



**THE PROSECUTION OF JEAN-CLAUDE DUVALIER**

**Ex President-for-Life of Haiti (21 April 1971-7 February 1986)**

**Submission *Amicus Curiae* for the Assistance of the Judicial Authorities**

1. On 16 January 2011, Jean-Claude Duvalier returned to Haiti after 25 years in exile in France. He is currently under investigation for offenses including corruption, attempted murder and sequestration.
2. These written comments are published for the assistance of the judicial authorities examining the case and explain the relevant international standards that apply directly in and upon Haiti. It has been suggested that it would be unlawful to prosecute Jean-Claude Duvalier, because a) the crimes at issue were not recognized offences at the time Duvalier is alleged to have committed them, and prosecution would violate the rule against retroactive criminal offences; b) the crimes at issue as crimes against humanity are not crimes under Haitian law; and c) prosecution for the crimes at issue are barred by the statute of limitations after 10 years.
3. However, as will be demonstrated in this submission, none of these arguments has merit. The conduct alleged was clearly recognized as a crime at the time both under Haitian criminal law and under binding international law, and it cannot be suggested that Jean-Claude Duvalier would or should not have known it was illegal. There is no impediment to an investigation of Jean-Claude Duvalier, and his prosecution for offenses alleged to have been committed as part of a widespread and systematic attack on the people of Haiti. To the contrary, Haiti has on frequent occasions agreed that there can be no impunity for such crimes, and so must act on those words.
4. These written comments address three points:
  - *A. Constitutional Application of International Standards in Haiti.* The Haitian Constitution of 1987 makes clear that human rights standards and international law accepted by Haiti are the law of the land, recognizing the penal nature of crimes against humanity and the duty to investigate and prosecute both their intellectual and material authors.
  - *B. No Statute of Limitations or Amnesties for such Crimes.* Crimes against humanity have been recognized as criminal offences since the Nuremberg Charter of 8 August 1945. The behavior alleged against Jean-Claude Duvalier was obviously criminal. Under international human rights standards accepted by Haiti no statute of limitations or amnesty can apply to such crimes. The 1986 Amnesty Law of 18 June 1986 together with Article 466 of the Criminal Investigation Code amended by the Decree of 4 July 1988 do not apply to these offences and should be set aside.
  - *C. Available Criminal Offenses.* The allegations against Jean-Claude Duvalier can be prosecuted under domestic law and characterized as crimes against humanity with no need for further legislation.
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accountability for international crimes, combat racial discrimination and statelessness, support criminal justice reform, address abuses related to national security and counterterrorism, expand freedom of information and expression, and stem corruption linked to the exploitation of natural resources. Our staff are based in Abuja, Amsterdam, Bishkek, Brussels, Budapest, Freetown, The Hague, London, Mexico City, New York, Paris, Phnom Penh, Santo Domingo and Washington, D.C.<sup>1</sup>

### **Factual Background**

6. On 21 April 1971, Jean-Claude Duvalier became the Haitian Head of State, the day his father, President for life François Duvalier, died. He occupied the Haitian presidency until he was deposed on the 7<sup>th</sup> of February 1986. He then left Haiti and spent twenty-five years in France in exile.
7. On 16 January 2011, Duvalier returned to Haiti. Shortly after his return, on 18 January 2011, Harycidas Auguste, the *Commissaire du gouvernement* (State Prosecutor) re-instated a previous criminal investigation against him, and referred the case to Judge Carvès Jean, the *juge d'instruction* (Investigating Magistrate). On that same day, Jean-Claude Duvalier was interrogated about allegations of political corruption, fraud and embezzlement. Due to the serious nature of the accusations the Haitian authorities confined Duvalier to house arrest pending their investigation.
8. In addition, since Jean-Claude Duvalier's return to Haiti, at least 22 individual citizens have filed criminal complaints in their name or on behalf of victims of crimes committed during his regime. The complaints allege, *inter alia*, that Jean-Claude Duvalier, throughout his period of rule, and together with other co-perpetrators committed widespread and systematic attacks against civilians, amounting to crimes against humanity. The complaints include allegations of extrajudicial killings, torture and enforced disappearances. The *Commissaire du gouvernement* has referred these additional complaints to the Investigating Magistrate for further investigation.
9. In order to charge Jean-Claude Duvalier, the investigating judge must investigate the complaints and decide whether or not to confirm an *acte d'accusation*. His *ordonnance de clôture* (closing order) can either be an *ordonnance de non lieu* (dismissal order) or an *ordonnance de renvoi* (referral order) to send the case to the *assises criminelles* (criminal courts). To reach the conclusion that a criminal indictment is warranted, the investigating judge must be satisfied that Haitian judicial organs possess jurisdiction over the offenses, and that there is sufficient evidence to indict Jean-Claude Duvalier.
10. There is ample documentation available in the public domain that details persistent patterns of abuse committed against Haitian citizens under the shield of government policy during his presidency.

