MEMORANDUM ON THE PROSECUTION OF APARTHEID-ERA CASES AS INTERNATIONAL CRIMES UNDER SOUTH AFRICAN LAW

I. INTRODUCTION

1. On 3 June 2019 the High Court dismissed the application by Joao Rodrigues for a permanent stay of prosecution in respect of the charge of murder for the death in detention of anti-apartheid activist Ahmed Timol in October 1971. In dismissing the application, the Court noted:[1]

> This, is many respects, is a difficult case. Not necessarily on account of the legal issues it raises, but rather to the extent that it compels us to revisit our troubled past; examine what occurred there; recognise the need for reconciliation; and the consequences that invariably went with it. *Importantly, this case reaffirms that justice and the truth were never meant to be compromised during all that our young society sought to do in dealing with its troubled, turbulent and shameful past.*

2. Two decades after the Truth and Reconciliation Commission (TRC) completed its work, the National Prosecuting Authority (NPA) has starting in earnest the process of ensuring justice and accountability for South Africa's 'troubled, turbulent and shameful past'. The case of Ahmed Timol is one amongst a number of such 'apartheid-era' cases that are being re-examined by the NPA, which include the cases of Nokuthula Simelane, the 'Cradock Four' and the 'PEBCO Three'.

3. To date the prosecution of the alleged conduct in these and other apartheid-era cases - which includes alleged abduction, torture and murder - has predominantly been considered from the perspective of *domestic* criminal law.

[1] *Rodrigues v National Director of Public Prosecutions of South Africa and Others* 2019 (2) SACR 251 (GJ), paras. 107-8.

However, as the Constitutional Court pointed out over a decade ago in *S v Basson*:[2]

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

4. As such, this Memorandum considers that legal avenues, and possibilities, of prosecuting these cases as *international crimes*. It concludes that, in respect of the alleged conduct in these cases, the State can (i) bring charges of crimes against humanity for *inter alia* abduction, imprisonment, torture, murder, enforced disappearance and the crime of apartheid, on the basis of customary international law applied through Section 232 of the Constitution, 1996; and/or (ii) bring charges under the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002* (the *Rome Statute Act*) for those acts that can be characterized as the crime against humanity of enforced disappearance.[3]

5. In order to substantiate these conclusions, this Opinion will proceed as follows:

[2] *S v Basson* 2005 (1) SA 171 (CC), para. 37.
[3] This Memorandum will focus on prosecutions through these two avenues, however it does so without prejudice to others, such as prosecuting crimes committed during apartheid as *war crimes* under South African law.

5.1. Part II ('The Prosecution of International Crimes Under South Africa Law') will set out the relevant avenues for prosecuting international crimes under South Africa law, and consider in detail the two that are most applicable to the facts of the present case, namely Section 232 of the Constitution and the *Rome Statute Act*.

5.2. Part III ('Prosecuting Crimes Against Humanity under South African law') will consider how, broadly speaking, the conduct alleged in these cases can be classified as crimes against humanity. In order to do so it will address the following sub-questions:

5.2.1. What were the applicable Contextual Requirements of crimes against humanity under customary international law during the period in question (the 1980s, for the most part),[4] and does the available evidence support the preliminary conclusion that these were met in respect of these cases?

5.2.2. What were the relevant Underlying Acts of crimes against humanity (e.g. torture, murder, imprisonment, 'enforced disappearance' and apartheid) recognised as such under customary international law at that time, how were they defined, and does the available evidence support the preliminary conclusion that these were met in respect of these cases?

[4] The exception being the case of Ahmed Timol, who died in detention in 1971.

6. In substantiating its conclusions, this Memorandum will rely on jurisprudence of other countries who have addressed similar questions in the context of dealing with past human rights abuses.

II. THE PROSECUTION OF INTERNATIONAL CRIMES UNDER SOUTH AFRICA LAW

A. Introduction

7. As the Constitutional Court has noted, the domestic prosecution of international crimes has a long history, one that pre-dates the more celebrated prosecution of German and Japanese leaders after World War II.[5] However, international criminal law has experienced a revival over the past two decades. At the international level, this culminated in the establishment of a permanent International Criminal Court (ICC) in The Hague in 2002, under an international treaty adopted in 1998: the *Rome Statute of the International Criminal Court* (the *Rome Statute*). At the domestic level, spurred on by these international developments, a number of states have adopted new legislation to provide for the prosecution of such crimes in their domestic courts, in line with the 'principle of complementarity' contained the *Rome Statute*.[6]

8. South Africa has been at the forefront of these developments in international criminal law at both the international and domestic level, playing an important role in the negotiation and adoption of the *Rome Statute* in 1998 and, in 2002, becoming the first African state to implement its provisions through the *Rome*

[5] In *S v Basson* 2007 (3) SA 582 (CC) the Constitutional Court noted (para. 171): "Prior to the establishment of the Nuremburg and Tokyo Tribunals after World War 2, the focus for trying such anciently condemned atrocities lay with national courts. The recent establishment of the International Criminal Court represents the culmination of a centuries-old process of developing international humanitarian law. It in no way deprives national courts of responsibility for trying cases involving breaches of such law which are properly brought before them in terms of national law."
[6] See Article 17, *Rome Statute of the International Criminal Court.*

Statute Act. In fact, there are presently no less than four possible avenues available under South African law for prosecuting the international crimes that are *prima facie* implicated in the present matter, namely: (i) the *Rome Statute Act*; (ii) the *Prevention and Combating of Torture of Persons Act 13 of 2013* (the *Torture Act*); (iii) the *Implementation of the Geneva Conventions Act 8 of 2012* (the *Geneva Conventions Act*)*;* and (iv) the direct application of customary international law under Section 232 of the Constitution, 1996.

9. The *Rome Statute Act* and the *Torture Act* do not have *general* retrospective application however, which places the alleged crimes against humanity committed in respect of these cases beyond their scope (unless, as discussed below, the conduct in question can be classified as the continuing crime of 'enforced disappearance'). While the *Geneva Conventions Act* arguably can be applied retrospectively,[7] for reasons of space this Memorandum will not consider the question of whether apartheid-era cases may be prosecuted as war crimes, and so the *Geneva Conventions Act* is not relevant at present.

10. There are two remaining avenues for the prosecution of these alleged international crimes in the present matter. The first, and most appropriate, is to prosecute the alleged conduct as crimes against humanity of torture, murder, imprisonment, enforced disappearance and the crime of apartheid through the

[7] Gevers, Wallis & Du Plessis, 'Sixty Years in the Making, Better Late Than Never? : the Implementation of the Geneva Conventions Act', *African Yearbook of International Humanitarian Law* (2012), p. 185-200.

direct application of customary international law under Section 232 of the Constitution. The second, alternate avenue is to prosecute the alleged conduct as the continuing crime against humanity of enforced disappearance, where applicable, using the *Rome Statute Act.* Each will be discussed in turn.

B. Prosecuting international crimes under Section 232 of the Constitution

11. International crimes can be prosecuted by the direct application of customary international law through Section 232 of the Constitution, 1996 which provides that "[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament".

12. In the case of *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC), the Constitutional Court explicitly endorsed the prosecution of international crimes (and crimes against humanity in particular) through this avenue. In that case - in which the Constitutional Court for the first time, and in some detail, considered the prosecution of international crimes under South African law - the Court noted (para. 37):[8]

> Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid require states, even in the absence of binding international treaty law, to suppress such conduct because "all states have an interest as they violate values that constitute the

[8] The Constitution Court had previously only alluded to this possibility, noting in *S v Basson* 2007 (3) SA 582 (CC): "*We have not found it necessary to consider whether customary international law could be used either as the basis in itself for a prosecution under the common law*, or, alternatively, as an aid to the interpretation of section 18(2)(a) of the Riotous Assemblies Act."

> foundation of the world public order". *Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm.*

13. The Court later repeated its finding that, as a result of Section 232, torture was a self-standing, non-statutory international crime under South African law; and proceeded to explicitly extend this finding to crimes against humanity generally, noting:

> In effect, torture is criminalised in South Africa under section 232 of the Constitution and the Torture Act *whilst torture on the scale of crimes against humanity is criminalised under section 232 of the Constitution, the Torture Act and the Rome Statute Act.*

14. The prosecution of international crimes by the direct application of customary international law was also endorsed by the Government (including the Minister of Justice and Correctional Services, the President and the (then) National Director of Public Prosecutions) in papers filed in the Constitutional Court in late 2016. In response to the charge that repealing the *Rome Statute Act* would leave South Africa unable to prosecute international crimes, the Government's response was unequivocal: no such *lacunae* would arise as 'international crimes are crimes in South Africa by operation of Section 232 of the Constitution'.[9]

[9] 'Answering Affidavit on behalf of the 1st, 2nd and 3rd Respondents in CCT 255/16 and on behalf of the 1st, 2nd, 3rd and 7th Respondents in CCT 256/16', filed in *Democratic Alliance v Minister of International Relations and Cooperation and Others* (CCT 255/2016) and *Council for the Advancement of the South African Constitution v President of the Republic of South Africa and others* (CCT 256/2016), para. 89.

15. Furthermore, section 7(4) of the *Geneva Conventions Act* can also be interpreted as recognizing the possibility of prosecutions of international crimes under Section 232 of the Constitution, 1996.[10]

16. This being the case, there can no longer be any doubt (if there ever was) that crimes under customary international law can be prosecuted through *the direct application of customary international law* under Section 232 of the Constitution, 1996.

