*.

However, despite this openness, the ICJ remains concerned about resource limitations faced by government ministries, the parliament and the judiciary. Staffing is limited and falls far short of what is needed. Facilities are often less than adequate and in some cases institutions are provided for by law, but for various bureaucratic, and political reasons have yet to be established. A notable example is the Constitutional Court of Suriname, provided for in terms of 1992 Amendments to Suriname's Constitution, but not yet in existence.[7] The ICJ noted considerable concern expressed by several different stakeholders – victims' families, politicians, journalists, ordinary citizens and even some of the accused, about the Amnesty Law, which was amended by the Parliament of Suriname in March 2012, to include events that had taken place in December 1982. Well-placed legal practitioners, legal scholars and other concerned parties insisted that one take note of the "purposes for which the Amnesty Law was amended".

The ICJ observer spoke with and noted concern by various diplomatic representations in Suriname who have been closely following the trial and related developments, notably the Amnesty Law. The Ambassador of France and other diplomatic staff have been following the trial since the beginning in 2007. The Ambassador of the United States of America has also been following the trial closely and the US government has openly expressed concern about the Amnesty law. The European Union delegation, which has also been following the trial closely, has included the Amnesty Law in its 30 May 2012 agenda of "political dialogue" with the Government of Suriname. The Netherlands government, which has withdrawn its ambassador in protest over the Amnesty Law, clearly has severely strained relations with the Government of Suriname, although diplomats continue to monitor the trial and

[6] It was unclear to the independent trial observer why the other accused were not present.
[7] During the course of on-site interviews, and as confirmed in public statements, there are various reasons for this, ranging from a "lack of co-operation" by the Ministry of Justice, to a "lack of political will" by the Parliament and/or Office of the President.

situation in the country. Finally, the embassy of Brazil has closely been following the trial and the amendment of the Amnesty Law, insisting that it will "respond to circumstances as they develop".

The ICJ received substantial and credible evidence of growing intimidation by unspecified actors against journalists, human rights activists and members of the legal profession. The lack of public and parliamentary debate over the Amnesty Law, which was passed by the Suriname parliament in less than four days was also noted, as well as an increasingly polarised climate in Suriname that regards one as either "with" or "against" the Amnesty law. The ICJ has also noted the role of state-sponsored media, which has persistently broadcast a message that support for the Amnesty Law promotes unity, while resistance to the Amnesty Law is divisive.

Furthermore, the ICJ gathered direct evidence of statements / responses by specified actors that have contributed to a tense atmosphere in Suriname surrounding the case. Examples include:

- Public statements by President Bouterse that those who oppose the Amnesty Law are "enemies of the people";
- A government spokesperson publicly insulting, by name, opponents of the Amnesty Law on the local radio;
- The government's response to the previous Minister of Justice, who publicly declared that the trial should proceed; after this statement he was immediately replaced;
- A public statement by a senior legal advisor to the president and previous head of the independent electoral commission: "Judges have no choice. They must follow the Amnesty Law and stop the trial."

These general factors notwithstanding, the atmosphere as perceived by the independent trial observer on 11 May 2012 is also worth noting. As mentioned earlier, the Court is located on a well-guarded military based in Boxel, a short distance from Paramaribo. Access to the Court requires permission of the Military Police, which in the case of the independent trial observer was easily obtained. The building and facilities, which were specially created for the sole purpose of this trial, are somewhat in a state of disrepair, but are still quite functional. The trial observer noted the presence of soldiers, who stood on either side of the courtroom throughout the course

of the trial, although they were polite and professional. By contrast, the presence of agents from the Central Intelligence and Security Service (CIVD) was unsettling, if not for their presence in the view of many persons attending the trial, then for their lack of presence in the view of the prosecutor, who appeared to be concerned about his personal safety; but did not speak at all throughout the course of the trial.

The ICJ now turns its attention to a legal assessment of the 11 May 2012 judgement, which was issued by the Court.

6 Legal Assessment of the 11 May 2012 Judgement

The two identical judgements issued on 11 May 2012 by Judge President Cynthia Valstein-Montnor on behalf of the civilian and military chambers of the Court was made available in written form on 15 May 2012.[8]The ICJ provides here a brief summary of the judgement. While it is not within the mandate of the ICJ mission to substitute its own opinion for that of the Court, in order to assess compliance with judicial guarantees of fair trial and due process, in accordance with international law and standards, the ICJ respectfully offers observations on the extent to which the Court took account of existing legal obligations in Suriname and international law as well as the procedural implications and associated human rights consequences of the judgement itself.

6.1 Summary of the Judgement

The Judge President read out identical judgements, first in the civil chamber, and then in the military chamber.[9] The 22-page judgement, delivered in Dutch, consisted of: a presentation of the amended Amnesty Law of 1989; a presentation of the defence position and the Court's assessment of that position; a presentation of the position of the prosecutor and the Court's assessment of that position; a discussion of the Amnesty Law in relation to binding obligations in international agreements, both treaties and binding political commitments, as well as the constitution of Suriname;

[8] Shortly after the judgement was issued, it was scanned and posted on a local website: www.starnieuws.com/index.php/beyond_files/get_file/5bc74f589748973e4673d72779fb4f43.pdf, Last accessed on 18 May 2012.
[9] The Court Martial ("Military Court") in the name of the Republic, Judgement in the Case of the *Public Prosecutor vs. The Accused (anonymised)*, Boxel, 11 May 2012.

(5) a discussion of the Amnesty Law's potential consequences in relation to the role of the prosecutor and the decision of the Court.

In describing the Amnesty Law, the Court focussed on article 1 (the possibility of gaining Amnesty for crimes), and article 3 (the consequences of gaining Amnesty), and in particular the consequences this had for an existing criminal trial, namely declaring the prosecutor to have no authority to prosecute ('niet-ontvankelijk').

The defence position as laid out by the Court was very brief (two paragraphs), focussing on Article 3 of the Amnesty Law, Article 80 of the Constitution ("laws shall be inviolable") and by extension Article 12 of the Suriname General Law, which forbids judges from judging laws based on their own values or sense of reasonableness.[10] The Court's assessment of this position was that the defence had overlooked that Article 80 of the Constitution stated further that, while laws are inviolable, exceptions could be made in circumstances relevant to articles 106 (incompatibility with international agreements), 137 (breach of fundamental rights) and 144 (as otherwise determined by the constitutional court of Suriname) of the Constitution.[11]The Court then elaborated its views in relation to these and other articles of the Constitution.

