MEMORANDUM ON THE CRIME OF ENFORCED DISAPPEARANCE AND ITS PROSECUTION UNDER THE ROME STATUTE ACT AS A CONTINUING CRIME

In re: Simelane

INTRODUCTION

1. We have been asked to provide an opinion in respect of two issues:

   1.1. Whether the enforced disappearance of Nokuthula Simelane in 1983 can be prosecuted as a 'continuing' crime against humanity under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (The Rome Statute Act)[1] ; and

   1.2. Whether the amnesty granted in favour of the accused (under the *Promotion of National Unity and Reconciliation Act* 34 of 1995) for the domestic crime of kidnapping precludes a charge of 'enforced disappearances' as a crime against humanity?

2. In order to fully address the first issue, two sub-questions must be answered:

   2.1. Is the crime of enforced disappearance a 'continuing' crime?;

[1] For the purposes of this Memorandum, we assume that the conduct in question meets the formal definition of the crime against humanity of enforced disappearance under the Rome Statute of the International Criminal Court (article 7(1)(i) and (2)(i)), incorporated into the Rome Statute Act (see section 1((i) and Schedule 1). For the background to the Simelane matter, and a discussion of whether the conduct in question can be characterized as a crime against humanity, see 'Memorandum on the Prosecution of Apartheid-Era Cases as International Crimes under South African Law' (November 2019), and '*In re Simelane:* Further Brief on International Crimes' (February 2021), prepared by Christopher Gevers. For a general overview of the prosecution under South African law of international crimes committed during apartheid, see 'Memorandum on Prosecuting Apartheid Crimes Under International Law' (March 2021), prepared by Max Du Plessis SC and Christopher Gevers.

2.2. Can continuing crimes that commenced prior to 2002 be prosecuted under the Rome Statute Act, notwithstanding the temporal limits placed on its jurisdiction generally under section 5(2).

3. For the reasons set out below, we conclude in respect of the first issue that the Rome Statute Act can – and arguably, in terms of sections 39(2) and section 233 of the Constitution, must – be interpreted so as to allow for the prosecution of continuing crimes that commenced prior to 2002 (and enforced disappearances, in particular), such as those alleged to have been committed in the case of Ms Simelane.

4. Similarly, and in respect of the second issue, we conclude that an amnesty granted for the domestic crime of kidnapping does not preclude a charge of 'enforced disappearances' as a crime against humanity as these are two fundamentally different offences. Furthermore, to the extent that there are overlaps between the amnestied conduct and certain elements of a crimes against humanity charge, South Africa's constitutional and international obligations again call for an interpretation of the relevant provisions in favour of proceeding on such a charge.

IS AN 'ENFORCED DISAPPEARANCE' A CONTINUING CRIME?

5. At a conceptual level, a distinction can be drawn between three types of international crimes:

5.1. a **completed** international crime which is 'a violation of a primary international obligation that does not continue in time - i.e. when an obligation targets an instantaneous event';[2]

5.2. a **continuing** international crime which 'is a violation of a primary obligations targeting a potentially ongoing situation that has been committed and then maintained';[3] and

5.3. 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'.[4]

6. Nissel employs the following, particularly relevant, analogy to distinguish between completed crimes and continuing crimes:[5]

> "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,*

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

the former is in continuing commission of the crime of enforced disappearance of persons."

7. As this example suggests, the crime of 'enforced disappearance' is the archetypal continuing crime. It involves not only the initial act of abducting, 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.[6]

8. The continuing nature of 'enforced disappearances', and their devastating impact on both victims and their families, has been recognized by a number of international legal instruments, foreign courts and international human rights bodies.

9. In Article 17(1) of the 1992 Declaration on Enforced Disappearances, 'enforced disappearances' 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".

10. 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'.

[6] Schedule 1, Part 2, Paragraph 2(i), *Rome Statute Act* and Article 7(2)(i), *Rome Statute.*

11. The 2006 International Convention on the Protection of All Persons from Enforced Disappearances takes note of the offences' 'continuous nature' (article 8 and 24) in considering the issue of statutes of limitations.

