



# Fiji Human Rights Commission

## **The Assumption of Executive Authority on December 5<sup>th</sup> 2006 by Commodore J.V. Bainimarama, Commander of the Republic of Fiji Military Forces: Legal, Constitutional and Human Rights Issues.**

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### **1.0 Introduction**

On December 5<sup>th</sup> 2006 at 6 pm on national television, the Commander of the Republic of the Fiji Military Forces, Commodore J. V. Bainimarama, announced that he had assumed executive authority of Fiji, as *inter-alia* President of Fiji, and declared a State of Emergency. He advised that the country would, in the meantime, be run by a military council, but the ministries would continue to function under their respective Chief Executive Officers.

He also announced the appointment of Caretaker Prime Minister, Dr Jona Baravilala Senilagakali, who, he said, had subsequently advised the President that Parliament be dissolved, with the President informing the public that Parliament was duly dissolved.

All these declarations were published in an Extraordinary issue of the Republic of Fiji Islands Government Gazette, Vol. 1 No. 2. dated Wednesday 6<sup>th</sup> December 2006. This was not a 'decree' but an Extraordinary issue of the Gazette.

The Commander's declarations of December 5<sup>th</sup>, have raised questions about the legality and constitutionality of his assumption of executive authority. There was initially some confusion about the actions of the Commander, who called his takeover a 'clean-up campaign'. Within a few days however, as the country witnessed the abandonment of office first by the Police Commissioner and then by the Prime Minister himself, the people of Fiji slid into a stunned acceptance of the Commander's assumption of authority.

The FHRC staff were keenly observing events prior to and during the assumption of executive authority by the Commander on December 5<sup>th</sup>. This investigation report is based on an assessment of the Commander's assumption of executive authority as well as on the apparently singular view of both local and international observers and commentators that the Commander of the RFMF illegally overthrew the democratically elected and legitimate Government of Fiji on December 5<sup>th</sup> 2006.

Given the number of requests the Commission has received from the public to determine legality issues, this report of our assessment is now being made public.

## **2.0 Legality of the Assumption of Executive Authority by the Commander**

### **2.1 Duty of Necessity**

When assuming executive authority on December 5, the Commander cited the doctrine of 'Necessity' as expressed in the Fiji cases of the State v Chandrika Prasad, Yabaki v The President, and the Pakistani case of Musharaf. In these cases the courts established the parameters within which 'duty of necessity' could be invoked by the person de facto or de jure claiming to exercise the 'reserve' power of the head of state or sovereign.

According to case law and constitutional texts, 'reserve power' can only be exercised by the purported or actual sovereign or head of state in order to preserve the life of the state. It is an extra-constitutional and temporary measure. The question of constitutionality or even legality with respect to 'duty of necessity' does not arise as the act done is often claimed to be necessary for the survival of the constitution, that is, for the legal foundation of the State itself.

Both the High Court and the Court of Appeal in the Chandrika Prasad case, which dealt with the abrogation of the 1997 Constitution by the (same) Commander of RFMF in 2000, held that the evidence showed that the purported abrogation done under 'duty of necessity' had been ineffective and lacked acquiescence. In any event, the court said, the duty of necessity doctrine could only be used as a reserve power to set aside the Constitution while the state of emergency (protecting the life of the nation) prevailed. When the emergency was over, so was the need for the necessity doctrine. The Court of Appeal decision in the Chandrika Prasad case had the effect of restoring the 1997 Constitution to the people of Fiji.

The Yabaki case which followed the Chandrika Prasad decision was brought by a Non-Governmental Organisation to restore the Labour Government which the Prasad judgment had stated was the legal Government of Fiji. The grounds for bringing the Yabaki action were that the recently appointed President of Fiji had erroneously, under the doctrine of necessity, moved to dismiss Mahendra Chaudhry as Prime Minister, appointed a caretaker Prime Minister and acted on his advice to dissolve Parliament after the Prasad decision and had called for new elections which had taken place with the Interim Government of Laisenia Qarase coming into power under the SDL banner.

Presumably because of the election of a new Government but more likely because the remedies part of the application had been unwisely, erroneously, and contrary to the principles of democracy, removed from it by the plaintiffs, the Yabaki application was declared moot in the Court of Appeal. Nevertheless, the cases are still relevant for the important constitutional principles that the courts established. In the first application in the High Court, the court established that only the sovereign or head of state had the capacity to decide on the extent, parameters and limitations of his reserve powers.

On appeal, the Court of Appeal disagreed with this subjective test of Scott J in the High Court. The Court of Appeal did not discuss the parameters of reserve powers in detail but it did note that section 96 (2) of the Constitution limited the circumstances where the President may act on his own judgment to those instances prescribed by the Constitution; he may do so under section 109 (2) but not under section 109 (1). The Court of Appeal said that the framers of the Constitution had been at pains to circumscribe the President's power of dismissal of a Prime Minister and to have required the House of Representatives (the CA did not stipulate whether there should be a vote on it or it could be gauged by inference), and not the President, to determine whether the Prime Minister had lost the confidence of the House.

Since the Court of Appeal had observed that the President's reserve powers under the duty of necessity were circumscribed by Constitution and that he could not have used those powers to dismiss a Prime Minister on a perceived loss of confidence, we reach the obvious conclusion that the President's actions in dismissing the Government of Prime Minister Chaudhry without recalling Parliament were not legal and could not be justified even under the wide reserve powers given to a head of state under the doctrine of necessity. The Yabaki case is therefore good law for circumscribing the reserve powers of the President to gauging confidence in a government in the House itself.

It is obvious that, had the question not been decided by the Court of Appeal as moot due to the elections having been held before the Court was seized of the matter, the President's dismissal of Mr Chaudhry on the basis of necessity would have been declared illegal. Therefore the only impediment to restoring the Chaudhry Government in 2001 was a Court of Appeal decision that rendered moot the question of the restoration of an elected majority Government. If the President had not dissolved Parliament and called for new elections under an extended and somewhat questionable use of the doctrine of necessity, the Chaudhry Government would have been in place until the next elections, due in 2004, were held.

We come to the conclusion then, that the use of 'duty of necessity' in 2001 by the President, Ratu J. Iloilo, himself a 2001 appointee of the Council of Chiefs, was unconstitutional given, as the Court of Appeal said, the circumscribed circumstances in which that duty can be used. If that decision was unconstitutional, so were the subsequent events: the appointment of the caretaker Prime Minister to dissolve Parliament; the appointment of another caretaker Prime Minister, Laisenia Qarase; and the holding of the 2001 elections.

The elections of 2001 were therefore based, not on an extra-constitutional duty of necessity, but on a series of executive decisions that were pronounced, albeit *obiter*, by the Court of Appeal as unconstitutional. The validity or legitimacy of the 2001 elections is therefore questionable. For 5 years, from 2001 to 2005 the Government of Laisenia Qarase, after elections, proceeded to rule on the basis of an act that was unconstitutional.

If the appointment of the new Interim Prime Minister was unconstitutional, and not permitted even under the 'doctrine of necessity' principle, who or what, then, was the legal entity holding sovereignty? The previous President, Ratu Sir Kamisese Mara, had resigned, and the Great Council of Chiefs (GCC) did not appoint President Iloilo until March 13<sup>th</sup> or 14<sup>th</sup>. President Iloilo had been the Vice President and had been noted by the Court of Appeal in the Prasad case as being able to continue the functions of the President until 15<sup>th</sup> March 2001. The legal entity was in fact the Vice President who held sovereign power until the GCC appointed him as President and, according to the evidence before the Court of Appeal in the Yabaki case, instructed him to re-appoint the interim Government, that is the Government of Laisenia Qarase, until the new Parliament was summoned.

