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

Jeremy Sarkin[1] Attorney South Africa, Attorney New York USA; Professor of Law, University of South Africa; former Chair-Rapporteur, UN Working Group on Enforced or Involuntary Disappearances

1 INTRODUCTION

Enforced disappearances remain one of the worst human rights violations ever practised.[2] It infringes on many human rights at the same time, including the right to life, the right not to be tortured, the right to dignity, the right to a fair trial, the right of access to justice and many others.[3]

While it is difficult to assess how many people have been disappeared in the recent past with any degree of certainty, because of the secrecy that surrounds disappearances, the numbers are conservatively estimated to be in the hundreds of thousands.[4] The actual numbers are however much higher, and probably millions of people have been disappeared. The UN Working Group on Enforced or Involuntary Disappearances (WGEID) alone has been seized with about 54,000 cases in the period between 1980 and 2015. Enforced disappearances are however not only an issue of the past. While hundreds of thousands disappeared in Latin America in the 1960s and 1970s, subsequent to that period, there have been many instances

[1]BA LLB (Natal) LLM (Harvard) LLD (UWC); E-mail: JSarkin@post.harvard.edu.
On 20 May 2015, after this article was submitted for publication, the family of Ms Nokuthula Simelane, the disappeared person dealt with in this article, filed an application in the High Court of South Africa to compel the National Director of Public Prosecutions and the Minister of Justice to refer the case of kidnapping, torture, disappearance and murder of Ms Simelane to a formal inquest before the High Court in terms of sections 5 and 6 of the Inquests Act 58 of 1959. The application further requested that the Court find that the rights of the applicants had been violated on a variety of grounds by not finalising the matter. The applicants also requested that the National Commissioner of the South African Police Services be ordered to finalize any investigations into the Simelane disappearance within 14 days of the granting of the relief requested of the Court, and that the National Director of Public Prosecutions be compelled to take a prosecutorial decision within 30 days of the date of the order that the Court may grant.
[2] See Vermeulen *Enforced Disappearance: Determining State Responsibility Under the International Convention For the Protection of All Persons From Enforced Disappearance* (2012).
[3] McCrory "The International Convention for the Protection of All Person from Enforced Disappearance" 2007 *Human Rights Law Review* 545.
[4] Scovazzi and Citroni *The Struggle Against Enforced Disappearance and the 2007 United Nations Convention* (2007) 17.

of disappearances, including as a result of the "war on terror" which spawned renditions[5] and secret prisons.[6]

While many believe that disappearances are a practice of the past, new cases from all around the world occur regularly. For instance, and these are just two examples of many: in 2014 the UN Inquiry on North Korea (DPRK) reported about 250, 000 disappearances having occurred there.[7] Tens of thousands of these people are still being held in North Korean detention camps.[8] In Sri Lanka[9] considerable numbers of people disappeared during the two and a half decade long civil war.[10] The Sri Lankan Government has also been accused of causing the disappearance of tens of thousands of people at the end of the war in 2009.[11] While many new cases occur globally, many are not reported to the authorities of the countries concerned, for a variety of reasons, and many are not reported to international mechanisms. Despite under-reporting being a challenge, in the 2013-2014 annual report of the WGEID 418 new cases of enforced disappearance from 42 states were reported for that year.[12] As noted above, the cases that the Working Group has been seized with often do not reflect the true situation on the ground. Thus, for example in Rwanda where possibly a million people disappeared in 1994,[13] the WGEID has only had a total of 24 cases from the country. South Africa, at present, only has one case before the Working Group. This is the Simelane case that is discussed in this article, which was reported to the WGEID in 2014.

This article contextualises enforced disappearances globally, as well as in South Africa, and

[5] Galella and Espósito "Extraordinary Renditions in the Fight Against Terrorism-Forced Disappearances?" 2012 *SUR International Journal on Human Rights* 7-31.
[6] See "Interview with UN Working Group on Enforced or Involuntary Disappearances Chair-Rapporteur Jeremy Sarkin on the Secret Detention Study" 2011 *Essex Human Rights Review* 57-67.
[7] UN Human Rights Council, Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea -- A/HRC/25/CRP.1 2014. See further Song "Legal Implications of the Final Report of the United Nations Commission of Inquiry on Human Rights in the Democratic Republic of Korea" 2014 *Korean University Law Review* 3. See also Sonen, Without a Trace: The UN Commission of Inquiry's Recognition of North Korea's Enforced Disappearance of South Korean Citizens" 2015 *University of Hawaii Law Review* 73.
[8] Cumming-Bruce "U.N. Panel Says North Korean Leader Could Face Trial" New York Times 17-02-2014 http://www.nytimes.com/2014/02/18/world/asia/un-panel-says-north-korean-leader-could-face-trial.html?_r=0
[9] Walker "Absent bodies and present memories: marking out the everyday and the future in Eastern Sri Lanka." 2015 *Identities* 109-123.
[10] Weliamuna "Discovering The White Van In A Troubled Democracy: An Analysis Of Ongoing Abductions In Sri Lanka" Retrieved from http://dbsjeyaraj.com/dbsj/archives/5855 (accessed 22-03-2012).
[11] UN Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011.
[12] UN General Assembly Report of the Working Group on Enforced or Involuntary Disappearances 4 August 2014 A /HRC/27/49 5.
[13] While genocide occurred in Rwanda in 1994, the state was involved in the actions that took place, and the actions that were perpetrated on many of the victims could be classified as disappearances.

examines their practice. It examines what enforced disappearance is and why it is defined usually as a crime committed by states. It examines the exception in the Rome Statute of the International Criminal Court that permits an individual who belongs to a political organisation to be prosecuted where disappearances have been perpetrated systematically or on a widespread basis as a crime against humanity.[14]

The article examines why states practise enforced disappearances globally, and looks briefly at the historical rise of the practice through World War II, in Latin America in the 1960s and 1970s, and as part of the War on Terror in the Post 9/11 Era.

The article also examines what has been happening in South Africa to deal with disappearances that occurred during the Apartheid era. Through the examination of the 1983 disappearance of Nokuthula Aurelia Simelane, the difficulties of families of disappeared persons are examined in their quest for truth and justice. The article reviews the Truth and Reconciliation Commission (TRC) process dealing with her case and the attempts to see prosecutions since then, as well as to find her remains. The case reveals the obstacles, delays and problems faced by families of the disappeared in South Africa, which are not atypical, but reflective of the circumstances other families find themselves in many other parts of the world.

The article also examines the mandate and functioning of the international institutions that exclusively deal with enforced disappearances. This is because the Simelane case has been taken up by the WGEID. Thus, the roles of the WGEID and the UN Committee on Enforced Disappearances (CED) are examined, including the way they coexist, interact and work with states, amongst others, to prevent and eradicate the practice of enforced disappearance.

The article further reviews the rights of victims to truth, justice and reparations to determine what advances have been made, and what the rights of families of the disappeared are as far as truth, justice and reparations. Various conclusions and recommendations are made to ensure that more is done to root out enforced disappearances, and more is done to make sure that the rights victims have in theory are realized in practice.

[14] Sarkin "The Role of the International Criminal Court (ICC) in Reducing Massive Human Rights Violations Such as Enforced Disappearances in Africa: Towards Developing Transitional Justice Strategies" 2011 *Studies in Ethnicity and Nationalism* 130-142.

2 CONTEXTUALISING ENFORCED DISAPPEARANCES TODAY

The term "disappeared" first emerged as a description of victims of state-sanctioned abductions coupled with denial of arrest.[15] The expression comes from the translation of the Spanish term *desaparecido,* which was used to describe the victims of the practice employed by Guatemalan death squads who abducted and assassinated anti-government forces.[16] The phrase "enforced disappearance" comes from the Spanish *desaparacion forzada*.[17] It became a widely used term in Latin America to describe the widespread cases of enforced disappearance.[18] The practice reached epidemic proportions in the Latin American region in the 1960s and 1970s.[19] As the Inter-American Court of Human Rights (IACHR)[20] held in its landmark decision *Velásquez-Rodriguez v Honduras*[21] in 1988:

> 'Disappearances are not new in the history of human rights violations. However, their systematic and repeated nature and their use not only for causing certain individuals to disappear, either briefly or permanently, but also as a means of creating a general state of anguish, insecurity and fear, is a recent phenomenon. Although this practice exists virtually worldwide, it has occurred with exceptional intensity in Latin America in the last few years.'[22]

While this finding was made in 1988 it still resonates strongly today. Latin America no longer sees the practice that existed in 1960s and 1970s, but the phenomenon is still used as noted by the Court, and still occurs all around the world.