It is important to note that the Court was of the view it was empowered to make an assessment of the constitutionality and/or compatibility with international law, of any law of Suriname, and to declare that law to be of no effect. The Court also noted that the role of the Constitutional Court was of an "abstract character", since it has yet to be established.[12]

In explaining the position of the prosecutor, the Court paid particular attention to Article 131, which forbids any interference in an ongoing criminal proceeding, and which the prosecutor argued did not apply in the case of the Amnesty Law.[13] The reasons for this, the prosecutor claimed, were due to an "area of tension" between the parliamentary power to legislate and judicial oversight over that legislation. However, while it was up to the Constitutional Court to resolve the matter, the "vacuum" created by the fact that the Court had not yet been created meant that the matter

[10]Ibid, § 1.1-1.2.
[11] Ibid, § 2.1
[12] Ibid, § 2.8
[13] Ibid, § 3.3

should be suspended by the Court for an indefinite period in accordance with the Amnesty law and with Article 144(2) of the Constitution (capacity to review the constitutionality and/or compatibility in relation to international agreements, of legislation).[14] The Court rejected the prosecutor's argument that the trial should be suspended the trial for these reasons.[15]

The Court then examined the Amnesty Law in relation to obligations created by the American Convention on Human Rights, and in particular article 1 (obligation to respect rights); article 2 (giving legal effect to rights and freedoms) and article 25 (judicial protection).[16] While acknowledging the rights of victims and their families, the Court nevertheless concluded that the Amnesty Law was not inconsistent with the American Convention on Human Rights, in part because Article 25 (2) of the Convention was not "self-executing". Furthermore, the Court concluded, without explanation, that the charges against the accused did not amount to crimes against humanity.[17]

The Court then proceeded to examine the Amnesty Law in relation to the Constitution of Suriname Article 10 (right for one's complaint to be heard by an impartial judge), Article 11 (right not to be kept from the assigned judge) and Article 137 (competency of a Court to declare a law inconsistent with fundamental rights) of Suriname's Constitution. Similarly to the previous assessment, the Court did not determine the Amnesty Law to be inconsistent with the basic rights of the victims and their families.[18]

Finally, the Court turned its attention to whether the prosecutor, according to Article 3 of the Amnesty Law, should be declared to have "no authority" to prosecute the matter. The Court openly acknowledged that if it were to do so, it would mean a formal end to the court proceedings. The Court furthermore drew attention to Article 131(3) of Suriname's constitution, which provided that "Every interference in the investigation or prosecution and in cases pending in court shall be forbidden". The Court regarded itself as not having the authority to make a determination whether or

[14] Ibid, § 3.4
[15] Ibid, § 4.3
[16] Ibid, § 5.1
[17] Ibid, § 5.2
[18] Ibid, § 6.1

not the Amnesty Law violated this section of the constitution, because article 131(3) is not in the chapter on fundamental rights of the constitution.

Subsequently, relying on Article 5(1) of the Suriname Law of Criminal Procedure, which provides that the court may suspend a criminal trial until a factual matter under dispute is resolved by a civil judge, the Court concluded that the trial and prosecution be **suspended** until the constitutional matter in terms of Article 131(3) was resolved and **instructed** the prosecutor to inform the Court, at a moment in time yet to be determined, about its position on this constitutional matter, upon which moment the Court would decided whether or not to lift the suspension. The Court also announced publicly at the trial that the accused had an opportunity to appeal the decision of the Court within fourteen days; this was not confirmed in the written judgement.

6.2 Consideration of Amnesty Law's compliance with international law

The ICJ positively notes the Court's consideration of three core articles of the American Convention on Human Rights. However, the ICJ wishes to stress that the overwhelming jurisprudence in relation to Article 25(2) regards this provision (the right to judicial protection) to be self-executing. The Court's negative determination of the self-executing nature of Article 25 of the American Convention on Human Rights appears to be inconsistent with the jurisprudence of the Inter-American Court of Human Rights (IACHR), which is the supreme authority in respect of the interpretation of Convention rights, as well as State practice and judicial determinations in Guatemala, Peru, Argentina and Brazil. Furthermore, the ICJ noted, with concern, the Court's failure to consider the Suriname's obligations under other core treaty rights, including in the International Covenant on Civil and Political Rights, to which Suriname acceded in 1976, and jurisprudence of its supervisory body, the United Nations Human Rights Committee. The Court also failed to take account of other relevant universal standards, such to a remedy and reparations and the right to truth, which have been agreed by all States, including Suriname. It should be noted in this regard, that in addition to the treaty obligations discussed below, the amnesty law is plainly incompatible with articles 19 and 24 of the UN *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*.[19]

[19] UN Doc. E/CN.4/2005/102/Add.1

6.2.1 The ICCPR

The ICCPR provides for positive obligations under articles 6 (right to life), 7 (prohibition of torture and cruel, inhuman or degrading treatment) and 9 (right to liberty and personal security) ICCPR. Apart from obligations to prevent violations of these provisions, the ICCPR entails obligations to investigate and prosecute such violations, and to provide for a remedy and reparation to victims of such violations.

The supervisory organ of the ICCPR, the UN Human Rights Committee (HRC), has pointed out that 'Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant. In their reports, States parties should indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by article 7 as well as appropriate redress'.[20]

In addition to the positive obligation to prevent (further) torture and other forms of ill-treatment, there is also a positive obligation to investigate and prosecute violations that took place subsequent to a failure to prevent torture and ill-treatment. This obligation is based on art. 7 jo. 2 ICCPR. Those who violate article 7 ICCPR must be held responsible, whether this violation is by 'encouraging, ordering, tolerating or perpetrating prohibited acts'.[21]

6.2.2 The IACHR

The IACHR has derived from articles 4 (right to life) and 5 (humane treatment) together with articles 1(1) (obligation to respect rights) and2 of the ACHR (domestic legal effects) the obligation of States not only to refrain from threatening people, but also to actively protect them against threats by others. This includes the duty to investigate prior violence and threats, and to prosecute and punish perpetrators. Furthermore, the IACHR has conclusively established that Article 25(2) of the ACHR

[20] HRC General Comment 20, §14.
[21] See e.g. HRC General Comment 20 on article 7 ICCPR, §8 and 13-14. See also, e.g. Concluding Document of the OSCE Budapest Summit (1994): participating States 'recognize the importance of national legislation aimed at eradicating torture. They commit themselves to inquire into all alleged cases of torture and to prosecute offenders', §20. In *Velasquez Rodriguez*, the Inter-American Court of Human Rights recognized that as a consequence of this obligation, "the States must prevent, investigate and punish any violation of the rights recognized by the Convention" *Velasquez Rodriguez* case, Judgment of 29 July 1988, §166. In *Velásquez Rodríguez* the Inter-American Court pointed out that 'if the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction'. "The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention".

is a self-executing provision (i.e. it does not require specific, national legislation to bring it into force).