### **A. Application of International Law in Haiti**

11. Under the Haitian Constitution, international law is the law of the land. Crimes against humanity have been recognized as criminal offences since Nuremberg. Haiti signed the

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<sup>1</sup> This brief was prepared with the assistance of Patricia Sellers, former Deputy Head of the Legal Advisory Section, Office of the Prosecutor, ICTY, and Special Legal Advisor to the Gender and Woman's Rights Division of the United Nation's High Commissioner for Human Rights. The Justice Initiative also recognizes the assistance of *Avocats sans Frontières Canada* for their assistance in the development of this *amicus curiae*. In Haiti, the *Collectif contre l'impunité*, which brings together claimants and human rights organisations, has also contributed.

Nuremberg Charter of 8 August 1945 on 3 November 1945, one of the 19 signatory countries. Haiti is required to investigate such crimes under the American Convention on Human Rights (ACHR) and the International Covenant on Civil and Political Rights (ICCPR), both ratified by Haiti, and also pursuant to Haiti's obligations under customary international law. Those accused of such crimes cannot hide behind domestic laws that purport to shield them. The victims of crimes against humanity have the right to justice, which means that there must be an effective investigation into the crimes against them which is capable of bringing about the prosecution of the material and intellectual authors of the crimes.

#### International Law is part of Haitian Law

12. It has been suggested that only the Constitution and other Haitian laws can be invoked by the Investigating Magistrate. However, this position fails to recognize that under the Haitian Constitution, international standards are also the law of the land.
13. The Preamble of the Haitian Constitution of 1987 proclaims that the government is "based upon fundamental liberties and respect for human rights" and recognizes their inalienable and imprescriptible rights to life, liberty and the pursuit of happiness in conformity with the Act of Independence of 1804 and the Universal Declaration of Human Rights of 1948." Article 19 of the Haitian Constitution specifically guarantees the right to "respect of the human person for all citizens without distinction" in conformity with the Universal Declaration of 1948.
14. Article 276.1 of the Constitution states that treaties, conventions and agreements must be ratified by decrees, after which they become part of Haitian law as recognized in Article 276.2. Once part of domestic law through the operation of the Constitution, Article 276.2 states that those rules in international conventions prevail over any inconsistent domestic law. As the Inter-American Commission of Human Rights explained, this includes the obligation to investigate and prosecute crimes against humanity which are contained in the American Convention on Human Rights (ACHR).<sup>2</sup>
15. Customary international law is binding upon all nations, and is defined in Article 38 of the Statute of the International Court of Justice as "international custom, as evidence of a general practice accepted as law". Thus, where a general practice is accepted by the community of nations as having a legal obligation to it, demonstrated by sources including legislation, legal opinions, and decisions of the General Assembly, it becomes binding upon all nations.<sup>3</sup> When a norm is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted" it becomes a *jus cogens* norm which allows no exception.<sup>4</sup> The Haitian Constitution does not explicitly express how international customary law, including crimes against humanity, is incorporated into Haitian law. However, given the continually emerging, non-written characteristics of international customary law, most States adopt an automatic incorporation of customary law into their domestic law and allow judges to establish the extent a customary rule binds the national system, unless or until the legislation implements

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<sup>2</sup> IACommHR, Statement of 18 May 2011 on Duty of Haiti to Investigate, paras. 6-9, 38. Available at [www.cidh.org/pronunciamientocidhhaitimayo2011.fr.htm](http://www.cidh.org/pronunciamientocidhhaitimayo2011.fr.htm)

<sup>3</sup> See Ian Brownlie, *Principles of Public International Law* (4th ed. 1990) at pages 5-7.

<sup>4</sup> Article 53, Vienna Convention on the Law of Treaties.

a given rule.<sup>5</sup> The lack of an express method of incorporation does not extinguish Haiti's obligations under international customary law.

16. In determining whether jurisdiction exists to pursue the complaints lodged against Jean-Claude Duvalier for crimes against humanity, the Investigating Magistrate should thus examine Haiti's non-derogable obligations under international human rights law to investigate and prosecute crimes against humanity, which form part of Haitian domestic law.

What is a Crime against Humanity?