Enforced disappearances are crimes usually perpetrated by states.[23] It is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorisation, support or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment

---

[15] Berman and Clark "State Terrorism: Disappearances" 1982 *Rutgers Law Journal* 531.
[16] Berman and Clark "State Terrorism: Disappearances*"* 1982 *Rutgers Law Journal* 531. See also Anderson *Dossier Secreto: Argentina's Desaparecidos and the Myth of the "Dirty War* (1993).
[17] U.N. Economic and Social Council Commission on Human Rights. *Civil and Political Rights, Including Questions of: Disappearances and Summary Executions*, ¶ 8, U.N. Doc. E/CN.4/2002/71 (Jan. 8, 2002) (*prepared by* Manfred Nowak).
[18] See further Nollkaemper and van der Wilt (eds) *System Criminality in International Law* (2009).
[19] Anderson "How Effective is the International Convention For the Protection of All Persons From Enforced Disappearance Likely To Be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance*"* 2006 *Melbourne Journal of International Law* 245, 246.
[20] Méndez and Vivanco "Disappearances and the Inter-American Court: Reflections on a Litigation Experience" 1990 *Hamline Law Review* 507–78 and González The Crime of Forced Disappearance of Persons According to the Decisions of the Inter-American Court of Human Rights 2010 *International Criminal Law Review* 475-489.
[21] *Velásquez-Rodriguez Case*, Judgment of July 29, 1988, Inter-Am. Ct.H.R. (Ser. C) No. 4 (1988).
[22] Paragraph 149.
[23] Ott *Enforced Disappearance in International Law* (2011) 9.

of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.[24]

Enforced disappearances are today however not only the preserve of states. Non-state actors such as insurgency or paramilitary groups are now also carrying out such practices.[25] Their crimes are by definition not enforced disappearances, as that name is reserved for such acts perpetrated by states.[26] State action is a critical part of what constitutes an enforced disappearance. Such acts are called acts analogous to disappearances, although some believe that the definition of the Rome Statute now constitutes the definition of enforced disappearance. Regardless, the definition of an enforced disappearance has been expanded in the Rome Statute[27] of the International Criminal Court (ICC),[28] to include non-state actors as well, even though the definition of an enforced disappearance has traditionally only been applied to actions carried out by states or their agents.[29] The Rome Statute[30] defines an enforced disappearance in a much wider way than other definitions do. It defines enforced disappearance to mean "the arrest, detention or abduction of persons by, or with the authorisation, 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."[31] However, the ICC is only able to prosecute disappearances where they occur within the context of crimes against humanity. For that to

[24] International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/77, art. 1.1, U.N. Doc. A/RES/61/77 (Dec. 20, 2006).
[25] See for example Rozema "Forced Disappearance in an Era of Globalization: Biopolitics, Shadow Networks, and Imagined Worlds" 2011 *American Anthropologist* 582-593.
[26] Giorgou "State Involvement in the Perpetration of Enforced Disappearance and the Rome Statute" 2013 *Journal of International Criminal Justice* 1001-1021.
[27] South Africa signed the Rome Statute on 17 July 1998 and became the 23rd state party to the treaty when it ratified it on 27 September 2000. South Africa incorporated the Rome Statute into its domestic law when it enacted the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. See Du Plessis " Bringing the International Criminal Court home- the implementation of the Rome Statute of the International Criminal Court Act 2002" 2003 SACJ 2.
[28] Sarkin "The Role of the International Criminal Court (ICC) in Reducing Massive Human Rights Violations Such as Enforced Disappearances in Africa: Towards Developing Transitional Justice Strategies" 2011 *Studies in Ethnicity and Nationalism* 130-142.
[29] Sarkin "The Role of the International Criminal Court (ICC) in Reducing Massive Human Rights Violations Such as Enforced Disappearances in Africa: Towards Developing Transitional Justice Strategies" 2011 *Studies in Ethnicity and Nationalism* 130-142.
[30] Sarkin "Enhancing the Legitimacy, Status and Role of the International Criminal Court by Using Transitional Justice or Restorative Justice Strategies" 2011-12 *Interdisciplinary Journal of Human Rights Law* 83-102.
[31] Rome Statute of the International Criminal Court art. 7(2)(i), July 17, 1998, 2187 U.N.T.S. 90. See Giorgou "State Involvement in the Perpetration of Enforced Disappearance and the Rome Statute" 2013 *Journal of International Criminal Justice* 1001-1021.

occur, the disappearances must have occurred in a systemic or widespread fashion. In *Kupreškić* the International Criminal Tribunal for the former Yugoslavia (ICTY) held that in terms of its statute an enforced disappearance is a crime against humanity as long as it is "carried out in a systematic manner and on a large scale."[32] Thus, in terms of the ICTY, ICTR and ICC statutes even a political organisation can be held responsible for a disappearance. There is no need for state action of any description for the ICC to be able to prosecute.

Disappearances are however most commonly employed as state policy during times of political opposition, domestic unrest or armed conflict. They are often used to silence political adversaries.[33] They are used to punish opponents, as well as a means to deter others that may have philosophical or political differences with the state. Its use not only causes confusion amongst the people about exactly who is committing the atrocities, but it also eliminates individuals deemed a threat to the state, and intimidates others. Disappearances are a means by which a state can get rid of opponents, without the publicity of a trial. For the victims and their families, enforced disappearances are particularly horrific.[34] They "serve as a double form of torture, in which victims are kept ignorant of their own fates, while family members are deprived of knowing the whereabouts of their detained loved ones."[35]

Enforced disappearances, while having occurred throughout human history, only came to the fore as a specific tool in Germany during World War II.[36] The practice re-emerged in Latin America in the 1960s and 1970s.[37]

[32] Prosecutor v Kupreški*ć*, Case No. IT-95-16-A, Judgment of Trial Chamber, ¶ 566 (Jan. 14, 2000). See also Prosecutor v Kvočka, Case No. I-98-30/1-T, Judgment of Trial Chamber, ¶ 208 (Nov. 2, 2001).
[33] Robins "A Participatory Approach to Ethnographic Research With Victims of Gross Human Rights Violations: Studying Families of the Disappeared in Postconflict Nepal" in Ozerdem and Bowd (eds) *Participatory Research Methodologies in Development and Post Disaster/Conflict Reconstruction* (2010) 181–196. On the range of reasons for human rights violations see Mitchell and McCormick "Economic and Political Explanations of Human Rights Violations" 1988 *World Politics* 476-498.
[34] O'Connell "Gambling With the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?" 2005 *Harvard International Law Journal* 295, 296.
[35] Punyasena "The Façade of Accountability: Disappearances in Sri Lanka" 2003 *Boston College Third World Law Journal* 115–158, 117.
[36] Vranckx *A Long Road Towards Universal Protection Against Enforced Disappearance (2007)* 3.
[37] Aguilar "The Disappeared and the Mesa de Diálogo in Chile 1999-2001: Searching for Those Who Never Grew Old" 2002 *Bulletin of Latin American Research* 413-424; Guest *Behind the Disappearances* (1990).

3 DEALING WITH DISAPPEARANCES FROM THE APARTHEID ERA IN SOUTH AFRICA TODAY

In South Africa it is believed that as many as 2,000 people might have been disappeared during the Apartheid years. The Khulumani Apartheid Reparations Database at present contains the records of the disappearance of 1, 200 people.[38] While 477 of these cases were officially recognised by the TRC, those working in the field have estimated that there are another 1,500 cases that are not officially recorded.[39] However, the WGEID that has been seized with about 54, 000 cases since 1980, has only ever dealt with twelve cases from South Africa.[40] 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. Thus, surprisingly, the WGEID has only one South African case at present. The Working Group transmitted this case to the Government of South Africa in 2014. This case is a useful entry point into the issues families face domestically, and why some of them choose to use the international human rights system, and how that system can be of assistance to them. The case also reflects the problems often faced by families in their search for their loved ones, their quest to learn the truth about what happened to them, and in their attempts to obtain justice.