Therefore the GCC, as the appointing authority of the President, also acted illegally in instructing the President to summon the new Parliament. In fact, in March 2001, the legal Government of Fiji was still the Labour Government. The subsequent acts by the executive appointing body, the executive, the appointment of two Caretaker Prime Ministers, dissolution of Parliament and the holding of new elections were all illegally facilitated.

The position of the military after the Chandrika Prasad and Yabaki decisions became tenuous. Having abrogated the Constitution and appointed the Interim Administration of Laisenia Qarase which was subsequently confirmed by the GCC through the appointment of President and Vice President, the military appears to have been told that its lawful duty under the 1997 Constitution was to be instructed by the Home Affairs Ministry. This seems to have been fortified by the Chandrika Prasad decision that the abrogation of the Constitution by the Commander was both ineffective and unpopular and, while permitted under the duty of necessity principle, was nevertheless only of an impermanent nature.

The military was subsequently discouraged from playing an active part in state events after the Courts' decisions because the GCC took over. The GCC not only acted against the decision of the Court of Appeal in the Chandrika Prasad case, it emasculated the ability of the RFMF Commander to act in the national interest according to section 94 of the 1990 Constitution as imported into section 112 of the 1997 Constitution Amendment Act.

## **2.2 Qarase Government 2001-2005**

During the course of its first five year term, the Qarase Government did everything in its power to undermine the Constitution, especially the entrenched Bill of Rights. It expanded beyond reason all the limitation clauses in the Bill of Rights provisions, especially those in section 38, to justify its anti-human rights and discriminatory policies.

The policies of Affirmative Action and the Blueprint, which in 2005 were found by the Human Rights Commission's independent evaluator to be in violation of section 38 and Chapter 5 of the Constitution and which, as already noted by the ICERD Committee on Fiji, compromised Fiji's obligations to ICERD, were implemented rapidly and sweepingly. The Commission's report was sent to Government for its comments and was attacked by the Prime Minister as being 'political', and, instead of properly responding to the issues raised in it which were produced from government's own sources and publications, he announced a review of the policies. Nevertheless, we noted a suspiciously close time-link between Government's condemnation of the Commission's report on Affirmative Action policies and the announcement of snap elections.

During its 2001-2005 term, the Qarase Government also initiated its ethnic propaganda programme through hate speeches and racially derogatory statements made by parliamentarians such as Asenaca Caucau and others in the Government ranks under cover of parliamentary privilege. These were justified by the Prime Minister himself as freedom of speech and opinion. During its first term, the Qarase Government also introduced the Reconciliation, Truth and Unity Bill (RTU Bill) which was seen by the public as a ploy to provide amnesty to the planners and organizers of the 2000 events. It was the RTU Bill and the persistent attempts to eliminate the increasingly trenchant criticism emanating from the military that seemed to have raised the ire of the Commander resulting in a number of public slanging matches in 2005 and early 2006.

Simplistically, the international community, through its diplomatic representatives in Fiji, saw the Commander as overstepping the boundaries and the military's responsibility as a department of Government under the Home Affairs Ministry.

However, the Constitutional position of the military has never really been articulated since 1990 and a question could have easily been referred to the Supreme Court for its opinion to avert potential public security threats. Certainly the Human Rights Commission saw the military's role as expressed in section 94 of the 1990 Constitution and imported into section 112 of the 1997 Constitution as being of constitutional interest. Section 94 (3) of the 1990 Constitution states: **'It shall be the overall responsibility of the Republic of the Fiji Military Forces to ensure at all times the security, defence and well being of Fiji and its peoples'**.

The Commission formulated a legal analysis to assist the dialogue when the military and government first started crossing swords. The analysis was provided in early 2006 to the Vice President, Ratu Joni Madraiwiwi, who was, at that time, seen as a possible mediator between the military and government. The Vice President told the Commission later that he had subsequently sought and obtained an alternative opinion to that provided by the Commission from the New Zealand Government. He did not provide the Commission with a copy of that opinion, despite repeated requests.

In any event, given that there appeared to be a legal issue to be tested, a question was supposed to be drafted by government for the Supreme Court's opinion but we heard no further reports of this actually having been done. In our view, the Vice President failed to resolve the issue at that time- the executive could have dealt properly, effectively and impartially with the constitutional position of the military. Not having done so eventually sealed the fate, not only of the Government of Fiji, but apparently also of the Vice President himself.

### **2.3 Snap elections of 2006**

The announcement in March 2006 of snap elections to be held in May came as a surprise to everyone in Fiji. As the machinery cranked up to cope with unexpected registration and elections requirements, it became obvious that Fiji was far from ready for elections. The Supervisor of Elections was away on study leave and did not return until he had completed his final month of study, the Elections Commission was unable to set sensible policy or to educate the public properly, and there were serious conflict of interest issues (in violation of section 156 of the Constitution) in the selection of Elections Commissioners. Furthermore, the last Census in Fiji had been conducted 10 years ago in 1996 but the Minister responsible for Census failed to request the Bureau of Statistics to hold another Census before the elections.

In Fiji, conducting a Census is an essential part of elections preparation to ensure that a person's Constitutional right to vote is adequately protected. Constituency Boundaries can only be drawn on the basis of accurate and up-to-date Census data. The elections process must be guided by sections 51-62 of the Constitution. Since voting is compulsory for everyone who has a right to be registered to vote, registration of votes is essential to a legal elections process. The contingent rights to register and vote according (mainly) to ethnicity and residency are provided by section 55 (1)- (10) of the Constitution.

The 71 members of Parliament are elected on the basis of section 51 (1). Forty six of the seats are reserved for Communal votes. The number of Fijian seats is 23; there are 19 Indian seats; 1 Rotuman seat and 3 seats reserved for those who are not Fijian, Indian or Rotuman. The rest of the seats, that is 25 in total, are for voters from all communities registered in the Open electoral roll. In both 2001 and 2005 election results in Fiji were determined by the Open seats.

Section 52 gives responsibility to the Constituency Boundaries Commission to determine boundaries of constituencies for both Communal and Open seats. Section 52 (2) and (3) require the Boundaries Commission to determine boundaries in such a way that the number of voters in each communal seat, except those determined by section 52 (2), is as far as reasonably practical the same and that, **if the proposed constituency relates to an open seat, the Commission must give due consideration to the principle that the voters comprise a good proportion of members of different ethnic communities.**

Section 53 makes it mandatory for the Constituency Boundaries Commission to review the boundaries of constituencies to determine whether or not they should be changed in the year following each official Census. It could review the boundaries at other times as well but it must do so in the year following each official Census. The reason the boundaries must be reviewed after each Census is to give effect to the requirements of subsections 52 (2) and (3). The Commission must give reasons, based on census data, for its determination of the boundaries. Section 53 allows the public to make objections to the proposed boundary changes by the Commission. The final decision of the Commission is subject to judicial review.

There is a vast difference in the reasons given for the determination of boundaries between the 1998 and 2005-2006 Boundaries Commission reports to parliament. The 1998 Commission worked closely with senior Bureau of Statistics Staff to obtain detailed population data for the Fiji Group, collected up-dated population statistics and received written submissions from political parties and provincial councils, as well as Fijian urban villages. The formula applied was that outlined in the Constitution, with the Population Section of the Bureau of Statistics providing detailed ethnic distribution of Fiji's population by Census enumerated areas. The Commission took as its basis of work the total adult population, that is, 21 years and over, to be the voting age category and its ethnic distribution throughout Fiji provided by the Census of 1996 as the statistical base on which the boundaries were to be demarcated.