17. A crime against humanity is an egregious manifestation of a human rights violation. It is a serious criminal act (such as murder, torture, rape) committed as part of a widespread or systematic attack, directed against a civilian population. There is no specific treaty dedicated to crimes against humanity, but they have been recognised as criminal offenses through treaty law, international custom, general principles of international law, and international and national jurisprudence. The Inter-American Commission on Human Rights recently clarified that the crimes committed during the regime of Jean-Claude Duvalier can be properly described as crimes against humanity.<sup>6</sup>
18. The concept of crimes against humanity developed in the early 20<sup>th</sup> century, and was then explicitly included in the Charters setting up the Nuremberg and Tokyo trials following the Second World War, in 1945 and 1946 respectively.<sup>7</sup> The penal nature of crimes against humanity quickly crystallized into international customary law:<sup>8</sup> in 1950 the International Law Commission affirmed as a "principle of international law" that crimes against humanity were "punishable as crimes under international law";<sup>9</sup> and the General Assembly of the United Nations passed a series of resolutions from 1967-1973, which affirmed the criminal nature of crimes against humanity and called on states to ensure their prosecution and punishment.<sup>10</sup> The European Court of Human Rights has recently recognized that crimes against humanity were established as attracting criminal liability from 1946, on the basis that in that year the UN General Assembly affirmed the principles of customary international law recognized in the Nuremberg Charter.<sup>11</sup>

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<sup>5</sup> See Brownlie, *supra*, at pages 43 and 47: "[the] dominant principle, normally characterized as the doctrine of incorporation, is that customary rules are to be considered part of the law of the land and enforced as such, with the qualification that they are incorporated only so far as is not inconsistent with Acts of Parliament or prior judicial decisions of final authority . . . A considerable number of states follow the principle of [automatic] incorporation, or adoption, of customary international law".

<sup>6</sup> IACCommHR, "Statement by the Inter-American Commission on Human Rights on the Duty of the Haitian State to Investigate the Gross Violations of Human Rights Committed during the Regime of Jean-Claude Duvalier", 17 May 2011, paras. 5, 14 and 39 ("IACCommHR Statement on Duty of Haiti to Investigate").

<sup>7</sup> Article 6(c) of the Charter of the International Military Tribunal defined crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

<sup>8</sup> Antonio Cassese, *Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law*, 4 *Journal of International Criminal Justice* 410, FN5.

<sup>9</sup> ILC, Principles of International Law Recognised in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, *Yearbook of the International Law Commission, 1950*, Vol II, para. 97.

<sup>10</sup> See para 29 below.

<sup>11</sup> See *Kolk and Kislyiy v. Estonia*, ECtHR decision on admissibility of 17 January 2006.

19. Since the Second World War, crimes against humanity have been recognized in the statutes of a number of subsequent courts and tribunals. Most relevant for Haiti is Article 5 of the Law of the Extraordinary Chambers of the Court of Cambodia (for offenses between 17 April 1975 and 6 January 1979). In addition, of relevance are Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (for offenses from 1991); Article 2 of the Statute of the International Criminal Tribunal for Rwanda (for offenses from 1994); Article 2 of the Statute of the Special Court for Sierra Leone (from November 1996); and Article 7 of the Rome Statute of the International Criminal Court (for offenses from 2002 onwards).
20. Each of these courts has enumerated the elements of crimes against humanity within their Statutes, with minor variations. The key requirement is that the offenses were committed as part of a widespread or systematic attack against a civilian population. The Extraordinary Chambers in the Courts of Cambodia examined in detail the elements of crimes against humanity under customary international law in the 1970s, and confirmed that by that time there was no requirement that they be committed in the context of an armed conflict.<sup>12</sup>
21. These *ad hoc* tribunals were created to deal with a specific situation, and so Haiti is not within their jurisdiction. In the case of the International Criminal Court, it can only deal with crimes that occurred after July 2002. The fact that Haiti has not accepted the compulsory jurisdiction of the ICC to try cases by signing the Rome Statute does not mean that the pre-existing international law does not apply. In general, the Rome Statute did not create new offenses but essentially acknowledged and codified existing international offences.<sup>13</sup> Similarly, the fact that Haiti has not signed the Convention for the Non-Applicability of Statutory Limitations for War Crimes and Crimes against Humanity, does not mean that Haiti is not bound by the customary law of crimes against humanity.

Obligation to Investigate and Prosecute under Human Rights Law

22. International human rights law binding on Haiti creates an obligation to investigate and prosecute the material and intellectual perpetrators of human rights violations, particularly egregious violations such as crimes against humanity. The same duty exists under customary international law. Haiti is not permitted to avoid these obligations, but must find a way to live up to them.
23. On 27 September 1977, during the presidency of Jean-Claude Duvalier, Haiti acceded to the American Convention on Human Rights (ACHR), entering into force on 18 July 1978. Article 1 of the ACHR requires States to respect the rights and freedoms set out in the Convention; Article 2 obliges States to take whatever measures are required to give effect to those rights; and Article 25 guarantees the right to judicial protection, requiring that everyone has the right to an effective judicial recourse.
24. The Inter-American Court and Commission have both interpreted these provisions as imposing upon all States an obligation to investigate and, if found guilty, punish the perpetrators of crimes against humanity. The Inter-American Court has emphasized that the “obligation that arises pursuant to international law to try, and, if found guilty, to punish perpetrators of ... crimes against humanity, is derived from the duty of protection

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<sup>12</sup> *Prosecutor v. Kaing Guek Eav alias Duch*, Judgment, 26 July 2010, paras. 281-296; see in particular para.292.