Accordingly, the jurisprudence of the IACHR has declared the incompatibility of national laws, including Amnesty laws, with basic rights contained in the American Charter on Human Rights. For example in the 2001 case of *Barrios Altos v. Peru*, the IACHR concluded that "the so-called 'laws' of *self-amnesty* are not truly laws: they are nothing but an aberration, an inadmissible affront to the juridical conscience of humanity" (emphasis added).[22] Furthermore, in the 2010 case of *Gomes Lund Et Al*, in relation to a *general* amnesty law, the IACHR in a lengthy judgement unanimously concluded that:

> The provisions of the Brazilian Amnesty law that prevent the investigation and punishment of serious human rights violations are not compatible with the American Convention, lack legal effect, and cannot continue as obstacles for the investigation of the present case, neither for the identification and punishment of those responsible, nor can they have equal or similar impact regarding other serious violations of human rights enshrined in the American Convention which occurred in Brazil.[23]

6.2.3 The ACHR and State Practice

The self-executing nature of these provisions, including Article 25 in relation to judicial protection, has been confirmed by state practice, through judgments of various national courts and by policies of various governments in the Americas. The Supreme Court of **Guatemala** (criminal chamber), in a judgment on 11 December 2009, declared the self-executing nature of the Inter-American Court of Human Rights' judgments in relation to the merits of previously decided cases.[24] The Court nullified the decisions previously issued in these cases because they violated universal principles of justice established in the American Convention on Human Rights. The Court ordered a new investigation in each case (as was required in the judgments of the Inter-American Court), requesting the intervention of the Public Ministry with the

[22] Inter-American Court of Human Rights (IACHR) Barrios Altos Case (Chumbipuma Aguirre et al. v. Peru, Judgement), *International Legal Materials*, Vol. 41, No. 1 (January 2002), pp. 93-119: § 26.
[23] Gomes Lund v. Brazil, Judgement, IACtHR, 24 Nov. 2010: § 325(3).
[24] These cases included: "Street Children" (Villagrán-Morales et al.) (1998); "White Van" (Paniagua-Morales et al.) (1999); "Bámaca Velásquez" (2000) and; "Carpio-Nicolle et al." (2004).

purpose of executing the investigations to effectively determine the persons responsible for the human rights violations established by the Inter-American Court in each case.[25]

The Supreme Court of **Peru** (special criminal chamber), 1 October 2010, reviewed and upheld the conviction of Montesinos and members of the *Colina* group, among others for the extrajudicial killing of 15 people.[26] The Court declared that it was obliged to follow the principles of the *Barrios Altos* judgment by the Inter-American Court.[27]

In the Supreme Court of **Argentina** in the case of *Simón and others* v *Office of the Public Prosecutor*, the judges declared on 14 June 2005 (7-1 vote, with one abstention) that the proposed amnesty laws were unconstitutional. Apart from laying down a new approach to the right to a remedy, concluding that the proposed amnesty laws had prevented Argentina from fulfilling its obligations under the American Convention on Human Rights, this 2005 decision emphasized that the principles of the *Barrios Altos* case (in relation to Peru) should also be implemented in good faith in relation to the case law of Argentina.

In a decision on 14 March 2012 federal prosecutors in **Brazil** brought charges against Sebastião Curió Rodrigues de Moura, a member of the military, for the kidnapping of five disappeared members of the Araguaia guerrilla, an insurgency group opposed to the military dictatorship. The federal prosecutors argued they were obliged to abide by the Inter-American Court's *Lund v Brazil* judgment, handed down on December 2010.[28]

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[25] See also judgment of 23 December 2008 in the Constitutional Court of Guatemala, finding that certain crimes, including forced disappearance, were excluded from the ambit of the Amnesty law. A further Constitutional Court of Guatemala, Cusanero case, Judgment of 7 July 2009 directly referred to Inter-American case law confirming the permanent nature of forced disappearances. Finally, the Tribunal upheld the Chimaltenango judgment of 31 August 2009 that convicted a former member of the military for forced disappearance of 6 members of an indigenous community between 1982 and 1984 and the Tribunal of Chiquimula (Tribunal Primero de Sentencia), El Jute case, judgment of 3 December 2009.

[26] Centre for Justice and International Law (CEJIL) (2010) 'EJIL Welcomes Conviction of Montesinos and Members of the Colina Group in Peru', Last accessed on 18 May 2012 at: http://cejil.org/en/comunicados/cejil-welcomes-conviction-montesinos-and-members-colina-group-peru

[27] *Chumbipuma Aguirre* v. *Peru*, judgment of 14 March 2001. See also the judgement of the Constitutional Court of Peru, Santiago Martín Rivas case, 29 November 2005, case no. 4587-2004-AA/TC, directly applying the Barrios Altos judgment of the Inter-American Court; Supreme Court of Peru, Special Criminal Chamber, Alberto Fujimori Fujimori, 7 April 2009, Case No. A-V 19-2001 (referring to Barrios Altos, La Cantuta and other judgments by the Inter-American Court).