17. The prospect of bringing a prosecution directly under customary international law will likely raise concerns, both legal and practical, which cannot be fully addressed here. However, suffice it for now to point out the following:

    17.1. First, as far as international law is concerned, from its inception international criminal law generally and crimes against humanity in particular have consistently overcome complaints that its prescripts are at best uncodified and unclear, and at worse applied retroactively in violation of the principle of *nullum crimen sine lege.* The first international tribunal, the International Military Tribunal at Nuremberg, rejected such complaints; as did the subsequent Control Council 10 tribunals in Occupied Germany, the first

[10] Section 7(4) of that Act states: 'Nothing in this Act must be construed as precluding the prosecution of any person accused of having committed a breach under customary international law before this Act took effect'. See further Gevers, Wallis & Du Plessis, 'Sixty Years in the Making, Better Late Than Never?' 185-200.

'domestic' tribunals to prosecute crimes against humanity. In fact, some foreign jurisdictions have elected to leave Courts with such discretion *even when creating specific statutory regimes for prosecuting international crimes*. For example, Canada's *Crimes Against Humanity and War Crimes Act* of 2000 outlaws any crime against humanity which:

> …at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

17.2. Second, as far as domestic constitutional law is concerned, the Constitution, 1996 specifically provides that the right to a fair trial includes the right 'not to be convicted for an act or omission that was not an offence *under either national or international law* at the time it was committed or omitted'.[11] In doing so, the Constitution not only pre-empts objections of *nullem crimen sine lege* based solely on the absence of a 'national' law, it also contemplates domestic prosecutions based solely on *international law* (such as, through Section 232 of the Constitution, 1996).

17.3. Third, as far as practical considerations are concerned, the most immediate question that arises is how a Court will determine whether an act was a crime under customary international law at the time of its commission. This is not however an insurmountable obstacle, nor is it limited to

[11] Section 35(3)(l), Constitution, 1996.

prosecution based on customary international law. As discussed below, a number of foreign courts have already considered the existence (and scope) of crimes against humanity under customary international law on or before 1983, and these cases can be relied on in the present matter.

18. To conclude this section, the most appropriate avenue for prosecuting international crimes implicated in the present cases is through the *direct application* of customary international law through Section 232 of the Constitution, 1996; which as an avenue for prosecuting international crimes is now beyond reproach.

C. Prosecuting 'enforced disappearances' under the *Rome Statute Act*

19. While the *Rome Statute Act* broadly speaking only applies to crimes committed *after 2002* (the date of the entry into force of the *Rome Statute* itself),[12] one possible exception to this temporal limitation on its jurisdiction arises in respect of 'continuing crimes' that commenced before 2002 but continued thereafter, such as the crime against humanity of enforced disappearance; a crime that is *prima facie* relevant to some of the cases being re-examined by the NPA (including the disappearance of Ms Simelane in 1983).

20. At a conceptual level, a distinction can be drawn between three types of international crimes: (i) a *completed international crime* which is 'a violation of

[12] See Section 5(2), *Rome Statute Act*.

a primary international obligation that does not continue in time - i.e. when an obligation targets an instantaneous event';[13] (ii) a *continuing international crime* which 'is a violation of a primary obligations targeting a potentially ongoing situation that has been committed and then maintained';[14] and a *composite international crime* which 'is a violation of a single, primary obligation that occurs a number of times; … [requiring] a plurality of acts and/or omissions to have been committed, which, *taken as a whole*, constitute a separate, composite crime'.[15]

21. Nissel employs the following, particularly apt, analogy to distinguish between *completed crimes* and *continuing crimes*:[16]

> To commit a *continuing crime*, the perpetrator must be in breach of a prohibition over a period of time. Enforced disappearance of persons, for example, takes time to commit - whether the disappearance is mere moments or endures for decades. *Thus, if a perpetrator kidnaps a victim, murders that victim secretly without revealing any information, (at least) two crimes were committed at the same time. The instant the victim was murdered, the perpetrator committed the [completed] crime of murder; additionally, so long as the perpetrator does not release information about the victim's whereabouts, the former is in continuing commission of the crime of enforced disappearance of persons.*

22. As the example suggests, the crime of 'enforced disappearance' is the archetypal *continuing crime.* It involves not only the *initial* act of abducting,

[13] Alan Nissel, 'Continuing Crimes in the Rome Statute', 25 *Michigan Journal of International Law* (2004) 653, 661.
[14] Alan Nissel, 'Continuing Crimes in the Rome Statute', 661-2.
[15] Alan Nissel, 'Continuing Crimes in the Rome Statute', 662-3.
[16] Alan Nissel, 'Continuing Crimes in the Rome Statute', 661-2.

arresting or detaining a victim, rather, its defining feature is the *continuing* 'refusal to acknowledge that deprivation of freedom or give information on the fate or whereabouts' of the victim.[17] The *continuing* nature of this crime is confirmed by numerous international instruments, including:

22.1. Article 17(1) of the 1992 Declaration on Enforced Disappearances it is "considered *a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified*".

22.2. Article III of the *Inter-American Convention on Forced Disappearance of Persons* states that the crime of enforced disappearance 'shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined'.

22.3. The 2006 *International Convention on the Protection of All Persons from Enforced Disappearances* takes note of the offences' 'continuous nature' (article 8) in considering the issue of statutes of limitations.

23. In this regard it is important to note that not only is 'enforced disappearance' the 'paradigmatic continuing crime',[18] the situation surrounding the fate of Ms Simelane is the paradigmatic enforced disappearance. In fact, Ms Simelane's

[17] Schedule 1, Part 2, Paragraph 2(i), *Rome Statute Act* and Article 7(2)(i), *Rome Statute.*
[18] Alan Nissel, 'Continuing Crimes in the Rome Statute', 668.

case is presently before the United Nations *Working Group on Enforced or Involuntary Disappearances,* established in 1980 to 'examine questions relevant to enforced or involuntary disappearances of persons' around the world, which in 2014 requested the Government of South Africa 'to carry out investigations in order to clarify the fate or whereabouts of …[Ms Simelane], and to inform the Working Group of the results'.[19]

24. However, the question that arises in respect of the present cases is whether the *Rome Statute Act* can be interpreted to allow for the prosecution of *continuing crimes* (such as the enforced disappearance of Ms Simelane) that commenced before the Act entered into force (i.e. 2002) but continued thereafter (in the present case, to this day).

25. Textually, the *Rome Statute Act* appears to defer to the *Rome Statute* on this question, by stating that '[n]o prosecution may be instituted against a person accused of having committed a crime if that crime in question is alleged to have been *committed before the commencement of the [Rome] Statute*.'[20] The difficultly however is that the drafters of the *Rome Statute* were themselves

[19] See UN Working Group on Enforced or Involuntary Disappearances,103rd session (7–16 May 2014), *Post-sessional document*, A/HRC/WGEID/103/1 (25 July 2014), para. 132; and UN Working Group on Enforced or Involuntary Disappearances, *Methods of work of the Working Group on Enforced or Involuntary Disappearances'*, A/HRC/WGEID/102/2 (2 May 2014), para. 132. According to Sarkin: 'Of the 12 cases ever filed about South Africans, only the Simelane case is outstanding. Three cases were clarified by the state, NGOs and families clarified two cases and six cases were discontinued'. Jeremy Sarkin, 'Dealing With Enforced Disappearances In South Africa (With A Focus On The Nokuthula Simelane Case) And Around The World: The Need To Ensure Progress On The Rights To Truth, Justice And Reparations In Practice', 29(1) *Speculum Juris* (2015).

[20] Section 5(2), *Rome Statute Act*.

unable to agree on the issue of whether the Court would have jurisdiction over *continuing crimes* that commenced prior to its entry into force.[21] As a result, the text of the *Rome Statute* is open to both interpretations. On the one hand, Article 11 states that 'the Court has jurisdiction only with respect to crimes *committed* after entry into force of [the] Statute', suggesting that crimes committed *on a continuing basis* (i.e. continuing crimes) would fall within the jurisdiction of the ICC. On the other hand, Article 24 states that 'no person shall be criminally responsible under this Statute for *conduct prior to the entry into force* of the Statute'. Academic opinion is divided on the question, and the ICC itself has not yet clarified the position on *continuing crimes*.

26. However, there are at least three arguments in favour of interpreting the *Rome Statute Act* as providing for the prosecution of *continuing crimes* that commenced before the *Rome Statute* came into force in 2002:

26.1. First, the text of the relevant section of the *Rome Statute Act* (i.e. section 5(2)), by referring to 'crime[s]…alleged to have been *committed*', recalls the article of the *Rome Statute* that favours such an interpretation (i.e.

[21] Schabas notes: 'The question of 'continuous crimes' arose during the Rome Conference. There were unsuccessful proposals to add the words 'unless the crimes continue after this date' so as to ensure the punishability of continuous crimes. …Verbs such as 'committed', 'occurred', 'commenced' or 'completed', in Article 24, were ways in which the problem might have been addressed, but this proved difficult to cope with in all six working languages in an appropriate manner. *Eventually, the 'unresolvable matter' was resolved by the chair of the Working Group on General Principles, who proposed simply avoiding the troublesome verb in the English version. Thus, the issue of 'continuous crimes' remains undecided and it will be for the Court to determine how it should be handled*.' William Schabas, *An Introduction to the International Criminal Court, 3rd ed.,* (2007), 70.

Article 11), and not its counterpart the militates against it (i.e. Article 24). Put differently, the drafters of the *Rome Statute Act* chose not to include the requirement in Article 24 of the *Rome Statute* that 'no person shall be criminally responsible under this Statute for *conduct* prior to the entry into force of the Statute'.