<sup>13</sup> See e.g. von Hebel and Robinson, “Crimes within the Jurisdiction of the Court” in Lee (ed) *The International Criminal Court: The Making of the Rome Statute* (1999), p. 91, citing the 1996 Preparatory Commission for the ICC Report, Vol I, paras. 51-54.

embodied in Article 1(1) of the American Convention”, and that “thorough investigation of ... crimes against humanity, as well as punishment of those responsible ... constitute an important element in the prevention of such crimes”.<sup>14</sup> The Court has also recently explained that “the obligation to investigate includes the duty to direct the efforts of the apparatus of the State to clarify the structures that allowed these violations, the reasons for them, the causes, the beneficiaries and the consequences”.<sup>15</sup>

25. Based on this consistent jurisprudence, the Inter-American Commission recently reminded Haiti that

“As a State Party to the American Convention, the Republic of Haiti has an international obligation to investigate and, where necessary, punish those responsible for the gross human rights violations committed during the regime of Jean-Claude Duvalier”<sup>16</sup>

The Inter-American Commission expressly confirmed both that crimes against humanity were criminalised under international law at the time of the crimes committed in Haiti during the Jean-Claude Duvalier regime (at para.10) and that Haiti’s obligation to investigate and prosecute crimes under the American Convention applies to crimes committed during that period (at para.9).

26. These obligations under the American Convention are mirrored by the international human rights regime.<sup>17</sup> Article 2(1) of the ICCPR requires states to secure the rights in the Covenant to those within their jurisdiction; Article 2(2) requires States to adopt “such legislation or other measures as may be necessary” to give effect to the rights recognized in the Covenant.
27. Article 2(3) of the ICCPR obliges States to provide an effective remedy for violations even where “that violation has been committed by persons acting in an official capacity”. The UN Human Rights Committee has interpreted this to mean that “mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly, and effectively”.<sup>18</sup> The Committee has called “the problem of impunity ... a matter of sustained concern by the Committee”, has confirmed that “[w]hen committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity”, and has clarified that a failure to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.<sup>19</sup> This obligation to investigate is an ongoing one, and the breach continues so long as there has not been an effective investigation, and thus has continued since Haiti ratified the ICCPR in 1990.

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<sup>14</sup> *Almonacid-Arellano et al. v. Chile*, IACtHR Judgment, 26 September 2006, para. 110, 106.

<sup>15</sup> *Manuel Cepeda Vargas v. Colombia*, IACtHR Judgment, 26 May 2010, para. 118; see also para. 119 (“the State authorities must determine, by due process of law, the patterns of collaborative action and all the individuals who took part in the said violations in different ways, together with their corresponding responsibilities. It is not sufficient to be aware of the scene and material circumstances of the crime; rather it is essential to analyze the awareness of the power structures that allowed, designed and executed it, both intellectually and directly, as well as the interested persons or groups and those who benefited”).

<sup>16</sup> IACCommHR Statement on Duty of Haiti to Investigate, para. 38; see also paras. 9, 11, 13.

<sup>17</sup> Haiti signed and ratified the ICCPR on 23 November 1990, and published it as law on 7 January 1991.

<sup>18</sup> General Comment No. 31 “The Nature of Legal Obligations Imposed on the State Parties to the Covenant” CCPR/C/21/Rev.1/Add.13 26 May 2004, para. 14.

<sup>19</sup> *Ibid.* para. 18; see also para. 15.

### Duty to Investigate and Prosecute International Crimes under Customary International Law

28. In addition to the obligation to investigate and prosecute under human rights law, crimes against humanity are international crimes, and there is a duty upon Haiti under international law to prosecute Jean-Claude Duvalier or to extradite him to a country that is willing to do so.<sup>20</sup> The prohibition of crimes against humanity, and the requirement to prosecute them as such, has been accepted as a *jus cogens* or peremptory norm of international law since the second world war,<sup>21</sup> and the Inter-American Court has explained that “the punishment of such crimes is obligatory pursuant to the general principles of international law.”<sup>22</sup>
29. Through a series of votes at the UN General Assembly (UNGA) shortly before Jean-Claude Duvalier came to power, the community of nations – including Haiti – agreed that such behavior was subject to criminal sanction. Resolutions 2338 (1967) and 2583 (1969) emphasized the duty of all states to conduct a “thorough investigation” of crimes against humanity and ensure “effective punishment” of individuals found guilty, while Resolutions 2712 (1970) and 2840 (1971) re-enforced the obligation upon States to prosecute or extradite alleged perpetrators of crimes against humanity.<sup>23</sup> The global obligation to prosecute crimes against humanity was re-affirmed during Jean-Claude Duvalier’s premiership as President for life through Resolution 3074 of 1973, entitled the *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*, which declared, *inter alia* that, “crimes against humanity, wherever they are committed shall be subject to investigation and the person against whom there is evidence ... [and] shall be subject to tracing, arrest, trial and if found guilty, to punishment.”<sup>24</sup>
30. The fact that Haiti has not signed certain international treaties nor accepted the jurisdiction of the International Criminal Court is irrelevant, as Haiti has signed key human rights treaties that impose such obligations and customary international law applies to all states, irrespective of whether they have signed any particular treaty.<sup>25</sup> International customary law requires states to arrest, investigate, prosecute and judge perpetrators of certain international crimes, such as piracy, slavery, genocide or crimes against humanity, in all circumstances. Such crimes concern the entire international community, and there is an