[28] Centre for Justice and International Law (CEJIL) (2012), 'Criminal complaint against military officer involved in dictatorship disappearances represents landmark in search for justice, Published on 14 March 2012, Last

6.2.4 Right to a remedy and reparation and the right to know the truth

As noted above, article 2 requires states to provide for remedy and reparation for any breach of ICCPR rights. The HRC has affirmed that, in addition to compensation, reparation will involve "restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."[29]

Compliance with the obligation to investigate and to punish those responsible is closely linked to 'the right of the next of kin of the alleged victims to know what happened and to know who was responsible for the respective events'.[30]

The UN Human Rights Council, in its resolutions 9/11, 12/12, recognised the importance of the right to truth to ending impunity and promoting human rights.[31] It stressed the need "to recognize the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations",[32] and to establish appropriate and effective mechanisms to this end.[33] The UN General Assembly itself recognised "the importance of the right to truth and justice".[34] The Inter-American Court has held that the right to truth is triggered by the violation of the right to access to justice, remedy and information, under Articles 1(1), 8(1), 25, and 13 of the American Convention.[35] This has been affirmed in recent cases,[36] including

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accessed on 18 May 2012 at: http://cejil.org/en/comunicados/criminal-complaint-against-military-officer-involved-dictatorship-disappearances-represe

[29] 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 at para. 16. See also 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, 16 December 2005, adopted by the UN General Assembly.

[30] See Inter-American Court of Human Rights *Case of García-Prieto et al.* v. *El Salvador*, Judgment of 20 November 2007, §102; and *Case of the 'Las Dos Erres' Massacre v. Guatemala*, Judgment of 24 November 2009, §105. In general about victims' rights see e.g. the United Nations General Assembly *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 29 November 1985.

[31] Resolution 9/11 of 24 September 2008, Article 1; Resolution 12/12 of 1 October 2009, Article 1.

[32] Resolution 9/11, Preamble; Resolution 12/12, Preamble. See also Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, UN Commission on Human Rights, resolution 2005/81, Principle 2; Set of Principles on remedy and reparations, principle 4; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, UN Doc. A/HRC/19/61, 18 January 2012, § 48.

[33] *Ibidem*; Resolution 12/12, Preamble.

[34] Resolution 65/196. In 2011, the UN Human Rights Council established a special procedure on the promotion of truth, justice, reparations and guarantees of non-recurrence: Resolution 18/7 of 29 September 2011.

[35] *Contreras et al. v. El Salvador*, 31 August 2011 (Merits, Reparations and Costs), C No. 232, §§ 173 and 26; *Familia Barrios v. Venezuela*, 24 November 2011 (Merits, Reparations and Costs), C No. 237, in Spanish, § 291; *Gelman v. Uruguay*, 24 February 2011 (Merits and Reparations), C No. 221, § 243. *Radilla-Pacheco v Mexico*, C No. 209, 23 November 2009, §§ 180, 212, 313 and 334.

in *Contreras et al. v. El Salvador*, where the Inter-American Court[37] recalled that "the right to know the truth has the necessary effect that, in a democratic society, the truth is known about the facts of grave human rights violations. This is a fair expectation that the state must satisfy, on the one hand by the obligation to investigate human rights violations and, on the other, by the public dissemination of the results of the criminal and investigative proceedings."[38]

States have the duty to organise their government apparatus so that they are capable of ensuring full enjoyment of human rights. As a consequence of this obligation they must prevent violations. To the extent violations have nevertheless taken place they must use all means at their disposal to investigate the facts and punish the perpetrators.[39]

6.3 Implications of the 11 May 2012 judgement

In order to further assess compliance with judicial guarantees of fair trial and due process, in accordance with internationally recognised standards, the ICJ is compelled to assess the implications of the 11 May 2012 judgement. The first matter to consider is whether the trial ought appropriately to be heard in a military setting by a Court Martial, with two chambers (civil and military). The ICJ notes that under international standards governing the administration of justice, a case of this nature should be tried in a civilian tribunal. As affirmed in Principle 9 of the UN Principles on the Administration of Justice Through Military Tribunals, "[i]n all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes." [40] In addition, the possibility of the two chambers coming to a conflicting decision has the potential to cause great confusion and uncertainty for all concerned, and notably for the accused and families of the victims. Prosecuting the group (military and civilian suspects) together in a civil chamber could have been a more appropriate solution to address this serious question.

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[36] *Fleury y otros v. Haiti*, 23 November 2011 (Merits and Reparations), C No. 236, in Spanish; *Gelman v. Uruguay*, op cit, § 256; *Gomes Lund y otros (Guerrilha do Araguaia) v. Brasil*, 24 November 2010, C No. 219, § 257; *Caracazo v. Venezuela*, 29 August 2002, C No. 95, §§ 117, 118.
[37] Relying on *Gelman v. Uruguay*, op. cit, § 192.
[38] Contreras et al. v. El Salvador, op. cit, § 170.
[39] In general see Independent study on best practices, including recommendations, to assist states in strengthening their domestic capacity to combat all aspects of impunity, by Diane Orentlicher, E/CN.4/2004/88, 27 February 2004; Updated Set of principles, E/CN.4/2005/102/Add.1, 8 February 2005 and E/CN.4/2005/102, 18 February 2005.
[40] U.N. Doc. E/CN.4/2006/58 (2006)

The reasoning of the Court leaves many questions unanswered, not least by its failure to fully address Suriname's international legal obligations. For example, the Court concluded that none of the charges against the accused amounted to crimes against humanity, but did not provide any legal argumentation as to why the Court came to this conclusion. This makes it impossible to assess the implications of the verdict in this regard.

It appears that the trial is suspended indefinitely, unless and until the prosecutor expresses his view on the constitutionality of the Amnesty Law in relation to Article 131(3) of Suriname's constitution, which forbids interference in a criminal proceeding, and refers this matter to an, as yet unspecified, Court.

In its 11 May 2012 press release, the ICJ expressed concern regarding the decision of the Court to suspend the trial, and leave the matter to a public prosecutor and another Court (yet to be designated), to decide on the implications of Suriname's Amnesty Law. ICJ was of the view that 'great uncertainty' would be created, both among the accused as well as the victims.

Others in Suriname have echoed this concern. Interviews by the independent trial observer with senior legal scholars and members of the legal profession expressed that the Court had already "gone too far" in assessing the jurisdiction of the Court to hear the matters before it. The current situation of *limbo* makes it very difficult to predict a future outcome.

7 Conclusions and Recommendations

In light of the ICJ's assessment of facts, and its legal assessment of the 11 May 2012 judgement, the ICJ respectfully offers the following conclusions and recommendations.

The ICJ recognises that the **Government of Suriname** has co-operated fully with the trial observation mission. It has not sought in any way to hinder the work of the independent trial observer and this is to be positively noted. However, the ICJ urges the government to take seriously its constitutional and international legal obligations and to assess the consistency – or otherwise – of the Amnesty Law (as amended) with these legal obligations.

