FOUNDATION FOR HUMAN RIGHTS

TORTURE OF NOKHUTHULA SIMELANE

OPINION[1]

INTRODUCTION

1. Consultant is the Foundation for Human Rights ("FHR").

2. FHR seeks to bring justice to those responsible for the abduction, torture and disappearance of Nokhuthula Simelane ("Simelane") in 1983.

3. This opinion is a section of a larger opinion dealing with the prospects of success of bringing a criminal prosecution against those accused of the torture and enforced disappearance of Nokhuthula Simelane. In the larger opinion several legal questions are addressed including the prospects of success of a constitutional challenge to s 18 of the Criminal Procedure Act 51 of 1977 which provides for the prescription of certain offences after 20 years.

[1] I am enormously grateful for the valuable inputs and suggestions made by Deena Hurwitz, Ryan Harvey, Annalise Nelson, Rachel Cella, Clare da Silva, Maxine Marcus, Daniel Rothenberg, Richard Mojica and Gabriel Sanchez.

4. In this opinion I focus on the question of whether the National Prosecuting Authority has the legal authority to pursue charges of torture against certain alleged perpetrators, notwithstanding the fact that the right to bring assault and assault to do grievous bodily harm charges have lapsed in terms of s 18 of the Criminal Procedure Act.

5. If we are successful in this endeavour there will be no need to consider the constitutionality of s 18 of the Criminal Procedure Act insofar as it applies to crimes of the past. This is because torture as a crime against humanity, and/ or a war crime is an international crime that never prescribes.[2]

6. In this opinion I do not deal with the enforced disappearance of Nokhuthula Simelane. Customary international law on the question of enforced disappearances was not as well developed as it was in respect of the crime of torture in the early 1980s. However, of more significance is the fact that unlike torture, the incidence of enforced disappearance during the apartheid regime seems not to have been widespread or systematic.[3] This may remove the crime in question from the realm of

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[2] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, November 26, 1968. See also Section 18(g) of the Criminal Procedure Act 51 of 1977 which was amended by s. 39 of Act 27 of 2002 which provided that international crimes are exceptions to the 20 year statute of limitations.

[3] Although the TRC recorded some 1500 cases of disappearances referred to in statements it did not conclude that the practice was widespread or systematic. Paragraph 52 of Volume Six, Section Five, Chapter two of the final report of the Truth and Reconciliation Commission of South Africa Report released on 21 March 2003.

international criminal law.[4] Matters are further complicated by the fact that the alleged perpetrators received indemnity against prosecution for the abduction of Simelane.[5] It would need to be shown that the enforced disappearance constituted a distinct and separate crime from the abduction (or kidnapping)[6] for which the perpetrators were granted amnesty. The fact that enforced disappearance is an international crime and the crime in question is a continuing crime[7] may (or may not) be sufficient to distinguish it from the crime of abduction. These issues will be dealt with in the main opinion.

7. I have structured this opinion as follows:

7.1. First I set out my main conclusions.

7.2. I then set out the background to this matter, including the facts in relation to the abduction, torture and disappearance of Simelane;

[4] However, an argument could be made out that the crime constituted a war crime.
[5] I have concluded in the larger opinion that while there are good grounds to review the decision of the Amnesty Committee we will be unable to overcome the long time delay.
[6] See the discussion on the crimes of abduction and kidnapping in the section dealing with a possible review of the amnesty decision in the main opinion.
[7] An enforced disappearance that has not been brought to conclusion by way of a release of the detainee, or the discovery of the body of the detainee, or the provision of decisive evidence pointing to the fate of the detainee should be regarded as a crime that has not been concluded. It is in reality an ongoing crime. Given that the crime is arguably still being "committed", the question arises as to whether it falls within the purview of the Implementation of the Rome Statute of the International Criminal Court Act, 2002. The fact however that key elements took place before the implementation date of this Act may offend the presumption against retrospectivity.

7.3. I then provide an overview of what transpired during the police investigation into Simelane's abduction and disappearance, and the amnesty hearing of those responsible for her abduction and torture.

7.4. I consider whether the torture perpetrated against Simelane constitutes a crime against humanity or any other international crime that would be exempted from the 20 year prescription rule. In so doing I set out the applicable principles of international law.

7.5. I next consider how international law and its various instruments have treated the crime of torture. In particular I examine the state of international customary law as it applied to the crime of torture in the year of 1983.

7.6. I outline South Africa's international law obligations in respect of crimes of torture and I consider these obligations with regard to torture as a crime against humanity and as a war crime. In particular I examine the circumstances of the torture of Simelane during 1983 in order to ascertain whether such torture constituted a crime against humanity and a war crime.

7.7. Finally I outline South Africa's obligations to investigate and prosecute international crimes.

MAIN CONCLUSIONS

8. My main conclusions are:

8.1. The physical and mental abuse perpetrated against Nokhuthula Simelane during her unlawful captivity at the hands of members of the former South African Security Police constitutes the international crime of torture.

8.2. It is well settled that in 1983, torture was a prohibited and unlawful act in terms of customary international law. In 1983 the crime of torture committed in South Africa was both a crime against humanity and a war crime.

8.3. The torture sustained by Simelane was not an isolated event but was rather part of a much wider programme of abuse directed against non-combatant and civilian opponents of the apartheid state which falls to be described as widespread or systematic. As such the crime of torture committed against Simelane was a crime against humanity.

8.4. South Africa is obliged to investigate and prosecute transgressions of customary international law and violations of the Geneva Conventions.

8.5. There is no legal impediment to an immediate criminal investigation of the international crime of torture against those alleged to be responsible for her torture.

BACKGROUND

9. On the evidence contained in sworn statements in the police docket the following pertinent facts have been alleged by several deponents:

9.1. Nokhuthula Simelane ("Simelane"), a young woman who performed underground activities for the ANC as a courier, was lured into a trap at the Carlton Centre by members of the South African Security Branch in August or September 1983.

9.2. She was removed to the police barracks in Norwood where she was interrogated and repeatedly assaulted for one to three weeks.

9.3. Simelane was then removed to an isolated farm in Northam near Thabazimbi where her interrogations and torture continued. She was so badly assaulted that Simelane's face was barely recognizable and she could no longer walk.