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<sup>20</sup> *Question of the punishment of war criminals and of persons who have committed crimes against humanity*, UN GA Resolution 2712 (XXV) (15 Dec. 1970) (calling upon all States to “take measures, in accordance with recognized principles of international law, to arrest such persons and extradite them to the countries where they have committed war crimes and crimes against humanity, so that they can be brought to trial and punished”).

<sup>21</sup> See, e.g., *A-G of the Government of Israel v. Adolph Eichmann* (1962), 36 ILR 277; *Kolk and Kislyiy v. Estonia*, ECtHR decision on admissibility of 17 January 2006; *Prosecutor v. Kupreksic et al.* (Trial Judgment), IT-95-16-T, ICTY, 14 January 2000, para. 520 (“most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character”).

<sup>22</sup> *Almonacid-Arellano et al. v. Chile*, IACtHR Judgment of 26 September 2006, para. 99.

<sup>23</sup> *Question of the punishment of war criminals and of persons who have committed crimes against humanity*, UN GA Resolution 2338 (XXII) (18 Dec. 1967); UN GA Resolution 2583 (XXIV) (15 Dec. 1969); UN GA Resolution 2712 (XXV) (15 Dec. 1970); UN GA Resolution 2840 (XXVI) (18 Dec. 1971).

<sup>24</sup> UN GA Resolution 3074 (XXVIII) (3 Dec. 1973).

<sup>25</sup> See *Kolk and Kislyiy v. Estonia*, ECtHR decision on admissibility of 17 January 2006 (holding that the “Charter of the Nuremberg Tribunal and also the Statute of the ICTY enshrined norms of customary international law which were binding irrespective of whether a particular State had acceded to an international human rights treaty”).

obligation to prosecute perpetrators in their own State or to extradite perpetrators to a State that will conduct prosecutions.

### **B. No Amnesty for Crimes against Humanity**

31. It has been argued that it is not lawful to prosecute Jean-Claude Duvalier now for crimes that were committed in the 1970s and 1980s, on the basis that such crimes were not prohibited at the time, and because the law of 18 June 1986 and Article 466 of the Criminal Investigation Code (introduced by the Decree of 4 July 1988) introduced an amnesty through a Statute of Limitations so as to prevent the prosecution of crimes against humanity and ordinary crimes after 10 years. Both of these arguments are not correct: the fact that the crimes were committed in the 1970s and 80s does not prevent them being prosecuted in Haiti today. Crimes against humanity have been crimes under customary international law since Nuremberg, and international law explicitly states that statutes of limitations may not be applied in a manner which would grant impunity or amnesty for such crimes.

#### Prosecution for Crimes against Humanity is not Retroactive Punishment

32. The fact that the crimes under consideration occurred in 1970s and 1980s, does not deprive Haitian courts of jurisdiction. As outlined above, the penal nature of crimes against humanity has been constantly recognized since 1946. Courts around the world have clarified that the crimes prohibited under customary international law in the 1970s can be tried in the 21<sup>st</sup> Century. In 2010, the Extraordinary Chambers in the Courts of Cambodia addressed this precise argument and held that they had jurisdiction to try offenses that occurred in the late 1970s as crimes against humanity, in a legal system that shares many characteristics with that of Haiti.<sup>26</sup> In 2006 the European Court of Human Rights held that crimes against humanity were not subject to statutory limitation, irrespective of the date on which they were committed, and that it was permitted for a State to hold trials for crimes against humanity committed in 1949 even though there was no such offence in national legislation at that time.<sup>27</sup>
33. The usual rule which forbids the retroactive application of criminal offenses (the *nullum crimen* principle) has a specific exception for crimes that are also offenses under international law, such as crimes against humanity. This is on the basis that conduct leading to an allegation of crimes against humanity is clearly criminal. While Article 15(1) of the ICCPR states that no-one shall be found guilty of conduct that was not an offense in domestic law at the time of commission, this only applies if it was also not an offense under international law at the time.<sup>28</sup> Where offenses were clearly contrary to international law at the time that they were committed, the accused may be tried and convicted for that offense.
34. The American Convention of Human Rights also requires that there should be redress for crimes against humanity even when committed decades ago under a previous regime. The Inter-American Court has ruled that “in 1973... the commission of crimes against humanity

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<sup>26</sup> See note 12, above.