26.2. Second, to the extent that the *Rome Statute's* jurisdiction is open to both broad and narrow interpretations on the question of *continuing crimes,* our Court's should adopt a *broader* interpretation of their own jurisdiction under the *Rome Statute Act* for two reasons: (i) this comports with the general relationship between the International Criminal Court and our own domestic courts regarding jurisdiction, where Parliament explicitly decided to grant the latter broader jurisdiction under the *Rome Statute Act* than the ICC itself has under the *Rome Statute* (compare Article 12(2), *Rome Statute* and Section 4(3), *Rome Statute Act*), and (ii) in the event that the ICC at some future point determines the matter in favour of the *broader* interpretation of its jurisdiction, the narrow interpretation of the *Rome Statute Act* in this regard would mean that South Africa would be unable to meet the requirements of the principle of complementarity in respect of such *continuing crimes* (i.e. the expectation that the ICC 'shall be complementary to national criminal jurisdictions').[22]

[22] Preamble, *Rome Statute.* See further, Article 17. In this regard it is worth recalling the Preamble of the *Rome Statute Act* which records South Africa's commitment to 'bringing persons who commit…atrocities to justice…in line with the principle of complementarity'.

26.3. Third, Section 39 of the Constitution enjoins 'every court, tribunal or forum …[to] promote the spirit, purport and objects of the Bill of Rights' when interpreting any legislation, and to 'consider international law' when interpreting the Bill of Rights. In this regard, a number of regional and international human rights bodies have adopted broad interpretations of their jurisdiction to include the *continuing violations* of the rights of victims,[23] and in the case *o*f enforced disappearances the devastating effects this practice has on their families.[24] For example, in *Blake v. Guatemala* the *Inter-American Court of Human Rights* found that the enforced disappearance of journalist Nicholas Blake in 1985 '[marked] the beginning of a continuing situation' that had 'actions and effects subsequent to the date on which Guatemala accepted the competence of the Court' in 1987. In doing so the Court noted:[25]

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[23] See *Loizidou* v. *Turkey (Article 50) (40/1993/435/514), Grand Chamber judgment of 28 July 1998*, European Court of Human Rights; *Kalashnikov* v*. Russia, Application no. 47095/99, Chamber judgment of 15 July 2002*, European Court of Human Rights, Third Section, para. 111; *Posti and Rahko* v. *Finland, Application no. 27824/95, Chamber judgment of 24 September 2002*, European Court of Human Rights, Fourth Section, para. 39; ***Blečić*** v. *Croatia, Application no. 59532/00, Chamber judgment of 29 July 2004*, European Court of Human Rights, First Section, paras. 73 *et seq*; and *Gueye* et al. v. *France*, Communication No. 196/1985, Views of the Human Rights Committee, *Official Records of the General Assembly, Forty-Fourth Session, Supplement No. 40* (A/44/40), pp. 189 and 191–192.

[24] As the Human Rights Council has noted: 'The families of missing people face a whole range of problems arising from their situation of vulnerability. Very often, these families are unable to overcome their pain and rebuild their lives and communities, even many years after the events, a situation that can undermine relationships between communities for generations. Missing persons should therefore not be considered the only victims; all the members of their families, in the broadest possible sense, are victims too.' Human Rights Council, *Report by the Human Rights Council Advisory Committee on best practices in the matter of missing persons*, Sixteenth Session, A/HRC/16/70 (7 February 2011), para. 13.

[25] *Blake v. Guatemala*, 24 January 1998, IACHR Series C, No. 36, paras. 66-67.

> Forced or involuntary disappearance is one of the most serious and cruel human rights violations, in that it not only produces arbitrary deprivation of freedom but places the physical integrity, security and the very life of the detainee in danger. It also leaves the detainee utterly defenseless, bringing related crimes in its wake. Hence, it is important for the State to take all measures as may be necessary to avoid such acts, to investigate them and to sanction those responsible, as well as to inform the next of kin of the disappeared person's whereabouts and to make reparations where appropriate.

27. For these reasons the *Rome Statute Act* can, and arguably should, be interpreted so as to allow for the prosecution of *continuing crimes* that commenced prior to 2002. Under this interpretation, alleged crimes against humanity of imprisonment, torture and murder would fall outside the temporal jurisdiction of the *Rome Statute Act* as they were *completed crimes* that took place before 2002, however the crime against humanity of enforced disappearance committed before that date could fall *within* the jurisdiction of the *Rome Statute Act* as a *continuing crime.*

28. To summarize and conclude Part II, the most appropriate avenue for prosecuting the international crimes implicated in the present cases is through the direct application of customary international law, an avenue which as a matter of law is now beyond reproach. Alternatively, if the conduct in question can be characterized as the crime against humanity of enforced disappearance, then it could arguably be prosecuted as a *continuing crime* under the *Rome Statute Act,* the general temporal limitations of that Act notwithstanding.

III. Prosecuting Crimes Against Humanity under South African law

A. Introduction

29. Broadly speaking, crimes against humanity involve the commission of certain 'inhuman acts' as part of a *widespread* or *systematic* attack directed against any *civilian population*. As a category of offence under international law, crimes against humanity have been crimes under international law since at least 1945, arguably before then, and certainly by the 1980s. They were first prosecuted by the International Military Tribunal at Nuremberg (IMT) in 1945, whose Charter defined them as follows (article 6):

> [M]urder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds... in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the law of the country where perpetrated.

30. Crimes against humanity were included (in the same terms) in the *Charter of the International Military Tribunal for the Far East*, signed on 19 January 1946, which established a Tribunal to try Japanese leaders after the War.[26] Following the IMT at Nuremberg, crimes against humanity committed by Germans were also prosecuted by the United States at the *Nuremberg Military Tribunals* (NMT) under 'Control Council Law No. 10'.[27]

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[26] See article 5(c) of the Charter (annexed to the Special Proclamation of 19 January 1946 by the Supreme Commander of the Allied Powers in the Far East).
[27] Article II(1)(c), Control Council Law No. 10 (1945), reprinted in *Trials of War Criminal Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vol. I, pp. XVI-XIX.

31. Since the post-World War II trials there have been a number of further developments in the prosecution of acts constituting crimes against humanity, including:

31.1. In December 1946, the United Nations General Assembly adopted a resolution that affirmed the international prohibition of crimes against humanity then, in 1950, the UN's International Law Commission adopted the 'Nuremberg Principles'. These Principles declared, *inter alia* that (i) any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment (Principle I), and (ii) the fact that internal law does not impose a penalty for an act which constitutes a crime under international law *does not relieve the person who committed the act from responsibility under international law* (Principle II).[28]

31.2. In 1961 Adolph Eichmann was tried and convicted by the District Court of Jerusalem for crimes against humanity and 'crimes against the Jewish people', committed during World War II.[29]

31.3. In 1966 the UN General Assembly adopted a resolution declaring apartheid a 'crime against humanity'.[30] Notably, all but one African state (aside from South Africa) voted in favour of the Resolution.[31]

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[28] 'Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal', International Law Commission Report on the Nuremberg Principles, 5 UN GAOR, Supp. No. 12, UN Doc. A/1316 (1950).
[29] *Attorney-General of the Government of Israel v. Adolph Eichmann* (1962), 36 ILR 277.
[30] General Assembly Resolution 2202 (XXI), adopted on 16 December 1966.
[31] Malawi was the only African state that did not support the resolution, deciding to abstain (along with Australia, Austria, Belgium, Canada, France, Italy, Japan, Luxembourg, Netherlands, New Zealand, United Kingdom and the United States). Portugal and South Africa opposed it. For the

31.4. In 1968 the UN General Assembly adopted the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,*[32] which declared that '[n]o statutory limitation shall apply to ….crimes against humanity whether committed in time of war or in time of peace', and at the insistence of African states specifically included 'inhuman acts of apartheid'.

31.5. In 1973 the General Assembly adopted the *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity* which *inter alia* declared:[33]

> War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and *the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment*.

31.6. In 1973, the General Assembly also adopted the *International Convention on the Suppression and Punishment of the Crime of Apartheid*, which 'criminalized' the crime against humanity of apartheid and created

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background to the resolution see 'General Assembly', 21(2) *International Organization,* (1967), at 391-400.

[32] General Assembly resolution 2391 (XXIII) of 26 November 1968 (entered into force: 11 November 1970).

[33] Para. 1, *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity* (adopted by General Assembly resolution 3074 (XXVIII) of 3 December 1973). Paragraph 5 added: 'Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes.'

unprecedented powers of jurisdiction for states to prosecuting it. Like the 1948 *Genocide Convention* it called for the prosecution of the 'crime of apartheid' by 'an international penal tribunal', but it went further by also empowering 'a competent tribunal *of any State Party*' to do so (i.e. universal jurisdiction);[34] and it provided for '[i]nternational criminal responsibility' for individuals who 'abetted, encouraged, or cooperated in the crime of apartheid'.[35]

32. As a result of these and other developments, in the first decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) - established in order to prosecute crimes committed since 1991 - the Court confidently declared:

> Thus, *since the Nürnberg Charter*, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned.

33. For these reasons, there is little doubt that crimes against humanity *generally* are crimes under customary international law. However, as the Extraordinary Chambers in the Courts of Cambodia (ECCC) has noted:[36]

> While consistently forming part of customary international law since the Nuremberg Charter, *crimes against humanity have been variously defined and its elements have been refined throughout the years.* This reflects both the crime's customary nature and the fact that the tribunals' jurisdictions over the crime were not always co-extensive with the full scope permitted under customary international law.