9.4. Towards the end of the year Simelane was removed from the Northam farm by Security Branch members W H Coetzee, A Pretorius and F B Mong and never seen again. These policemen claimed that they were returning her to Swaziland. Several of the police deponents to statements in the docket however suspect that Coetzee, Pretorius and Mong removed Simelane from the farm in order to murder her.

POLICE INVESTIGATION

10. A police investigation commenced in early 1996 following the publication of a story in the Sowetan on the disappearance of Simelane. Several of the witnesses and suspects were traced and statements were taken.

11. Four Security Branch members stated under oath in their statements that they personally witnessed assaults perpetrated against Simelane and/ or they saw clear evidence of assault marks on her face and body and/ or they participated in such assaults. These members were Mzimkulu Nimrod Veyi, Mokone Sefuthi, Moleke Peter Lengene, and Mohapi Lazarus Selhmolela. Lengene has subsequently died.

12. These four persons were members of the SAP's Security Branch at the time Simelane's ordeal. All worked under the direct command of W H Coetzee and A Pretorius. At the time Coetzee was a warrant officer and

Pretorius was a sergeant. On 6 July 1998 W H Coetzee was warned of his rights in terms of section 35 of the Constitution in respect of the “murder” of Nokuthula Simelane.

13. It appears from the docket that Coetzee and Pretorius intimidated the late Sergeant Lengene into making a false statement. They also attempted to coach Norman Mkhonza, who was involved in the abduction, into making a false statement. To date these persons have not been charged with defeating the ends of justice charges. The National Prosecuting Authority (NPA) has been asked to proceed against them.

14. The NPA has also been asked to bring a charge of kidnapping against Detective Inspector Msebenzi Timothy Radebe who played a role in the abduction and the torture of Simelane at Norwood and Northham. He did not apply for amnesty. Kidnapping is listed as an exception to the 20 year prescription rule contained in18 of the Criminal Procedure Act 51 of 1977.

15. It appears from the Amnesty Hearing record that Coetzee claimed that Willem Schoon was apprised of the abduction and gave authorisation for the 'kopdraai'. He and Mong accompanied Brigadier Muller (deceased OC of Soweto SB) to Pretoria to brief Schoon on the Saturday afternoon immediately following the Carlton Centre operation. He also did not apply

for amnesty. His role in this matter should be investigated with a view to possible prosecution.

16. It appears from the investigation diary of the police docket that the police investigation was wound up during October 1996. On 22 October 1996 it was recorded that the matter was to be held back pending the instructions of Advocate Ebrahim from the office of the Attorney General. No subsequent instructions from Advocate Ebrahim were recorded in the investigation diary. The final entry in the investigation diary was dated 10 February 1998 which stated: "amnesty hearings o/s". O/s presumably means "outstanding". It seems that further investigations were suspended pending the outcome of the amnesty applications.

AMNESTY HEARING

17. The following persons applied for amnesty or indemnity against prosecution for the abduction and assault of Nokhuthula Simelane in terms of section 18 of the Promotion of National Unity and Reconciliation Act No. 34 of 1995: W H Coetzee, A Pretorius, J F Williams, F B Mong, N L Mkhonza, M M Veyi and M L Selamolela. Hearings were held in May and June 1999 and May 2000. The decision of the Amnesty Committee of

Denzil Potgieter, Chris de Jager and L Gcabashe was handed down on 23rd May 2001.

18. Under the facts listed by the Amnesty Committee (the Committee) as common cause was that while Simelane was held at the police barracks in Norwood she was:

> **"… interrogated and continuously assaulted by a group of Security Police officers. The assaults were of a serious nature and Applicants accepted that this can be equated to torture."[8]**

19. The Committee also noted under the list of common cause facts that the interrogation and torture continued on the farm in Northam but that there was conflict in the versions of the applicants. The Committee noted that on the versions Coetzee, Pretorius and Mong that during Simelane's first week of detention that on the "odd occasion [ ] she would be given a slap or a punch". On the versions of Veyi and Selamolela she was "severely assaulted throughout her detention" to the point where "she could hardly be recognised".

20. All the applicants were granted amnesty in respect of the abduction[9] but Coetzee, Pretorius and Mong were refused amnesty for the torture of

[8] Page 3 of the Decision of the Amnesty Committee in the matter of AC/2001/1985.
[9] It seems that the Amnesty Committee has confused the offence of abduction with the elements of the offence of kidnapping. The facts of the offence before the Committee were clearly that of kidnapping, not abduction.

Simelane on the basis that they had not made a full disclosure of all the relevant facts. Veyi and Selamolela were granted amnesty in respect of all offences and delicts arising from the torture of Simelane.

21. Notwithstanding the May 2001 denial of amnesty to Coetzee, Pretorius and Mong in respect of the torture it appears that the police investigation against them was not resumed.

22. There appears then to be sufficient evidence on hand to proceed with assault and assault with intent to do grievous bodily harm charges against Coetzee, Pretorius and Mong. Prosecutors state however that they are prevented from proceeding with assault charges as the right to prosecute such offences have prescribed by virtue of section 18 of the Criminal Procedure Act 51 of 1977. This law prevents the prosecution of certain offences after 20 years. Assault is not listed as one of the exceptions to the 20 year prescription period.

23. It appears from the Amnesty Hearing record that Coetzee claimed that Willem Schoon was apprised of the abduction and gave authorisation for the 'kopdraai'. He and Mong accompanied Brigadier Muller (deceased Officer Commanding of the Soweto Security Branch) to Pretoria to brief Schoon on the Saturday afternoon immediately following the Carlton Centre operation. Schoon did not apply for amnesty on this matter. The

NPA has been asked to investigate his role in this matter with a view to possible prosecution.

INTERNATIONAL LAW

24. International law is comprised essentially of treaties and "customary laws". Treaties bind those states that are parties to them. International law regulates the actions of states and non-state groups, such as armed groups and individuals. Within international law there exists a body of rules referred to as international human rights law and a collection of rules known as international humanitarian law. International human rights law deals with the obligations that states owe to individual persons.[10] It does not bind non-state groups, such as armed liberation movements. International humanitarian law regulates the conduct of all participants in armed conflict, including states, armed groups and individuals.[11]

25. Customary international law is a collection of rules that have been accepted and practiced by the international community. Rules of

[10] Examples include the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of the Child.