The case in the books of the WGEID concerns South African Ms Nokuthula Aurelia Simelane, who was 23 years of age when she disappeared in 1983. A film called *Betrayal* has been made about her disappearance.[41] She was last seen some five weeks after being abducted, in the boot of a policeman's motor vehicle in Johannesburg. The Security Branch of the South African Security Police and the police from Soweto are alleged to be responsible for her disappearance.[42] At a TRC amnesty hearing in 1997,[43] in which a number of people

[38] http://www.khulumani.net/truth-memory/item/519-khulumani-remembers-the-unresolved-loss-and-pain-of-families-affected-by-enforced-disappearances-on-this-anniversary-of-international-day-for-the-disappeared.html
[39] Aronson "The Strengths And Limitations of South Africa's Search For Apartheid-Era Missing Persons." 2011 *International Journal of Transitional Justice* 262-281.
[40] United Nations Working Group on Enforced and Involuntary Disappearances Report 4 August 2104 A/HRC/27/49 accessed at http://daccess-ddsny.un.org/doc/UNDC/GEN/G14/099/81/PDF/G1409981.pdf?OpenElement.
[41] "*Betrayal*" SABC 2006.
[42] UN Working Group on Enforced or Involuntary Disappearances Post-sessional document 103rd session (7–16 May 2014) A/HRC/WGEID/103/1 25 July 2014 17.
[43] Her case is reported in the TRC Report, in volume 6, section 3, chapter 1, paras 199-206 and in TRC Report, volume 2, chapter 3, paras 287-92.

applied for amnesty for her torture and abduction,[44] the evidence was that she was an *Umkhonto we Sizwe* (MK)[45] courier, who was sent to a meeting at the Carlton Centre in Johannesburg.[46] She was taken to the Norwood Security Branch Flats in Johannesburg where she was tortured for a number of days. She was then taken to a farm in Northam in the northern part of the country, where she was again extensively and severely tortured.[47] The former commander of the Soweto Intelligence Unit (SIU), who was later denied amnesty for the torture, but granted amnesty for her abduction,[48] told the TRC that his unit had used her as a spy, and that she had not been killed, but had been sent back to Swaziland to spy on her ANC colleagues. Conflicting testimony was that she was shot and killed in December 1983, and buried in Rustenburg.[49] The decision of the Amnesty Committee[50] was that:

> 'we are satisfied that Ms Simelane was abducted by members of the South African Security Police, including some of the Applicants, acting under the command of Coetzee on or about Saturday, 11 September 1983 at the Carlton Centre, Johannesburg. During her subsequent detention for a period of approximately five weeks, she was continuously and very seriously assaulted by the group of Security Police, under the command of Coetzee, who held her captive. All attempts to extract information concerning MK or its operations as well as attempts to recruit her to become a Security Police informer, were fruitless. Due to the prolonged and sustained assaults, Ms Simelane's physical condition deteriorated to the extent that she was hardly recognisable and could barely walk. Ms Simelane was last seen where she was lying with her hands and feet cuffed in the boot of Coetzee's vehicle. She never returned to her familiar environment in Swaziland after having been abducted by the South African Security Police and had disappeared since. It is

[44] W H Coetzee (AM 4122/96), A Pretorius (AM 4389/96), J F Williams (AM4 375/96), J E Ross (AM 4377/96), F B Mong (AM 4154/96), N L Mkhonza (TRC ref. AM5420/97), M M Veyi (AM 5421/97), and M L Selamolela (AM 5419/97).

[45] MK was the armed wing of the African National Congress (ANC).

[46] Mashego "All I want are my daughter's remains" *City Press* 16-04-2006.

[47] Mashego "All I want are my daughter's remains" *City Press* 16-04-2006.

[48] Amnesty was denied for the torture to those who applied for amnesty for that crime because the Committee found that the applicants had not made full disclosure about 'the duration and extent of Ms. Simelane's torture' (Amnesty Decision AC/2001/185). The Committee found that "the evidence of Coetzee, Pretorius and Mong is untruthful insofar as it concerns the duration and extent of Ms Simelane's torture whilst she was in the custody of the Security Police, especially on the farm. Coetzee, Pretorius and Mong have accordingly failed to make a full disclosure of all relevant facts in regard to this aspect of the matter as required by the provisions of Section 20 of the Act. Their applications are accordingly REFUSED on this aspect." Some alleged perpetrators never applied for amnesty for the crimes committed against her. No one applied for amnesty for her killing.

[49] Jobson "Exploring the Legacy of Nokuthula Simelane in Bethal, Mpumalanga: A Khulumani Youth Dialogue from the Khulumani Support Group" 12 March 2011 http://www.khulumani.net/truth-memory/item/429-exploring-the-legacy-of-nokuthula-simelane-in-bethal-mpumalanga-a-khulumani-youth-dialogue-held-on-saturday-march-12-2011.html.

[50] On the amnesty process generally see Sarkin "An evaluation of the South African Amnesty Process" in Chapman and van der Merwe (eds) *Truth and Reconciliation: Did the TRC Deliver* (2008) 55. See also Sarkin "The Amnesty Hearings In South Africa Revisited' in Werle (ed) *Justice In Transition – Prosecution And Amnesty In Germany And South Africa* (2006) 43-53 and Sarkin *Carrots And Sticks: The TRC and The South African Amnesty Process* (2004).

> not necessary for the purpose of this matter to make a definitive finding on the eventual fate of Ms Simelane.'[51]

Nokuthula Simelane's family has been working on her case for many years. Her case was reported to the police in 1996 under case number Priority Investigation: JV Plein: 1469/02/1996. Her family appeared before the TRC. Her father told the TRC's Human Rights Violations Committee in 1997 that: "All that we want now are her remains so we could bury Nokuthula in a decent way. In our culture we bury people decently and we would like to do that."[52] Her family has been pressing for many years for a criminal case to be brought against those believed to be responsible for her abduction, torture and death, or for a judicial inquest to be held. They have been told on numerous occasions that the case is still being investigated by the NPA.

In 2007, Nokuthula Simelane's sister[53] together with a number of others sued the South African government over its pardon and amnesty policy. The family, and others, viewed the new policy adopted in 2005 as an attempt to grant additional amnesties and pardons to those who had not been granted amnesty by the TRC. In *Nkadimeng and others v The National Director of Public Prosecutions,*[54] the applicants alleged that the new policy was in violation of international law, as well as South Africa's Constitution. In December 2008, Judge MF Legodi agreed with the applicants that the new policy was unconstitutional in that the policy intended to replicate the TRC, but without a transparent process. He found the rules to be a '"copy cat" of the TRC's guidelines and "a recipe for conflict and absurdity"[55] and that there was a duty on the prosecuting authorities to investigate and prosecute cases when there was sufficient evidence to do so.[56]

---

[51] AC/2001/185.
[52] 7 June 1997, http://www.doj.gov.za/trc/hrvtrans/leandra/simelane.htm.
[53] Thembisile Phumele Nkadimeng, who is in 2015, the Executive Mayor of the City of Polokwane.
[54] TPD case no 32709/07.
[55] Paragraph 15.4.3.1 and paragraph 15.5.3.
[56] This is not the only case that has dealt with the legacy of the TRC and the question of amnesty and pardons. In *Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC) the Constitutional Court examined the power to grant pardons. In this case 384 incarcerated members of the Inkatha Freedom Party sued the Minister of Justice for not having taken a decision on their pardon applications despite the passage of some four years since they had sent in applications to the President. While the High Court and the Supreme Court of Appeal ruled in favour of the applicants the Constitutional Court found that the pardon power vested with the President and not the Minister and thus dismissed the applicants case. An earlier case on pardon powers was *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC). This case reviewed President Mandela's decision in 1994 to pardon women in prison who had children favourably. The Special Dispensation Process, announced by President Thabo Mbeki on 21 November 2007, to grant further pardons was interdicted on 29

In October 2010 the South African Missing Persons Task Team (MPTT) was requested to explore the farm in question at Northam, to determine whether Nokuthula Simelane's remains could be found, and to check mortuary records for possible leads. However, in October 2012 the MPTT, after exploring the farm in question, found that they could not find a burial site without providing more specific information. In January 2013, her family formally requested that an inquest be held, but have been told on a number of occasions thereafter, that the investigations were continuing. In March 2013, the remains of a young woman were found during the construction of a shopping mall in Brits. DNA tests were inconclusive. These remains were sent to the International Commission on Missing Persons in Bosnia-Herzegovina for further testing, but the results indicated that it was not Ms Simelane.

The importance of this case is that it is representative of many of the 500 cases submitted by the Truth and Reconciliation Commission to the Government for further investigation and possible prosecution. It has been alleged that the bulk of these cases have not been seriously investigated, and that political interference is the reason why the Priority Crimes Litigation Unit of the National Prosecuting Authority (NPA) has not prosecuted these cases, despite their attempts to do so.[57] These cases were supposed to have been investigated and at least some prosecuted after the TRC concluded its work.[58] For this reason, in 1999, a working group named the Human Rights Investigative Unit (HRIU) was created within the NPA.[59] It was mandated to review, investigate and prosecute cases in which perpetrators had been denied amnesty or in which perpetrators had not applied for amnesty. The HRIU continued operations until 2000, but instituted no prosecutions. Its cases were taken over by the Special National Projects Unit (SNPU), which existed until 2003, but also instituted no prosecutions. On 15 April 2003, former President Thabo Mbeki tabled the final TRC Report in Parliament

April 2009. See *Centre for the Study of Violence and Reconciliation v President of the RSA* [2009] ZAGPPHC 35. An appeal against the interdict was unanimously dismissed by the Constitutional Court on 23 February 2010 and reported in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC). The celebrated case that determined that the amnesty process of the TRC was constitutional was *Azanian Peoples Organization (AZAPO) v President of the RSA* 1996 4 SA 672 (CC). An interesting case was that of *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC) in which Robert McBride attempted unsuccessfully to get the Court to order, that because he had obtained amnesty, he could no longer be called a murderer.