<sup>27</sup> See *Kolk and Kislyiy v. Estonia*, ECtHR decision on admissibility of 17 January 2006. The European Court declared the case inadmissible, finding that the Estonian Court did not err in law when concluding that crimes against humanity formed part of international customary international law in 1949.

<sup>28</sup> Article 15(1) ICCPR states, in part, that: “No one shall be held guilty of a criminal offense on account of any act or omission which did not constitute a criminal offense under national *or international law* at the time when it was committed...” (emphasis added). See, e.g., *Prosecutor v. Kaing Guek Eav alias Duch*, Judgment, 26 July 2010, paras 27, 30; *Prosecutor v. Aleksovski*, Judgment, ICTY Appeals Chamber (IT-95-14/1-A), 24 March 2000, para. 26.



... was in violation of a binding rule of international law. Said prohibition to commit crimes against humanity is a *jus cogens* rule, and the punishment of such crimes is obligatory”;<sup>29</sup> and the Inter-American Commission has explicitly stated that “the prohibition of crimes against humanity had already acquired *jus cogens* status at the time the aforementioned gross violations of human rights were committed in Haiti.”<sup>30</sup> Crimes against humanity were thus clearly criminalized in customary international law by the 1970s, and so it cannot be said that Duvalier did not know that such conduct was illegal, and that it would be unlawful to try him.

35. International jurisprudence has established that to comply with the *nullum crimen* principle, a crime must be sufficiently foreseeable and the law must have been sufficiently accessible to the accused. Judges at the Khmer Rouge Tribunal in Cambodia have grappled with this issue, when considering in 2010 the crimes committed by the Khmer Rouge in the 1970s. In 2010 the Court held that:

“Compliance with the principle of legality requires that the offense with which an individual is charged is sufficiently foreseeable and that the law providing for such liability was sufficiently accessible to the accused at the relevant time. ...

It was thus foreseeable during the 1975 to 1979 period that the Accused could be held criminally liable for the offenses [of crimes against humanity] with which he is charged .... The law providing for the Accused’s criminal responsibility was also sufficiently accessible considering its international customary basis.”<sup>31</sup>

36. Similarly, the European Court of Human Rights has established that crimes against humanity were sufficiently accessible to individuals as far back as 1949. In *Kolk and Kislyiy v. Estonia*, the Court reasoned that because the UN General Assembly had affirmed the principles of customary international law recognized in the Nuremberg Charter by 1946, the accused should have been aware that their 1949 acts constituted crimes against humanity.<sup>32</sup> Haiti signed the Nuremberg Charter on 3 November 1945.
37. In conclusion, the elements of crimes against humanity were foreseeable and accessible to Jean-Claude Duvalier irrespective of the national laws of Haiti or practices of his government at the time. Jean-Claude Duvalier was aware – or reasonably should have been – that a state policy to incarcerate political prisoners, force deportations, murder, cause the disappearances of dissidents and practice forced labor or enslavement amounted to criminal conduct.

#### Amnesties Cannot apply to Crimes against Humanity

38. The obligation to investigate and prosecute means that the State may not impose any barriers to the criminal process or absolve such crimes. After the end of Duvalier’s regime, on 18 June 1986, a decree was issued which applied a statute of limitation of 10 years to crimes committed between 22 September 1957 and 7 February 1986, the precise dates of the reign of Francois Duvalier and Jean-Claude Duvalier. However, such statutes of limitations, which in fact amount to a general amnesty for crimes against humanity, are illegal under international law and have no legal force.

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<sup>29</sup> *Almonacid-Arellano et al. v. Chile*, IACtHR Judgment, 26 September 2006, para. 99.

<sup>30</sup> IACommHR Statement on Duty of Haiti to Investigate, para. 10.

<sup>31</sup> *Prosecutor v. Kaing Guek Eav alias Duch*, Judgment, 26 July 2010, paras. 28 and 294.

<sup>32</sup> See *Kolk and Kislyiy v. Estonia*, ECtHR decision on admissibility of 17 January 2006. See also footnote 25 above.