[11] These include the four Geneva Conventions of 12 August 1949; the two Protocols Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International and non-International Armed Conflict of 8 June 1977; the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects of 10 October 1980; and the laws and customs of war.

customary international law are binding on all states.[12] Much of that law has evolved from norms proclaimed in international human rights instruments, which have their basis in the Charter of the UN, the Universal Declaration of Human Rights and other treaties of a universal character.[13] The *Restatement of the Foreign Relations Law of the United States (Third)* (1987) (*Restatement Third*)[14] characterizes some of the rights in the Universal Declaration as customary international law. Without claiming it to be exhaustive, it lists the following governmental practices as violating international law: genocide, slavery, murder or causing the disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination and consistent patterns of gross violations of internationally recognized human rights. [15]

26. Under international law individuals can be held accountable for committing a range of crimes, including genocide, crimes against humanity, acts of

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[12] *Restatement (Third)* § 702.
[13] Buergenthal, *International Human Rights in a Nutshell*, St. Paul, West Publishing Co. 1988 at 245.
[14] The Restatements of laws are published by the American Law Institute as scholarly refinements of black letter law. Restating selected subjects of the law was the first undertaking of the Institute after its establishment in 1923. Restatement of the Law Second was undertaken, in part, to update the original Restatements by revising their formulations in the light of changes and developments in the law. Restatement of the Law Third was inaugurated with the publication of the 1987 Restatement of the Foreign Relations Law of the United States, which superseded the Restatement published in 1965 as part of Restatement Second. Like Restatement Second, the third series of Restatements contains both revised and updated versions of previous Restatement subjects and Restatements of subjects not previously addressed by The American Law Institute, as well as extensive Reporter's Notes. The authoritativeness of the Restatements of the Law is evidenced by their acceptance by courts throughout the United States. As of March 1, 1995, the Restatements had been cited 129,533 times. See http://www.ali.org/
[15] *Restatement (Third)* § 702.

aggression and war crimes. Individuals can be held to account when they intentionally commit, plan, instigate, order, aid or abet in the planning, preparation or execution such crimes. They can be held accountable on the basis of direct responsibility, common plan or conspiracy, or command responsibility.

27. International law recognizes both torture and enforced disappearance as crimes against humanity and war crimes. Crimes against humanity are certain prohibited acts committed as part of a widespread or systematic attack directed against any civilian population. These acts include murder, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, enforced disappearance of persons, rape, persecution against any identifiable group or collectivity on political, racial, national ethnic, cultural, religious gender, or other grounds, among others.[16]

28. The core crimes must be committed as part of a widespread or systematic attack against the civilian population. This means there must be a pattern of criminality directed against the civilian population. 'Widespread' refers to the large-scale nature of the attack and the number of targeted persons,

[16] Statute of the International Criminal Court (*hereafter,* Rome Statute), U.N. Doc. 2187, U.N.T.S. 90, *entered into force* July 1, 2002, Article 7.

while the phrase "systematic" refers to the organized nature of the acts of violence and the improbability of their random occurrence.[17]

29. The term "war crimes" is generally used to describe violations of international humanitarian law, namely crimes committed in connection with armed conflict. Importantly, "the law of war crimes extends not only to international armed conflict, but as the international criminal law of civil war, to internal armed conflicts as well, if they achieve a certain degree of intensity and duration."[18]

30. Torture, as defined in Article 1(1) of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Torture Convention), is any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for purposes such as obtaining information or a confession, punishment, intimidation or coercion, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an

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[17] *Kunarac Appeal Judgement*, para. 94. According to the ICTR an attack is "widespread" if it is a massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a mulitplicity of victims. (Prosecutor v Akayesu, Judgment, No. ICTR-96-4-T, para. 580 ,Sept. 2, 1998). The ICTR defined "systematic" as constituting "organized action, following a regular pattern, on the basis of a common policy and involving substantial public or private resources ….[T]here must be exist some preconceived plan or policy. (Prosecutor v Musema, Judgment, No. ICTR-96-13-T, para. 204 ,Jan. 27, 2000). The plan or policy need not be formally articulated; it may be inferred from the circumstances, including "the scale of the acts of violence perpetrated." (Prosecutor v Blaskic, Judgment, No. IT-95-14-T, para. 204 ,March 3, 2000).

[18] Gerhard Werle, *et al*, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW (2005), 269, para. 773.

official capacity. It does not include pain or suffering that is inherent in or incidental to lawful sanctions.[19]

31. Crimes against humanity and war crimes are recognized as *jus cogens*.[20] *Jus cogens*, or compelling or higher law, refers to those principles of international law that are so fundamental that no nation may ignore them or attempt to contract out of them through treaties. They comprise a set of rules, which are peremptory in nature, and no derogation from them under any circumstances is allowed. Rules contrary to the notion of jus cogens could be regarded as void, as those rules are inconsistent with the fundamental norms of international public policy. The prohibition against torture is also considered as *jus cogens*.[21]

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[19] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*hereafter,* Torture Convention), G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987.

[20] The rules of jus cogens were confirmed in 1986 at the Vienna Convention on the Law of Treaties between States and International Organisations or Between International Organisations. Werle, *et al*, *supra* note 18, at 218, para. 639; and p. 275, para. 790 (affirming the customary law status of the Geneva Conventions); Theodor Meron, *The International Criminalization of Internal Atrocities*, 89 Am. J. Int'l L. 554, 557 (1995).

[21] *Prosecutor v. Furundzija*, Case No. IT-95-17/1 (Appeals Chamber), judgment of 21 July 2000, para. 111 ("Takes the view that the definition given in Article 1 reflects customary international law"), and (Trial Chamber), judgment of 10 December, 1998, paras. 139, 153; *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699, 714-18 (9th Cir.1992), *cert. denied,* 507 U.S. 1017 (1993); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §702 (1987).