[57] See the affidavits of former NDPP Advocate Vusi Pikoli and that of former head of the PCLU Advocate Anton Ackerman filed in the 2015 application concerning the disappearance of Ms Simelane.

[58] TRC Report, volume 5 311. See Amnesty International (2003) *South Africa: Truth and Justice: Unfinished Business in South Africa*. https://www.amnesty.org/en/documents/afr53/001/2003/en/ (accessed 23-03-2015)

[59] Bubenzer *Post-TRC Prosecutions in South Africa* (2009) 77.

and directed the National Director of Public Prosecutions (NDPP) to institute prosecutions that arose out of the TRC process. In May 2003 then NDPP, Bulelani Ngcuka, determined that all cases emerging from the TRC, where there had been no amnesty applied for or where amnesty had been refused, were 'priority crimes.' Thus, a Task Team was established to look into the approximately 500 cases from the TRC. The NPA reported that the PCLU conducted an audit of around 300 cases that had been submitted in 1999, and that 167 were finalised, because it was found that no prosecutions could be brought. It identified 150 cases, including the Simelane case, as requiring investigation,[60] although it seems as though some wanted these cases to be investigated more to find the "missing person," rather than to prosecute.[61] For that reason, a Missing Persons Task Team (MPTT) was established.[62] The TRC Unit was transformed into the Priority Crimes Litigation Unit (PCLU).[63] Advocate Anton Ackerman headed this unit, which in 2006 was working on 16 cases, of which five were deemed high priority, and were at an advanced stage of investigation.[64] However, Ackerman was removed from this unit and posted elsewhere because of his supposed commitment to prosecute certain cases, including, so it was believed, a number of ANC leaders. Ackerman states in his 2015 affidavit in the Simelane case that: "I believe that it can safely be assumed that the NDPP was instructed at a political level to suspend these cases." Advocate Vusi Pikoli, the then NDPP, was suspended because of suspicions that he was targeting ANC leaders for prosecution, because of their roles in committing human rights violations during the Apartheid era.[65] Pikoli, in the 2015 Nkadimeng application filed before the High Court, notes that he was suspended because of his possible prosecution of apartheid cases. He states in his affidavit that: "In this affidavit I set out evidence that reflects such political interference, I also set out the serious impact that such interference had on the pursuit of the TRC cases by the National Prosecuting Authority." "I confirm that there was political interference that effectively barred or delayed the investigation and possible prosecution of the cases recommended for prosecution by the TRC, including the kidnapping, assault and murder of Nokuthula Aurelia Simelane in the case: Priority Investigation: JV Plein 1469/02/1996."[66]

[60] Terreblanche "Apartheid Massacres Go to Court" *The Sunday Independent* 23-04-2006.
[61] See NPA Priority Crimes Litigation Unit https://www.npa.gov.za/?q=node/17 (accessed 3 January 2015). See https://www.npa.gov.za/sites/default/files/pclu/About%20PCLU%20signedoff.pdf
[62] See generally on the work of the MPTT, Davison, Benjedou, and D'Amato "Molecular Genetic Identification of Skeletal Remains of Apartheid Activists in South Africa" 2008 *African Journal of Biotechnology* 4750-4757.
[63] The PCLU was created by Presidential proclamation on 23 March 2003.
[64] Bubezer *Post-TRC Prosecutions in South Africa* (2009) 29.
[65] See the affidavits in the Simelane case.
[66] See the affidavits in the 2015 Simelane case.

What has been told to the Simelane family by the NPA is that the NPA is still reviewing the case for a possible prosecution, even though many years have passed since the case was reported, and many years after the TRC process was concluded. However, prevarication and delay have been the order of the day in dealing with these cases.[67] Very few cases have been prosecuted[68] – those that were prosecuted were cases that were in the process of being prosecuted, but were interrupted by the amnesty process. A small number of those cases were taken up again after the applicants were denied amnesty, but the courts then acquitted almost all of the accused. One of the few cases that started afresh after the amnesty process was of five people, including Adriaan Vlok, a former Minister of Police, and Johan van der Merwe, a former Commissioner of Police, for the attempted assassination of Reverend Frank Chikane. The five accused were convicted and received suspended sentences after plea deals in August 2007. Various steps have being taken to ensure that the other cases were not prosecuted, partly because of the fear that prosecuting such cases would see calls for even-handedness,[69] and thus the possibility that crimes committed by ANC members would have to be prosecuted as well.[70] Thembi Nkadimeng, Nokuthula Simelane's sister, wrote in 2013 that many obstacles had been placed in the path of the family in their quest to get answers and find out the truth about what happened to Nokuthula Simelane. Thembi Nkadimeng wrote that:

> 'the prosecutors claimed that the police were refusing to provide investigators. It took a high-level intervention for an investigating officer to eventually be appointed to the case in 2010 – but apparently the docket had gone "missing." Three years later, even after finding the docket, there was no progress. It was clear to me that the authorities were not going to investigate the case seriously, let alone prosecute anyone. They even refused to charge those police officers involved in the kidnapping who did not apply for amnesty. At the beginning of 2013, I instructed my lawyers to demand the holding of a judicial inquest into her death. This request was refused. After 17 years of idleness, the prosecutors advised us that their investigations were still not yet complete. We do not believe them. We have lost all faith in the prosecutors and

[67] Sarkin "To Prosecute or Not to Prosecute? Constitutional and Legal Issues Concerning Criminal Trials" in Villa-Vicencio and Doxtader (eds) *The Provocations of Amnesty: Memory, Justice and Impunity* (2003) 237-264.

[68] Redpath "Failing To Prosecute? Assessing The State of the National Prosecuting Authority in South Africa" *Institute for Security Studies Monographs* (2012): 108.

[69] A criticism often levelled at transitional justice processes is that they are one sided as often the victors prosecute those who lost the conflict. Thus, those who are prosecuted see these processes as political. Pursuing violators in an even-handed manner on all sides is critical to achieve the goals of a successful process.

[70] A secret report "Report: Amnesty Task Team" drafted by the NPA in 2004 noted that an "Amnesty Task Team" (ATT) had been appointed. In the affidavit filed by Advocate Vusi Pikoli, then NDPP, to the Gihwala Commission, that was reviewing his fitness to hold office in 2008, he noted the attempts by various politicians to prevent prosecutions for this reason.

> police. They have betrayed our trust. They now claim that they are occupied with inquiries, which could conceivably drag on indefinitely while witnesses and suspects grow old and die. We do not know why the authorities in the new South Africa would turn their backs on one of their own.'[71]

As this statement indicates, the family of Ms Simelane, in spite of the difficulties they have faced, have been robust in their determination to get action and answers.

Interestingly, in the context of the debate about damaging and defacing statues in South Africa in 2015, the statue of Ms Simelane, that had been erected in the Bethal cultural precinct by the Mpumalanga Provincial Government in November 2009, was attacked and damaged in January 2011.[72] In October 2011 the Bethal Magistrate's Court convicted a 25-year old white man, Cornelius van Tonder, for the crime.[73] He was ordered to pay a fine of R15, 000 or face three years imprisonment. He also had to pay for the extensive damage that had been caused to the statue. The damage had been caused when he had tied a rope around the statute and had attempted to drive off with the statue dragging behind a vehicle.[74] The statue of Nokuthula Simelane was again defaced by having paint thrown over it on 16 April 2015.

4 INTERNATIONAL INSTITUTIONS DEALING WITH DISAPPEARANCES

4 1 The UN Working Group on Enforced or Involuntary Disappearances (WGEID)

The Simelane case is before the WGEID. This is because the family filed the case with the body to try and open a channel of communication with the South African government in order to find their loved one. This avenue was open to them as the WGEID is the only international institution with a global mandate to tackle disappearances. It was the first United Nations human rights thematic special procedure established with a universal mandate. This occurred on 29 February 1980, following the numerous cases of enforced disappearances that originated in various parts of the world during the 1960s and 1970s.