39. The Inter-American Court has confirmed that:
- “a crime against humanity ... is neither susceptible of amnesty nor extinguishable ... crimes against humanity are intolerable in the eyes of the international community and offend humanity as a whole. ... the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity clearly states that ‘no statutory limitation shall apply to [said internationally wrongful acts], irrespective of the date of their commission.’ Even though the Chilean State has not ratified said Convention, the Court believes that the non-applicability of statutes of limitations to crimes against humanity is a norm of General International Law (*jus cogens*), which is not created by said Convention, but it is acknowledged by it. Hence, the Chilean State must comply with this peremptory rule.”<sup>33</sup>
40. The UN Human Rights Committee has explained that “where public officials or State agents have committed violations of the Covenant rights, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties”.<sup>34</sup>
41. There is thus a clear and binding norm of international law which prohibits the grant of amnesty or the application of statutes of limitations to those charged with international crimes such as crimes against humanity. This standard is a *jus cogens* norm which applies directly upon and in Haiti. It is irrelevant that Haiti has not signed the 1968 Convention on the Non-Applicability of Statute of Limitations to War Crimes and Crimes against Humanity, as the standards apply whether that particular treaty acknowledging them has been signed or not.
42. Article 27 of the Vienna Convention on the Law of Treaties, which Haiti acceded to on 25 August 1980, requires that international obligations must be honored in good faith and that domestic laws cannot be invoked to justify their violation. This means that the statute of limitations for ordinary crimes set out in Article 466 of the Criminal Investigation Code cannot apply to crimes against humanity and has no validity in this case: it cannot be used to prevent Haiti from complying with its international obligations to investigate and prosecute crimes against humanity. This is consistent with Article 19 of the Haitian Constitution of 1987, which states that fundamental guarantees shall not be subject to any limitations, temporal or otherwise.
43. The Inter-American Commission of Human Rights has recently examined the application of these principles to the current investigation of crimes against humanity in Haiti, and came to the same conclusion:
- “it is clear that the torture, extrajudicial executions and forced disappearances committed during the regime of Jean-Claude Duvalier constitute crimes against humanity that must not go unpunished, are not subject to any statutory limitations and, as will be shown below, cannot be the subject-matter of amnesty. The State must remove all obstacles standing in the way of compliance with the obligation to investigate and punish those responsible, such as statutory limitation, the non-retroactivity of criminal law and the principle of *non bis in*

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<sup>33</sup> *Almonacid-Arellano et al. v. Chile*, IACtHR Judgment of 26 September 2006, at paragraphs 152-153.

<sup>34</sup> General Comment No. 31 “The Nature of Legal Obligations Imposed on the State Parties to the Covenant” CCPR/C/21/Rev.1/Add.13 26 May 2004, paras. 15, 18.

*idem*, and must use every means at its disposal to conduct the investigation expeditiously.”<sup>35</sup>

The Commission concluded that:

“the torture, extrajudicial executions and forced disappearances committed during the regime of Jean-Claude Duvalier are crimes against humanity that, as such, are subject neither to a statute of limitations nor to amnesty laws”.<sup>36</sup>

### **C. Available Criminal Offenses**

44. In order to exercise jurisdiction and to indict Jean-Claude Duvalier for crimes against humanity, the Judicial authorities can charge him with offenses under the Penal Code, such as murder and sequestration, while characterizing them within the narrative of the *acte d'accusation* as being part of a widespread and systematic attack against the civilian population.

#### Domestic Offenses characterized as Crimes against Humanity

45. There is nothing to stop the judicial authorities from charging Jean-Claude Duvalier with domestic crimes, and characterizing the facts as part of a widespread or systematic attack upon the civilian population.
46. Duvalier’s alleged crimes, including murder, torture, and sequestration, constitute serious offenses under Haitian law. Article 241 of the Haitian Penal Code defines murder as any premeditated or felonious killing, punishable by life imprisonment. Article 248 states that “torture” or acts of “barbarity” are punishable as murder. Haitian law also criminalizes the act of sequestration or false imprisonment, punishable by imprisonment for up to five years. The complaints filed against Jean-Claude Duvalier describe a systematic pattern of arbitrary arrests and detentions, including allegations of arbitrary detentions, torture, and killings committed by government officials under Jean-Claude Duvalier’s command.
47. Although these are domestic offenses, the *Commissaire du gouvernement* (State Prosecutor) could seize the Investigating Magistrate with the facts which demonstrate that the crimes took place in the context of a widespread or systematic attack on the civilian population, and are therefore correctly characterized as crimes against humanity; and could include such facts in the narrative description of the circumstances of the allegations contained within the *acte d'accusation*. Although this may not alter the formal legal nature of the offenses, which would remain offenses of murder, torture or sequestration under Haitian law, it would ensure that the facts which demonstrate the particularly serious nature of these offenses, as crimes against humanity, are part of the case and can be considered in the prosecution of Duvalier, and when it comes to sentencing.

#### Forms of criminal liability

48. Jean-Claude Duvalier is potentially liable for the crimes that occurred during his regime (1) as an indirect perpetrator, (2) as an accomplice, and (3) through command responsibility.<sup>37</sup>

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<sup>35</sup> IACommHR Statement on Duty of Haiti to Investigate, para. 10.

<sup>36</sup> IACommHR Statement on Duty of Haiti to Investigate, para. 5.

<sup>37</sup> The objective of this section is to point out to the judicial authorities three modes of liability through which Jean-Claude Duvalier’s responsibility for the crimes that were allegedly committed during his regime can be examined. It does not represent an extensive review of the modes of liability available, nor an extensive description of each mode.