At the time, some analysts had expressed serious reservations about the constitutionality of some of the decisions in boundary demarcations of the 1998 Commission, however, by and large, the Commission adhered to the Constitutional requirements for Constituency Boundaries issues.

The 2005-2006 Boundaries Commission could not undertake its work with the same degree of thoroughness. The Boundaries Commission Report of 2005-2006 states that, in commencing its deliberations, the Commission was faced with population figures almost 10 years out of date. Indeed, the entire report of the Boundaries Commission of 2005-2006 shows lack of compliance with the requirements of the 1997 Constitution on the determination of boundaries. We can only estimate the possible consequential effects of such a lack of compliance both on registration of voters and the ability of people of Fiji to fully exercise their right to vote at election time.

Due to the serious deficiencies noted with respect to the 2006 elections, the Fiji Labour Party issued a legal challenge to the results determining a number of Open seats. These cases were still before the courts when the military took over on December 5<sup>th</sup>. The legal challenge was based on reports to the Elections Observer Groups of problems with voter registration including conflicts of interest in the registration exercise itself, faulty registration slips, people registered in wrong constituencies, failure to comply with the Electoral Act in terms of scrutiny of voter rolls, excessive printing of ballot papers, unscheduled polling, ballot boxes being left unattended for long hours, and conflict of interest in the choice of firms selected to provide security and transportation of ballot boxes.

In our view, the Elections Observer Groups reports were unreliable, based as they were on limited assessment and observation of the actual voting process. The majority of the Groups arrived shortly before elections and left shortly after. The process of elections preparation, in compliance with the Constitution, was not addressed adequately, although other shortcomings were noted in the final reports. Some Observer Groups made partisan and ill-informed choices about which interest groups to visit; in one case the Human Rights Commission had to remind a representative of one of the Groups about the neutrality with which they should approach their work and urged them to visit the military and certain NGOs which they initially refused. In future, if Fiji is to employ the services of Elections Observer Groups again, their methods of work should be reviewed as a matter of policy. During the elections process in Fiji, whether out of ignorance or insufficient briefing, the Observer Groups were generally oblivious to the constitutional requirements for holding elections.

The Human Rights Commission also made its own assessment during voting week and recorded some rumours and innuendoes that the voting mechanism was not functioning properly but these could not be verified so the commissioners who monitored elections endorsed the process as free, fair and democratic. Two members of the Commission were relied upon as elections experts. The former Chairperson had been a previous Supervisor of Elections, and one member had observed elections in Nigeria. In future, the Commission will need to take a much more analytical approach to elections monitoring.

It is now apparent that the 2006 elections were not held in compliance with the Constitution. This finding questions the legitimacy of the result, and whether the rights of the voters were protected in accordance with sections 55 and 56 of the Constitution. It is doubtful that the Qarase Government was elected in compliance with the relevant provisions of the 1997 Constitution. The question of whether the Qarase Government was democratically elected is therefore also significant.

The conclusion that is reached after investigation and assessment of the allegation that the Military Commander overthrew a legitimate and democratically elected Government of Fiji, is that the legal basis of the 2001 elections is in doubt and that the Government of 2006 appeared not to have been elected according to the provisions of the 1997 Constitution. What the Commander overthrew on December 2006 was not the legitimate and democratically elected Government of Fiji. Only an accurate assessment of boundaries based on up-to-date Census would be able to determine if any Government is the constitutional Government of Fiji. Therefore, whether there is an illegality or legality associated with the Commander overthrowing a Government which was elected unconstitutionally and therefore illegally, may be a matter for the courts.

Leaving the actual overthrow aside, can a President or Acting President dismiss the Government given the provisions of section 109 (1) of the Constitution? The provision states that the **President may not dismiss a Prime Minister unless the Government fails to get or loses the confidence of the House of Representatives and the Prime Minister does not resign or get a dissolution of the Parliament.** The question of whether Prime Minister Qarase lost the confidence of the House of Representatives should be seen in the same light as that which was considered in 2001 when the President Ratu Iloilo dismissed the Labour Government after Chandrika Prasad. According to the High Court judgment in the Yabaki case, the President can decide subjectively and unilaterally whether the Government has lost the confidence of the House and this does not have to be tested on the floor of the House.

The question for the courts would be whether the events in the last few weeks of Parliament before the takeover in December 2006, amounted to a perception of lack of confidence of the House of Representatives in Government. The facts at hand, as reported at the time, are as follows: that Labour Cabinet ministers were divided as to their loyalty and a number of them did not turn up to vote at all in support of the 2007 Budget; that there was evidence of a breakdown of talks over the multi-party Cabinet protocols; that, against Parliamentary convention and election promises, there was a surprising, unconventional and unpopular vote in favour of the Budget by the two members of the Opposition (a radio anchorperson referred to Hon. Beddoes as a 'snake in the grass' on national radio the next morning); there were reports of an indication given by the Independent Government Minister Robin Irwin that he may become an independent representative again, and evidence of a public outcry against VAT and proposed Indigenous Claims Tribunal (ICT) and Qoliqoli Bills, the latter translating into a formal objection in Parliament by a member of the Select Committee that the interim report on the Bills to Parliament of the Chairperson of the Committee did not have the consensus of the members of the Committee.

Given these facts, and the constant calls by the military commander for the Government to accede to certain demands, only the courts can decide whether this constituted sufficient ground to judge that the Government had lost the confidence on the floor of the House of Representatives so as to enable President Iloilo to call for the Prime Minister's resignation, which, according to the news reports, he did but was turned down.

The High Court in the Yabaki case decided that it was up to the President to decide in his own judgment whether the Government had lost the confidence of the House, explicitly or impliedly. The Court of Appeal said this had to be gauged from the floor of the House itself. The President, presumably, in his own deliberate judgment, decided how this was to be gauged from the floor of the House. Again, the courts will no doubt decide whether this was sufficient to dismiss a Government, according to the Yabaki decisions.

#### **2.4 Government Policy, proposed legislation and crimes against humanity**

Almost immediately after the elections, in a somewhat disturbing development, the Qarase Government introduced the Indigenous Claims Tribunal and Qoliqoli Bills but had neglected to mention its intention to do so during the election campaign. These Bills rapidly became the new focus of public attention, dividing the population along ethnic and tribal lines.

The Human Rights Commission, in its submissions to the Parliamentary Select Committee on the proposed Bills, noted that the combined legislation, if enacted in their current form, would have the effect of removing the constitutionally protected property rights of at least 50 per cent of the population and also of causing havoc and potentially serious violence among the indigenous population. In addition, the Commission advised the Select Committee that the law and order and national security implications of the Bills were serious enough to pose a major threat to the life of the State, quite apart from issues of discrimination and inequity they raised.

Despite this advice, in the last week of Parliament before the takeover, a surprising attempt was made by the Chairperson of the Parliamentary Select Committee, Mr Bulanauca to introduce the Bill and record a report of the findings but at the eleventh hour this was prevented by a member of the Select Committee, Mr Felix Anthony, who insisted that the interim report of the Committee had not been agreed to by its members and therefore could not be reported to Parliament. Had the Bills been passed, or even the Interim Report tabled in the November session of Parliament to indicate consensus of the Committee on the Bills, the law and order situation and thus human rights violations in Fiji would have deteriorated further.