---

[71] Thembi Nkadimeng "My sister's heart" *City Press* 26-12- 2013. http://www.citypress.co.za/columnists/sisters-heart/ (accessed 12-02-2014).

[72] Jobson "Exploring the Legacy of Nokuthula Simelane in Bethal, Mpumalanga: A Khulumani Youth Dialogue from the Khulumani Support Group" 12-03-2011 March. http://www.khulumani.net/truth-memory/item/429-exploring-the-legacy-of-nokuthula-simelane-in-bethal-mpumalanga-a-khulumani-youth-dialogue-held-on-saturday-march-12-2011.html (accessed 12-02-2014)

[73] http://www.khulumani.net/truth-memory/item/547-guilty-verdict-for-vandalising-the-memorial-statue-of-nokuthula-simelane.html (accessed 12-02-2014).

[74] http://www.khulumani.net/khulumani/in-the-news/item/557-hit-him-in-the-pocket-man-who-defaced-anc-statue-must-pay.html (accessed 12-02-2014).

While there were earlier working groups set up to deal with specific situations, the earlier mechanisms were created to deal with a specific country or region. The Resolution creating the WGEID established it for a period of one year "to examine questions globally relevant to enforced or involuntary disappearances of persons."[75] The Economic and Social Council renewed it annually until 1986, when the Economic and Social Council began renewing the Working Group's mandate biennially. Since 1992, it has been renewed for three years at a time.

Until 2012, the WGEID did not deal with situations of international armed conflict. It does now, as a result of a change to its working methods. This occurred after the WGEID came to realise that the distinction between international and non-international armed conflict when dealing with disappearances was problematic, and did not make sense. Until 2010, the WGEID did not deal with matters that occurred before 1945. This was the case, supposedly on the basis that it could not deal with matters before the UN came into being, and because human rights protection supposedly only originated from the formation of the UN. From 2010, the WGEID changed this, because of the realisation that the continuous human rights violations principle made such a position untenable, and because it accepted that the origins of human rights law is earlier than 1945. However from 2010, the WGEID took country situations from before 1945, but not cases from before then, because of the concern particularly by secretariat of the WGEID, that it would be overwhelmed by thousands of cases, particularly from the Spanish civil war era.[76] The Working Group later changed its position, so that it now takes cases as well as country situations from before 1945. The fear that thousands of pre-1945 cases would be filed has not transpired.

One of the mandates of the Working Group is to assist relatives, such as the Simelane family from South Africa, to determine the fate and whereabouts of their loved ones. The WGEID examines reports of disappearances received from relatives of disappeared persons or human rights organisations acting on their behalf. The Working Group deals with the cases on a purely humanitarian basis, irrespective of whether the government concerned has ratified any relevant human rights treaty, providing an individual complaints procedure. It acts as a

[75] Mandate: Working Group on Enforced or Involuntary Disappearances, *available at.* http://www2.ohchr.org/english/issues/disappear/index.htm. (accessed 12-02-2014).
[76] Linares "Francoism Facing Justice Enforced Disappearances before Spanish Courts" 2013 *Journal of International Criminal Justice* 463-483.

channel of communication between the families of disappeared persons and governments, and has successfully developed a dialogue with many governments with the aim of resolving cases of disappearances. Its functions do not include establishing individual or state responsibility or dealing with non-State actors. The WGEID does not judge, issue sanctions, or carry out exhumations. The ability of the WGEID to impact cases like that of the Simelane family is extremely limited. Its mandate is limited and it has very few resources at its disposal to play a meaningful role on the cases, and on the situations that occur around the world.

The main work of the WGEID consists of dialoguing with states to achieve results. Most states cooperate with the WGEID. Thus, of the approximately 90 states where the WGEID had cases in 2009, only Burundi, Guinea, Israel, Mozambique, Namibia, Seychelles and Timor-Leste, as well as the Palestinian Authority, never replied to the Working Group's communications.[77] Thus, generally the states where there have been disappearances accept and acknowledge the WGEID.

The second mandate entrusted to the Working Group is to ensure compliance by states of the Declaration on the Protection of All Persons from Enforced Disappearance following its adoption by the United Nations General Assembly in 1992.[78] Thus, the Working Group was entrusted with monitoring the progress of states in fulfilling their obligations flowing from the Declaration and providing assistance to them in their implementation. The Declaration is a fundamental document in the fight against enforced disappearance setting forth a set of rules that all member states of the United Nations are called upon to apply as a minimum to prevent and address this practice whenever and wherever it occurs. States generally, at least publically, say they comply with the Declaration on the Protection of All Persons from Enforced Disappearance,[79] even though on the face of it the Declaration is non-binding. However, the WGEID can only monitor obligations if there are obligations.[80] In other words, the rights in the declaration were seen to be ones that could be and ought to be monitored. The General Assembly did not differentiate between different types or levels of seriousness

[77] U.N. Doc. A/HRC/10/9 ¶ 1(Jan. 5, 2009), *available at* http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/10/9/Add.1&Lang=E.
[78] UN General Assembly, *Declaration on the Protection of All Persons from Enforced Disappearances*, 12 February 1993, A/RES/47/133
[79] Declaration for the Protection of all Persons from Enforced Disappearances, G.A. Res 47/133, ¶1.1, U.N. Doc A/Res/47/133 (Dec. 18, 1992).
[80] Pérez Solla, Maria Fernanda, Enforced Disappearance in International Human Rights, McFarland & Company, 2006 10.

of acts of enforced disappearances but stressed the importance of devising "an instrument which characterises all acts of enforced disappearance of persons as very serious offences and sets forth standards designed to punish and prevent their commission."[81]

4 2 The Committee on Enforced Disappearances

For many years the WGEID was the only international body focused exclusively on disappearances. This changed when the Committee on Enforced Disappearances, which is provided for in article 26(1) of the International Convention for the Protection of All Persons from Enforced Disappearance, was established[82] in 2011.[83] The CED can only work on matters and cases that come from the 46 states, or about a quarter of states around the world, that have ratified the Convention so far.[84] As South Africa has surprisingly neither signed nor ratified the Convention, the Simelane family cannot approach this institution. In fact, victims in many countries where there are on-going disappearances are precluded from approaching the CED as their countries have not become part of this process. Thus, a critical challenge for victims globally is the small number of ratifications of the Convention. A further problem is the smaller number of states that have accepted the competence of the CED to take complaints. By 19 April 2015, 46 states had ratified and 94 countries had signed the Convention. Unfortunately, most of the 46 countries that have ratified the treaty do not represent those countries, with one exception (Mexico), where many new cases of enforced disappearances are occurring. Additionally, relatively few states that have ratified the treaty have accepted the competence of the CED to receive and examine individual complaints. Only a small number of states have accepted the CED's jurisdiction as far as inter-state complaints are concerned.

[81] Resolution 47/133 of 18 December 1992.
[82] The Conference of State Parties elected the first 10 members on 31 May 2011. Unfortunately there were only ten candidates for the ten places.
[83] Kyriakou "International Convention for the Protection of All Persons from Enforced Disappearance and Its Contributions to International Human Rights Law, with Specific Reference to Extraordinary Rendition" 2012 *Melbourne Journal of International Law* 424. See also Stevens "The International Convention for the Protection of All Persons from Enforced Disappearance – A Welcoming Response to a Worldwide Phenomenon with Limited Relief" 2010 *Journal of Contemporary Roman-Dutch Law* 368-386.
[84] As at 19 April 2015 94 States had signed the Convention.

The role of the CED is to ensure compliance with the new Convention.[85] Thus, it receives and considers reports from the state parties on the measures taken to give effect to the Convention.[86] The CED also receives requests by relatives of the disappeared persons or their legal representatives, their counsel or any person authorised by them, as well as by any other person having a legitimate interest, that a disappeared person should be sought and found as a matter of urgency. It receives and considers communications from or on behalf of individuals claiming to be victims of violations of provisions of the Convention by states that have expressly declared to recognise such competence of the CED, as well as receive and consider communications in which a state party claims that another state party is not fulfilling its obligations under the Convention. The CED also undertakes visits to a state, after consultation with the state concerned. If the CED receives information which appears to contain well-founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory under the jurisdiction of a state party, it may, after seeking all relevant information on the situation from the concerned state, urgently bring the matter to the attention of the General Assembly of the United Nations, through the Secretary-General.

For the treaty to become more meaningful and relevant for victims, especially where the bulk of disappearances actually occur, more states, and especially those that have many disappearances, ought to ratify the treaty.[87] However, ratifying the Convention is only the first step that states must take. Implementation needs to occur and much needs to be done to give effect to it and ensure that it is complied with. The families of the disappeared need this process to bolster their abilities to achieve their rights.