TORTURE AND INTERNATIONAL LAW

32. It is well settled under international instruments that torture is both a crime against humanity and a war crime. Crimes against humanity and war crimes were first codified following World War II in the Nuremberg Charter and the Control Council Law No. 10 (establishing a uniform legal foundation for domestic war crimes prosecutions in Germany).[22] While the Charter made no specific mention of torture, its definition of crimes against humanity provided for "inhumane acts committed against any civilian population," and the list of war crimes included "ill-treatment of prisoners of war." Article II of Law No. 10 of the Control Council for Germany included "torture" as one of the "Atrocities and Offenses" constituting a crime against humanity. Four years later, Article 3 common to the Geneva Conventions of 1949 definitively prohibited torture, and listed it among the grave breaches that state parties are obligated to prosecute.[23]

33. The inclusion of torture in the definition of crimes against humanity and war crimes has been so consistent and universal as to be considered a *jus cogens* norm.[24] Indeed, the crime of humanity of torture covered in

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[22] Nuremberg Charter, art. 6(c). 82 U.N.T.S. 279, *entered into force* Aug. 8, 1945; Control Council Law No. 10, Dec. 20, 1945, *available at:* http://www.yale.edu/lawweb/avalon/imt/imt10.htm.

[23] *See* Arts. 129 and 130 of Geneva Convention III (Prisoners of War), and Arts. 146 and 147 of Geneva Convention IV (Civilians).

[24] Werle *et al*, *supra* note 18 at 280, para. 805 (Art. 8(2) of the Rome Statute as listing the core crimes of the law of war crimes, which also embody customary international law).

Article 7(1)(f) of the Rome Statute of the International Criminal Court is based on Article II(1)(c) of Control Council Law No. 10, Article 5(f) of the ICTY Statute and Article 3(f) of the ICTR Statute.[25] Torture is recognized as a war crime in the ICTY statute, Article 2(b) (violations of the Geneva Conventions), 3 (war crimes) and in the ICTR statute: 4(a). In addition, Article 2(f) of the statute of the Special Court for Sierra Leone provides that torture is a crime against humanity as well as a serious violation of Article 3 of the Geneva Conventions.[26] Article 8(2)(a)(ii) (international armed conflicts) and 8(2)(c)(i) (non-international armed conflicts) of the Rome Statute recognize "torture or inhuman treatment" as a war crime.[27]

34. Considering that the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not refer to war crimes or crimes against humanity, it is worth noting that the definitions of torture in these instruments are fundamentally similar. The primary difference is that under the ICTY, ICTR and ICC statutes torture need not be carried out by a public official or a person acting in an official capacity. Such a requirement would be contrary to customary international law.[28]

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[25] *Id.* at 244, para. 710. Statute of the International Criminal Tribunal for Former Yugoslavia, *available at*: http://www.un.org/icty/legaldoc-e/index.htm, Article 5(f) ; Statute of the International Criminal Tribunal for Rwanda *available at*: http://www.ictr.org, Article 3 (f).

[26] Statute of the Special Court of Sierra Leone, *available at*: http://www.sc-sl.org/scsl-statute.html.

[27] Rome Statute, *supra* note 16.

[28] Werle *et al, supra* note 18, 246, para. 716. *See also*, Ratner & Abrams, *supra* note **Error! Bookmark not defined.** at 68-69.

International law jurisprudence and torture

35. Jurisprudence of international tribunals and courts holds that torture is a crime against humanity and a war crime. International tribunals have not only included torture as a crime against humanity and a war crime in their statutes, they have developed a growing body of jurisprudence holding individuals accountable for these offenses.

36. The ICTY pioneered the prosecution of torture as a crime against humanity and as a war crime and, in particular, defined it more broadly than that of the Torture Convention.[29] The ICTY noted that the Convention definition explicitly states it is "for the purposes of this Convention," and does not necessarily extend to other entities. Hence, "[a]n extra-conventional effect may . . . be produced to the extent that the definition at issue codifies, or contributes to developing or crystallizing customary international law."[30]

37. In *Kunarac et al*, involving the charge of torture as a crime against humanity, the ICTY strongly reinforced its previously-held view that, for torture as a crime against humanity, "the prohibited purpose must simply

[29] *Prosecutor v. Kunarac et al.,* ICTY (Trial Chamber), judgment of 22 Feb. 2001, para. 482: "The definition of torture contained in the Torture Convention cannot be regarded as the definition of torture under customary international law, which is binding regardless of the context in which it is applied. …"
[30] *Furundzija* (Trial Chamber), *supra* note 21 at para. 160.

be part of the motivation behind the conduct and need not be the predominating or sole purpose."[31] Similarly, in *Akayesu*, the International Criminal Tribunal for Rwanda defined the essential elements in accordance with the Torture Convention, and provided three further elements of torture as a crime against humanity:

(a) torture must be perpetrated as part of a widespread or systematic attack;
(b) the attack must be against the civilian population
(c) the attack must be launched on discriminatory grounds, namely: national, ethnic, racial, religious or political grounds.[32]

38. The ICTY dealt with torture as a violation of the laws or customs of war in the *Furundzija* and *Celebici* cases.[33] The Trial Chamber found it necessary to "identify or spell out some specific elements that pertain to torture as considered from the specific viewpoint of international criminal law relating to armed conflict."[34] Hence, while holding that the definition of torture in article 1 of the Torture Convention "applies to any instance of torture, whether in time of peace or of armed conflict," the Chamber considered the elements of torture in an armed conflict require that torture:

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[31] *Kunarac et al*, supra note 29, a, para 486. *Prosecutor v. Mucic et al*, Case No. IT-96-21 (Trial Chamber), judgment 16 November 1998, para 470.
[32] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Trial Chamber), judgement of 2 September 1998, paras. 593-594.
[33] *Furundzija* (Appeals Chamber), *supra* note 21; *Furundzija* (Trial Chamber), *id.at* paras. 159-164 (defining torture for purposes of war crimes).
[34] *Furundzija* (Trial Chamber), *id.* at para. 162.

(i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition

(ii) this act or omission must be intentional;

(iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;

(iv) it must be linked to an armed conflict;

(v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.* as a de facto organ of a State or any other authority-wielding entity.[35]

Opinions of learned scholars support the conclusion that torture is a crime against humanity and a war crime

39. The opinions of learned scholars and experts in the field provide further support for the conclusion that torture is a crime against humanity and a war crime.

[35] *Id.*; *see also Prosecutor v. Mucic at al ("Celebici"),* Case No. IT-96-21 (Trial Chamber), judgment of 16 November 1998 at para. 470 (positing that this is not a conclusive list).