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[34] Article V, Apartheid Convention (as opposed to the 'the State in the territory of which the act was committed') (Article VI, *Genocide* Convention)).
[35] John Dugard, *International Law: A South African Perspective* (1994), 214
[36] *Kaing Giiek Eav alias Duch,* Judgement, ECCC, Case No 001/18-07-2007/ECCC/TC (26 July 2010), para. 290.

34. Therefore, it is necessary to first establish what the prevailing definition of the relevant crime against humanity was *at the relevant time* (i.e. during the 1970s and 80s).[37] In this regard it is important to note that crimes against humanity consist of two separate elements: (i) the general Contextual Requirements of the crime, and (ii) the particular Underlying Acts that an accused is said to have committed with the requisite intent (such as murder, torture, sexual violence and other inhuman acts). As it necessary to prove both elements in order for a prosecution to be successful, the preliminary question to be addressed is what the prevailing customary international law definition of both these elements was in the 1970s and 80s.

B. The Contextual Requirements

a) What were the Contextual Requirements of crimes against humanity under customary international law in the 1970s and 80s?

[37] Notably, this is arguably a necessary step regardless of whether the alleged conduct is prosecuted under Section 232 of the Constitution or as an 'enforced disappearance' under the *Rome Statute Act,* as even in the latter instance a Court must be satisfied that it was a crime under customary international law in order to avoid falling foul of the principle of *nullen crimen sine lege*, as recognised both under Section 35(3)(l) of the Constitution and international law. *See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, 1 34, 35, UN Doc. S/25704 (1993); *Prosecutor v Tadic*, ICTY Case No. ICTY-94-1-T, 72; *Prosecutor v. Delalic et al*., ICTY Case No. IT-96-2 1-T, 313 (ICTY Trial Chamber Nov. 16, 1998) and Articles 11, 21-24 of the *Rome Statue*.

35. While crimes against humanity have always taken place within the context of an 'attacks against civilians', the remaining Contextual Requirements of the offence have been modified and contested since its introduction in 1945. For example:

35.1. The definition adopted by the *IMT* at Nuremberg in 1945 contained a requirement that crimes against humanity must be linked to an armed conflict,[38] however since then this requirement has been abandoned by a majority of subsequent tribunals and international legal instruments (both international and domestic).

35.2. Similarly, the ECCC and the ICTR definitions include an additional requirement that the attack be 'directed against any civilian population, *on national, political, ethnical, racial or religious grounds*' - a so-called 'discriminatory requirement'.[39] However, this was not one of the Contextual Requirements prior to the 1970s (including at Nuremberg), and has been omitted from all other instruments adopted since.[40]

35.3. In contrast, the Contextual Requirements of crimes against humanity today are almost universally considered to include the requirement that the attack against civilians must be either '*widespread* or *systematic*'.[41]

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[38] Article 6(c) of the IMT Charter stated that crimes against humanity must be carried out "in execution of or in connection with [a war crime or a crime against peace]".
[39] See Article 5 of the ECCC Law and Article 3 of the ICTR Statute.
[40] See, for example, article 7 of the *Rome Statute of the International Criminal Court,* reproduced in South Africa's *Rome Statute Act*
[41] See, for example, article 7 of the *Rome Statute of the International Criminal Court,* reproduced in South Africa's *Rome Statute Act*

35.4. Finally, the definition of crimes against humanity contained in the 1998 *Rome Statute of the International Criminal Court* includes, as a Contextual Requirement, that the attack must be committed 'pursuant to or in furtherance of a State or organizational policy to commit such attack': the so-called 'State or organizational policy requirement'.[42] This was a novel requirement for crimes against humanity, which was not included in the definitions of other International Tribunals (e.g. ICTY, ICTR, Special Court for Sierra Leone).

36. In determining what the prevailing Contextual Requirements of crimes against humanity were during the 1970s and 80s, the landmark decision of *Kaing Giiek Eav alias Duch* ('the *Duch* case'), handed down by the Extraordinary Chambers in the Courts of Cambodia (ECCC) in July 2010, is particularly instructive.[43] The ECCC was established in 2001 to try crimes committed by the Khmer Rouge regime *between April 1975 and January 1979,* however Cambodian law contained no provisions relevant to crimes against humanity and was not party to any international treaty relevant to these crimes during the period in question. As a result, the ECCC had to first determine the customary international law definition of crimes against humanity during this period (i.e. 1975-1979), and in

[42] Article 7(2)(a), Rome Statute.
[43] *Kaing Giiek Eav alias Duch,* Judgement, ECCC, Case No 001/18-07-2007/ECCC/TC (26 July 2010).

doing so the Court made a number of important findings relevant to the present matter.

36.1. First, the ECCC found that the Contextual Requirement that crimes against humanity must be connected to an armed conflict was not part of the customary international law definition of the crime in 1975.[44]

36.2. Second, as far as the 'discriminatory requirement' is concerned, the ECCC found that this was not part of the customary international law definition, in 1975 or since. Noting that the 'discriminatory requirement':[45]

> … constitute[s] a jurisdictional requirement that narrows the scope of the ECCC's jurisdiction over crimes against humanity further than would otherwise have been necessary under customary international law during the 1975 to 1979 period. *Subsequent jurisprudence from international criminal tribunals, as well as the ICC Statute, has since clarified that except in the case of persecution, a discriminatory intent is not required by customary international law as a legal ingredient for all crimes against humanity.*

36.3. Third, the ECCC found that the Contextual Requirement of 'widespread or systematic' - the defining element of modern crimes against humanity - was part of customary international law as of 1975.[46] Notably, recently a Uruguayan court similarly found that these Contextual

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[44] *Kaing Giiek Eav alias Duch,* ECCC, para. 292 (noting: 'The Chamber…considers that the lack of any nexus with armed conflict in Article 5 of the ECCC Law *comports with the customary definition of crimes against humanity during the 1975 to 1979 period*).
[45] *Kaing Giiek Eav alias Duch,* ECCC, para. 314.
[46] Noting (at para. 300): 'In accordance with customary international law, the attack must be either widespread *or* systematic'.

Requirements were part of the customary international law definition of crimes against humanity in 1976.[47] Moreover, in *Korbely v. Hungary* the ECHR Grand Chamber found that these were already part of the definition of crimes against humanity as of 1956.[48]

36.4. Finally, the ECCC found that the 'State or organizational policy requirement' was not part of the customary international law definition in 1975.[49] In fact, it is worth noting that there is considerable debate amongst academics whether the 'State or organizational policy requirement' is even part of the customary international law definition of crimes against humanity *today,* notwithstanding its inclusion in the Rome Statute.[50]

37. On the basis of the above, it is my considered opinion that the Contextual Requirements for crimes against humanity under customary international law in the 1970s and 80s were: (1) an attack committed against a civilian population, and (2) that was either widespread or systematic. In additional this, it will have to be shown, in each particular case, that there is a link or 'nexus' between the acts

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[47] Bordaberry case, IUE 1-608/2003, First Instance Criminal Court, 7th turn (9th February 2010).
[48] *Korbely v. Hungary*, ECHR, Grand Chamber, Application no. 9174/02 (19 September 2008), para. 83.
[49] *Kaing Giiek Eav alias Duch,* ECCC, para. 301. Similarly, the ICTY has found that 'the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime'. ICTY, *Prosecutor v. Kunarac,* Appeal Chamber, para. 98.
[50] See Cryer et al., *An Introduction to International Criminal Law and Procedure* (2007), 197. Notably, in his application for amnesty, Mr Coetzee told the TRC that: "The actions and omissions which I committed, I committed in the execution of my official duties and as a member of the opposition to the struggle. These actions were aimed against supporters of a liberation movement. What I did, I did in order to protect the government and the interests of the National Party and to combat the revolutionary onslaught." *TRC, Amnesty Committee, Willem Helm Johannes Coetzee, Simelane Incident*, 17 May 1999, Day 9.

or omissions of the accused and this 'attack against civilians', and that the accused had knowledge of the attack.

b) The relevant Contextual Requirements of crimes against humanity and the present cases

38. Before one considers whether these Contextual Requirements are likely to be met in the present cases, two introductory points are apposite. The first is that any discussion of prosecuting crimes against humanity committed during apartheid must begin with the remarks of the Constitutional Court in *S v Basson* 2005 (1) SA 171 (CC):[51]

> *It is also clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes*. We do not have all the details before us but it does appear that the crimes for which the accused was *charged may well fall within the terms of this international law obligation.*

39. These remarks is important for two reasons.

39.1. First, the finding by our apex Court that (i) the practice of apartheid, broadly speaking, 'constituted *crimes* against humanity' and (ii) international law obliges the state to punish such international crimes, must be the background against which the present matter is considered. There can be no doubt that crimes against humanity (and war crimes) were committed during apartheid, the only question is whether these particular cases are

[51] *S v Basson* 2005 (1) SA 171 (CC), para. 37.

ones which ‘fall within the terms’ of this international crime and the consequent obligations.

39.2. Second, this broad characterization of apartheid constituting ‘crimes against humanity’ is of particular import when it comes to considering the Contextual Requirements of this crime, where courts are asked to consider the broader, systemic context in which specific inhuman acts were committed. In fact, an argument could be made that apartheid should be considered a singular, continuous, long-term ‘widespread and systematic attack against a civilian population’ (i.e. crime against humanity) and that courts should simply take judicial notice of this broader context for the purpose of the Contextual Requirements of the offence.