Even as the Select Committee members were holding their public hearings, the Fiji media were already reporting incidences of Qoliqoli claimants exercising their authority in a number of areas. The Commission, with some concern, noted a media report on the mistreatment of a group of fishermen in Vanua Levu whose outboard motor was removed from their boat while they were out fishing in an apparently disputed qoliqoli area. They were set adrift in the open waters without their engine. Had it not been for mobile contact made by one of the fishermen with the police, they may have been lost at sea. Other incidents of Qoliqoli claimants erecting roadblocks near hotels and allegedly harassing tourists were also reported. Clearly, even without the Bills being enacted, serious law and order breaches were already being noted.

In its report to the Committee, the Human Rights Commission also pointed out that the most serious implication of the proposed ICT and Qoliqoli legislation was the intended review of the terms of the Deed of Cession which is considered to be the ‘grundnorm’ of Fiji. The intention of the Government was to introduce legislation that would review the Deed of Cession itself to give effect to principles that may not have been intended by the original parties to the Deed in 1874. Our view was that this would have undermined the basic law or grundnorm of the State, and further, that there had been no discussion of the implications of the proposed legislation by the entire community in Fiji at the time of elections.

The Bills could have been challenged before their enactment, pursuant to the Privy Council's decision in The Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v The Speaker of the House of Assembly and 7 Others, on the ground that their enactment would be so grave, irreversible and unconstitutional that the life of the people and welfare of the State would be threatened unless the courts intervened. However, whether or not the courts would have entertained such an application, or indeed would have been able to rule on the matter before the legislation was passed is now only of academic interest. In any event, the military insisted throughout the hearings that the Bills should be withdrawn.

During the same period, in another puzzling initiative, the Qarase Government published its intention to appoint consultants to a proposed Affirmative Action Consultancy Team, to review the policies and implementation strategies of Government's Affirmative Action strategy. This Team was being established to undertake a study and analysis of the human rights aspects of Government's affirmative action policy. The Commission saw the proposed establishment of another review Team as a wasteful expenditure of public funds.

However, it was clear that Government intended to ignore the Commission report of the Affirmative Action investigation by appointing another team, despite the report's similarity in substance with that provided by the United Nations ICERD Committee on Fiji. The Commission had already recommended that the Affirmative Action programmes be removed in their present form and any such programme or legislation would need to comply with the provisions of Chapter 5 of the Constitution.

All these actions and proposed legislation of the Qarase Government were reported by the Human Rights Commission as being a breach or potential breach of the Constitution and international human rights law. The Commission consistently pointed out to Government that section 21 of the Constitution bound all branches of the State, including the legislature, and that the Government could not enact legislation that was unconstitutional.

The Government pressed on regardless. There was no real response to the papers developed by the Commission for Government's attention. Even though a Cabinet Memorandum had undertaken to consult with the Human Rights Commission on all cabinet policies that affected human rights, the reality was that the Commission heard about proposed unconstitutional bills only at their first reading in Parliament.

The parliamentary processes of appearance before select committees, and majority voting requirements in the House of Representatives and the Senate seemed to have been used as a mechanism for promoting and implementing unfair, discriminatory and anti-human rights policies in Fiji. The parliamentary process during 2001-2005 was being used to make a mockery of the Constitution. The foundation of illegality on which the Qarase Government had based itself from 2001-2005 was consolidated from 2006 by unconstitutional actions in both formulating and implementing policy and laws.

Remarkably, the fact that the parliamentary process was being abused to further unconstitutional and anti-human rights aims went unnoticed by the international community and its representatives in Fiji who endorsed the actions of the Government as 'democracy at work'. This is despite the Commission briefing members of the diplomatic corps about the serious breaches of the Constitution contemplated by the proposed enactment of the RTU, ICT and Qoliqoli Bills. The Commission's staff twice pointed out in a European Union briefing that there was a serious potential breach of the Cotonu Agreement if the Bills were to be enacted. During the term of the Qarase Government, there was a curious unwillingness by the international community represented in Fiji to consider the deteriorating human rights situation in Fiji from anything other than the populist view.

The populist view was promoted relentlessly by a few NGOs with serious conflict of interest motivations. Some NGOs, for example Greenpeace, hailed the unconstitutional ICT and Qoliqoli Bills with pleasure and others, especially women's organizations, went down a slippery immoral path in trying to gain mileage for women out of an illegitimate piece of legislation. Most NGOs remained oblivious to the human rights implications of the Bills. The inability of these NGOs to comprehend human rights issues in Fiji, identify crimes against humanity committed by Government, and appropriately brief the donor governments who fund them is a serious matter for state policy that will need to be strategically addressed by any new Government that is established in future.

Clearly, enactment of the proposed legislation would have destroyed both peace and security in Fiji and the region. Life, liberty and security, for at least 50 per cent of the population, probably much more than that, would have been very seriously affected, as the Commission pointed out to the members of the Select Committee as well as the international community representatives. Article 18 (f) of the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind 1996, which makes it a crime against humanity to impose institutionalized discrimination on racial, ethnic or religious grounds involving the violations of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population, would have been breached, if not already through the affirmative action policies, then certainly through the proposed Bills. Fiji has been quite oblivious to obligations arising out of other relevant treaties and conventions prohibiting systematic and unfair discrimination, such as ICERD which it has ratified.

The Qarase Government was involved in massive violations of human rights in Fiji, constituting crimes against humanity, and made serious attempts to impose ethnic cleansing tactics in Fiji. The Commission attempted to thwart such inroads into constitutionality by a combination of persuasion and warnings, but ultimately, its funding was reduced, and even foreign government funding politicized by adverse reports on the Commission's investigations and analysis of Government's abuse of human rights and fundamental freedoms.

The Commission's work has also been undermined by a number of prominent human rights activists who had managed to acquire for themselves some influence and one or two key statutory positions in Government, including as members of the Commission. The fact that some of them were also being sheltered by the United Nations under its Development Programme in Fiji and other programmes, and supported financially by foreign governments, is one of the more sordid aspects of NGO activity in Fiji during the Qarase regime. In fact, the crimes against humanity that were committed in Fiji 2001-2006 were condoned not only by the NGOs but also by the UN agencies.

The very structure, mandate and independence of the Human Rights Commission was threatened by these activists when the military took over on December 5<sup>th</sup>. The activists demanded that the weight of the Commission should be applied to support their analysis of an illegal overthrow of a democratically elected Government. It became obvious that they were attempting to use the Commission to shield their private interests from scrutiny under the guise of protecting democracy and human rights. When the Commission staff obtained evidence which cut through this obfuscation and declined to provide credibility to self-interested protestors, the NGO activists' vengeance, supported by an irrational media frenzy, inflicted on the Commission knew no bounds. The dignified restraint with which the Commission staff dealt with these public attacks, while compiling an independent and impartial investigation report, is recommended as the most appropriate strategy for other human rights national institutions facing similar problems in crisis situations.

The question of legality of the military takeover was unclear from the very beginning. There were a number of extra-constitutional principles invoked by the Commander in undertaking his 'clean-up'. The fact that he 'cleaned up' an unconstitutionally elected Government whose *raison d'être* from 2001-2006 was to make every attempt to sweep the Constitution aside at every opportunity and to impose policies and legislation which would have constituted a crime against humanity according to international law would be a consideration in any determination of legality in this case.

The Fiji Human Rights Commission's responsibility is to up-hold the Bill of Rights provisions in their current form under any type of Government. The ideal form of government within which rights can realize their full potential is democracy. But our experience since 2001 is that democracy was used by the Qarase Government to introduce and force the passage of unconstitutional legislation- a good example is the discriminatory Immigration Bill which was passed in the dead of night to avoid public scrutiny.