40. The International Law Commission (ILC)'s work on a Draft Code of Crimes Against the Peace and Security of Mankind,[36] reflects the opinions of legal experts as well as the positions of participating governments."[37] Specifically, the Commentary to the 1996 ILC Draft Code explains that "[t]he definition of crimes against humanity contained in article 18 is drawn from the Nürnberg Charter, as interpreted and applied by the Nürnberg Tribunal, taking into account subsequent developments in international law since Nürnberg."[38]

41. Those subsequent developments as related to torture (Draft Code Article 18(c)), are elaborated in the Commentary. It notes that the Torture Convention "contemplates that the term 'torture' may have a broader application under other international instruments more particularly in the context of crimes against humanity committed not only by governments but by organizations or groups."[39] The ILC Draft Code includes torture as a war crime in Article 20(a)(ii); the Commentary similarly references the Nuremberg Charter and Tribunal, as well as the Geneva Conventions.[40]

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[36] Adopted by the Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report (A/48/10), which also contains commentaries on the draft articles, was published in *Yearbook of the International Law Commission, 1996*, vol. II(2), *available at* http://www.un.org/law/ilc/texts/dcode.htm.

[37] Ratner & Abrams, *supra* note **Error! Bookmark not defined.** at 56.

[38] International Law Commission, *Draft Code of Crimes Against the Peace and Security of Mankind*, Commentary, Art. 18, in particular, paras. 2-4, 10, *supra* note 36.

[39] *Id.,* Commentary, Art. 18, para. 9 (referring to Art.1, para. 2 of the Torture Convention).

[40] *Id.,* Commentary, Article 20.

Disappearance as torture

42. Former UN Special Rapporteur on Torture, Sir Nigel Rodley, recognized a growing consensus that forced disappearances constitute severe pain or suffering amounting to torture, both for the families of the "disappeared" person and for the victim, as long as the disappearance remains unresolved.[41] This perspective has strengthened over time.

43. In General Comment No. 20 interpreting Article 7 of the ICCPR (prohibition of torture), the Human Rights Committee makes an explicit connection between the occurrence of torture and of enforced disappearance. Recognizing the significant *potential* for acts of torture to occur when the whereabouts of prisoners are not known, the Human Rights Committee recommends that states should make provisions against "incommunicado detention."[42]

44. The Human Rights Committee has issued several Communications in which, based on the disappearance, it found violations of specific

[41] Nigel Rodley, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 261 (2d ed., 1999).
[42] General Comment No. 20, *Concerning the prohibition of torture* (Article 7), para. 11 (1992). *See also*, Human Rights Committee General Comment No. 21, *Concerning humane treatment of persons deprived of liberty* (Article 10), which recognizes the particular vulnerability of individuals who are deprived of their liberty, and asserts that article 10 is designed to complement the ban on torture in article 7. ("[P]rovisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends.")

provisions of the ICCPR.[43] In the case of *Eduardo Bleir v. Uruguay*, the Committee found that Bleir's disappearance and eye-witness reports of torture in a government detention center revealed "breaches of articles 7, 9, and 10(1) of the International Covenant on Civil and Political Rights and that there are serious reasons to believe the ultimate violation of article 6 has been perpetrated by the Uruguayan authorities."[44] In *Mojica v. Dominican Republic*, the Committee found that in light of "the nature of enforced or involuntary disappearances in many countries, the Committee feels confident to conclude that the disappearance of persons is inseparably linked to treatment that amounts to a violation of article 7."[45] Similarly, in *Basilio Laureano Atachahua v. Peru*, the Committee held that abduction and disappearance, and prevention of contact with family and outside world constitutes cruel and inhuman treatment, in violation of ICCPR article 7, juncto article 2, paragraph 1.[46]

45. In the landmark cases of *Velasquez Rodriquez* and *Godinez Cruz,* the Inter-American Court found that "the mere subjection of an individual to

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[43] *Eduardo Bleier v. Uruguay,* Communication No. R.7/30 (23 May 1978), U.N. Doc. Supp. No. 40 (A/37/40) at 130 (1982). *Available at:* http://wwwserver.law.wits.ac.za/humanrts/undocs/session37/7-30.htm. *See also, Maria del Carmen Almeida de Quinteros, on behalf of her daughter, Elena Quinteros Almeida, and on her own behalf v.Uruguay*, Communication No. 107/1981 (17 September 1981), U.N. Doc. Supp. No. 40 (A/38/40) at 216 (1983), *available at:* http://wwwserver.law.wits.ac.za/humanrts/undocs/session38/107-1981.htm.

[44] *Bleier, id.*, para 14.

[45] *Mojica v. Dominican Republic*, Communication No. 449/1991, U.N. Doc. CCPR/C/51/D/449/1991 (1994), para. 5(7), *available at:* http://www1.umn.edu/humanrts/undocs/html/vws449.htm.

[46] *Basilio Laureano Atachahua v. Peru,* Communication No. 540/1993, U.N. Doc. CCPR/C/56/D/540/1993 (1996) para 8(5), *available at*: http://www1.umn.edu/humanrts/undocs/540-1993.html

prolonged isolation and deprivation of communication is in itself cruel and inhuman treatment."[47]

46. The UN Working Group on Enforced Disappearances asserted that "disappearance itself constitutes ipso facto torture or other prohibited ill-treatment…[t]he very fact of being detained as a disappeared person, isolated from one's family for a long period is certainly a violation of the right to humane conditions of detention and has been represented to the Group as torture."[48]

AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

47. The African Charter on Human and People's Rights[49] requires the member states of the African Union which are party to the Charter to recognize the rights, duties and freedoms enshrined in Chapter 1 – Human and Peoples' Rights of Part 1 – Rights and Duties. [50] Article 1 requires such member states to adopt legislative or other measures to give effect to such rights and duties.

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[47] *Velasquez Rodriguez, supra* note **Error! Bookmark not defined.** at para. 187; *Godinez Cruz, supra* note **Error! Bookmark not defined.** at para. 197.
[48] http://www.ichr-law.org/english/expertise/areas/disappearances.htm
[49] Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986
[50] Article 1 of Chapter 1, Part 1.

48. Article 2 guarantees the right of each individual to enjoy the rights and freedoms set out in the Charter. Article 3 guarantees equal protection under the law to every individual.

49. Article 4 provides for the right to life:

> **Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.**

50. Article 5 provides for the right not to be subjected to torture or inhuman treatment:

> **Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.**

51. Article 6 guarantees the right of every individual to his or her right to liberty and to the security of his or her person. In particular, Article 6 prohibits arbitrary arrest or detention and the deprivation of freedom except for reasons and conditions previously laid down by law.