12. While courts and tribunals have, to date, more often been called upon to consider the question of enforced disappearances in terms of their impact on human rights obligations, rather than under criminal law,[7] the recent jurisprudence of Peru's Supreme Court of Justice is instructive in this regard. Since enforced disappearances were criminalized by Peru's Penal Code of 1998, this offence has been applied and interpreted on a number of occasions by its criminal courts. Of particular note for present purposes, is the Peruvian courts' consistent endorsement of the continuous nature of the crime of enforced disappearances:

    12.1. In 2006 Peru's Permanent Criminal Chamber of its Supreme Court of Justice was faced with a case relating to the kidnapping and subsequent disappearance of Ernesto Rafael Castillo Páez by the Peruvian National Police in October 1990.8 After considering the definition of enforced disappearances and the fundamental human rights it seeks to protect, the Chamber stated:

> "[U]p to this moment, the whereabouts of Castillo Páez are unknown, a situation that is a direct consequence of the

[7] For instance, Radilla Pacheco v. Estados Unidos Mexicanos (IACtHR, November 23, 2009); Varnava and Others v. Turkey, Appl. No. 16064/90, 16065/90, 16066/90, […] ECtHR [GC], 18 September 2009, para. 192; Eduardo Bleier v. Uruguay, Communication No. R.7/30, U.N. Doc. Supp. No. 40 (A/37/40) at 130 (1982) para. 7 (b); Mr. S. Jegatheeswara Sarma v. Sri Lanka, Communication No. 950/2000, U.N. Doc. CCPR/C/78/D/950/2000 (2003), para. 6 (2).

[8] Peru, Supreme Court of Justice, Permanent Criminal Chamber, Castillo Páez case, Case No. 0012-20060HC/TC, Judgement of 15 December 2006 (2006 Castillo Páez case).

> perpetrator's unlawful acts for which he must be held fully responsible. Based on the evidently unquestionable fact that the fate of the student Ernesto Castillo Páez is still unknown, we must presume that his unlawful deprivation of liberty continues and thus the offence continues to be perpetrated – hence its definition as a continuous offence. It is possible to state in these cases that the offence was 'continuously committed over time'. This was established by the Constitutional Court in case no. 2488-2002-HC/TC, Villegas Namuche Case, section 7, sub-section 26, fourth paragraph, which … is binding on all judicial decisions."[9]

12.2. In 2007 the First Provisional Criminal Chamber of Peru's Supreme Court of Justice, hearing the matter on appeal, reiterated in respect of the offence of enforced disappearance:[10]

> "…the offence is a "continuous offence" because the crime continues to be committed for as long as the whereabouts or fate of the person who has disappeared remain concealed. In this sense, the offence is not part of the past but continues to be committed for as long as the above-mentioned conditions are met."

[9] 2006 *Castillo Páez* case at para 30.

[10] Peru, Supreme Court of Justice, First Provisional Criminal Chamber, Castillo Páez case, Case No. 0012-2006-HC/TC, Judgement of 18 December 2007 (2007 Castillo Páez case), para 3(iv). The "above-mentioned conditions" involves "depriving the victim of his or her liberty in a clandestine way – hiding him or her – by means of detention, arrest, hijack, kidnapping or other methods." According to the Court, "This is the typical definitional element of the offence which is essential for an enforced disappearance to occur and which has the effect of placing the victim outside the protection of the law and of the institutions". 2007 Castillo Páez case, para 3(i).

12.3. Further, in 2007 the National Criminal Chamber of Peru's Supreme Court of Justice held in the *Chuschi* case[11], "Both at national and international levels, it is established that the crime of enforced disappearances is a continuous crime".[12] The Court held further:

> "[T]he crime of enforced disappearance is a **continuous offence** and therefore the status of disappeared person is granted from the moment the person is detained **and his or her whereabouts become unknown until his or her location (dead or alive) is established.** This is because:
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> - the violation to his or her rights continues;
> - the person remains under the responsibility of his or her captors;
> - his or her family continue to await information on his or her whereabouts."[13]

12.4. The judgment by the National Criminal Chamber in the *Chuschi* case was partially appealed. On appeal, the Permanent Criminal Chamber found:[14]

> "The crime of enforced disappearance … involves not only a person's deprivation of liberty by state agents – according to the

[11] Peru, Supreme Court of Justice, National Criminal Chamber, Chuschi case, Case No. 105-04, Judgement of 5 February 2007 (Chuschi case).
[12] *Chuschi* case at p. 30.
[13] *Chuschi* case at p. 115.
[14] Peru, Supreme Court of Justice, Permanent Criminal Chamber, Chuschi case, Case No. 1598-2007, Judgement of 24 September 2007 (*Chuschi* appeal).