4 3 The Coherence and Alignment of the CED and WGEID

Many believed that a committee, as part of the architecture of the Convention, was unnecessary, given that the WGEID already addressed cases of enforced disappearances. Critics argued that because these two bodies occupied the same sphere, they would overlap and impede each other. However, as with many other thematic human rights issues like

[85] Anderson "How Effective is the International Convention For the Protection of All Persons From Enforced Disappearance Likely To Be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance" 2006 *Melbourne Journal of International Law* 245, 248.
[86] Phillipe and Sarkin "La Convention Internationale Pour La Protection De Toutes Les Personnes Contres Les Disparitions Forces" in Randall and Hottelier (eds) *Introduction Aux Droits De L'homme* (2014) 343 -360.
[87] Oberdörster "Why Ratify?: Lessons from Treaty Ratification Campaigns" 2008 *Vanderbilt Law Review* 681.

torture, racial discrimination, discrimination against women, rights of the child, and a series of civil, cultural, economic, political, and social rights, the CED and the Working Group coexist, and collaborate where possible to assist states in their fight against enforced disappearances. This collaboration takes into account that while the competence of the CED is limited to those states that have ratified the Convention, the Working Group is able to consider the situation in all countries. While the CED is competent to deal with those cases of enforced disappearances that took place after the entry into force of the Convention, the Working Group can examine all situations regardless of when they occurred. Thus, the functions performed by the WGEID and the CED are significantly different. The CED monitors a binding treaty, while the WGEID enforces a non-binding declaration and is designed primarily to provide humanitarian aid. The CED's central focus is treaty enforcement while the WGEID is concerned with maintaining channels of communication open between victims and states. Because the CED is enforcing a binding treaty, it has greater power than the WGEID to enforce obligations. The CED enforces these obligations through procedures that differ significantly from the procedures available to the WGEID. Nevertheless, the CED is limited to monitoring states that are party to the Convention. In contrast, the WGEID has a universal mandate. But rather than describing the WGEID and the CED as completely separate bodies or as bodies that overlap, but are in discord, it is more accurate to describe their interaction as complementary. The overlap that exists benefits victims of disappearances and increases deterrence. It provides additional safeguards for victims of disappearances. The procedures available to the CED in particular are designed to pressure states to find victims before they are permanently disappeared. Additionally, both mechanisms, although likely to occur in few states initially, should decrease impunity by heightening international pressure on states to prevent disappearances and to punish offenders. It ensures that states understand the overwhelming degree of international condemnation of these crimes. Most importantly, where there is overlap member states will be under heightened scrutiny and will have to answer to both the CED and the WGEID. When violations do occur, the CED will be able to follow through more forcefully than the WGEID. This should deter disappearances in both member and non-member states.

To ensure coherence the WGEID and the CED meet at least once a year and have other meetings as and when they are needed. The first annual meeting occurred on 9 November 2011 during the first session of the CED and while the WGEID was in session. At that meeting the two institutions agreed to coordinate their work and stressed their common goal

of combating enforced disappearances and ending impunity. Thus, the two groups are working on a complementary basis and work together to deal with issues related to enforced disappearances within their mandates.

5 THE RIGHTS TO TRUTH, JUSTICE AND REPARATIONS IN THE CONTEXT OF THE DISAPPEARED

The search, recovery, and specifically the identification of disappeared persons is arguably the newest form of transitional justice. Identification for many is embedded in the right to truth. Reconciliation in many places is unlikely without dealing with the missing.[88] There also needs to be truth, accountability, and reparations.[89] In addition, there is now a right to a remedy, which includes the right to an effective investigation, verification of the facts, and the disclosure of the truth.[90] States have a duty to investigate. The right to the truth requires a state to carry out a rigorous investigation to disclose, "what really happened, why did it happen, and who is directly and indirectly responsible."[91]

As far as the families of the disappeared are concerned, the Advisory Committee of the Human Rights Council has noted that the:

> 'issue of persons reported missing in connection with armed conflicts is today a harsh reality for countless families throughout the world, causing them tremendous suffering. 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.'[92]

The role of the victim in such processes should be at centre stage.[93] Victims[94] need to be involved from the beginning of such processes. They suffer severely in numerous ways and

[88] Daly "Truth Skepticism: and Inquiry into the Value of Truth in Times of transitional" 2008 *The International Journal of Transitional Justice* 27.
[89]Broneus "Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts" 2008 *Security Dialogue* 55 - 76.
[90] Naqvi "The Right to Truth in International Law: Fact or Fiction?" 2006 *International Review of the Red Cross* 245-273.
[91] Méndez & Bariffi "The Right to Truth, *International Protection" in Max Planck Encyclopaedia of Public International Law* Section 4.
[92] Human Rights Council Advisory Committee Sixth session 17 – 21 January 2011 Report on best practices in the matter of missing persons Prepared by the drafting group of the Advisory Committee on missing persons.
[93] Aldana "A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities" 2006 *Journal of Human Rights* 107-126.

their trauma and the hardship they have endured needs to be dealt with.[95] Victims' needs have been considered and taken into account in many countries although often insufficiently.[96]

In South Africa for example, exhumations have occurred to provide some relief to families attempting to bring certainty as to whether a person is dead or not. During the life of the TRC, it carried out a number of exhumations[97] to provide some measure of healing to victims' families.[98] However, much more could and should be done to search for those who had disappeared. More could have been done to provide assistance to the families. The Simelane case reflects the need of the families for answers. They seek the truth about what occurred to their daughter and sister.

Victims in all countries need to be part of whatever processes occur that affect them, so that their issues are put on the table from the start.[99] The rights to liberty, to autonomy, to informed consent, to equality, identity, and to the right to the truth amongst others, all need to be safeguarded. It is certainly in the public interest to deal with these issues.[100] Families want to be part of the process[101] and know what the process is.[102]

---

[94] Maguire and Shapland "Provision for Victims in an International Context" in Davis, and Skogan (eds.) *Victims of Crime* (2nd ed) (1997) 218.

[95] Sarkin "Integrating Transitional Justice and Demobilisation, Disarmament and Reintegration: The Need to Achieve Rehabilitation, Reintegration and Reconciliation for Child Soldiers and Child Victims of Enforced Disappearances" in Illse Derluyn et al (eds) *Remember: Rehabilitation and Reintegration of War-Affected Children* (2012) 77-104.

[96] Sarkin "Keep on Investigating until there is Clarification: Interview with UN Chair-Rapporteur Jeremy Sarkin on Disappearances in Nepal" 2011 *Informal Journal Nepal* 14.

[97] TRC Report on the Human Rights Violation Committee. Exhumations Volume 6, Section 4, Chapter 2 550-569. http://www.doj.gov.za/trc/ (accessed 27-05-2013).

[98] On these issues in the South African context see Stein, Seedat, Kaminer, Moomal, Herman, Sonnega, and Williams "The Impact of The Truth And Reconciliation Commission on Psychological Distress and Forgiveness in South Africa" 2008 *Social Psychiatry and Psychiatric Epidemiology* 462-468.

[99] Garcia-Godos and Lid "Transitional Justice and Victims' Rights before the End of a Conflict: The Unusual Case of Colombia" 2010 *The Journal of Latin America Studies* 487–516 and Robins "Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Post-conflict Nepal" 2011 *International Journal of Transitional Justice* 75-98.

[100] Antkowiak "Truth as Right and Remedy in International Human Rights Experience" 2002 *Michigan Journal of International Law* 977-987.

[101] Rubio-Marin, Sandoval & Diaz "Repairing Family Members: Gross Human Rights Violations and Communities of Harm" in Rubio-Marin (ed) *The Gender of Reparations* (2009) 215.

[102] See further Kovras and Loizides "Delaying Truth Recovery For Missing Persons" 2011 *Nations and Nationalism* 520–539.