40. Be that as it may, I am in any event of the view that there is sufficient evidence to support the finding that the specific context surrounding these cases will meet the relevant Contextual Requirements of crimes against humanity - namely ‘an attack committed against a civilian population’ (Contextual Requirement 1), that was ‘widespread or systematic’ (Contextual Requirement 2).

41. The second preliminary point is to highlight an important distinction, made by the European Court of Human Rights in *Jorgic v Germany,* between, on the one hand, the *existence of an international crime under customary international law*

at a particular time and, on the other, the *interpretation of the elements of that crime* by subsequent courts. In that case the court found:[52]

> In any system of law, including criminal law, however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. …Article 7 of the [European] Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen. In the light of the above principles, *the Court therefore needs to decide whether the national courts' interpretation of the crime of genocide under German law…was consistent with the essence of that offence and could reasonably be foreseen by the applicant at the material time.*

42. In *Jorgic* the ECHR found that Germany's interpretation of the crime of genocide 'could *reasonably be regarded as consistent with the essence of that offence and could reasonably be foreseen by the applicant at the material time*'.[53] Similarly, the ECCC has noted that '[t]he principle of legality prevents neither a reliance on unwritten custom nor *a determination through a process of interpretation and clarification as to the elements of a particular crime*'. [54]

43. Applying this reasoning to the present cases, as the existence (and relevant definition) of crimes against humanity has been established generally, arguably there is nothing preventing the reliance on the interpretation of this crimes'

[52] *Jorgic v Germany*, European Court of Human Rights Application no. 74613/01 9 (12 October 2007), paras. 101-103. The ECHR Grand Chamber repeated this reasoning in *Korbely v. Hungary*, (para. 71), which also concerned crimes against humanity.
[53] *Jorgic v Germany*, para. 114.
[54] *Kaing Giiek Eav alias Duch,* ECCC, para. 290.

elements by subsequent international and domestic courts since then, as long as they are '*consistent with the essence of that offence and could reasonably be foreseen by the applicant at the material time'.*

44. Against this backdrop, I now turn to consider the relevant Contextual Requirements of crimes against humanity in the present cases.

i. Contextual Requirement 1: An attack committed against a civilian population

45. As far as the Contextual Requirement of an 'attack against civilians' is concerned, International Courts and Tribunals have in the past found that that (i) the 'attack' need not be a military attack,[55] (ii) the 'attack' involves multiple commission of acts of violence,[56] and (iii) while the attack must be directed against the *civilian* population in general, it need not be directed exclusively against civilians.[57]

46. This approach to the 'attack against civilians' Contextual Requirement was broadly followed by the ECCC in the *Duch* case in relation to events in 1975, noting:

> An attack is a course of conduct involving the multiple commission of acts of violence. The acts which constitute an

[55] See *Rome State, Elements of Crimes*. Article 7: Introduction, para. 3.
[56] *Prosecutor v. Nahimana et al.,* Judgement, ICTR Appeals Chamber (ICTR-99-52-A), 28 November 2007 ("*Nahimana* Appeal Judgement"), para. 918. Moreover, Article 7(2)(a) of the *Rome Statute* specifically requires "the multiple commission of acts" against a civilian population in order for the threshold of crimes against humanity to be met.
[57] *Prosecutor v. Kunarac,* ICTY Appeal Judgement, para. 91.

> attack need not themselves be punishable as crimes against humanity. They will nevertheless often be of the kind of mistreatment listed as an underlying offence in Article 5 of the ECCC Law. The accused does not have to commit all of the acts of violence that make up the attack – the accused's acts need only be part of the broader attack. There may exist, within a single attack, a combination of acts of violence, for example acts of murder, rape and torture.

47. In my opinion, there are reasonable grounds to conclude that the alleged conduct (including abduction, torture, murder and enforced disappearances) in these cases took place in the context of a broader 'attack against civilians' during the 1970s and 80s, as defined above. However, as a preliminary issue, it must be noted that there are various levels at which this Contextual Requirement might be 'scaled'. Put differently, there are different levels at which the general 'attack against civilians' might be determined to have been carried out during this period: from the system of apartheid has one continuous 'attack against civilians' (i.e. the broadest level) to the actions of particular groups (of both state actors and non-state actors) as carrying out such an attack. Ultimately this is a question to be determined by the State, as it involves elements of evidence and strategy, but to my mind three options present themselves for determining the scale of the alleged 'attack against civilians' in the present cases, beginning with the most expansive.

Option 1: An 'attack against civilians' carried out by the State Security forces

48. First, the 'attack against civilians' could be characterized as being carried out by the State Security forces *generally.* During the 1980s the South African security apparatus adopted a '*Total Strategy'* aimed at combatting the activities of anti-apartheid actors, and the TRC found that during this period the state committed a host of gross violations of human rights in South Africa.[58] These included, amongst other violations:[59] (i) extra-judicial killings in the form of state-planned and executed assassinations, (ii) the mutilation of body parts, (iv) torture, (v) abduction or kidnapping, disappearances, (vi) severe ill treatment, abuse and harassment, (vii) destruction of homes or offices through arson or sabotage, (viii) establishment and support to offensive paramilitary units or hit squads for deployment internally against opponents of the government.

49. In respect of extrajudicial killings in particular, the TRC found that:[60]

> Extra-judicial killings were undertaken by a number of different security branch divisions and by the special forces and occurred across the country but with a concentration in areas adjacent to South Africa's borders with its immediate neighbours as well as within those states.

50. Moreover, the TRC found that '[a]llegations of torture of detainees form a large percentage of all violations reported to the Commission', and 'torture was used systematically by the Security Branch, both as a means of obtaining information and of terrorising detainees and activists'.[61]

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[58] *TRC Report, Vol 5 Ch 6, Findings and Conclusions*, p. 222.
[59] *TRC Report*, *Vol 5 Ch 6, Findings and Conclusions*, p. 223.
[60] *TRC Report, Vol 2 Ch 3, The State inside South Africa between 1960 and 1990,* p. 288.
[61] *TRC Report, Vol 2 Ch 3, The State inside South Africa between 1960 and 1990*, p. 187.

51. With the exception of the Timol case, all the cases under re-examination fall broadly within the scope and *modus operandi* of this 'Total Strategy' employed by the State Security forces in the 1980s, and could be characterized as taking place within the context of this 'attack against civilians' carried out by the State Security forces generally.

Option 2: An 'attack against civilians' carried out by the Special Branch

52. Second, and in the alternative, the relevant group that undertook the 'attack against civilians' could be characterized as the 'Special Branch' of the South African Police Service *in particular,* which was a focal point of state-sponsored violence during this period and gained a reputation for being efficient and ruthless in equal measure.[62]

53. The 1994 report of the *Goldstone Commission of Inquiry regarding the Prevention of Public Violence and Intimidation*[63] ('*Report to the International Investigation Team*) noted:[64]

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[62] See *TRC Report, Vol 2 Ch 3, Appendix: State Security Forces*, p. 316.

[63] The Commission, under the chairmanship of Justice Richard Goldstone, was appointed by former President FW de Klerk on 24 October 1991, in terms of The Prevention of Public Violence and Intimidation Act No. 139 of 1991, to investigate incidents of public violence and intimidation in South Africa prior to the 1994 general election. Members of the Goldstone Commission: Mr Justice Richard Goldstone (Chairman), Adv. Danie Rossouw, SC (Vice-Chairman), Adv. Solly Sithole, Ms Lillian Baqwa, and Mr Gert Steyn.

[64] Goldstone Enquiry: *Report to the international investigation team about the involvement by the CIS (previously Security Branch) in criminal conduct including murder, fraud, blackmail and political disinformation.*

> We would like to draw attention to the fact that [former Security Policeman, Paul] Erasmus has opened only one window into the frightening operation of the Security Police in South Africa. Their involvement in violence and political intimidation is pervasive and touches directly or indirectly every citizen in this country. The documents we have been given by one warrant officer can only be a tiny sample of the whole.
> The whole illegal criminal and oppressive system is still in place and its architects are in control of the SAP. It cannot be coincidence that in most senior ranks of the SAP there is such a predominance of officers who have led the Security Branch over the past couple of decades.

54. The Security Branch was implicated directly by the TRC in practice of extrajudicial killings.[65] Moreover, broadly speaking, their activities included the close monitoring of the affairs and movements of individuals, the detention of tens of thousands of citizens and the torture of many, as well as trials and imprisonment of suspects. In January 1990, General Basie Smit disclosed that the Security Branch had "given attention to" 314,000 individuals and 9,500 organisations" since it was formed in the late 40s. In his testimony before the TRC, Mr Willem Coetzee admitted that, prior to the abduction, imprisonment and assault of Ms Simelane, he had been involved in 'several' similar operations as a member of the Security Branch (although he refused to estimate how many).[66]

Option 3: An 'attack against civilians' carried out by groups within the Special Branch

[65] *TRC Report, Vol 2 Ch 3, The State inside South Africa between 1960 and 1990,* pp. 221-222.
[66] *TRC, Amnesty Committee, Willem Helm Johannes Coetzee, Simelane Incident*, 17 May 1999, Day 9.