While the ICJ has high regard for the **Judiciary of Suriname**, and the ICJ remains of the (cautious) view that there is still space for a fair trial in Suriname, continued delays make this already difficult task, even more challenging. The ICJ urges the judiciary to once again acknowledge its judicial function and to come to a swift judgement on the Amnesty Law, in light of Suriname's constitutional and international legal obligations.

The ICJ recognises the importance of a **free and independent media** and has been impressed by the commitment, respect and professionalism of many journalists who have been following this matter, both from Suriname and from international media outlets. The ICJ urges independent journalists to continue writing about this matter.

Finally, the ICJ welcomes the extensive interest expressed in this trial by various **diplomatic delegations**, including the United States, the European Union (EU) and Brazil. The ICJ also appreciates the physical presence of many observers from these delegations. The ICJ furthermore notes the forthcoming "political dialogue" on 30 May 2012 between the EU and the Government of Suriname, in which the Amnesty Law will be discussed. The ICJ urges all parties to take heed of existing jurisprudence of the HRC and ICCPR, as well as the IACHR and the ACHR in considering the legitimacy of the Amnesty Law.

8 Annex – Further International Law Commentary

Suriname became a State Party to the American Convention on Human Rights (hereinafter "the Convention") and recognized the jurisdiction of the Court on 12 November 1987. Suriname furthermore acceded to the International Covenant on Civil and Political Rights on 28 Dec 1976.[41] While Suriname has not (yet) acceded to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, many of the provisions of this Convention are also reflected in the aforementioned Convention and Covenant, or in their attendant jurisprudence. The prohibition of torture is well established as a peremptory norm of international law.[42]

8.1 Jurisprudence of the United Nations Human Rights Committee (HRC)

According to the International Covenant on Civil and Political Rights (ICCPR) and jurisprudence of the HRC, the State has a direct obligation to protect individuals from acts of torture and extra-judicial executions, and to investigate, prosecute and punish the violators of these acts, independent of the wishes of the victim of the torture or ill-treatment. In addition, the victim has a right to a remedy. The HRC has explained that this obligation arises on the basis of both articles 2 and 7.[43] Judges and prosecutors have a particular responsibility to promptly and effectively investigate allegations.

The Amnesty Law enacted in Suriname hinders and potentially blocks the State from implementing these obligations, in particular with regard to articles 6 and 7, core rights, which are non-derogable, even in times of emergency. Apart from hindering the state in its direct obligation to ensure the Covenant rights, this new law effectively denies the right under article 2(3) ICCPR of victims to seek an official investigation into human rights violations, which is particularly serious. The absence of official investigations also makes it difficult to initiate and continuation of a civil suit. This

[41] On 1 September 1989, Suriname lifted its state of emergency declared on 1 December 1986 in the territory of the Districts of Marowijne, Commewijne, Para, Brokopondo and in part of the territory of the district of Sipaliwini. During this period, Suriname derogated from articles 12, 21 and 22 of the Covenant.
[42] See, eg, UN GA Resolution 64/153, UN doc. A/RES/64/153. See also E. de Wet (2004), 'The prohibition of torture as an international norm of jus cogens and its implication for national and customary law', *European Journal of International Law*, Vol. 15(1), 97-121.
[43] See e.g. HRC General Comment 31(80) on the nature of the general legal obligation imposed on States parties to the Covenant (Article 2), 29 March 2004.

may result in a denial of the right to have one's rights determined through a civil court and to seek reparation, including compensation, in contravention of article 14 ICCPR.

Indeed, the HRC has always affirmed that amnesties hinder the obligation to ensure the Covenant rights, in accordance with article 2(3) ICCPR) as well as the right to a remedy, in accordance with article 2(1) ICCPR. It has pointed out, for instance, that under article 2(3) ICCPR:

> the State party is under an obligation to provide the victim … with an effective remedy. The Committee urges the State party to open a proper investigation into the disappearance of Ana Rosario Celis Laureano and her fate, to provide for appropriate compensation to the victim and her family, and to bring to justice those responsible for her disappearance, notwithstanding any domestic amnesty legislation to the contrary.[44]

According to article 2(3), ICCPR internal political constraints cannot serve as a justification for amnesty laws.[45] In fact, according to the HRC, crimes against humanity, and in general serious human rights violations, should *never* be subject to amnesty laws.

In 1985, the Human Rights Committee supervising the ICCPR in relation to Suriname already found that victims of the 1982 murders were arbitrarily deprived of their lives contrary to article 6 (1) ICCPR. It urged the State party to take effective steps: (i) to investigate the killings of December 1982; (ii) to bring to justice any persons found to be responsible for the death of the victims) (iii) to pay compensation to the surviving families; and (iv) to ensure that the right to life is duly protected in Suriname.[46] This decision by the HRC is still awaiting compliance.

In its decision on the merits, the HRC has referred to the duty to investigate and prosecute human rights violations. In *Bautista de Arellana* v. *Colombia* (1995) the HRC found violations of Articles 6(1), 7 and 9(1) ICCPR. It determined that the State was 'under an obligation to provide the family of Nydia Bautista with an appropriate remedy, which should include damages and an appropriate protection of members of

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[44] Human Rights Committee *Basilio Laureano Atachahua (on behalf of his disappeared granddaughter Ana Rosario Celis Laureano)* v. *Peru*, 25 March 1996, CCPR/C/56/D/540/1993, 16 April 1996.
[45] See e.g. Concluding Observations on Chili, Add. 104, 1999, See also on Peru, Add.67, 1996.
[46] Human Rights Committee *Baboeram et al.* v. *Suriname*, 4 April 1985, CCPR/C/24/D/154/1983.

N. Bautista's family from harassment'. It also urged the State to 'expedite the criminal proceedings leading to the prompt prosecution and conviction of the persons responsible for the abduction, torture and death of Nydia Bautista'. In addition reminded the State again of its obligation to ensure that similar events would not occur in the future.

Finally, in its decision on the merits in *Tshishimbi* v. *Zaire* (1996), the HRC referred to its prior jurisprudence that Article 9(1) also included protection against 'threats made by persons in authority to the personal liberty and security of non-detained individuals within the State party's jurisdiction'. After having found violations of Articles 9(1) and 7 ICCPR, the HRC urged the State to thoroughly investigate the circumstances of the abduction and detention and to bring to justice those responsible. As it usually does, the HRC also referred to the obligation to ensure that similar violations do not occur in the future.