Unlike other countries which function on the basis of parliamentary sovereignty, Fiji has constitutional sovereignty. This means that Parliament is not permitted to pass legislation or implement policy that is unconstitutional and against the rights of its citizens. In recent months, the Qarase Government was blithely proceeding on the mistaken belief that, since it had been re-elected in 2006, it could act unconstitutionally against the public interest with impunity.

### **3.0 The effect of the military takeover on the Bill of Rights provisions in the 1997 Constitution: compliance audit from December 5<sup>th</sup> 2006**

The doctrine of necessity invoked by the Commander has not so far had the effect of abrogating the 1997 Constitution of Fiji, though some warnings have been given that it could be abrogated. The Commander had, on the first day of his takeover, declared a State of Emergency. Chapter 14 of the Constitution sets out provisions to be followed under a state of emergency. This Chapter allows Parliament to make a law conferring power on the President, acting on the advice of the Cabinet, to proclaim a state of emergency.

Chapter 14 allows the appropriate authorities to derogate from certain rights protected by the Bill of Rights, namely sections 23, 24, 30, 31, 32, 33, 34 or 37, if Cabinet has reasonable grounds for believing that, because of the emergency described in the proclamation of the state of emergency, the life of the State is threatened and the exigencies of the situation are such that they cannot be dealt with effectively without derogating from the Bill of Rights. The proclamation of the state of emergency must be laid before the House of Representatives and confirmed by it within five sitting days after the proclamation. Other similar provisions are contained in sections 187- 189. In the case of the takeover and gazetted declaration of the State of Emergency by the Commander, it is unclear whether the duty of necessity doctrine was used to invoke the substance of Chapter 14 but not its procedure. There were references made to an ‘emergency decree’ but since the Gazetted Notice was not a ‘decree’, it is unclear whether Chapter 14 derogations would actually apply.

In reality and in the Commission’s assessment of events in the early stages, few of the rights in the Bill of Rights provisions were derogated from by the Commander to the extent of Chapter 14 requirements, though concerns were raised in the first week about a number of people being taken to the army camp for questioning. The one person who was reported to have been treated with an indignity during this early period was trade unionist and former member of Parliament (in the 2001-2005 Parliament), Kenneth Zinck. According to news reports, Zinck was made to run around the rugby grounds at the RFMF camp and jump over a ditch. There was also a report of the destruction, by plain-clothes men, of a democracy shrine erected by two businesspeople and some others but the military denied involvement. Threatening calls were reportedly made to two professional activists from a phone booth near the army camp but, again, responsibility for this was denied by the military.

In the initial stages also, the Editor in Chief of the Daily Post was intimidated in his office, taken to the camp for questioning, slapped about the face, his (Australian) passport taken, and his work permit questioned. He was threatened with deportation for apparently publishing articles critical of the Commander and writing editorials that were 'inciting' people.

The Fiji Human Rights Commission received reports from some of these individuals and groups and staff were able to process the complaints according to the normal statutory procedures. However, to date, no formal response has been received from the military about allegations of human rights abuses, though verbal reports and assurances have been conveyed to the Commission by phone. In the absence of the Fiji Red Cross or ICRC, the Commission has consistently reminded the military of its undertaking to respect international humanitarian law, for example the Geneva Conventions monitored by the Red Cross, which are usually the only human rights laws prevailing during war or internal strife. It has also reminded the military of its partnership with the Fiji Human Rights Commission under the terms of the **National Security and Human Rights Handbook** for the Disciplinary Services.

Since no curfew had been put in place, freedom of movement (section 34) remains intact, though military checkpoints are in place at key points around Suva City and the country. Initially no one was detained for more than a few hours and thus personal liberty (section 23) remained unaffected. There was also no reported imposition of servitude or forced labour (section 24). Similarly, there was no interference initially with freedom of association or ability to join trade unions (sections 32 and 33). In fact a number of prominent and respected trade unionists were appointed to the new administration by the Commander.

It is not known whether there is currently any interference with privacy including of personal communication (section 37) since telephone lines have remained clear and people are able to communicate with each other through mobiles as well as land lines. At first, there was some suspicion among the people that telephone lines and vodaphone calls were being monitored, not by the RFMF but by Australian special agents who had apparently been placed some weeks before the takeover within the Australian High Commission. They were reportedly in contact with three Australian naval vessels stationed just off the horizon outside Suva, though no one could verify this information.

On the other hand, the main civil rights that did appear to be affected later by the state of emergency were freedom of expression (section 30) and freedom of assembly (section 31). These freedoms were not however, derogated from to the extent anticipated under a Chapter 14 State of Emergency-type situation. Freedom of assembly was restricted since people were denied a permit to march and to protest or express their dissent against the military but they were permitted to take part in a mardi gras and dance in the streets to welcome the New Year. Freedom of speech was also limited and, in the early days, a number of people were questioned and warned about their public comments.

However, while it appears that freedom of expression and assembly were not removed entirely, they were nevertheless implemented to remind the public of relevant constitutional limitations . Freedom of expression in section 30 is limited even in normal times by national security, public safety and public order law, represented by the Public Order Act, by the laws on defamation and the right to be free from hate speech, but only to the extent that the limitation is reasonable and justifiable in a free and democratic society. Freedom of assembly is similarly limited by the Public Order Act and other laws. The question of whether the application of limitation provisions in these two sections could be reasonably and justifiably invoked in response to the factual scenario unfolding during the week after the takeover will no doubt be the subject of further proceedings in due course.

Under the circumstances, Commission thought it wise, in the interest of public safety, to bluntly remind people of the limitation clauses in the Bill of Rights, especially as some of the protesters appeared to the Commission investigators to be deliberately antagonizing the military and justifying their acts on the fact that the Constitution was still in place. The forthright message that the Commission delivered to the public was that actions taken in defence of rights had to be constitutional and legal. Otherwise the Constitution itself was at risk from actions of a few NGOs which did not appear to be supported by the rest of civil society.

The effects on the Constitution which protects human rights effectively was the paramount consideration of the Commission when it alerted protesters to the limitation clauses in the Bill of Rights. Reliance placed on the Constitution by many people who did not, in any event, appear to be genuine pro-democracy protesters was imposing a great strain on the ability of the Constitution to survive abrogation. If it had been abrogated the Commission would have been prevented from protecting the rights of every part of civil society, not just the NGOs.

The one right that appears to have been rather more seriously affected almost immediately by the takeover is section 33 of the Constitution which protects every person's right to fair labour practices, including humane treatment and proper working conditions. Soon after the assumption of executive authority, the Commander announced sweeping changes to the composition of statutory and other Boards and to the Chief Executive Officers of Government departments. A list of names of those summarily terminated from their employment and from Boards was announced, accompanied by a list of replacements to those vacant positions.

Many people, most of them public officers, lost their jobs and positions and heard about their terminations on national television. Apart from the Chief Executive Officer of Airports Fiji Limited (AFL), who was told publicly that his contract would not be renewed after 2006 due to discrepancies found in a Special Audit of the accounts of AFL, there were few reasons given for the summary dismissal of most of those who lost their jobs and their positions. It was reported that the termination of many Board members was because of the need to limit the size and number of Boards in Fiji. The reasons for termination of a number of Chief Executive Officers were not given.