> limited view of our legislator – but also the systematic concealment of such detention in order to keep the victim's whereabouts unknown. **It can therefore be classified as a continuous offence**, requiring a specific result and perpetrator. The perpetrator adopts a negative attitude towards providing information on the whereabouts of the victim, **thus creating and maintaining a state of uncertainty regarding his or her fate** and placing him or her outside the protection of the law and the judiciary. …
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> …[T]he crime of enforced disappearance is a continuous crime (an unlawful situation is generated as a consequence of a punishable act whose continuation depends on the will of the perpetrator). **The fact is renewed continuously as a consequence of the victim's deprivation of liberty and subsequently his or her disappearance.**"[15]

13. In addition to this, although not formally binding, the General Comments of the UN Working Groups are highly influential as to how treaties should be interpreted and further that, at the very least, states have a good faith obligation to consider General Comments when interpreting human rights treaties.[16] As discussed below,

[15] *Chuschi appeal* at pp 159-161.

[16] According to the United Nations Human Rights Office of the High Commissioner, the purpose of a General comment is to interpret and clarify substantive provisions, not only with regard to the reporting duties of State parties but also for the purpose of providing guidance and suggested approaches on the implementation of treaty provisions or thematic issues in question. Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and their Legitimacy' in Keller and Ulfstein (eds), *UN Human Rights Treaty Bodies,* pp 116-199.

these are also highly relevant when it comes to the interpretation of statutes under the Constitution.

14. According to the UN Working Group, enforced disappearances are "prototypical continuous acts".[17] The act begins at the time of the abduction and extends for the whole period of time that the crime is not complete.[18] More specifically, it extends until such time that the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual.[19]

15. The UN Working Group is further of the opinion that 'enforced disappearances' is a unique and consolidated act, instead of a combination of acts.[20] Therefore, the act of not acknowledging the victim's detention or releasing information on their whereabouts is to be regarded as inseparable from the initial attack.[21] As such, for as long as the State refuses to release information on the fate of the individual, the crime is "dragged along" in time, on account of the continued commission of the *actus reus*.

16. At this juncture, we pause to note that – based on the publicly available information – there can be no doubt that the case of Ms Simelane constitutes an 'enforced disappearance'. Just as the crime of 'enforced disappearance' is the 'paradigmatic

[17] Report of the Working Group on Enforced or Involuntary Disappearances, 2010. Document A/HRC/16/48, at para 1.
[18] Ibid.
[19] Ibid.
[20] Report of the Working Group on Enforced or Involuntary Disappearances, 2010. Document A/HRC/16/48, at para 2.
[21] Ibid.

continuing crime'[22], the situation surrounding the fate of Ms Simelane is the paradigmatic 'enforced disappearance'.

17. In fact, Ms Simelane's 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, and 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 of the results'.[23]

18. To conclude the first sub-question (i.e. whether enforced disappearances constitute 'continuing crimes'), it is our opinion that this should be answered in the affirmative. The permanent and continuous nature of the crime is well-grounded by international legal instruments, foreign jurisprudence and academic opinion, as well as the considered views of the United Nations Working Group on Enforced or Involuntary Disappearance.

19. In light of the established continuous nature of 'enforced disappearances', the pertinent issue now becomes its prosecution as such in the present case, in light of the temporal jurisdictional limit of the Rome Statute Act.

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[22] Alan Nissel, 'Continuing Crimes in the Rome Statute', 668.

[23] 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).

CAN CONTINUING CRIMES THAT COMMENCE PRIOR TO 2002 BE PROSECUTED UNDER THE ROME STATUTE ACT?

20. The critical issue that arises in the present case is whether the Rome Statute Act allows for the prosecution of continuing crimes that commenced **before** the Rome Statute entered into force (i.e. 2002) but continued thereafter (in the present case, to this day).

21. 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).[24] However, 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 the disappearance of Ms Simelane in 1983).

22. The Rome Statute Act itself is silent on the issue of temporal jurisdiction, and instead 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.'[25]

[24] See Section 5(2), Rome Statute Act.
[25] Section 5(2), Rome Statute Act.

23. The difficulty, however, is that the drafters of the Rome Statute were themselves unable to agree on the issue of whether the ICC would have jurisdiction over *continuing crimes* that commenced prior to its entry into force.[26]

24. As a result, the text of the Rome Statute seems to be at odds with itself and thus open to both interpretations. On the one hand, Article 11 of the Statute 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'.