8.2 Jurisprudence of the Inter-American Court of Human Rights (IACHR)

In its judgments on the merits and on reparations the IACHR often refers to the obligation to prevent, to investigate and to punish. It has pointed out this obligation in the judgment on the merits because the obligation to guarantee and ensure the effective exercise of the rights in the ACHR is different from and independent of the obligation to make reparation. This means that the State is obliged to investigate the facts and punish those responsible, even if the victim or his next of kin would decide to waive the measures of reparation. Otherwise, the State would fail to comply with its general obligation to *ensure the free and full exercise* of the rights recognized under the ACHR.

At the same time, the IACHR has expressed an awareness of the difficulties of investigation in certain circumstances. It has pointed out:

> The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon

> their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.[47]

At the end of 2007,the IACHR found violations on the merits, including a failure to comply with the obligation to investigate the threats and harassment endured. It found 'a lack of diligence by the police and prosecutorial authorities' in the conduct of investigations. This had 'impeded the determination of the facts and the identification, trial, and possible punishment of the perpetrators responsible for the threats and harassment directed at some members of the García Prieto Giralt family. Moreover, the lack of an adequate and serious investigation has permitted that such events continue to the present'. It had been proven 'that José Mauricio García Prieto Hirlemann and Gloria Giralt de García Prieto have lived for years, and continue living, with feelings of insecurity, anguish, and powerless due to the lack of an investigation of the events perpetrated against them. The failure to investigate the threats and harassment has affected the personal integrity of Ramón Mauricio García Prieto's parents'. By way of reparation the Court ordered the State to conclude the pending investigations into the murder of Ramón Mauricio García Prieto and the threats and harassment; as well as to publish the operative paragraphs of the judgment, and certain specific paragraphs, in the official gazette and in another important national newspaper, and to provide the victims with the psychiatric and psychological care required, free of charge.

The Inter-American Court has often emphasised the positive obligation to investigate death threats and harassment and prosecute those responsible. It considers these measures against impunity necessary in three phases of the proceedings: in the judgments on the merits,[48] in the judgments on reparations and also as part of its provisional measures.

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[47] IACHR *Velásquez Rodríguez*, judgment of July 29, 1988, para 177.

[48] See e.g. IACHR Velásquez Rodríguez, 19 July 1988 discussing the merits: "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious

In the judgment on the merits, this is necessary because the obligation to guarantee and ensure the effective exercise of the rights in the ACHR is 'independent of and different from the obligation to make reparation'.[49] This means that the State is obliged to investigate the facts and punish those responsible even if the victim or his next of kin would decide to waive the measures of reparation.[50] Otherwise it would fail to comply with its general obligation to 'ensure the free and full exercise' of the rights under the ACHR.[51]

In its judgments on reparations, the Court often reiterates the obligation to investigate the facts and identify and punish the perpetrators. From its first cases the Court has emphasised the importance for the next of kin of the victims of their right to know what happened.[52] Equally, they have a right to know the identity of the perpetrators. The State had the duty to properly investigate the facts and punish those responsible.[53]

In the context of judgments on the merits on the right to life and the prohibition of torture and cruel treatment action against impunity (finding the truth and prosecuting those responsible), the guarantee of non-repetition follows directly. Article 1(1) ACHR requires investigation and prosecution in order to guarantee the right to life and the prohibition of cruel treatment.[54] At the stage of judgments on reparations, action against impunity may be required to achieve reparation for specific individuals,

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investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation", §174. "The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention", §176 and "The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains", §181.

49 IACHR Garrido and Baigorria, 27 August 1998 (Reparations), §72.

50 See e.g. IACHR Garrido and Baigorria, judgment of 27 August 1998 (reparations), §72.

51 See e.g. IACHR Bámaca Velásquez, judgment of 25 November 2000 (merits), §129;Garrido and Baigorria, judgment of 27 August 1998 (reparations), §73 and Paniagua Morales et al, judgment of 8 March 1998, §178.

52 See e.g. IACHR Velásquez Rodríguez, 29 July 1988 (merits), §181;Godínez Cruz, 20 January 1989 (merits), §191 and Aloeboetoe et al., 10 September 1993 (reparation), §109.

53 See e.g. IACHR El Amparo, judgment of 14 September 1996 (reparation), §61; Blake, 22 January 1999 (reparations), §65 and Suárez Rosero, 20 January 1999 (reparations), §§79-80, pointing out this is already an obligation on the merits, not just on reparations, referring to its judgment on the merits in this case of 12 November 1997, 6th operative paragraph.

54 See e.g. CIDH Damion Thomas v. Jamaica, 4 April 2001 (merits), §45 (establishing that Article 1(1) ACHR, obligating the State to ensure the free and full exercise of the rights and freedoms in the Convention to all persons subject to its jurisdiction, requires the State 'to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights'. Flowing from these obligations 'are correspondent duties to prevent, investigate and punish any violation of the rights recognized in the Convention'.

namely: the right to the truth, restoring some measure of dignity, removing fear and recognition of suffering. In other words, action against impunity at this stage aims at recognition, satisfaction and rehabilitation.

The Court has defined impunity as the 'total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention'. In this respect 'the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives'.[55]

In April 2012 the Inter-American Commission (IACHR) expressed its deep concern with respect to the amnesty legislation approved by the Parliament of Suriname. It noted that this impedes compliance with cases that have already been decided by the inter-American system, including the Massacre of Moiwana case. It reiterated that amnesty laws related to serious human rights violations are incompatible with international human rights obligations, as such laws keep States from investigating and punishing the perpetrators. The IACHR pointed out that the Court has established repeatedly that an amnesty law may not serve as a justification for failing to comply with the duty to investigate and to ensure access to justice.[56]

Finally, the doctrine of the Inter-American Court (found in most orders monitoring compliance with its judgments), includes the following measures:

- Pursuant to Article 68(1) of the American Convention, "[t]he State Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties." Therefore, State Parties must ensure that the rulings set out in the decisions of the Court are implemented at the domestic level.[57]

[55] IACHR Paniagua Morales et al, judgment of 8 March 1998 (merits), §173. It has also found certain amnesty laws to be incompatible with the ACHR and therefore lacking legal effect. Barrios Altos v. Peru, judgment of 14 March 2001 (merits).