55. Third, the relevant group undertaking the attack in question might be further specified as being undertaken by units or groups within the Security Branch. Taking Ms Simelane's case as an example, all of the accused persons in that case were members of Section C of the Security Branch. Section C was headed at all material times by Brigadier Willem F. Schoon who, during his TRC Testimony, stated that the total onslaught of the ANC/SACP forced the Security Branch to operate outside the boundaries of the law.[67] Based on the Amnesty applications made by his subordinates this involved numerous crimes that included *inter alia* murders, cross border raids, kidnappings, illegal detentions, assaults, defeating the ends of justice and more. Two notable examples of which are:

55.1. Dirk Coetzee (first Commander of the secret police base on the Vlakplaas farm near Pretoria) who testified to the commission of various acts of violence under the direction of Schoon, including 'illegal cross-border raids into neighbouring countries, … blowing up houses, killing people, … abducting so-called activists during the time, getting rid of them', as well as making statements after the fact designed to mislead loved ones about the fate of their family members (in other words, 'enforced disappearance').[68]

[67] Brigadier Schoon commanded Section C of the Security Branch from 1981 until 1990.
[68] *TRC, Amnesty Committee, Application in Terms of Section 18 of The Promotion of National Unity and Reconciliation Act, No. 34 Of 1995,* AC/2001/279.

55.2. Eugene de Kock, who became the new Commander of Vlakplaas in May 1983, testified before various TRC Amnesty Committee's about crimes that he had committed whilst in command of Vlakplaas these included armed cross-border raids, murders, attempted murders, assaults, kidnappings, thefts, fraud, abductions and other crimes. Notably, when de Kock received amnesty in 2000, Schoon as well as two of the accused in the Simelane case (Willem Coetzee and Anton Pretorious) were implicated in the actions for which he received amnesty.

56. In their testimonies before the TRC in respect of Ms Simelane's disappearance, Willem Coetzee and John Williams claimed the operation was undertaken with the permission of Brigadier H Muller and Brigadier Schoon[69] (although the latter denied any knowledge of the operation). Notably, the TRC found that '[t]he Soweto Intelligence Unit [was] under the command of Coetzee', and that the 'the overall commander of the Soweto Security Police, the late Brigadier H Muller… ordered that the [Ms Simelane] should be abducted with a view to turning the member into an agent of the Security Police'.[70]

57. The relevant testimonies before the TRC in respect of Ms Simelane confirm that, as members of Section C of the 'Special Branch' their *multiple acts of violence*

[69] *TRC, Amnesty Committee, Willem Helm Johannes Coetzee, Simelane Incident*, 17 May 1999, Day 9; *TRC, Amnesty Committee, John Frederick Williams, Simelane Incident,* 18 May 1999, Day 10; and *TRC, Amnesty Committee, Anton Pretorius, Simelane Incident,* 18 May 1999, Day 10.
[70] *TRC, Amnesty Committee, Application in Terms of Section 18 of The Promotion of National Unity and Reconciliation Act, No. 34 Of 1995,* AC/2001/185, para. 2.

(including physical assaults, slapping, punching, 'the use of a wet bag' for suffocation, imprisonment, inhuman treatment and torture) were not an isolated incident, but rather were a regular activity for which they were trained as members of Section C.[71] As such, the 'attack against civilians' might be more narrowly scaled as one prolonged attack carried out by the members of Section C of the Special Branch.

58. In any event, it is my considered opinion that *regardless* of how the 'attack against civilians' is scaled in these cases (i.e. as being committed by the (a) State Security forces, or (b) the 'Special Branch', or (c) units with *the Special Branch*), they will likely satisfy this Contextual Requirements of crimes against humanity, namely:

58.1. An attack directed against the civilian population in general (bearing in mind that it need not be directed exclusively against civilians);[72]

58.2. An attack that involving the multiple commission of acts of violence,[73] many of which were, or are of a similar character to, the inhuman acts of crimes against humanity.

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[71] Pretorious told the TRC - in response to a question about 'the methodology of your approach' - that 'if we had arrested a man, then that man would have received the same treatment as Ms Simelane. According to me, according to my personal Memorandum, there is no distinction between the methods that we would have used and would have used different methods.' *TRC, Amnesty Committee, Anton Pretorius, Simelane Incident,* 19 May 1999, Day 11.
[72] *Prosecutor v Kunarac,* ICTY Appeal Judgement, para. 91.
[73] *Prosecutor v. Nahimana et al.,* Judgement, ICTR Appeals Chamber (ICTR-99-52-A), 28 November 2007 ("*Nahimana* Appeal Judgement"), para. 918. Moreover, Article 7(2)(a) Rome

ii. Contextual Requirement 2: An attack that was either widespread or systematic

59. As far as the second Contextual Requirement is concerned, I am of the opinion that there are substantial grounds to believe that this 'attack against civilians' of which these cases formed part, however it is 'scaled',[74] was either *widespread* or *systematic,* or both.

60. Broadly speaking, courts and tribunals have interpreted the Contextual Requirement of widespread or systematic as follows:

60.1. *Widespread* has been understood to be a question of scale or degree, which may be met by either: (i) the scale of the attack itself (i.e. a 'massive, frequent, large scale action, carried out collectively with considerable seriousness',[75] a 'singular massive attack of extra-ordinary magnitude',[76] or the 'cumulative effect of a series of inhumane acts')[77], or (ii) the number of victims ('directed against a multiplicity of victims').[78]

Statute specifically requires "the multiple commission of acts" against a civilian population in order for the threshold of crimes against humanity to be met.

[74] While the manner in which the 'attack' is scaled will impact how this requirement is assessed by a Court, I do not believe this will materially alter the outcome of that assessment.

[75] *Prosecutor v. Akayesu,* ICTR Trial Judgement, para. 580.

[76] *Prosecutor v. Akayesu,* ICTR Trial Judgement, para. 195.

[77] *Prosecutor v. Blaškić*, ICTY Trial Judgement, para. 206.

[78] *Prosecutor v. Akayesu,* ICTR Trial Judgement, para. 580.

60.2. *Systematic* has been understood to refer to the *nature* of the attack. The ICTR has defined the systematic attack as one that is "thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources".[79] While, the ICTY has found that "patterns of crimes — that is the non-accidental repetition of similar criminal conduct on a regular basis — are a common expression of such systematic occurrence".[80] While the ECC in the *Duch* case found that 'the term "systematic" refers to the organised nature of the acts of violence and the improbability of their random occurrence'.[81] In *Blaskic* the ICTY further specified (emphasis added):[82]

> The systematic character refers to four elements which for the purposes of this case may be expressed as follows:
>
> - *the existence of a political objective*, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community;
>
> - the perpetration of a criminal act on a very large scale against a group of civilians or the *repeated and continuous commission of inhumane acts linked to one another*;
>
> - the preparation and use of *significant public or private resources*, whether military or other;
>
> - the *implication of high-level political and/or military authorities* in the definition and establishment of the methodical plan.

[79] *Prosecutor v. Akayesu,* ICTR Trial Judgement, para. 580.
[80] *Prosecutor v.* Kunarac, ICTY, para. 94.
[81] *Kaing Giiek Eav alias Duch,* ECCC, para. 300.
[82] *Prosecutor v. Blaskic*, ICTY, Trial Judgment.

61. It is worth noting that further that, while they are defined as alternatives, in practice it may be difficult to distinguish neatly between the question of an attack's *widespread* scale and *systematic* nature when it comes to the relevant evidence. As the ECCC has noted:[83]

> While the requirements are alternatives, in practice these criteria may often be difficult to separate since a widespread attack targeting a large number of victims generally relies on some form of planning or organisation. …The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities, or any identifiable patterns of crimes may be taken into account to determine whether the attack satisfies either or both of the "widespread" or "systematic" requirements.

62. In my opinion, in the present matter there is considerable evidence to support one/or both of these Contextual Requirements, depending on how the attack is 'scaled'.

63. In the event that it is scaled as *an attack by the State Security forces generally,* there can be little doubt that it would, based on the TRC's findings alone, meet the requirement of *widespread* (regardless of whether this refers to the scale of the attack or the number of victims). Moreover, as far as *systematic* is concerned, there is evidence on record that the actions of the State Security forces during the relevant period demonstrated (i) a political objective or plan; (ii) large-scale or continuous commission of crimes which are linked; (iii) use of significant public[84] or private resources; and (iv) the implication of high-level political and/or

[83] *Kaing Giiek Eav alias Duch,* ECCC, para. 300-301.
[84] See Docket A3, paras. 16-17;

military authorities.[85] On the latter, the TRC found no less that the former State President Botha or senior members of his Cabinet responsible for acts of violence carried out by State Security forces during the relevant period, including the bombing of Khotso house in Johannesburg[86] and acts of sabotage by blowing up such public facilities as the diplomatic mission of the ANC in London, the South African Catholic Bishops' Conference (Khanya House) and the Congress of South African Trade Unions (COSATU).

64. Similarly, there can be little doubt that if the attack is scaled as *an attack by the 'Special Branch'* it would meet the requirement of *widespread*. In particular, if widespread is understood as referring to the number of victims, General Basie Smit's statement that the Security Branch had 'given attention to' 314,000 individuals and 9,500 organisations since it was formed in the late 1940's is significant. As far *systematic* is concerned, there is evidence supporting the involvement of high-level political and/or military authorities, as well as that the 'Special Branch' acted in a manner that was 'thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources'.[87] Moreover, the TRC's detailed descriptions of the consistent use of tactics of 'abduction, interrogation and killings by the Special Branch points to the *systematic* nature of such violence. In its final Report, the TRC pointed out in such instances:[88]

[85] *Prosecutor v. Blaskic*, ICTY, Trial Judgment, para. 203.
[86] *TRC Report, Vol 5 Ch 6, Findings and Conclusions*, p. 224
[87] *Prosecutor v Akayesu,* ICTR Trial Judgement, para. 580.
[88] *TRC Report, Vol 2 Ch 3, The State inside South Africa between 1960 and 1990,* p. 234.