52. Article 3(g) of the Constitutive Act of the African Union[51] requires member states to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments. Articles 4(m) and (o) requires member states to respect the sanctity of human life, condemn and reject impunity and political assassination, and uphold human rights and the rule of law.

53. In 2002, the 32nd ordinary session of the African Commission on Human and Peoples' Rights (ACHPR)[52] adopted the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines).[53] In term of the ACHPR resolution member States are urged to co-operate with the United Nations Human Rights Treaties Bodies, with the UN Commission on Human Rights' thematic and country specific special procedures, in particular, the UN Special Rapporteur on Torture. The Robben Island Guidelines called for the criminalisation of torture and required, *inter alia,* that:

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[51] Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, Adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Governments on 11 July, 2000 at Lomé, Togo, entered into force May 26, 2001.

[52] Held in Banjul, The Gambia, from 17th to 23rd October 2002. The African Commission on Human and Peoples' Rights is a mechanism created under the African Charter on Human and Peoples' Rights to promote and protect human rights. The African Commission was created in 1986 and has its secretariat in Banjul. The Commission receives complaints against state parties from states and individuals. It issues recommendations to the state concerned.

[53] ACHPR /Res.61(XXXII)02: Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002). These guidelines emerged from the recommendations of the Workshop on the Prohibition and the Prevention of Torture and Ill-treatment, organised jointly by the African Commission and the Association for the Prevention of Torture, on Robben Island, South Africa, from 12th to 14th February 2002.

53.1. States should ensure that acts, which fall within the definition of torture, based on Article 1 of the UN Convention against Torture, are offences within their national legal systems.

53.2. National courts should have jurisdictional competence to hear cases of allegations of torture in accordance with Article 5 (2) of the UN Convention against Torture.

53.3. Torture should be made an extraditable offence.

53.4. The trial or extradition of those suspected of torture should take place expeditiously in conformity with relevant international standards.

53.5. Circumstances such as state of war, threat of war, internal political instability or any other public emergency, shall not be invoked as a justification of torture, cruel, inhuman or degrading treatment or punishment.

53.6. Notions such as “necessity”, “national emergency”, “public order”, and “ordre public” shall not be invoked as a justification of torture, cruel, inhuman or degrading treatment or punishment.

53.7. Superior orders shall never provide a justification or lawful excuse for acts of torture, cruel, inhuman or degrading treatment or punishment.

53.8. Those found guilty of having committed acts of torture shall be subject to appropriate sanctions that reflect the gravity of the offence, applied in accordance with relevant international standards.

TORTURE: THE STATE OF CUSTOMARY INTERNATIONAL LAW IN 1983

54. Although South Africa only ratified the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 10 December 1998 there is much to indicate that torture was considered a punishable offence under customary international law during 1983.

55. Crimes against humanity and war crimes were first codified following World War II in the Nuremberg Charter and the Control Council Law No. 10 (establishing a uniform legal foundation for domestic war crimes prosecutions in Germany).[54] While the Charter made no specific mention of torture, its definition of crimes against humanity provided for "inhumane acts committed against any civilian population," and the list of war crimes included "ill-treatment of prisoners of war." Article II of Law No. 10 of the

[54] Nuremberg Charter, art. 6(c). 82 U.N.T.S. 279, *entered into force* Aug. 8, 1945; Control Council Law No. 10, Dec. 20, 1945, *available at:* http://www.yale.edu/lawweb/avalon/imt/imt10.htm.

Control Council for Germany included “torture” as one of the “Atrocities and Offenses” constituting a crime against humanity. Four years later, Article 3 common to the Geneva Conventions of 1949 definitively prohibited torture, and listed it among the grave breaches that state parties are obligated to prosecute.[55]

56. Article 5 of the Universal Declaration of Human Rights of 1948 and Article 7 of the International Covenant on Civil and Political Rights of 1966 both provided that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. A resolution of the General Assembly in 1973 proclaimed the need for international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. A further resolution of the General Assembly in 1975 proclaimed the desire to make the struggle against torture more effective throughout the world. The fundamental human rights of individuals, deriving from the inherent dignity of the human person, had become a commonplace of international law. Article 55 of the Charter of the United Nations was taken to impose an obligation on all states to promote universal respect for and observance of human rights and fundamental freedoms.

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[55] *See* Arts. 129 and 130 of Geneva Convention III (Prisoners of War), and Arts. 146 and 147 of Geneva Convention IV (Civilians).

57. During the early 1980s, U.S. courts have from time to time relied on customary international law to grant judicial relief. The most relevant case falling into this category is *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) which held that the right to be free from torture "has become part of customary international as evidence and defined by the Universal Declaration of Human Rights …"[56] To substantiate its conclusion, the court traced the evolution of this rule from the UN Charter, the Universal Declaration of Human Rights and other major human rights instruments. A similar methodological approach was adopted in *Fernandez v. Wilkinson*, 505 F.Supp. 787 (D.Kan. 1980).[57]

58. The view of the *Filartiga* and *Fernandez* courts was largely confirmed in The *Restatement of the Foreign Relations Law of the United States (Third)* (1987) (*Restatement Third*) which characterized certain of the rights in the Universal Declaration as customary international law including the governmental practices torture or other cruel, inhuman or degrading treatment or punishment.

59. In their handbook on the Convention against Torture (1984), Burgers and Danelius wrote at p. 1:

> "Many people assume that the Convention's principal aim is to outlaw

[56] 630 F.2d 876 (2d Cir. 1980) at 882.
[57] Affirmed in 654 F.2d 1382 (10th Cir. 1981). See also *Von Dardel v. Union of Soviet Socialist Republics* 623 F.Supp. 246 (D.D.C. 1985). But see *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774 (D.C. Cir. 1984), which limits the holdings of the *Filartiga* case.

> torture and other cruel, inhuman or degrading treatment or punishment. This assumption is not correct insofar as it would imply that the prohibition of these practices is established under international law by the Convention only and that the prohibition will be binding as a rule of international law only for those states which have become parties to the Convention. On the contrary, the Convention is based upon the recognition that the above-mentioned practices are already outlawed under international law. The principal aim of the Convention is to strengthen the existing prohibition of such practices by a number of supportive measures."