49. Liability as an *indirect perpetrator* arises for the domestic offenses outlined above because these crimes were committed as part of an organized hierarchical apparatus under his command.<sup>38</sup> When Jean-Claude Duvalier assumed power in 1971, Haiti's Constitution named the president the supreme chief and leader of the nation's armed forces (Articles 188-192); the 1983 Constitution confirmed this power (*de jure* authority). In addition, a number of Jean-Claude Duvalier's public speeches explicitly referred to his control over the same government officials and armed forces that detained and tortured Haitian civilians, which demonstrates the connection between Duvalier and the crimes committed by his subordinates (*de facto* authority).<sup>39</sup>
50. Under Haitian criminal law, senior government officials may be held responsible as *accomplices* to crimes perpetrated by their subordinates if there is a causal link between the leader's orders and the crimes, and if the senior leader instigated, aided, or abetted the commission of crimes. Article 45 of the Haitian Penal Code provides for accomplice liability where there is an underlying crime, an act of complicity before or during the crime, and knowing participation in the criminal activity.
51. Jean-Claude Duvalier is also liable for the alleged crimes through the well-established customary international law doctrine of *command responsibility*, by which individuals in command of civilians or military forces may in certain circumstances be responsible for crimes committed by those under their authority.<sup>40</sup> This concept makes a superior liable for a failure to act to prevent, put an end to or punish misconduct of his subordinates and punishes the superior both for his own failure to intervene and for the crimes of others under his command.

#### Enumeration of the elements of the offence

52. If the authorities feel that it is necessary to have specific domestic provisions under which to try Jean-Claude Duvalier for crimes against humanity, then legislation can be introduced

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<sup>38</sup> The International Criminal Court has interpreted the theory of "indirect perpetration" as follows: "The leader must use his control over the apparatus to execute crimes, which means that the leader, as the perpetrator behind the perpetrator, mobilises his authority and power within the organization to secure compliance with his orders. Compliance must include the commission of any of the crimes under the jurisdiction of this Court." ICC-02/05-01/09-3, 4 March 2009, para. 211.

<sup>39</sup> See, e.g., Jean-Claude Duvalier, *Allocution du 21 juin 1971 du Chef de l'Etat (Jean-Claude Duvalier) au nouveau commandant de la milice de Fort Dimanche*, (Port-au-Prince: Imprimerie Henry Deschamps (1978), where Duvalier identifies himself as "[t]he Supreme Chief and Effective Head of the Armed Forces, the Police Forces and the National Security Volunteers (VSN) and highlights that he is "now the only supervisor of the militia" and that "individuals who, either openly or secretly, get in the way of the path of [the] Revolution will be systematically be swept away by this great force of history."

<sup>40</sup> See the ICTY case *Prosecutor v. Delalic, et al.*: "military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law," Case No. IT-96-21-A, Judgment (Appeals Chamber), 20 February 2001, para. 195. "There can be no doubt that the doctrine of superior responsibility (...) is a well-established principle of customary international law" in Kai Ambos, "Superior Responsibility" in Cassese *et al.* (ed.), *The Rome Statute and the International Criminal Court*, Oxford, 2002, pp. 846-847. See also Article 28 Rome Statute, which implements the principle of command responsibility for military commanders where they knew or ought to have known that their forces were committing or about to commit an offence, and failed to take all necessary and reasonable measures to prevent or punish the offence; and for non-military superiors where they knew or consciously disregarded information that subordinates under their effective control were committing or about to commit crimes and failed to prevent or punish them.

to enumerate the elements of the crimes that already exist in international law, so as to execute that jurisdiction. This would be in accordance with human rights standards. The UN Human Rights Committee has explained that under the ICCPR, State Parties are required to adopt legislative, judicial, administrative or other appropriate measures to fulfill their legal obligations under the Covenant.<sup>41</sup>

### **Conclusion**

53. Haiti possesses the requisite jurisdiction over crimes against humanity based on its domestic criminal law, its constitutional law (of 1987), and due to its binding international obligations, under both international criminal law and human rights law. As such, Haiti is compelled to exercise and implement its jurisdiction over crimes against humanity, and thus, to indict, prosecute, judge and in the event of a finding of guilt, to punish Jean-Claude Duvalier. In the alternative, Haiti must extradite Jean-Claude Duvalier to a country willing to pursue the accusations of crimes against humanity. Neither statute of limitations, amnesties nor the principles of legality that bar retroactive prosecution or punishment prohibit the relevant judicial authorities including the Investigating Magistrate and the *Commissaire du Gouvernement* (State Prosecutor) from recognizing Haiti's right to exercise jurisdiction for crimes against humanity in regard to Jean-Claude Duvalier.

New York

14 December 2011

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<sup>41</sup> See General Comment No. 31 "The Nature of Legal Obligations Imposed on the State Parties to the Covenant" CCPR/C/21/Rev.1/Add.13 26 May 2004, para. 7.