[56] See Inter-American Commission's press release of 13 April 2012, http://www.oas.org/en/iachr/media_center/PReleases/2012/038.asp

[57] *Cf. Case of Baena-Ricardo et al. v. Panama. Competence.* Judgment of November 28, 2003. Series C No. 104, para. 131; *Case of Barrios Altos v. Peru. Monitoring Compliance with Judgment.* Order of the Court of December 7, 2009, considering clause No. 3,and *Case of Las Palmeras v. Colombia. Monitoring Compliance with Judgment.* Order of the Court of December 7, 2009, considering clause No. 4.

- Judgments of the Court are final and not subject to appeal; therefore, pursuant to the provisions of Article 67 of the American Convention, the State must promptly and fully comply with them within the term set for this purpose.
- That the obligation to comply with the rulings of the Court conforms to a basic principle of law regarding the international responsibility of the State. That is, States must comply with their international treaty obligations in good faith (*pacta sunt servanda*) and, as the Court has previously stated and is set forth in Article 27 of the Vienna Convention on the Law of Treaties of 1969, they cannot invoke their municipal laws to escape their pre-established international responsibility. The State Parties' obligations under the Convention bind all State branches and organs.[58]
- States Parties to the Convention must guarantee compliance with the provisions thereof and their effects (*effet utile*) at the domestic-law level. This principle applies not only in connection with the substantive provisions of human rights treaties (*i.e.*, those addressing the protected rights), but also in connection with their procedural provisions, such as those concerning compliance with the Court's decisions. These obligations are to be interpreted and enforced in a manner such that the protected guarantee is truly practical and effective, considering the special nature of human rights treaties.[59]"

8.3 Right to a remedy and reparation and the right to know

An overview of the existing State obligations in respect to a right to a remedy and reparation and the obligation of States to ensure the inalienable right to know the truth about violations can be found in the UN *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.*[60] These Principles and Guidelines were adopted by all States, including Suriname, in a consensus resolution of the UN General Assembly.

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[58] *Cf. International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994.* Series A No. 14, para. 35; *Case of La Cantuta v. Peru. Monitoring Compliance with Judgment.* Order of the Court of December 7, 2009, considering clause No. 5, and *Case of Cantoral-Benavides v. Peru. Monitoring Compliance with Judgment.* Order of the Court of July 9, 2009, considering clause No. 5.

[59] *Cf. Case of Ivcher-Bronstein v. Peru. Competence. Judgment of September 24, 1999.* Series C No. 54, para. 37; *Case of La Cantuta v. Peru, supra* note 2, Considering clause No. 6, and *Case of Cantoral- Benavides v. Peru, supra* note 2, considering clause No. 6.

[60] General Assembly resolution 60/147, 16 December 2005.

The positive obligations that flow from the undertaking to prevent cruel treatment include an obligation to grant redress, including cessation and guarantees of non-repetition, as has been set out in the *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*. The *Set of principles for the protection and promotion of human rights through action to combat impunity* refers in principle 1 to the obligation of States to ensure the inalienable right to know the truth about violations. Once the authorities have knowledge of a violation 'they should initiate a serious, impartial and effective investigation, *ex officio* and without delay'.[61] As noted, the duty to investigate is not just a step taken by private interests. It does not depend upon the initiative of the victim or his family or upon their offer of proof.[62]

Investigations of human rights violations should be carried out with diligence, that is, using all legal means available and oriented toward determining the truth.[63] States have the obligation to ensure that all necessary steps are taken to uncover the truth about what happened and to ensure that those responsible are punished.[64]Impunity cannot be combated in the absence of efficient witness protection programmes.[65]

9 Annex – Interim Press Release by ICJ on 11 May 2012

PRESS RELEASE For immediate use: 11 May 2012

The decision to suspend the trial of Suriname's President Bouterse is of concern – ICJ

The International Commission of Jurists (ICJ) is concerned about the decision by a Suriname Military Court to suspend the trial of President Desi Bouterse and leave it to the public prosecutor and an as yet undesignated court to decide on whether President Bouterse should benefit from the country's Amnesty Law.

Bouterse had been accused of having been present on December 8, 1982, at the military barracks of Fort Zeelandia where 15 political opponents were allegedly executed.

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[61] See Inter-American Court of Human Rights Case *of García-Prieto et al. v. El Salvador*, Judgment of 20 November 2007, §101; and Case of the *Gómez-Paquiyauri Brothers v. Peru*, Judgment of 8 July 2004, §146.
[62] See Inter-American Court of Human Rights *Case of Velásquez-Rodríguez v. Honduras*, Judgment of 29 July 1988, §177; see also, e.g. *Case of Zambrano-Vélez et al. v. Ecuador*, Judgment of 4 July 2007, §120.
[63] See Inter-American Court of Human Rights *Case of García-Prieto et al. v. El Salvador*, Judgment of 20 November 2007, §101.
[64] See Inter-American Court of Human Rights *Case of Bulacio v. Argentina*, Judgment of 18 September 2003, §114;and *Case of the Rochela Massacre v. Colombia*, Judgment of 11 May 2007, §146 and *Case of the Miguel Castro-Castro Prison v. Peru*, 25 November 2006, §382.
[65] See Interim report of the Special Rapporteur on the independence of judges and lawyers (Gabriela Knaul), A/65/274,10 August 2010, §47.

At the time, Bouterse was leading a military government. In 2010 he was elected president of Suriname. The Amnesty Law applies to crimes committed between 1980 and 1992.

“The ICJ is concerned by the decision of the Military Court to discharge itself of responsibilities in relation to this case,” said Dr. Jeff Handmaker, who has been observing the trial on behalf of the ICJ. “Handing the matter over to the office of the prosecutor, without taking a decision on the constitutionality of the Amnesty Law, leads to great uncertainty.”

According to international law, and Suriname's Constitution, the victims to this matter have the right to an honest and public treatment of their complaint within a reasonable period of time.

“Indications are that this will not happen,” Handmaker added. “The case has been pending for nearly 30 years since the events took place and for five years since the trial began in 2007. Justice delayed is justice denied.”

The ICJ now calls on a higher Court to urgently reconsider the decision of the Military Court and take a decision on the constitutionality of the Amnesty Law.

For further information, please contact:
Jeff Handmaker, ICJ Observer at the trial of President Bouterse, T: +597 863 2712

NOTES:

- Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.
- While the Court has provided an extensively argued judgment that was read out in Court, a written version is not yet available. When it is available, it will be studied more closely.