There was one exception. The dismissal of the Chairperson of the Public Service Commission and Acting Chairperson of the Constitutional Offices Commission, Mr Stuart Huggett, was announced as the very first high level termination, on the grounds that the private architectural firm belonging to Mr Huggett had some weeks before the takeover announced that it was bidding for the design of a new \$40 million Prison Complex. This was stated by the Commander, in his first press conference, to be in violation of section 156 of the Constitution which prohibits public officers from putting themselves in a situation where their public duties may conflict or be seen to conflict with their private interests. In fact this is a concern that was already in the public domain a few weeks before the takeover, but NGOs with a specific integrity mandate failed to register the significance of certain news reports which should have alerted them to potential conflicts between private interests and public duties of public officials during the Qarase Government's term.

Whether any of the terminations of the public officers was unfair or in violation of section 33 of the Bill of Rights provisions of the Constitution can only be determined in due course, assuming the reasons for the summary dismissals will be provided by the executive authority, or after any determination by the courts. Currently two people who have been terminated have officially made enquiries with the Commission. It is not yet been revealed whether any separate applications have been made to the courts.

Human rights enquiries to the Commission increased from Christmas Day. Just after midnight, one of the Commission staff received a report that an activist had been taken to the RFMF Barracks and allegedly interrogated. The activist was joined by some others who had been taken in earlier on Christmas Eve. They reported through secondary sources that they had been assaulted, and ill-treated by the military. The reports of the assaults, while believable and substantiated by by-stander accounts, cannot be verified by the Commission's investigators because no statements have yet been made by the victims. The secondary reports provided by mobile phone were thought to be unreliable as there were conflicting accounts of the events. Clearly, the Red Cross has the mandate to provide humanitarian assistance immediately in such circumstances and it is curious that they had not been informed. Nevertheless, the Commission staff acted swiftly to deal with the situation in which the protesters found themselves, and were able to have them released within an hour, though not as soon as the Red Cross would have been able to do.

To date, the 1997 Constitution remains intact, but the reality is that the limitation clauses in the Bill of Rights provisions are more visible. The Commander announced on December 17<sup>th</sup> that he would consider abrogating the Constitution if that was the only way to obtain immunity for the actions of the RFMF on December 5 2006. This led many people to suggest ways to avoid abrogation since most want the Constitution retained. The view of the people is that the Bill of Rights provisions must remain. The Human Rights Commission would look very carefully at any amendments proposed to the Bill of Rights to ensure compliance with the spirit of the Constitution.

It must be remembered that it is not easy to abrogate a Constitution that people have given to themselves, pursuant to the Preamble in the 1997 Constitution. The case of Chandrika Prasad, which the Commission prepared for solicitors for Prasad, is evidence of the difficulty with which constitutions can be removed.

## **4.0 Observations and recommendations regarding duties and responsibilities of Institutions of the State, public officials and other relevant stakeholders**

### **4.1 Courts**

The courts have the final say in any interpretation of the Constitution. In doing their duty courts must be fair, independent and neutral and it is expected that in any applications before the courts in this matter, the judiciary will remain impartial.

It is common knowledge that in 2000, some judges of Fiji played a questionable role in assisting with the drafting of decrees on the administration of justice and in wrongly advising to abrogate the Constitution. This was challenged specifically in interlocutory matters in the Chandrika Prasad and the Yabaki cases (High Court).

In the interlocutory application, CCF v The President and the Attorney-General, counsel for the applicants, former Speaker of the House of Representatives and eminent lawyer, Sir Vijay R. Singh, unsuccessfully requested Judge D.V. Fatiaki to disqualify himself from hearing the substantive application on the ground of bias. In this application, two of his colleague judges swore affidavits that Justice Fatiaki had ‘common cause’ with HE the President in the issues raised by the applicant and that he had effectively prejudged the outcome. The CCF called on the President to institute an Inquiry into Judge Fatiaki’s conduct with a view to his removal from office but this matter was never addressed fully by any authority. Clearing of the judiciary’s name is desirable in this context.

### **4.2 The Attorney General**

The position of the Attorney General, as chief legal adviser to Government, has been called into question in Fiji. Section 100 of the Constitution spells out the qualifications and experiences required of an Attorney General. Given the unconstitutionality of legal advice given to Government in the proposed enactment of the RTU, ICT and Qoliqoli Bills, the position and qualifications of the Attorney General need reviewing. The Attorney General must also comply with the provisions of section 156 of the Constitution and the Commission. It is not possible for the chief legal advisor of Fiji to also, even indirectly, be involved in private practice. The Constitution prohibits it.

### **4.3 Fiji Law Society**

In a crisis, the Fiji Law Society must be an independent and impartial actor. Legal practitioners depend on the Law Society to protect and promote its independence, especially in matters of discipline and observation of the law. The 2006 events saw a shameless exhibition of the bias with which the Fiji Law Society Council conducted itself. Its decision to suspend the Practising Certificates of the Army Legal Services personnel without a hearing was not only a violation of the rules of Natural Justice, but a breach of sections 28 and 29 of the Constitution which, *inter alia*, protect the right to self-defence.

The individuals who are members of the Law Society Council are beset with some potentially serious conflict of interest issues. One or two law firms to which some of them belong also provide legal services to the media agencies and to important state institutions for example the Great Council of Chiefs. Any decision the Council makes as a public office (as it is constituted by law) must therefore be considered in terms of section 156 of the Constitution. In decisions of this nature, the Council should always be assisted by the wise counsel of senior practitioners who may have the capacity to prevent the occurrence of serious breaches of the law by those purporting to exercise authority on behalf of the Fiji Law Society members.

The Commission is currently dealing with serious breaches of the Constitution and the Legal Practitioners Act on the part of the Law Society Council through the legal mechanisms available under the Human Rights Commission Act.

#### **4.4 The role of NGOs and the international community**

It was noted that a number of NGOs such as the Fiji Women's Rights Movement, the Fiji Women's Crisis Centre, Pacific Centre for Public Integrity, and RRRT, in association with its employer UNDP, have been particularly condemnatory of what they have termed as the 'illegal takeover of a legally elected Government'. In Fiji most NGOs are funded by the Governments of Australia and New Zealand under AUSAID and NZAID respectively. Some are also funded by the European Union.

While most NGOs have formed various coalitions with each other in defence of human rights and democracy, their mandates do not necessarily coincide and there have been problems reported with their positions on a number of fronts. The Fiji Human Rights Commission has maintained observer status on the NGO Coalition of Human Rights, as it had assisted in its restructuring and development from 1999. It has however, recently withdrawn from the Coalition due to the strategies employed by some Coalition members to interfere with the independence of the Commission.

The Regional Rights Resource Team (RRRT) is a regional body also with observer status in the NGO Coalition but the Commission has, on a number of occasions raised concerns about the Team's placement as an NGO project within UNDP. The Commission is aware that the United Nations does not normally support in-house NGOs and will be clarifying this with UN New York Headquarters since the recent events in Fiji have made it difficult for the Commission to decide whether to protect activist members of RRRT as an NGO, or let UNDP look after its own employees who constitute RRRT. The fact that RRRT has on its Board a number of senior New Zealand and Australian former public officials and politicians is also of some concern to the Commission with respect to independence and neutrality of the organization in the region.

NGOs have exhibited limited knowledge and understanding of international human rights issues. In one case, the representative of the NGO, Pacific Centre for Public Integrity, astonishingly, publicly admonished the High Commissioner for Human Rights for saying that in crisis situations Human Rights Commissions should act as neutral and impartial brokers of peace. Apparently, the UN-prescribed role of national human rights institutions such as the Fiji Human Rights Commission is incomprehensible to some NGO representatives.