25. Academic opinion is divided on whether Articles 11 and 24 should be interpreted to include within the temporal limitation of the Statute 'continuing crimes' that commenced prior to the Rome Statute came into force (2002) and which continued thereafter. For instance, Sadat adopts a structural interpretation against the inclusion of 'continuing crimes', arguing that Article 11 "precludes retroactive crimes committed" (i.e., excludes crimes committed before 2002) whilst Article 24 "precludes retrospective conduct that has occurred" (i.e., excludes conduct that occurred prior to 2002 from attracting criminal liability under the Statute).[27]

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[26] 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 Intr2oduction to the International Criminal Court, 3rd ed.,* (2007), 70.

[27] Leila Sadat, 'The ICC and the Transformation of International Law: Justice for the New Millennium (Transnational Publishers, New York; 2002) at p186.

Schabas[28] and Pangalangan[29], on the other hand, share the view that the Statute remains unclear on the issue of "continuing crimes". Schabas suggests that this is a matter for the ICC to determine (however, the ICC has yet to clarify the position on continuing crimes).

26. Nissel's interpretation of the issue is, however, preferable insofar as it allows for prosecutions of 'continuing crimes' through a broad interpretation of the Rome Statute[30] – consistent with international human rights jurisprudence on the topic, and which approach is, for the reasons we give further below when we consider the proper interpretation of South Africa's Rome Statute Act, likely to be attractive to a South African court. After analysing human rights jurisprudence on enforced disappearances, Nissel concludes that, "if the accused continues even to withhold information on the whereabouts of relevant persons this would be included within the jurisdiction ratione personae of the ICC [(the ICC's authority to require a person to be in court)] **even if the initial abduction preceded the relevant critical date** (our emphasis added)."[31]

27. In relation to the contextual elements of crimes against humanity (i.e. a widespread or systematic attack against the civilian population), Nissel adds that it is not the initial attack itself (either on the victim in particular or, if there are many victims, on someone else) that needs to have occurred after the critical date (2002), but the **continuing incarceration of victims in breach of Article 7(1)(i) constitutes a**

[28] William Schabas, 'An Introduction to the International Criminal Court' (2001) at p 59.
[29] Raul Pangalangan, 'Non-retroactivity ratione personae' in Kai Ambos, Otto Triffterer (Ed.) *The Rome Statute of the International Criminal Court,* at p 467, 471-72.
[30] Alan Nissel, 'Continuing Crimes in the Rome Statute', 25 *Michigan Journal of International Law* (2004) 653, 661.
[31] Ibid, 670.

continuing attack on the individual liberty of the victim in question.[32] The "attack portion" of the crime is therefore extended beyond the initial attack, further allowing for the prosecution of enforced disappearances which commenced before and continued past 2002.

28. What further commends Nissel's approach is that the UN Working Group adopts a similar line of interpretation to Nissel. In its General Comment, the UN Working Group specifically recognizes and deals with the consequences of regarding the application of the principle of non-retroactivity, both in treaty law and criminal law, in relation to the continuous nature of enforced disappearances.[33]

29. The UN Working Group suggests the following:

> "Even if some aspects of the violation [enforced disappearance] may have been completed before the entry into force of the relevant national or international instrument, **if other parts of the violation are still continuing, until such time as the victim's fate or whereabouts are established, the matter should be heard, and the act should not be fragmented.**[34] Similarly, in criminal law, the Working Group is of the opinion that one consequence of the continuing character of enforced disappearance is that it is **possible to convict someone for enforced disappearance on the basis of a legal instrument that was enacted after the enforced disappearance began**, notwithstanding

[32] Ibid.
[33] Report of the Working Group on Enforced or Involuntary Disappearances, 2010. Document A/HRC/16/48.
[34] Ibid. para 2.

the fundamental principle of non-retroactivity. The crime cannot be separated, and the conviction should cover the enforced disappearance as a whole.[35]

As far as possible, tribunals and other institutions ought to give effect to enforced disappearance as a **continuing crime… for as long as all elements of the crime or the violation are not complete.**"[36]

30. Insofar as whether these General Comments take into consideration the principle of *nullum crimen sine lege* (and therefore the rights of the accused), we are of the opinion that for as long as the victim's whereabouts remain undisclosed (as in Simelane's case), the perpetrator continues to commit the crime. The consummation of the act is therefore pulled into the present, rendering the perpetrator liable for the crime even after the Rome Statute came into force in 2002.

31. There are at least five further 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:

32. ***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* itself that favours such an interpretation (i.e. Article 11), and not its counterpart that 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

[35] Ibid. para 5.
[36] Report of the Working Group on Enforced or Involuntary Disappearances, 2010. Document A/HRC/16/48, at para 6.

conduct prior to the entry into force of the Statute'. They must have known about the international law debates on the topic – including that Schabas had noted that the issue still required determination by the ICC – and yet had decided to cut South Africa's way past the debates by express reference to crimes that had been "committed".