The right to the truth is both an individual and collective right. Victims have the right to know the truth about violations that were committed against them.[103] As Naqvi notes:

> 'For victims and family, the right entails an obligation for the state to provide specific information about the circumstances in which the serious violation of the victim's human rights occurred, as well as the fate of the victim. For society in general, the right to the truth imposes an obligation on the state to disclose information about the circumstances and reasons that led to 'massive or systematic violations,' and to do so by taking appropriate action, which may include non-judicial measures.'[104]

Truth is important to deal with denials,[105] manipulations and myths surrounding what occurred in the past. Greater truth assists in knowing about the perpetrators, who, and how many victims there were, and what was done to the victims by the perpetrators. Individual families want to know what happened,[106] but society as a whole also has a right to know the truth. Knowing the truth is a fundamental aspect in ensuring an accurate historical record. Processes of truth recovery can assist in dealing with denials.[107] Certainly, truth recovery processes are useful, but is not a substitute for the search, recovery and identification of missing persons. In this regard Ignatief has noted that, "all a Truth Commission can achieve is to reduce the number of lies that can be circulated unchallenged in public discourse. In Argentina, its work has made it impossible to claim, for example that the military did not throw half-dead victims in the sea from helicopters. In Chile, it is no longer permissible to assert in public that the Pinochet regime did not dispatch thousands of entirely innocent people."[108] Thus, where forensic evidence exists there is much more certainty about what occurred than through a general truth examination process, such as a truth commission. Forensic analysis can provide, where DNA and other examinations are performed, specific and verifiable information about specific missing persons, where they are and what happened to them. In this way the right to the truth has become more accessible for the families of the missing.

---

[103] Klinkner and Smith "The Right to Truth, Appropriate Forum and the International Criminal Court" 2015 *Current Issues in Transitional Justice* 3-29.
[104] Naqvi "*The Right to the Truth in International Law: Fact or Fiction*?" 2006 International Review of the Red Cross 245, 260.
[105] See Blaauw and Lahteenmaki "Denial and silence' or acknowledgement and disclosure" 2002 International Review of the Red Cross 767-783.
[106] Boss *Loss, Trauma and Resilience - Therapeutic Work with Ambiguous Loss* (2006). See also Bonanno "Loss, Trauma, and Human Resilience: Have We Underestimated the Human Capacity to Thrive After Extremely Aversive Events?" 2004 *American Psychologist* 20-28.
[107]Klinkner "Proving Genocide? Forensic Expertise and the ICTY" 2008 *Journal of International Criminal Justice* 447-466.
[108] Index on Censorship "Articles of Faith" (1996) 113.

Besides the right to truth, the right to justice is also critical.[109] Obtaining justice is also a demand of many families of the missing or disappeared.[110] In this regard, a state has duties to prosecute and punish perpetrators of human rights and humanitarian law violations.[111] This is linked to the right to a remedy, including the right to an effective investigation, verification of the facts, and the disclosure of the truth. To this end, the then United Nations Human Rights Commission noted that "state parties should also take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate and impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life."[112]

The European Court of Human Rights[113] has held that a state's failure to conduct an effective investigation "aimed at clarifying the whereabouts and fate" of "missing persons who disappeared in life-threatening circumstances" constitutes a continuing violation of its procedural obligation to protect the right to life under Article 2 of the Convention.[114] In this regard, the comments of the WGEID in their General Comment on the Right to the Truth in Relation to Enforced Disappearances in 2010 are important. The Working Group noted that: "the relatives of the victims should be closely associated with an investigation into a case of enforced disappearance. The refusal to provide information is a limitation on the right to the truth."[115]

In South Africa in the case *S v Basson*[116] the Constitutional Court held that the NPA is under an international obligation to prosecute crimes committed during the apartheid era. It held that:

---

[109] Fletcher and Weinstein "Violence And Social Repair: Rethinking The Contribution Of Justice To Reconciliation" 2002 *Human Rights Quarterly* 573-639.
[110] Crew "If They Are Dead, Tell Us "'A Criminological Study Of The Disappearances In Kashmir" 2008 *Internet Journal of Criminology* http://www.internetjournalofcriminology.com/Crew_Disappearances_In_Kashmir.pdf (accessed 12-04-2014)
[111] Henckaert and Doswald-Beck *Customary International Humanitarian Law: Rules (2005)* 342.
[112] *Laureano v. Peru*, U.N. GAOR, Hum.Rts. Comm. 56th Sess. P8.3, U.N. Doc. CCPR/C/56/D/540/1993 (1996).
[113] Kyriakos "Enforced Disappearances on Cyprus: Problems and Prospects of the Case Law of the European Court of Human Rights" 2011 *European Human Rights Law Review* 190-199.
[114] *Cyprus v. Turkey* (Applic. no. 25781/94), ECHR Judgment (10 May 2001), para. 136. See further Keller and Heri "Enforced Disappearance and the European Court of Human Rights A 'Wall of Silence', Fact-Finding Difficulties and States as 'Subversive Objectors" 2014 *Journal of International Criminal Justice* 735-750.
[115] Paragraph 3.
[116] 2005 (1) SA 171 (CC).

> 'the State's obligation to prosecute offences is not limited to offences which were committed after the Constitution came into force but also applies to all offences committed before it came into force. It is relevant to this enquiry that international law obliges the State to punish crimes against humanity and war crimes. It is also clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes.'[117]

Besides the rights to truth and justice, other developments that have occurred have seen the right to reparations come to the fore.[118] They are delineated in the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law."[119] These principles should be more thoroughly understood and applied in all settings. States need to provide reparations that are integral and adequate to victims.[120] They ought to be determined in proportion to the gravity of the violation, taking into account, among other factors, the period of the disappearance, the conditions of the detention, and the suffering of the family and the victim.[121] Further monetary damages should take into consideration the damage that resulted from the disappearance including physical or mental harm, lost opportunities, loss of earnings, harm to reputation and legal costs. The perpetrators have an obligation to rehabilitate the victim. This must mean that medical and psychological care as well as other services must be given.

Public acknowledgements, in the form of tributes or commemorations of victims, in addition to a range of other measures are beneficial to those affected. Memorials and other sites of commemoration may assist in processes to restore dignity and honour the memory of those

---

[117] *S v Basson* Paragraph 37. This case ended in acquittal, as did a number of other prosecutions. See further Swart "The Wouter Basson Prosecution: The Closest South Africa Came to Nuremberg?' 2008 *Heidelberg Journal of International Law* 209-226. The first case brought against apartheid era violators was the Malan case (*S v Msane and 19 others*) that ended also in acquittals in 1996 for the accused including a former Minister of Defence for setting up and running hit squads during the Natal Violence. See Varney and Sarkin "Failing to Pierce the Hit-Squad Veil: An Analysis of The Malan-Trial" 1997 *South African Journal of Criminal Justice* 141-161. While the Court in 1996 did not accept the version of the prosecution, that version was shown to be true when a number of perpetrators applied for amnesty and told their versions about what had occurred. See Sarkin *Carrots and Sticks: The TRC and the South African Amnesty Process* (2004) 48, 49, 79-80, 262-268, and 289.

[118] Fulton "Redress for Enforced Disappearance Why Financial Compensation is not Enough" 2014 *Journal of International Criminal Justice* 769-786.

[119] On these issues in Bosnia and Herzegovina see Rostand "The Right to Compensation in Bosnia: An Unfulfilled Promise and a Challenge to International Law" 2000 *Cornell International Law Journal* 113.

[120] See further Robins "A Participatory Approach to Ethnographic Research With Victims of Gross Human Rights Violations: Studying Families of the Disappeared in Postconflict Nepal" in Ozerdem (ed) *Participatory Research Methodologies in Development and Post Disaster/Conflict Reconstruction* (2010) 181–196 and Sarkin *Colonial Genocide and Reparations Claims in the 21st Century: The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia, 1904-1908* (2009).

[121] ECOSOC Question of the Human Rights of all Persons Subjected to any Form of Detention or Imprisonment: Question of Enforced or Involuntary Disappearances, UN Doc. E/CN.4/1998/43(1998), para.73.

affected by enforced disappearance. Public apologies can also be helpful in addition to other reconciliation processes.[122]

6 CONCLUSION

While this article focused on South Africa and the Simelane case, enforced disappearance is a global phenomenon-affecting people in many countries across the world. Enforced disappearances affect the fundamental human rights of victims: both the person who is disappeared as well as those surrounding the person who is taken. Civil and political rights as well as economic, social and cultural rights, such as the right to liberty; the right to be recognised as a person; the right to life; the right to security; and the right to family life are just some of many rights affected by an enforced disappearance.

An enforced disappearance is recognised as an international crime and a wrongful act by international customary law, treaties and jurisprudence: due to its continuous and multi-offensive nature as well as to the multiplicity of victims. Enforced disappearance requires a *sui generis* regime and constitutes *per se* a violation of various human rights.[123] The prohibition of enforced disappearance and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*.[124]

The fight to prevent and eradicate the practice of enforced disappearances around the world has come a long way since the 1980s. International law, as well as various institutions to ensure compliance, has been put in place. The entry into force of the Convention in 2010 was a major advance in this respect. It is useful that many other institutions have played a role in the fight against the practice including the various regional mechanisms, as well as UN bodies such as the Human Rights Committee, the UN Working Group and more recently the Committee on Enforced Disappearances.