60. The House of Lords in 1999 in the second extradition decision relating to General Augusto Pinochet,[58] had little difficulty in holding that torture was outlawed in terms of customary international law prior to the 1984 Torture Convention, although six of the seven Law Lords held that British courts could only assume universal jurisdiction (the authority to assume jurisdiction over acts committed abroad) if provided by way of treaty, and not customary international law, even if customary law had achieved the status of *jus cogens.*[59]

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[58] HOUSE OF LORDS: Lord Browne-Wilkinson, Lord Goff of Chieveley, Lord Hope of Craighead, Lord Hutton, Lord Saville of Newdigate, Lord Millett, Lord Phillips of Worth Matravers. OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE: REGINA v. BARTLE AND THE COMMISSIONER OF POLICE FOR THE METROPOLIS AND OTHERS (APPELLANTS) EX PARTE PINOCHET (RESPONDENT) REGINA v. EVANS AND ANOTHER AND THE COMMISSIONER OF POLICE FOR THE METROPOLIS AND OTHERS (APPELLANTS)EX PARTE PINOCHET (RESPONDENT) (ON APPEAL FROM A DIVISIONAL COURT OF THE QUEEN'S BENCH DIVISION) ON 24 March 1999

[59] This aspect of the opinions has been severely criticized. See Michael Byers, The Law and Politics of the Pinochet Case, 1*0 Duke J. of Comp. & Int'l L.* 415 at 436: In terms of its understanding of the relationship between customary international law and treaties, this reasoning is clearly flawed -- not least because it misses much of the point of *jus cogens* rules: they override and are superior to other rules, which suggests that a *jus cogens* rule without a treaty would be just as effective in overriding an immunity rule as a *jus cogens* rule with a treaty. See further: Vienna Convention on the Law of Treaties, May 23, 1969, arts. 53, 64, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

61. On the question of whether torture was outlawed in terms of international law prior to the 1984 Convention Against Torture, Lord Saville of Newdigate stated:

> "**Although the systematic or widespread use of torture became universally condemned as an international crime**, it does not follow that a former head of state, who as head of state used torture for state purposes, could under international law be prosecuted for torture in other countries where previously under that law he would have enjoyed immunity ratione materiae."[60] (Emphasis added)

62. In its submissions before the House of Lords, the Republic of Chile, which opposed the extradition of Pinochet to Spain accepted that by 1973 (the year Pinochet seized power), accepted that the use of torture by state authorities was prohibited by international law, and that the prohibition had the character of *jus cogens* or obligation *erga omnes*.[61]

63. While the opinions issued by the Judicial Appeals Committee of the House of Lords disclosed differences of opinion with respect to extra-territorial jurisdiction in relation to crimes of torture committed prior to the Torture Convention of 1984, there was no dispute as to the jurisdiction of states to prosecute those accused of carrying out torture within its territory.[62]

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[60] *Ibid* footnote 111.

[61] *Id.* See opinion of Lord Millet. Chile argued however that this did not confer universal jurisdiction or affect the immunity of a former head of state ratione materiae from the jurisdiction of foreign national courts.

[62] On the *jus cogens* source of jurisdiction see the judgment of the International Tribunal for the Territory of the Former Yugoslavia in *Prosecutor v. Anto Furundzija* (unreported) given on 10 December 1998, where the court stated: "At the individual level, that is, of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every state is entitled to investigate,

64. It is clear then that there is abundant authority for the proposition that by 1983 the crime of torture had assumed the character of *jus cogens* and was an unlawful act prohibited under customary international law which was binding on all states.

SOUTH AFRICA'S OBLIGATIONS UNDER INTERNATIONAL LAW

65. Current South African law is consistent with international law standards in that it defines both torture and enforced disappearance as crimes against humanity and war crimes. Schedule 1 of Act No. 27 of 2002 serves as a key reference for these definitions. However, a torture prosecution in this matter cannot proceed under Act No. 27 of 2002, as it is not a matter that falls within the temporal jurisdiction of the Rome Statute.

66. Part 2 of Schedule 1 Act No. 27 of 2002 defines crimes against humanity consistent with the Rome Statute of the ICC as any number of acts committed as part of a widespread or systematic attack directed against any civilian population, including …. (f) torture."[63] War crimes are defined as "any of the following conduct against persons or property protected

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prosecute, and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction."

[63] South African Implementation of the Rome Statute of the International Criminal Court Act (2002) Schedule 1 of Act No. 27, para. 1.

under the provisions of the relevant Geneva Conventions," including torture or inhumane treatment (Part 3, para. (a)(ii)).

67. South Africa's definition of torture is consistent with international law as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused"[64]

68. Under Customary International Law torture was a crime against humanity at the time of the committal of the offence against Simelane. Torture was furthermore a listed war crime under the Geneva Conventions I to IV to which South Africa had acceded on 31 March1952. During the early 1980s South Africa can be considered to have been in a state of internal and possibly international armed conflict. As such South Africa is obliged to pursue prosecutions against those responsible for the torture of Simelane as a crime against humanity, or as a war crime, or both.

THE TORTURE OF SIMELANE AS A CRIME AGAINST HUMANITY

69. It needs to be shown that the abuse suffered by Simelane at the hands of the South African Security Police was committed as part of a widespread or systematic attack directed against sections of the civilian population.

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[64] *Id.,* at para. 2(3).

70. Nokhuthula Simelane was a student and a civilian person who engaged in occasional activities as a courier for the then banned and underground African National Congress. She had not engaged in any armed or violent actions on behalf the ANC or its armed wing. She was a non-combatant and accordingly she falls to be described as a civilian who engaged in unarmed supportive actions on behalf of the ANC. As such Simelane was part of a large segment of the South African civilian population that supported the actions of the underground ANC in one form or another.

71. It further needs to be demonstrated that the torture of Simelane was not an isolated event but rather part of a larger pattern that was widespread or systematic in nature. Support for this contention is found in the Final Report of the South African Truth and Reconciliation Commission (TRC).