33. ***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 Courts should adopt a *broader* interpretation of their own jurisdiction under the Rome Statute Act for two reasons:

33.1. 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

33.2. In the event that the ICC at some future point determines the matter in favour of the *broader* interpretation of its jurisdiction, a 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').[37]

34. ***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. Furthermore, section 233 of the Constitution states that '[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with [it]'. 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,[38] and in the case of enforced disappearances the devastating effects this practice has on their families.[39] 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

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[37] 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'.

[38] 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.

[39] 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.

date on which Guatemala accepted the competence of the Court' in 1987. In doing so the Court noted:[40]

35. 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.

36. ***Fourth***, such an interpretation would be consistent with a recognition that the enforced disappearances in issue arise from, and are part and parcel of, the crime of apartheid. The Rome Statute of the International Criminal Court criminalized the act of apartheid as a crime against humanity. The inclusion of the crime of apartheid in the Rome Statute takes its inspiration from apartheid South Africa not only in adopting the term 'apartheid' but in defining the 'crime of apartheid'. The importance of the ICC as an international tribunal that has the potential to deter and prosecute such crimes is demonstrable: had the Court been in place during the apartheid years, crimes such as those committed at Sharpeville and the policy of racial hatred may well have given rise to criminal liability for apartheid leaders, generals, officials and policymakers, and a related hastening of the demise of the apartheid state.

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

37. No doubt that served as one of the inspirations for South Africans being instrumental in drafting the Rome Statute in 1998, and South Africa's position in the debates giving rise to the many compromises contained in the Statute (which allowed for the Court's establishment in the first place) have been heralded as vital not only to the birth of the Court but also its success.[41]

38. It is intolerable that a crime started during the apartheid years and which continues today as enforced disappearance, would result in impunity for the perpetrators. South Africa's ability to confront its apartheid past is tied up with its willingness to tackle those crimes that continue today. Enforced disappearance is the paradigm example. A failure to act against the accused who perpetrated such crimes and who continue to escape accountability for the continuing harms felt by their victims and families, would be akin to condoning the crime of apartheid itself.

39. ***Fifth***: and relatedly, this interpretation would be consistent with a right to a remedy for such crimes, and the public's right to the truth about enforced disappearances as a feature of our apartheid past. As we have already said, section 39(1)(b) of the Constitution provides that courts must consider international law when interpreting the rights in the Bill of Rights. In Glenister II, the Constitutional Court explained that the Constitution "draws the obligations assumed by the State on the international plane deeply into its heart, by requiring the State to fulfil them in the domestic

[41] See for example, Max du Plessis and Christopher Gevers, "South Africa's Foreign Policy and the International Criminal Court: Of African Lessons, Security Council Reform and Possibilities for an Improved ICC", Chapter 12, in T.M. Shaw and J. Warner (eds.), *African Foreign Policies in International Institutions*, Contemporary African Political Economy, Harvard, 2018.

sphere".[42] This includes customary international law, which has "a higher rank in the international hierarchy than treaty law".[43]

40. There is an emerging principle of customary international law that recognises a right to truth for serious human rights violations.[44] Our Constitution's commitment to truth-seeking is both confirmed by and given deeper meaning by our international law commitments to the right to truth.

41. In any event, section 233 of the Constitution enjoins the courts to interpret any legislation in a manner that is consistent with international law. In Sonke, the Constitutional Court said: "*International law also offers useful interpretative guidance outside the sphere of Bill of Rights interpretation. . . . Section 233 of the Constitution requires us, when interpreting any legislation, to prefer an interpretation that accords with international law*."[45] Therefore, the Rome Statute Act – and the prosecutorial discretion exercised thereunder – must be interpreted in accordance with the customary right to truth.

42. As an emerging principle of customary international law, while the contours of the right to truth are still developing, a core of the right has crystallised.[46] This is that states have an obligation to provide victims, those closely related to victims and

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[42] *Sonke Gender Justice NPC v President of the Republic of South Africa* [2020] ZACC 26 at para 45; citing *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 189.

[43] *Sonke* ibid at para 63; citing ***Prosecutor v Anto Furundžija***, IT-95-17/1-T, § 153, ICTY 1998. Section 232 of the Constitution provides that "*customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament*."