> "[T]he purpose of interrogation was to gather intelligence on issues such as *modi operandi*, guerrilla infiltration routes and possible planned operations. This information was considered vital, not only to enable countermeasures to be taken, but for the on-going and effective penetration of such structures by agents or Askaris. …[I]n the nature of clandestine work, once a detention was known about, old routines, codes and meeting places would be regarded as compromised and therefore changed. It was for this reason, the Security Branch argued, that it was preferable to abduct rather than officially detain, and to kill the abductee once information had been extracted. *In some instances, the Security Branch attempted to 'turn' (recruit) the individual; where this proved unsuccessful, killing was regarded as necessary.*

65. In the event that the attack is 'scaled' as *an attack by specific units of the Special Branch,* it would be more difficult but by no means impossible to demonstrate that it was *widespread*. Returning to the example of the Simelane case, as far the *systematic* element is concerned there is evidence supporting the involvement of high-level political and/or military authorities.[89] Moreover, the systematic nature of the 'Special Branch' actions of 'abduction, interrogation and killing' set out by the TRC applies equally to Section C. The operation carried out against Ms Simelane was a procedure called a 'kop draai aksie', which was described during the TRC hearing into her case as 'beating a person into

[89] The former Commander of C1 Section (Vlakplaas), Brigadier Jack Cronje, told the TRC that, in respect of a particular operation, "[the] instruction was given to me in Springs by General van der Merwe and during this instruction he specifically indicated to me that this came directly from Minister le Grange and that it had indeed been authorised by President PW Botha, as well as Commissioner Johan Coetzee, both of whom knew about this and authorised it … If it should be claimed therefore by anyone that the State Security Council was not aware of the actions of the security forces and the security police or of any specific incidents this would not be true.' *TRC Report, Vol 3 Ch 6, Regional Profile: Transvaal,* p. 630.

submission and then rebuilding them and incorporating them into structures'.[90] The common training and tactics employed in so-called 'kopdraai' operations points to their systematic nature, and the manner in which Ms Simelane was assaulted was itself systematic, a number of witnesses indicating that the assault 'continued in the same pattern on each and every day'.[91] Moreover, it worth noting that in their applications for amnesty Ms Simelane's captors acknowledged that their actions were carried out pursuant to a 'political objective', one of the elements of 'systematicity' that the ICTY enumerated in the *Blaskic* case.

C. The 'Underlying Act' element

66. On the basis that there are reasonable grounds to believe that the alleged conduct in these cases would satisfy the Contextual Requirements of a crimes against humanity, I turn now to consider the second element of the crime: the Underlying Acts. For the same reasons set out above in respect of the Contextual Requirements, this raises three sub-questions:

66.1. What were the relevant Underlying Acts of crimes against humanity under customary international law in the1970s and 80s?

[90] The systematic nature of this operation was set out detail in Mr Coetzee's testimony before the TRC. See generally *TRC, Amnesty Committee, Willem Helm Johannes Coetzee, Simelane Incident*, 17-18 May 1999, Day 9-10.
[91] Docket at A208, para. 16; A209, para. 14; A210, para. 6.

66.2. What were the relevant definitions of these Underlying Acts at that time?

66.3. Whether the alleged conduct of the accused persons in these cases, if proven, would satisfy the definitions of these Underlying Acts?

67. As the third question raises issues of fact and evidence (related to the conduct and intention of the accused persons), it is neither possible nor appropriate to go into a detailed discussion of this here. Suffice it to note that, with the exception of enforced disappearances and the crime of apartheid, the remaining Underlying Acts implicated by these cases (namely imprisonment, torture and murder) contain substantially the same *mens rea* and *actus rea* elements as their equivalent domestic offences. Therefore, to the extent that the State can make out a case for these offences, this case will apply *mutatis mutandis* to the Underlying Act requirement of crimes against humanity. As far the crime against humanity of enforced disappearance is concerned, this Memorandum will take the case of Ms Simelane as a case study to establish how this crime might be prosecuted in respect of apartheid-era offences. The question of whether these cases are likely to meet the requirements of the crime against humanity of apartheid will be discussed in a separate Memorandum.

a) The relevant Underlying Acts recognised as such under customary international law in the 1970s and 80s

68. Unlike the Contextual Requirements of crimes against humanity which have been modified, contested and changed over time, the list of Underlying Acts of the crime have gradually expanded to an increasing number of 'inhuman acts'. Rather than an exhaustive consideration of *all* possible underlying acts at the relevant time, this Memorandum will focus on those most relevant to the facts of present cases, namely: imprisonment, torture, murder, enforced disappearance and the crime of apartheid.

69. As **murder** was specifically included in the first definition of crimes against humanity at Nuremberg in 1945, and has been included in every relevant instrument since, there can be no doubt that it was an Underlying Act of crimes against humanity under customary international law in the 1970s and 80s. The ECHR Grand Chamber recently found that 'murder…could provide a basis for a conviction for crimes against humanity committed in 1956'.[92]

70. Similarly, the inclusion of **imprisonment** and **torture** in Article II of Control Council Law No. 10, which took place shortly after the IMT at Nuremberg, means that there can be little doubt that these were part of the customary international law definition in the 1970s and 80s. Notably, the Canadian Superior Court found in 2009 in *R v Munyaneza* that both imprisonment and torture were Underlying Acts of crimes against humanity 'before 1945 and, therefore, in Rwanda in

[92] *Korbely v. Hungary*, para. 81.

1994'.[93] Similarly, in 2010 the ECCC convicted Kaing Guek Eav (*alias* 'Duch') for murder, imprisonment and torture as a crimes against humanity committed between 1975 and 1979. In respect of torture specifically, the ECCC found in the *Duch* case:[94]

> The crime of torture is proscribed and defined by numerous international instruments, including the 1975 United Nations General Assembly Declaration on Torture, adopted by consensus, and the 1984 Convention against Torture. The definition in the 1984 Convention against Torture, which closely mirrors that of the 1975 General Assembly Declaration, has been accepted by the ICTY as being declaratory of customary international law. *The Chamber accordingly finds that this definition had in substance been accepted as customary by 1975.*

71. This conclusion is further supported insofar as the underlying act of torture is concerned by that fact that in recent times domestic courts have prosecuted acts of torture that took place before 1983 as crimes against humanity.[95]

72. As far as the crime against humanity of **enforced disappearances** are concerned, while it was not specifically included in Article II of Control Council Law No. 10, the NMT at Nuremberg did prosecute it as a crime against humanity under the residual 'other inhumane acts' category. In this regard Finucane notes:[96]

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[93] *R v Munyaneza,* para. 112
[94] *Kaing Giiek Eav alias Duch,* ECCC, para. 353.
[95] In 2005 a Spanish Court convicted an Argentine naval officer Adolfo Scilingo of torture as a crime against humanity, committed between 1979 and 1983. In 2010 a Uruguayan court handed down a conviction for torture as a crime against humanity committed in 1976. Bordaberry case, IUE 1-608/2003, First Instance Criminal Court, 7th turn (9th February 2010).
[96] Brian Finucane, 'Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War', 35 *Yale Journal of International Law* (2010) 171, pp. 178-179.

> In the Justice case, the leading lawyers of the Third Reich were tried for their roles in implementing the Night and Fog program. The NMT built upon the earlier decision of the IMT regarding the criminality of enforced disappearance, but it also expanded upon the IMT's judgment. The NMT's prosecutors and judges grounded their arguments not only in the laws of war, but also in the "general principles of criminal law as derived from the criminal laws of all civilized nations" and the "laws of humanity," and therefore classified enforced disappearance both as a war crime and as a crime against humanity. Even more than the prosecutors and judges of the IMT, their counterparts in the later NMT accentuated the effects of enforced disappearance upon the families of the missing.

73. The crime against humanity of **apartheid** is unique, in both its history, definition and enforcement. Despite the fact that it was declared a crime against humanity by the General Assembly in 1966, and since 1973 has been subject to a specialised convention calling for its prosecution that over half the states in the world have signed up to, there has never been single prosecution of this crime against humanity since then, by a domestic or an international court.

74. The reasons for the domestic and international impunity for apartheid to date are complex, but there can be little doubt that by the 1980s apartheid was recognised by states as a crime under customary international law. It is worth recalling in this regard that in 1991 - during the early stages of the drafting process that would lead to the *Rome Statute* - the International Law Commission noted that the crime of apartheid 'is nowadays so deeply condemned by the world's conscience that it was *inconceivable … to exclude it* from a code which punishes the most abominable crimes that jeopardize the peace and security of mankind'.[97]

[97] *Yearbook of the International Law Commission, 1991, Volume II, Part Two,* 102 (own emphasis).

75. As such, in my opinion the acts of imprisonment, torture, murder, enforced disappearance and apartheid were recognised as Underlying Acts of crimes against humanity under customary international law in 1983.

b) The definition of the relevant Underlying Acts in the 1970s and 80s

76. In discussing the relevant definitions of each of these Underlying Acts it must be recalled that the precise definition of each of these underlying acts have, like the Contextual Elements, been modified over time. As such, primary reference will be made to the definition adopted by the ECCC in the recent *Duch* case, as an authoritative statement of prevailing customary international law at the relevant time, and secondary reference will be made to the ICC's *Elements of Crimes* and the jurisprudence of other courts and tribunals.

i. Imprisonment

77. In order to constitute a crime against humanity **imprisonment** or the deprivation of physical liberty must be both severe and unlawful. According to the ECCC:[98]

> Imprisonment refers to the arbitrary deprivation of an individual's liberty without due process of law. The customary status of the prohibition of arbitrary imprisonment under international law initially developed from the laws of war and is supported by human rights instruments.