On a much broader scale, there is evidence of conflict of interest among the NGO community which requires careful analysis for assessment to identify the appropriate relationship to be established or maintained between NGOs and the Human Rights Commission. The Commission had noted that prominent members of the NGO community, including some trade unionists, were appointed by the Qarase Government to various statutory and other government-constituted boards. It appears that the term 'conflict of interest' and the provisions of section 156 of the Constitution are not yet understood by prominent individuals and NGOs who may have allowed their private interests and public duties to merge during the Qarase Government's term.

Since NGOs are all funded by foreign governments through their donor agencies, the Commission has had no alternative but to review the position of Australia and New Zealand Governments in response to the takeover. Australia and New Zealand were more interventionist in the 2006 events than in either 1987 or 2000. A few weeks before the takeover, Australia and apparently also New Zealand were reported to have been requested to assist Fiji militarily by the Prime Minister Laisenia Qarase. Australia dispatched three naval vessels, apparently to evacuate Australian citizens, but the hardware reportedly carried by the ships raised doubts in the minds of observers about real reasons for such weaponry. The RFMF took serious enough note of the arrival of the ships as well as the presence of SAS personnel, initially with the Police and then with the Australian High Commission, to fire off some warning shots and flares into the sea a few days before the takeover.

Before the takeover, the New Zealand Government had attempted to mediate between the RFMF Commander and Prime Minister Qarase at a special meeting in Wellington to which Qarase ill-advisedly took the Police Commissioner, Andrew Hughes. The talks were a reportedly a failure despite New Zealand's best efforts.

On December 5<sup>th</sup>, as the army takeover of Government took place, the Prime Minister of New Zealand released a number of statements on national television in New Zealand which were not particularly seen to be particularly helpful. She used undiplomatic language to describe what she thought was the state of the Commander's mental health and wrongly accused him of 'ripping up the Constitution'. These statements were not only incorrect, they were unnecessary and potentially dangerous for the safety of the people of Fiji.

Upon hearing this New Zealand reaction in the news media, the Human Rights Commission staff telephoned contacts in New Zealand in an attempt to ask its Prime Minister to listen to different advice by sending envoys with a more accurate sense of reality and deeper understanding of the position of everyone in Fiji, though this did not transpire. She continued to make statements in the press which, inevitably, were ignored by the Commander. The Australian reaction was equally savage. Such reactions from Australia and New Zealand limited their ability to monitor, assist or play any role whatsoever to improve the situation.

In fact, the Australian and New Zealand Governments' strategies in Fiji after the takeover are considered to have been somewhat more interventionist than has been publicly reported. Soon after the takeover, the Commission received reliable reports that diplomatic staff of the Australian, New Zealand, and possibly other embassies, were facilitating or encouraging a 'passive/aggressive' resistance campaign. There has been no official verification of these reports.

The Commission, on a number of occasions since the takeover, officially contacted senior officials of New Zealand Foreign Affairs in Wellington to stress the need to obtain accurate and independent advice from all stakeholders, not a selective few. The last such advice given to a regional NZAID official was on Thursday 21 December when he visited the Fiji Human Rights Commission to forcefully reiterate the New Zealand Government's position on the issue of the military takeover. Nevertheless, the Commission advised him that the briefing received by the New Zealand Government from the High Commissioner in Fiji should be based on a range of NGO responses to the situation, not just from those funded by New Zealand. The New Zealand Government's position as conveyed to the Commission through the NZAID official was that some NGOs were 'coup defenders'.

The complete misreading of the situation, perhaps based on unreliable NGO information, assisted in producing ill-timed reactions and un-diplomatic language which made matters worse for the ordinary people of Fiji during the weeks leading up to and including the military takeover on December 5<sup>th</sup>. Such reactions and interventionist policy fostered the deterioration of the human rights situation in Fiji between Christmas Eve and Boxing Day.

The role of the NGOs in being able to disseminate accurate information to their donors must be reviewed. Despite alternative assessments of the situation provided by a number of larger NGOs, religious organizations, and the Human Rights Commission, the New Zealand and Australian Governments continued to follow the line established by their funded organizations whose human rights credentials are questionable. Thus the accuracy of reports of such organizations on the legality or illegality of the events in Fiji must be approached with a great deal of caution. These matters must be of interest to New Zealand and Australian taxpayers who subsidise NZAID and AUSAID funding of NGOs in Fiji. Whether there is transparency in the selection of NGOs for New Zealand and Australian government support is a matter for the public in these countries to consider carefully at the earliest opportunity.

The Commission has noted more restraint in the New Zealand opinion in recent weeks and it is hoped that, after a period of cooling off and the possibility of accurate intelligence obtained by Wellington, New Zealand and Fiji relations may be restored, if not fully, then at least with a measure of diplomacy which is called for in the circumstances.

The media also deserves some mention in this assessment by the Commission. New Zealand and Australian interests have a major stake in a number of media agencies in Fiji. Though media freedom is guarded fiercely, there is some evidence of interference in the media by various interest groups. It is recommended that the Media Council analyse the perspective taken by the media in the events of 2006 compared to 2000 and 1987 with a view to assessing whether the media is as independent and impartial as it could be in crisis situations in Fiji. The Media Council should also consider whether there may be serious conflict of interest issues undermining compliance of the media with principles that protect media freedom in Article 19 of the Universal Declaration of Human Rights, as well as section 30 of the Constitution of Fiji.

#### **4.5 The Fiji Human Rights Commission**

The Human Rights Commission has a constitutional responsibility, as a neutral and impartial broker, to defend human rights. Its role in crisis situations has been outlined by the High Commissioner for Human Rights and various UN resolutions. Normally a Human Rights Commission protects individual rights but in Fiji, the Commission is responsible for protecting group rights as well.

The Commission is expected, and indeed required by law, to judge each situation and assess the extent of rights and principles that must be protected. In some acute situations, usually during a crisis, the Commission is required to advise that individual rights be limited in the public interest, though any strict limitation must be implemented according to the UN Siracusa Principles in favour of public safety as the ultimate standard.

But when there is an opportunity to determine a principle of human rights, it is important that a Commission takes it. The only credible method of operating a Human Rights Commission in a crisis situation is to proceed normally, without excitement, frenzy or fanfare, just as the Commission approached the crisis of 2000. It is equally important not to be sidetracked by other interest groups' agendas. The Commission is required to be seen to be acting impartially and independently of all sides and at the same time able to make judicious statements about the need to maintain respect for human rights and law and order.

Human Rights Commissions are not NGOs, nor do they represent any government, and therefore Commissions cannot take sides in a political conflict. It is biased only in favour of rights, and will assess the procedures and requirements for dealing with any government or executive authority, whether elected or not. Interference in the legislative responsibility of Human Rights Commissions may seriously jeopardize the investigations process of a Commission and prevent its ability to undertake its responsibilities. In 2000, the Commission, under the guidance of the Chairperson the late Justice Sailosi Kepa, was strategic in its acceptance of the Chandrika Prasad complaint, and continued to act with restraint afterwards. When the time was right, the Commission was able to substantively support Prasad's application in person for constitutional redress in the High Court. Ultimately the Constitution was restored to the people of Fiji. However, what works in one situation cannot necessarily be replicated in another. This is something that the NGOs and their legal advisers failed to understand in December 2006.

During the events of December 2006, several serious attempts were made to compromise the Fiji Human Rights Commission's statutory duties and independence. The attempts were made both from within and outside the Commission. In the interests of maintaining the Commission's independence and impartiality under the UN Principles Relating to the Status and Functions of National Institutions for the Promotion and Protection of Human Rights ("the Paris Principles"), it is recommended that the prescribed constitutional authority inquire into reports and evidence of interference with the Commission's statutory duty pursuant to sections 156 and 172 of the Constitution.