[44] The right to truth falls under the umbrella right to know. See Dermot Groome "Principle 2: The Inalienable Right to Truth" in Handleman and Unger (eds) *United Nations Principles to Combat Impunity: A Commentary* (Oxford University Press, Oxford 2018) (**"Groome"**) at 59. See further Dermot Groome, "The Right to Truth in the Fight Against Impunity", 29 *Berkeley Journal of International Law*, 175 (2011), available at http://scholarship.law.berkeley.edu/bjil/vol29/iss1/5

[45] *Sonke* above n **Error! Bookmark not defined.** at para 70.

[46] Groome above n 44 at 59.

the public with information about serious human rights violations.[47] The customary norm, thus, also recognises the right to truth as a collective right held by the public.[48] And, importantly, prosecutions of continuing crimes is one of the key mechanisms for fulfilment of the obligation to provide the victims with a remedy, which may include the truth.

43. An explicit recognition of the right to truth is found in the United Nation Principles on Impunity[49] (formulated in 1996) and the Updated Principles (updated in 2005).[50] The UN Principles on Impunity identified an inalienable right to the truth.[51] This was affirmed in the Updated Principles in Principle 2, which says:

> *"Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations."*

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[47] See Naqvi "The right to the truth in international law: fact or fiction?" (2006) *International Review of the Red Cross* Volume 88 Number 862 (**"Naqvi"**) at 260; and Groome ibid at 65.

[48] Naqvi ibid; and Groome ibid.

[49] Economic & Social Council (ECOSOC), Commission on Human Rights, The Administration of Justice and the Human Rights of Detainees, Annex 1 "Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity," U.N. Doc. E/CN.4/Sub.2/1996/18 (June 29, 1996) (**"UN Principles on Impunity"**) available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G97/141/42/PDF/G9714142.pdf?OpenElement.

[50] ECOSOC, Commission on Human Rights, Promotion and Protection of Human Rights: Impunity, Add. 1 "Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity," Principle 2, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) (**"Updated Principles"**) available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement.

[51] Principle 1 provides: "*Every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through systematic, gross violations of human rights, to the perpetration of heinous crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of violations in the future*."

44. This is clearly a collective right to truth held by the public, as distinguished from the right of victims to know the truth recognised in Principle 4. Moreover, Principle 5 of the Updated Principles provides that States must take effective measures to give effect to the right to truth, including in Principle 19 the investigation and prosecution of those responsible for crimes.

45. In a 2006 report on the right to truth, the Office of the UN High Commissioner for Human Rights,[52] concluded that:

> "*[T]he right to the truth about gross human rights violations and serious violations of human rights law is an inalienable and autonomous right, linked* ***to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations***." (our emphasis)

46. There are also a number of UN resolutions that propound the right to truth and call for its protection. In 2005, the General Assembly of the United Nations passed a resolution on the Basic Principles on the Right to Reparation for Victims.[53] The Resolution recognised a collective right to truth for human rights violations as a component part of the right to a remedy.[54]

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[52] Promotion and Protection of Human Rights: Study on the right to the truth. UN Doc E/CN.4/2006/91 (8 February 2006) (**"UN study on the right to truth"**) available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/106/56/PDF/G0610656.pdf?OpenElement.

[53] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147 (16 December 2005) (**"Basic Principles on the Right to Reparation for Victims"**) available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx.

[54] Ibid at paras 18, 22(b) and (e).

47. A decision not to prosecute such continuing crimes would thus also fail to honour the victims' and the public's right to truth.

48. For all these reasons we conclude that the Rome Statute Act can, and arguably should, be interpreted so as to allow for the prosecution of *continuing crimes* that commenced prior to and continued after 2002. Particularly in Ms Simelane's case, the continuing crime of 'enforced disappearances' is prima facie established through the continued non-disclosure of the whereabouts and fate of Ms Simelane (and thus the continued commission of the actus reus) to this date.

49. Importantly, under this interpretation, the distinction is made clear between alleged crimes against humanity that would fall outside the temporal jurisdiction of the Rome Statute Act due to them being *completed* crimes that took place before 2002 (such as imprisonment, torture, murder and apartheid) and continuing crimes against humanity (such as the crime of 'enforced disappearance') that could fall within the jurisdiction of the Rome Statute Act as a continuing crime, due to them commencing before and continuing after 2002.

DOES THE AMNESTY GRANTED IN FAVOUR OF THE ACCUSED FOR THE DOMESTIC CRIME OF KIDNAPPING PRECLUDE A CHARGE OF 'ENFORCED DISAPPEARANCES'?