72. In its final report released on 21 March 2003 the Commission found the following in respect of State responsibility for torture:

> **"16. The Commission found in its five-volume Final Report that torture was systematic and widespread in the ranks of the South African Police (SAP) and that it was the norm for the Security Branch of the SAP during the Commission 's mandate period.**
>
> **17. The Commission also found that the South African government condoned the practice of torture. The Commission held that the Minister of Police and Law and Order, the Commissioners of Police and Commanding Officers of the Security Branch at national, divisional and local levels were directly accountable for the use of**

torture against detainees and that Cabinet was indirectly responsible."[65]

73. The Commission made its findings on torture based on evidence received from victims through the human rights violations process, perpetrators in amnesty applications and evidence given before the Commission by senior politicians and security force officials of the former government. In addition, local and international human rights groups made a number of submissions to the Commission, based on the studies they had carried out during the apartheid period.[66] The Commission received over 22 000 statements from victims alleging that they had been tortured. In most instances, the torture had been at the instance of members of the security forces.[67]

74. According to the TRC, human rights groups estimated that more that 73 000 detentions took place in the country between 1960 and 1990. The Commission found that it was established practice for torture to accompany a detention. Detention, arrest and incarceration without formal charges were commonplace in South Africa at that time.[68] The

[65] Paragraphs 16 and 17 of Volume Six, Section Five, Chapter two of the final report of the Truth and Reconciliation Commission of South Africa Report released on 21 March 2003. See http://www.info.gov.za/otherdocs/2003/trc/
[66] *Id* paragraph 21.
[67] *Id* paragraph 22.
[68] *Id* paragraph 24.

Commission found that the former state perpetuated a state of impunity by tolerating and sanctioning the practice of torture. [69]

75. The elements of a crime against humanity have accordingly been demonstrated in relation to the torture of Nokhuthula Simelane.

THE TORTURE OF SIMELANE AS A WAR CRIME

76. Article 3 common to the Geneva Conventions of 1949 definitively prohibited torture and other forms of ill treatment, and listed it among the grave breaches that state parties are obligated to prosecute.[70] It also required parties to any armed conflict not of an international character (domestic conflicts) to apply certain minimum standards to persons taking no active part in the hostilities. South Africa acceded to the Geneva Conventions in 1952 and was consequently bound to act against perpetrators of torture in the domestic conflict that persisted during the Apartheid years, more particularly the 1980s.

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[69] *Id* paragraphs 25 to 49. See paragraphs 55 to 57 which highlight the case of Simelane. See also Volume Two Chapter Three of the Interim TRC Report released in 1997 at http://www.news24.com/Content_Display/TRC_Report/2chap3.htm

[70] *See* Arts. 129 and 130 of Geneva Convention III (Prisoners of War), and Arts. 146 and 147 of Geneva Convention IV (Civilians).

77. Common Article 3 has in any event assumed the character of international customary law.[71] The inclusion of torture in the definition of crimes against humanity and war crimes has been so consistent and universal as to be considered a *jus cogens* norm.[72]

78. The apartheid state did not however, ratify or accept the additional protocols of 1977, and sought to argue that it could not be bound by their provisions. The TRC however found that:

> **" it is generally accepted that, even though the previous government did not ratify these conventions, it was formally bound by the principles enunciated by these bodies during the relevant period, as they are expressions of customary international law on state responsibility for the commission of gross human rights violations."[73]**

79. The TRC argued that the conflict arising out of the resistance to apartheid also fell to be described as international armed conflict. This was because of various UN resolutions dealing with apartheid, colonialism and the right to self determination. In particular Resolution 31029(XXXVIII) of the UN General Assembly adopted in 1973 provided that the armed conflict involving the struggle against colonial and racist regimes were to be regarded as international armed conflicts and that the 1949 Geneva

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[71] See by way of example: Nicaragua v. U.S. 1986 ICJ 14, 114 (June 27).
[72] Werle *et al*, *supra* note 18 at 280, para. 805 (Art. 8(2) of the Rome Statute as listing the core crimes of the law of war crimes, which also embody customary international law).
[73] Paragraph 37 of Volume Six, Section Five, Chapter one of the final report of the Truth and Reconciliation Commission of South Africa Report released on 21 March 2003. See http://www.info.gov.za/otherdocs/2003/trc/. Additional Protocol II dealt with the protection of victims of non-international armed conflicts.

Conventions and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments were to apply to struggles against colonialism and racism.

80. Thus, even if Simelane were to be regarded as a combatant in an armed conflict of an internal or international nature, South African courts retain the jurisdiction to consider the war crime of torture arising from her abuse at the hands of the Security Police in 1983.

DUTY TO INVESTIGATE AND PROSECUTE

81. There is no controversy with regard to South Africa's duty to investigate and prosecute international crimes that took place during the apartheid era.

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82. The Constitutional Court in the matter of *S v Basson*[74] has held that the National Prosecuting Authority represents the community and is obliged under international law to prosecute crimes of apartheid:

> **"… the State's obligation to prosecute offences is not limited to offences which were committed after the Constitution came into force but also applies to all offences committed before it came into force. It is relevant to this enquiry that international law obliges the State to punish crimes against humanity and war crimes. It is also clear that the practice of apartheid constituted crimes against**

[74] 2005 (1) SA 171 (CC)

> **humanity and some of the practices of the apartheid government constituted war crimes."** [75]

83. The duty to investigate and prosecute offenders of international crimes is derived from three sources. The first is the Geneva Conventions to which South Africa has been a party since 1952. The second is customary international law which is binding on South Africa. The third is general international human rights law binding on South Africa. I discuss each of these sources below. The main opinion deals in greater detail with South Africa's duty to bring justice to perpetrators of international crimes.

84. In the matter in question in which application for amnesty in respect of the assaults was denied there can be no justification for impunity. I have demonstrated in this opinion that Simelane did not only endure a series of vicious assaults but she was furthermore a victim of the international crime of torture. In circumstances, the duty on the state to prosecute is not only uncontroversial, but also intricately linked to the legitimacy and lawfulness of the entire model of truth and reconciliation.

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[75] Paragraph 37 at 189E - G., *Basson.* This holding appeared to overturn or cast doubt on the holding of the Constitutional Court in *Azanian Peoples Organization (AZAPO) and others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC).at Paragraph [29] at 689B-C that the Geneva Conventions did not apply to the conflict that took place during apartheid.

CONCLUSION

85. There is no legal impediment to the bringing of a charge of torture as both a crime against humanity, and alternatively a war crime against those responsible for the torture of Simelane.

86. I recommend that this be done as speedily as possible.

Howard Varney

Chambers
Johannesburg
22 March 2006