[98] *Kaing Giiek Eav alias Duch,* ECCC, para. 347.

78. According to the ICC *Elements of Crimes* the imprisonment or deprivation must be of sufficient gravity to amount to a "violation of fundamental rules of international law" (i.e. *severe*).[99] More importantly, it must not be lawful imprisonment or deprivation under *domestic law*.

ii. Torture

79. In the *Duch* case, the ECCC relied on the definition of **torture** found in the 1984 *Convention Against Torture,* which it found 'had in substance been accepted as customary by 1975'.[100] According to Article 1 of that Convention the crime of torture is defined as:

> '*Any act by which severe pain or suffering, whether physical or mental*, is intentionally inflicted on a person *for such purposes as obtaining* from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, 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 official capacity*. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

80. Broadly speaking, this definition of the *crime* of torture has been adopted by other International Courts and Tribunals when it comes to defining torture as the *underlying act* of a crime against humanity. However, some Courts and legal instruments have omitted the 'specific purpose' requirement (i.e. 'for such purposes as' obtaining information or a confession, punishment, intimidation,

[99] Elements, Article 7 (1) (e) – Element 2. Further, "The perpetrator was aware of the factual circumstances that established the gravity of the conduct". Elements, Article 7 (1) (e) – Element 3.
[100] *Kaing Giiek Eav alias Duch,* ECCC, para. 353.

etc), while others have omitted the 'public official' requirement (i.e. that it must be committed 'by or at the instigation of…a public official or other person acting in an official capacity').[101] For its part, in *Duch* the ECCC noted these developments, but found that both of these requirements were part of the definition of crimes against humanity under customary international law in 1975.[102]

81. As far as the *physical element* of the act of torture is concerned, the ECCC found:[103]

> [T]here is no exhaustive classification of the acts that may constitute torture. Acts that have been considered sufficiently severe as to constitute torture may arise from conditions imposed upon detention and have included beating, sexual violence, prolonged denial of sleep, food, hygiene and medical assistance, as well as threats to torture, to rape or to kill relatives. Certain acts are considered by their nature to constitute severe pain and suffering. These acts include rape and the mutilation of body parts.

iii. Murder

82. The ECCC found that **murder** 'requires the death of the victim resulting from an unlawful act or omission by the perpetrator', and that '[t]he conduct of the perpetrator must have contributed substantially to the death of the victim'.[104] According to the ICC's *Elements of Crimes*, murder encompasses the notions of

[101] See Article 7(2)(e), *Rome Statute.*
[102] *Kaing Giiek Eav alias Duch,* ECCC, para. 356-357.
[103] *Kaing Giiek Eav alias Duch,* ECCC, para. 355.
[104] *Kaing Giiek Eav alias Duch,* ECCC, para. 331.

'killing' and 'causing death'.[105] According to the ICTR, the elements of murder are: (i) the victim is dead; (ii) the death resulted from an unlawful act or omission of the accused or a subordinate; and (iii) at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm was likely to cause the victim's death, and being reckless whether death ensued or not.[106]

83. Notably, in the *Duch* case the ECCC went on to state:

> The elements of murder can be satisfied ***whether or not it is shown that a victim's body has been recovered*.** The fact of a victim's death can be inferred circumstantially, including from proof of the following: ***incidents of mistreatment directed against the victim, patterns of mistreatment and disappearances of other individuals***, a general climate of lawlessness at the place where the acts were allegedly committed, ***the length of time that has elapsed since the person disappeared***, and the fact that ***the victim has failed to contact other persons that he or she might have been expected to contact***, such as family members. ***The victim's death as a result of the perpetrator's act or omission must be the only reasonable inference that can be drawn from the evidence***.

iv. Enforced Disappearance

[105] ICC Elements of Crimes. Fn. 7.
[106] *Prosecutor v Akayesu,* ICTR Trial Chamber, para 589.

84. The definition of the crime against humanity of **enforced disappearance** in the *Rome Statute* - which is repeated in the *Rome Statute Act* and the ILC's *Draft Articles on Crimes Against Humanity* - states:[107]

> [T]he arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

85. The ICC *Elements of Crimes* contains a more elaborate definition of this underlying act, which contemplates a perpetrator who *either* (i) arrests, detains or abducts one or more persons (the 'detention'), or (ii) refuses to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons (the 'denial of information'). In other words, a particular perpetrator need not be implicated in both the *detention* and the *denial of information* elements of an enforced disappearance. Moreover, according to the *Elements of Crimes,* a perpetrator implicated in the *detention* of a person or persons would include a person who 'maintained an existing detention', and 'under certain circumstances an arrest or detention *may have been lawful*'.

v. Apartheid

[107] Article 7(2)(i) of the Rome Statute.

86. The absence of a prosecution for the crime against humanity of **apartheid** to date makes determining its definition at the relevant time somewhat more difficult. The obvious candidate for such a definition are the 1973 *Apartheid Convention* and the *Rome Statute.* In terms of the former apartheid is defined, in relevant part, as:

> ‘[T]he following inhuman acts *committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them*:
>
> (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:
> (i) By murder of members of a racial group or groups;
> (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
> (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;
> …
> (f) *Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.*

87. In terms of this definition, the accused conduct could be characterized as the commission of ‘inhuman acts *committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them*, or in the alternative, the ‘persecution of … persons, by depriving them of fundamental rights and freedoms*, because they oppose apartheid*’.

c) The definition of the relevant Underlying Acts at that time

88. As noted above, the Underlying Acts of the crimes against humanity of imprisonment, torture and murder are substantially the same as their domestic equivalents, such that should the NPA determined there is sufficient evidence to charge persons implicated in these cases with the latter, then the same evidence would substantiate charging them in terms of the former (as far as the Underlying Acts element is concerned). However, the crimes against humanity of enforced disappearances and apartheid are *sui generis* international crimes, with no domestic equivalents, which would require further evidence to be proven in order to be charged as underlying acts. Using the case of Ms Simelane as a case study, the remainder of this Memorandum will consider how apartheid-era offences might be prosecuted as the crime against humanity of enforced disappearance.

89. The Underlying Act of enforced disappearance contains two distinct *actus rei*: (i) the arrest, detention or abduction of one or more persons (the 'detention' element), or (ii) the refusal to acknowledge such arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons (the 'denial of information' element). According to the TRC's decision on the amnesty application in respect of Ms Simelane, her abduction and imprisonment was common cause:[108]

> In accordance with the plan decided upon by the group of police officers, Mkhonza lured Ms Simelane to the basement of the Carlton Centre where she was apprehended and abducted. Ms Simelane was manhandled, placed in the boot of a police

[108] *TRC, Amnesty Committee, Application in Terms of Section 18 of The Promotion of National Unity and Reconciliation Act, No. 34 of 1995,* AC/2001/185, para. 2.

> vehicle and transported to the Custodum Flats where the Security Police had an operational office in the cleaner's quarters on the roof of the building. She was subsequently removed to the operational office where she was kept for a few days. …Ms Simelane was subsequently transferred to a secluded premises on a farm in the district of Northam in the present North West Province. Here she was detained for a period of approximately 4 to 5 weeks.

90. As far as the 'denial of information' element is concerned, while the TRC decided that for its purposes it '[was] not necessary … to make a definitive finding on the eventual fate of Ms Simelane', the only reasonable conclusion to draw from its findings that Ms Simelane (i) 'was last seen where she was lying with her hands and feet cuffed in the boot of Coetzee's vehicle', (ii) 'never returned to her familiar environment in Swaziland after having been abducted by the South African Security Police' and (iii) 'had disappeared since', is that here 'fate or whereabouts' are known to some of all of the accused persons, and that they continue to withhold this information from both Ms Simelane's families and the authorities.

91. In any event, even if one or more of the persons implicated in Ms Simelane's case are considered to have only taken part in either the *detention* or the *denial of information* aspects of the crime, the evidence suggests that they would have been aware that (i) the *detention* 'would be followed in the ordinary course of events' by the *denial of information,* or (ii) the *denial of information* 'was preceded or accompanied by' the *detention* - as contemplated by the ICC *Elements of Crimes*.[109]

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[109] See ICC *Elements of Crimes,* article 7(1)(i), paragraph 3(a) and (b).

92. Finally, as far as the requirement that these acts must be carried out ‘by, or with the authorization, support or acquiescence of, a State or a political organization’ is concerned, this is likely to be satisfied in Ms Simelane’s case regardless of how the ‘attack against civilians’ is scaled (see above). In this regard its worth recalling the TRC’s finding that the purposes of Ms Simelane’s abduction and detention was to ‘extract information concerning MK or its operations’ and ‘recruit her to become a Security Police informer’. Moreover, it can be reasonably inferred from the totality of her captor’s conduct that they ‘intended to remove [Ms Simelane] from the protection of the law for a prolonged period of time’.

IV. CONCLUSION

93. In conclusion, it is my considered opinion not only *can* the State include international crimes in any ongoing or future prosecution of such apartheid-era cases, in terms of its obligations under the Constitution and international law as set out in *S v Basson* it is arguably obliged to do so. These charges should include, but not be limited to:

93.1. The crimes against humanity of imprisonment, torture, murder, enforced disappearance and apartheid under Section 232 of the Constitution; and, or in the alternative,

93.2. The crime against humanity of enforced disappearance under the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.*