50. We are instructed that certain of the accused have been granted amnesty for the kidnapping of Ms Simelane under the *Promotion of National Unity and Reconciliation Act* 34 of 1995. However, there are at least three arguments in favour of prosecuting the crime of humanity of 'enforced disappearance' in the

present case, notwithstanding the amnesty granted to the accused for the domestic crime of kidnapping:

51. ***First*** and foremost, the domestic offence of kidnapping and the crime against humanity of enforced disappearance are fundamentally different crimes, on various levels; as such, the legal elements of the crime against humanity of 'enforced disappearances' diverge considerably from the domestic crime of kidnapping in at least two respects:

51.1. The first is that, unlike the domestic crime of kidnapping, the actus reus of 'enforced disappearances' does not stop at the initial attack (the abduction of the individual). Instead, and as discussed under the first issue in this opinion, the actus reus begins at the time of the initial abduction and *extends* for as long as the State fails to acknowledge the detention or release of the individual or disclose their fate or whereabouts.

51.2. It is therefore the continued non-disclosure of the victim's fate or whereabouts that prolongs the actus reus in the crime of 'enforced disappearances', resulting in the crime essentially being committed several times over at any given point within the critical time.

51.3. The second is that the various contextual elements of the 'enforced disappearance' in the present case elevates the crime to a crime against humanity.

51.4. The classification of the enforced disappearance of Simelane as a crime against humanity is an extensive issue that cannot be fully traversed for

the purposes of this opinion. In short, however, it is our considered opinion that there are reasonable grounds to conclude that the enforced disappearance of Simelane: (1) took place in the context of a broader 'attack against civilians' during the 1980s (2) which 'attack against civilians' was either widespread or systematic, or both.[55] The threshold for 'enforced disappearances' constituting a crime against humanity has therefore arguably been met.

51.5. These additional 'contextual elements' of the crime against humanity of enforced disappearance render it substantially different from the offence of kidnapping. As the General Comment on Article 4 of the Declaration on the Protection of All Persons from Enforced Disappearances makes clear,[56] it is "*not sufficient for Governments to refer to previously existing criminal offences relating to enforced deprivation of liberty, etc …. In order to comply with Article 4 of the Convention, the very act of enforced disappearance as stipulated in the Declaration must be made a separate criminal offence*." The General Comment goes on to explain that States must "*ensure that the act of enforced disappearance is defined in a way which clearly distinguishes it from related offences such as enforced deprivation of liberty, abduction, kidnapping, incommunicado detention, etc*".[57]

[55] For a more detailed discussion see 'Memorandum on the Prosecution of Apartheid-Era Cases as International Crimes under South African Law' (November 2019), prepared by Christopher Gevers.
[56] See *Report of the Working Group on Enforced or Involuntary Disappearances, 1995*. document E/CN.4/1996/38, at p 3 para 54 (available at http://www.concernedhistorians.org/content_files/file/TO/293.pdf)
[57] Ibid, p 3 para 55

51.6. Accordingly, any amnesty granted for the crime of kidnapping cannot be regarded as the equivalent of an amnesty granted for the crime against humanity of enforced disappearance.

52. ***Second***, it is worth recalling that the unique nature of the crime of enforced disappearance lies not only in its particular inhumanity, but in the extensive number of victims it leaves in its wake. Simply put, the conduct of enforced disappearances is *designed* to cause maximum suffering to its direct victims (the 'disappeared' persons) and their families and terrorize the civilian population at large. The crime's origins can be traced back to World War II, and Adolf Hitler himself, who instructed the head of his Army Forces Wilhelm Keitel , that an 'effective and lasting deterrent [to resistance to Nazi occupation] can only be achieved by death sentences *or by measures which will keep the relatives of the perpetrator and the population in suspense concerning the fate of the perpetrator*'.[58]

53. It is for this reason that international jurisprudence has gone as far as to classify the anguish and suffering caused to both the victim and the family (as a result of the disappearance itself and the continuing uncertainty over the person's fate and whereabouts) as a form of torture or cruel and inhuman treatment. This has been articulated on several occasions by the Human Rights Committee,[59] the European

[58] *Trials of War Criminals before the Nuernberg Military Tribunals - Volume III,* 'The Justice Case' (1951), pp. 777-778.
[59] See *María del Carmen Almeida de Quinteros et al. v. Uruguay*, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138 (1990) at para. 14; *Katombe L. Tshishimbi v. Zaire*, Communication No. 542/1993, U.N. Doc. CCPR/C/53/D/542/1993(1996) at para 5.5; *Basilio Laureano Atachahua v. Peru*, Communication No. 540/1993, U.N. Doc. CCPR/C/56/D/540/1993 (1996) at para 8.5;