10 Annex – Amnesty Law Amendment 2012

[Translation]

2012 OFFICIAL GAZETTE No. 49

OF THE REPUBLIC OF SURINAME

Act dated 5 April 2012, amending the act dated 19 August 1992 ('Amnesty Act 1989') granting amnesty to persons who committed certain criminal offences as herein described in the period from 1 January 1985 to the date of entry into force of this Act (Official Gazette 1992 no. 68).

THE PRESIDENT OF THE REPUBLIC OF SURINAME

having considered that in order to further national unity and continue the undisturbed development of the Republic of Suriname, it is necessary to lift the current interruption between the amnesty terms governed by the Act dated 3 April 1980 (Official Gazette 1980, no. 27) and the Amnesty Act 1989 (Official Gazette 1992, no. 68) and, for that purpose, to amend the Amnesty Act 1989;

having heard the State Council and obtained the approval of the National Assembly, has ratified the act set forth below:

ARTICLE I

The Act dated 19 August 1992 granting amnesty to persons who committed certain criminal offences as therein described from 1 January 1985 to the date of entry into force of the Act (the 'Amnesty Act 1989') (Official Gazette 1992 no. 68) is amended as follows:

A. The preamble is amended as follows:

The phrase ' who... from 1 January 1985 to the date of entry into force of this Act' is replaced by ' who ... in the period from 1 April 1980 to 20 August 1992'.

B. Article 1, paragraph 1, is amended as follows:

In Article 1, paragraph 1, the phrase 'Amnesty is granted to those persons who ... in the period commencing on 1 January 1985 and ending on the date of entry into force of this Act' is replaced by:

'Amnesty is granted to the persons who ... in the period commencing on 1 April 1980 and ending on 20 August 1992;'

Sections a, b, c and d of the Amnesty Act1989 are relettered and a new section, a, is added, which reads as follows:

a. ... have committed and/or are suspected of and/or have been summoned to appear in court for criminal offences within the context of the defence of the State and/or overturning the lawful authorities;

After the new section 'e', two new sections: 'f' and "g' are added, which read as follows:

f. Who committed criminal offences within the context of the conflict in the interior and/or the events of December 1982 and/or other conflicts connected to those referred to in paragraphs a and b in the period from 1 April 1980 to 20 August 1992 and/or who are suspected of them within the meaning of sections a,b,c,d and e;

g. are regarded as suspects and have been summoned to appear in court as such in connection with acts committed on 7, 8 and/or 9 December 1982 as described in the writ of summons in connection with Articles 347, 348, 349 or Article 72(2) and Article 360 et seq. of the Criminal Code.

C. Articles 4 and 5 have been relettered to become Articles 5 and 6, respectively, and a new Article 4 is added, which reads as follows:

Article 4

Immediately after the publication of this Act, a truth and reconciliation commission will be created by law to investigate and establish the truth regarding human rights violations in the period from 1980-1985, including the events of 8 December 1982.

ARTICLE II

1. This act will be published in the Official Gazette of the Republic of Suriname.

2. It will enter into effect on the day following that of its publication.

3. The Minister of Justice and Police will be in charge of implementing this Act.

Delivered in Paramaribo on 5April 2012.

ROBERT L.A. AMEERALI

Issued in Paramaribo on 5 April 2012

The Minister of Home Affairs *ad interim*

L. DIKO

Act dated 5 April 2012, amending the act dated 19 August 1992 ('Amnesty Act 1989') granting amnesty to persons who committed criminal offences as herein described in the period from 1 January 1985 to the date of entry into force of this Act (Official Gazette 1992, no. 68).

EXPLANATORY MEMORANDUM

In the history of the people of Suriname, the period between 1975 and 1993 will continue to be characterised as a time of dramatic political, administrative, socioeconomic and sociocultural events. The aforementioned period of time was dominated by national as well as international forces. Those fields of force have led to a variety of events in our country.

The 1980s have not failed to leave their mark on the community in various ways in the past 32 years.

The first generation that did not bear witness to that period was born in 1987. Since then, that generation has largely participated in the political and social process of our country and is now about to reach complete adulthood. Despite the passage of time, we all too often still see politicians and administrators introduce their experiences and perspectives of that time in the debate of current national issues of crucial interest, which has a negative effect on the debate and on the approach to important new issues.

We have seen much time being lost in discussions of that period and its effects, both in a positive and negative sense.

Our country has an urgent need for acceleration of its development and a joint approach to a number of new, very serious issues regarding our future and our very survival. We will be unable to overcome the challenges and threats facing our country this century if we fail to act decisively and in unity in order to protect the current and future generations of Surinamers.

There is a growing understanding that our country will be able to sustain itself only by strong solidarity in the coming years in the battle against the many problems with which the world has confronted us.

In the years behind us, appeals for amnesty have been heard from various sides more and more often. Within that context, various attempts were made to achieve reconciliation by means of granting amnesty.

As is also explained in the Explanatory Memorandum of the Act, once amnesty has been granted, society has more opportunities for acceptance and thus, for social rest and development. Partly for that purpose, it is important to honour all who have fallen and to guide our country towards the road to recovery.

Peace is not a mere lack of active combat operations. The low intensity conflict that has afflicted our country since the 1980s equally stands in the way of development. For these reasons, it is necessary within the context of peace, national unity and the development of the Republic of Suriname for the Amnesty Act to no longer cover only a selective part of the 1980s.

The existing wording and the Explanatory Memorandum are very clear about the relevance of amnesty to achieve normalisation, reconciliation and further development in our country. Because the existing act already provides for all the necessary considerations in connection with the relevant exceptions and international law and international custom, it was only necessary to amend the Act so that it, together with the Act of 3 April 1980, will extend to all cases in the entire period as from the coup d'état until 19 August 1992. This is also important within the context of the equality principle (Article 8(2) of the Constitution). Because society seeks to achieve national reconciliation, a truth and reconciliation commission of broad composition must be installed immediately after amnesty is granted in order to establish the truth as clearly as possible.

It is expressly noted that the Moiwana ruling handed down by the Inter-american Court of Human Rights, falls outside the scope of application of this Act and must therefore be enforced without restriction.

Paramaribo, 19 March 2012

R. PANKA

R. TAMSIRAN

A. MISIEKABA

A. PAAL

M. BOUVA

R. DOEKH1E