---

[122] Daly and Sarkin *Reconciliation in Transitional Societies: Finding Common Ground* University (2007).
[123] Sarkin "Enforced Disappearance As Continuing Crimes And Continuing Human Rights Violations" in Leyh, Haeck, Herrera, & Garduno (eds), *The Realization of Human Rights: When Theory Meets Practice* (2013) 389-414.
[124] See Sarkin "Why The Prohibition Of Enforced Disappearance Has Attained Jus Cogens Status In International Law" 2012 *Nordic Journal of International Law* 537-584. See also Trindade "Enforced Disappearances of Persons as a Violation of Jus Cogens: The Contribution of the Jurisprudence of the Inter-American Court of Human Rights" 2012 *Nordic Journal of International Law* 507-536.

A lot more needs to be done however, to deal with the situation on the ground, which sees disappearances still occurring all over the world. States ought to make all possible efforts to prevent and eradicate this practice.[125]

If more countries ratify the Convention, especially states affected by many disappearances, a lot more could be done to deal with the disappearances that occur globally. If more countries that have ratified the Convention accepted the competence to deal with complaints this would also have a positive effect on dealing with the situations in a far more comprehensive fashion in those states.

As the Simelane case indicates, victims face enormous challenges in the quest to have their rights upheld. Very few have the time and resources that the Simelane family has had to pursue their case. The Simelane family have been lucky that their case has had the backing of a number of public interest lawyers and law firms that have seen their case as one worthy of being fought. Most families in South Africa and elsewhere in the world are not so fortunate. A lot more needs to be done to ensure that the rights the families have on paper are translated into reality.[126] Without the means to ensure that the rights victims have are in substance the same as those that they have in theory, victims will remain without the remedies they are entitled to. The position that the Simelane family, and other families in similar circumstances in South Africa are in, is surprising seeing that Ms Simelane was an ANC cadre. South Africa should at least have the political will and commitment to deal with this case and others, where the victims come from among its own supporters. This case seems to indicate that the political will to deal with such cases does not exist.

South Africa's commitment to deal with disappearances also seems to be lacking when viewed from the lens of South Africa not having signed or ratified the Convention. There has been an expectation that South Africa, with its background and its appalling history of disappearances, many perpetrated on ANC and other liberation fighters, would have been amongst the first states to sign onto the Convention. It has not done so.

[125] Sarkin (forthcoming) "Putting in Place Processes and Mechanisms to Prevent and Eradicate Enforced Disappearances Around the World" 2014 *South African Yearbook of International Law***.**
[126] See Robins *Families of the Missing* (2013).

Because governments don't take the steps they ought to, victims are seldom able to obtain redress in their national court systems. The Simelane case is reflective of this. If South Africa had dealt with this case, and/ or others since the TRC process had been concluded, its commitment to dealing with impunity would have been more apparent. This is crucial as South Africa has a very high crime rate and has extremely high levels of violence. Holding people to account for violations committed, is crucial to act as a deterrent against others committing crime. States ought to bring to justice those believed to be responsible for the crime; they ought to refrain from acts of intimidation or reprisals against those persons who contribute to the eradication of the practice; and states ought to take effective measures to ensure that victim are able to realize the rights to truth,[127] justice[128] and reparation.[129]

The Simelane family has battled to gain resolution of their case. Even the South African government, supposedly friendly to their case, has not been sympathetic to their plight. When one considers that most governments around the world, where disappearances have occurred, are not pro-victim, unless there has been a change in government since the disappearance occurred, one can understand why few victims and their families receive the support they are entitled to, and desperately need. Much more needs to be done by states to assist families to achieve truth and justice, and receive reparations, for the harm they have suffered.

States should take specific legislative, administrative, judicial or other measures, including the establishment of specific investigating bodies, to prevent and eradicate enforced disappearances.

Because so many disappearances were practiced, South Africa should have indicated it commitment to rout out the crime by criminalising it. However, like many other countries it does not have a specific crime of enforced disappearance. If South Africa, and other states, are committed to the eradication of the practice it would enact such a crime, as well as ensuring that steps are taken to prohibit and prevent the practice. States need to take specific measures under their criminal law to define enforced disappearances as an autonomous

[127] See further Groome "The Right to Truth in the Fight Against Impunity" 2011 *Berkeley Journal of International Law* 175, 184.
[128] Maogoto "Now You See, Now You don't: The State's Duty to Punish Disappearances and Extra-Judicial Executions" 2002 *Australian International Law Journal* 176, 179.
[129] See Maogoto "Now You See, Now You don't: The State's Duty to Punish Disappearances and Extra-Judicial Executions" 2002 *Australian International Law Journal* 176, 179.

criminal offence and to bring their legislation in line with the position that enforced disappearances are outlawed. Enforced disappearance needs to be incorporated as an autonomous crime for cases not linked to crimes against humanity. The criminal law ought to be amended to remove the possibility of granting amnesties for serious international law crimes, including enforced disappearance. Judicial and other police accountability mechanisms should be strengthened. States ought to take effective and immediate steps to investigate all cases of enforced disappearances and prosecute those found responsible. States also ought to be taking all possible measures to prevent enforced disappearances, including: accessible and updated registries of detainees at all places of detention and confinement; guaranteed access to appropriate information and to all such places for relatives as well as lawyers; bringing arrested persons promptly before a judicial authority; and strengthening civil society organizations that deal with the issue of enforced disappearance. States need to promptly investigate cases of enforced disappearances. People accused of having committed these violations ought to be arrested and prosecuted. States also need to ensure that every person having knowledge of, or a legitimate interest in, an enforced disappearance, has the right to complain to a competent and independent authority, and have their complaint promptly, thoroughly and impartially investigated.

States should apply the continuous human rights and continuous crime doctrine to enforced disappearances.[130] This will be beneficial, in conjunction with many other actions by States, in dealing with enforced disappearances. This is because enforced disappearances, by their very nature, are shrouded in secrecy. This assists impunity for the perpetrators. The authorities will often deny that the individual is being held in custody,[131] or block access to information, labelling it 'classified' in terms of state security. Because of the secret manner in which disappearances occur, the facts do not become known and perpetrators cannot be held accountable. Perpetrators may withhold information, or dispose of the victim's body in a manner that the person's identity can never be established so as to escape punishment, while the statute of limitations runs out.

It is the political situation in a country that often causes enforced disappearances to be

[130] Sarkin "Enforced Disappearance As Continuing Crimes And Continuing Human Rights Violations" in Leyh, Haeck, Herrera, & Garduno (eds), *The Realization of Human Rights: When Theory Meets Practice* (2013) 389-414.
[131] Berman and Clark "State Terrorism: Disappearances*"* 1982 *Rutgers Law Journal* 531.

perpetrated.[132] For this reason alone, the causes of political violence need to be investigated[133] and steps taken to ensure that the democratic system is fully inclusive. There are a variety of actors at international, regional[134] and sub-regional levels, which must play their part in dealing with the issues.[135] They should look for early warning signs of such conduct and then work to stop such occurrences.[136] Other actors must also play a part in eradicating the practice of enforced disappearances. For example, the media,[137] both international and domestic, have a crucial role in highlighting the practice wherever it occurs, but also to educate on what needs to be done and what resources are available. At the domestic level, national human rights institutions, NGOs, as well as others, must also be involved in the eradication of this heinous crime.

[132] See generally François and Sud "Promoting Stability and Development in Fragile and Failed States" 2006 *Development Policy Review* 141.
[133] See also Bangura *The Search for Identity: Ethnicity, Religion and Political Violence* (1994) 39
[134] See further Sarkin "The African Commission on Human and People's Rights and the Future African Court of Justice and Human Rights: Comparative Lessons from the European Court of Human Rights" 2012 *South African Journal of International Affairs* 281-293.
[135] See for example Davis "The European Union: Time to Further Peace and Justice" 2011 *Egmont Security Policy Brief* 1.
[136] See further Pace and Deller "Preventing Future Genocide: A Responsibility To Protect" 2006 *World Order* 16 and Marc "Making Societies More Resilient to Violence: A Conceptual Framework for the Conflict, Crime, and Violence Agenda" in World Bank Social Development Department available online at http://siteresources.worldbank.org/EXTCPR/Resources/CCV_Framework_Note.pdf (accessed 08-04-2015)
[137] See generally Sarkin and Fowler "The Responsibility to Protect and the Duty to Prevent Genocide: Lessons to be Learnt from the Role of the International Community and the Media during the Rwandan Genocide and the Conflict in the Former Yugoslavia" 2010 *Suffolk Transnational Law Review* 35.