Court of Human Rights,[60] the Inter-American Court of Human Rights[61] and by the UN Working Group on Enforced Disappearances. For example:

53.1. The Inter-American Court of Human Rights held in light of the prohibition on enforced disappearances that "prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being".[62]

53.2. The European Court of Human rights, in its judgment of *Kurt v. Turkey*[63], stated that, *"*The uncertainty, doubt and apprehension suffered by the applicant (**the mother of the disappeared person**) over a prolonged and continuing period of time caused her severe mental distress and anguish."

53.3. The UN Working Group on Enforced Disappearances has also indicated that the anxiety and grief caused by the enforced disappearance of a family member constitutes, "suffering that reaches the threshold of torture [… and therefore] the State cannot restrict the right to know the truth about the fate and the whereabouts of the disappeared as such restriction only adds to, and prolongs, the continuous torture inflicted upon the relatives."[64]

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[60] *Kurt v. Turkey*, Appl. No. 15/1997/799/1002, Council of Europe: European Court of Human Rights, 25 May 1998, at paras 130-134.
[61] See *Anzualdo Castro v. Peru* Judgment of September 22, 2009 at para 113; Osorio Rivera and Family Members v, Peru Judgement of November 26, 2013, at paras 227-228; *Goiburú et al. v. Paraguay* Judgment of September 22, 2006, at para 211; *Bámaca-Velásquez v. Guatemala* Judgment of November 25, 2000 at para 160.
[62] *Loayza-Tamayo v. Peru* Judgement of 17 September 1997. Series C No. 33, at para 58.
[63] *Kurt v. Turkey* (note 58 above).
[64] Report of the Working Group on Enforced or Involuntary Disappearances,2010. Document A/HRC/16/48.

54. What is further clear, then, is that the crime against humanity of 'enforced' disappearances is distinct from the domestic crime of kidnapping in its *effect* - in that it reaches far wider than the more immediate effect that kidnapping has on a victim. Again, no amnesty for kidnapping could stand in the way of prosecuting people for the crime of enforced disappearances and its effects, which are quantitatively and qualitatively different. To allow an amnesty for kidnapping to stand in the way of such a prosecution, would be to allow impunity for torture and the like effects that are cognate elements of the crime of enforced disappearance.

55. ***Third***, the internationally recognized human rights implications that the crime of 'enforced disappearances' brings with it recalls South Africa's obligations under section 39 of the Constitution, which 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. Further, section 233 of the Constitution states that '[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with [it]'.

56. In this regard, we have already earlier highlighted why the broad interpretation of 'enforced disappearances' by a number of international human rights bodies not only should, but *ought* to be favoured over its narrower counterpart, allowing for prosecution of 'enforced disappearances' in South Africa. A decision not to prosecute such crimes because of an amnesty granted for the domestic crime of kidnapping, would not only ensure impunity through the backdoor for one of the

most egregious of all crimes, it would also make a mockery of South Africa's international human rights commitments.

57. In short, any person who applied and who was granted amnesty for kidnapping, did not apply nor was granted amnesty for the materially different crime of enforced disappearance.

CONCLUDING REMARKS

58. We end by noting that, while the NPA is granted prosecutorial discretion in relation to the crimes in the Rome Statute Act, in exercising its discretion, the provisions of the Act and the Constitution call for the NPA to consider not only the evidence available to it, but also:

58.1. The aims of the Rome Statute Act (to facilitate domestic prosecutions of individuals alleged to be guilty of crimes against humanity, war crimes and genocide pursuant to South Africa's international obligations to do so as a party to the Rome Statute);

58.2. The objects of the Act (to enable such prosecutions as far as possible);

58.3. The NDPP's obligation under section 5(5) of the Rome Statute Act to provide to the Central Authority the full written reasons for its decision to decline prosecution of a person under the Act, which decision (together with the reasons thereof) must be forwarded to the Registrar of the International Criminal Court; and

58.4. South Africa's international obligations to prosecute international crimes.

59. We trust that this opinion has provided clarity in favour of prosecuting the 'enforced disappearance' of Ms Simelane as a *continuing crime* under the Rome Statute Act and notwithstanding amnesty granted for the domestic crime of kidnapping.

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29 March 2021