### **5.0 The RFMF's position as de-facto Government of Fiji**

The Great Council of Chiefs provided recognition to the military as the de-facto government of Fiji in an official press statement after their meeting in December. This pronouncement triggered a series of constitutional reference points for the Commission, including the application of limitations on the Bill of Rights provisions and the operations of the Commission in the prevailing circumstances. The Commission is required by law and convention to take note of constitutional re-arrangements in order to exercise its legal duties on behalf of the people of Fiji.

For constitutional bodies such as the Commission, the military currently exercises effective authority in Fiji. The RFMF is now reportedly set on a course to destroy corruption, introduce good governance and accountability, and prepare the country for census and elections. The Commission will monitor the process by which this is being done through the appropriate provisions of the Constitution.

The Human Rights Commission continues to emphasise that human rights considerations are paramount and the military has been reminded a number of times that the Bill of Rights binds all levels of the State, including public officials. While ‘duty of necessity’ was invoked to dismiss the Government after allowing the Commander to ‘step into the shoes’ of the President, this duty must continue to be exercised pursuant to section 94 of the 1990 Constitution and section 112 of the 1997 Constitution. The principles of ‘duty of necessity’ established by Gates J in the Chandrika Prasad case is relevant in this respect and should be considered carefully. The duty is to uphold the Constitution and respect the rights and welfare of citizens is a fundamental duty which the military has undertaken to respect.

In this regard, there are some issues that the Human Rights Commission must bring to the attention of the executive authority as well as the people of Fiji. The first is that in any declared state of emergency, the rights that can be derogated from do not include section 38, which prohibits discrimination, including on the grounds of age. The High Court has recently ruled in a landmark case, the Proceedings Commissioner of the Human Rights Commission v the Suva City Council, that age should not be a ground for discrimination. Recent remarks by the Caretaker Prime Minister that the retirement age should be reduced to 55 does not augur well for section 38 Constitutional protection of the people and the Commission will be keenly observing any movements in this direction. In Fiji and internationally, unfair discrimination cannot be justified, even under a state of emergency, because the right to be free from discrimination is the core right in the UN legal framework.

The second issue is the new role that the military finds itself in Fiji. In fact it is not a new role as the idea is provided for in the 1990 Constitution. Section 94 of the 1990 Constitution certainly envisaged an interventionist role for the military but, judging by the recent reaction of one of the Constitutional Review Commission members to the crisis, his original intention, (whether or not shared by everyone else on the Commission) may not have been to see the military in this way, given its history in looking after the welfare of only certain interests to the exclusion of others. Nevertheless, judging from the military’s actions from 2001, it has increasingly seen itself as protecting national interests. This means that the military sees itself as being able to exercise force for the public good. This is anathema to those who see a militarized society as objectionable and reflects some of the hesitation of the members of the public, in a hangover from the Cold War years, to accept an army to look after the good of all.

Nevertheless, in the 21<sup>st</sup> century the role of the military in public life should be reviewed to avoid falling into that clichéd phrase, the coup cycle. Historically, the monopoly for the use of force lay with the State. Only the State could have an army. Soldiers outside the national army were defined as mercenaries and prosecuted. However, since the 1980s first Gulf War, and the demise of the Soviet Union, a proliferation of private armies have emerged. Private soldiering has led to a new industry world wide called the private security and private military industry. Private companies are now contracted by many States to undertake a large part of combat and non-combat services. The State is therefore less able to take responsibility for human rights violations in armed conflict situations, a term which is itself undergoing revision because of the varied nature of warfare in evidence today. Thus a State that can effectively and forcefully protect its people, not only from armed invasion, but also from unsavoury practices from within, is actually quite a rarity in the modern world and should not be lightly dismissed as a military dictatorship.

But there should be no vagueness about the expression of duty and responsibility of a military in the public domain. The Constitution should expressly state the agreed duty of the military, for example importing section 94 (3) of the 1990 Constitution into section 112 of the 1997 Constitution. An example of how this could be exercised is in exactly the way the RFMF mobilized to provide water to people who had gone without for days, the resolution of the Emperor Gold Mine issues for the workers, stopping armed home invasions, and so on. On the other hand, the military could itself become more knowledgeable about governance and politics, so that its force is seen to be exercised for the people rather than against them as Fiji has experienced in the past.

The third issue is that the fact that the Commander referred to himself as having ‘stepped into the President’s shoes’ and thereafter as Acting President confirms what the Commission has suspected all along- the substantive President remained in his position. His role was undertaken briefly by the Commander to remove the Prime Minister and others and dissolve Parliament. These events were then recorded in the Extraordinary Gazette. The Duty of Necessity doctrine was used to accomplish what the substantive President had tried to achieve by asking the Prime Minister Qarase to resign. The substantive President remains, but others have gone. Lawyers will inevitably argue ad infinitum about the justifiability of the short period of duty of necessity invoked, but legally speaking, it is an extra-constitutional possibility.

## **6.0 Conclusion**

The result of this investigation and assessment of the legality or otherwise of the assumption of executive authority by the RFMF is that authority was assumed over a Government that was first of all established on a foundation of illegality in 2001, and secondly over a Government that was elected unconstitutionally in 2006. Between 2001 and 2005, the Government put in place unconstitutional policies and legislation that, in addition, violated Fiji's obligations under the ICERD, as pointed out by the CERD Committee in 2002.

Despite advice it received from its own human rights agency, the Human Rights Commission, the Government proposed to enact unconstitutional legislation which would have been passed in parliament on the principle of majoritarianism and inflicted upon the people of Fiji. The RFMF overthrew an illegally constituted, unconstitutional Government which was acting against the public interest in violation of public security and public safety protections in the Constitution.

The RFMF has the capacity to invoke certain human rights and welfare powers under section 94 of the 1990 Constitution and section 112 of the 1997 Constitution Amendment Act.

Since it has the constitutional power to ensure security and protect people, the military does not act unlawfully as long as it keeps to this objective. In view of the rampant abuse of power, privilege, illegalities and wastage of wealth of the Qarase regime, as well as its proposed discriminatory legislation which, if enacted, would have constituted a 'crime against humanity' under the International Law Commission's definition, and limited scope for an immediate judicial solution, there appear to be few options remaining to protect the people of Fiji from an illegal, unconstitutional, anti-human rights, and despotic regime. The Qarase Government relied on majoritarianism, and collaboration with some powerful members of the international community including close neighbours as well as some NGOs, to shield its extensive human rights violations in Fiji from scrutiny.

The pre-conditions for a democratic government in Fiji are firstly, strict adherence to the constitutional provisions on elections, secondly, an understanding of section 156 of the Constitution with reference to public officers, thirdly, awareness of the Bill of Rights provisions of the Constitution to ensure that only constitutional legislation is enacted, and fourthly, due regard to be paid to the Compact provisions as well as Chapter 5 of the Constitution.

We may need other provisions to consolidate the idea of real democracy of our times, rather than an outdated 20<sup>th</sup> century model which gets increasingly more remote as the voting process becomes more mathematical and positivist. Democracy is still very much at an experimental stage internationally, and the Human Rights Commission acknowledges that as long as there is representation of all the people in governance, any kind of human rights- respecting democracy would be acceptable. It is reminded of the fact that Hitler won both an election and a plebiscite before 1939, and survived a military putsch. The price of Hitler's democracy was 11 million people dead in the death camps.

From the human rights point of view, democracy without rights is a farce. The work that now needs to be done is to ensure that Fiji becomes truly democratic with the rights and interests of all citizens properly protected and appreciated.