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Uitspraak

OPINION

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IN: RE BOUTERSE

I. FACTS

1.1 On 8/9 December 1982 fifteen persons were arrested by the Surinam military authority under the command of Lt.Col. D D Bouterse (hereinafter Bouterse) and held in Fort Zeelandia in Paramaribo. The arrested persons comprised prominent persons in Surinam (lawyers, professors, businessmen, trade-union leaders, journalists and army officers) who were seen to pose a threat to the military authority under Bouterse.

1.2 The available evidence shows that the arrested men were tortured before being summarily and arbitrarily executed by the military on the orders of Bouterse. Autopsies were not performed on the bodies but witnesses who saw the bodies in the mortuary shortly after they were killed claim to have seen signs of torture on the bodies of the victims. There is evidence that Bouterse played a major role in the killing of the arrested persons.

1.3 The explanation given by the military authority is that the men were arrested by reason of their involvement in a counter-revolutionary coup attempt and had been shot while attempting to escape. (The veracity of this explanation was undermined by the testimony of witnesses who claimed that the deceased persons had been shot in the front and not in the back).

1.4 There was no armed conflict in Surinam at the time of the killings.

1.5 The killing of the fifteen persons on 8/9 December was not an isolated incident. Persons opposed to the military authority had been killed before this time and were killed after this time. In February 1983 Major Roy Horb, second-in-co~and of the military in December 1982, was found dead in his cell after he had been arrested on 30 January 1982 for allegedly plotting against Bouterse. The official explanation that he had hanged hirnself was not generally believed.

1.6 Bouterse was a national of Surinam at the time of the killings.
See Beschikking van 3 maart van het Gerechtshof te Amsterdam, paras 2.1-2.3

1.7 Fourteen of the persons tortured and killed were Surinam nationals. One person, Frank Wijngaarde, was a Dutch national.

1.8 The killings had serious repercussions in the Netherlands. According to the Amsterdam Court of Appeal in its decision of 3 March 2000:

"Nederland heeft nauwe historische banden met Suriname. In Nederland bevindt zich een grote, uit Suriname afkomstige, bevolkingsgroep. De gebeurtenissen in december 1982 hebben bij deze groep, maar ook in Nederland in ruimere kring, een schok veroorzaakt. Er zijn aanwijzingen dat ten minste één der slachtoffers, maar mogelijk meer, de Nederlandse nationaliteit bezat. Ten slotte wonen klagers, verwanten van twee van de slachtoffers, in Nederland." Para 4.2.

1.9 Surinam became a party to the International Covenant on Civil and Political Rights in 1977. It is not a party to the 1984 Convention against Torture but it is a party to the 1985 Inter-American Convention to Prevent and Punish Torture (12 November 1987). It is not a party to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

Sources
Report of Special Rapporteur Amos Wako to the United Nations Economic and Social Council E/CN.4 /1985/17, 12 February 1985 (Commission on Human Rights, 41st Session, Agenda Item 12).

Report of the Dutch Lawyers Committee for Human Rights, The Events in Paramaribo, Suriname, 8-13 December 1982, Leiden, 14 February 1983.

De Decembermoorden in Suriname. Verslag van een Ooggetuige (1983).

2. QUESTIONS ASKED

I have been asked by the Amsterdam Court of Appeal to advise on the following questions on the basis of the above facts. (The questions appear in para 5.5 of the Court's decision):

2.1 Can the acts described above be considered as torture, crimes against humanity or war crimes, involving individual criminal responsibility, according to customary international law as it stood in 1982? (para 5.5.1.)

2.2 Were the acts subject to statutory limitations according to customary international law in 1982? (para 5.5.2.)

2.3 Did customary international law as it was in 1982, or later, give a state competence to exercise extraterritorial criminal jurisdiction over a person accused of torture or crimes against humanity when that person was not a national of the state? (para 5.5.3.)

2.4 Does it make any difference to the answer to question 2.3 if the accused person is present on the territory of the same state? (Para 5.5.4.)

2.5 Does it make any difference to the answer to question 2.3 if the victims of the crime were nationals of that state? (Para 5.5.5.)

2.6 Did customary international law as it stood in 1982, or later, oblige a state to exercise criminal jurisdiction in the circumstances mentioned in questions 2.3, 2.4 and 2.5? (Para 5.5.6.)

2.7 Are there any other comments that might be made on this matter? (Para 5.5.7.)

In this Opinion I have not responded to each question asked in the order set out in the decision ("Beschikking") of the Amsterdam Court of Appeal of 3 March. Instead I have considered each of the international crimes mentioned in para 2.1 above (Beschikking para 5.5.1) separately, together with the questions posed relating to jurisdiction and the effect of lapse of time under customary international law.

3. DID THE ACTS CONSTITUTE A WARCRIME IN 1982

3.1 In its decision of 3 March 2000 the Amsterdam Court of Appeal expressed the provisiona1 judgment ("voorlopig oordeel") that the acts in question did not constitute a war crime. I share this view for the following reasons.

3.2 Attempts have been made to define the term "war crime" in many international instruments, ranging from the Nuremberg Charter to the 1998 Rome Statute on an International Criminal Court. The threshold for the commission of such a crime is that there be an "armed conflict", whether of an international or non-international nature.
See:
(i) Geneva Conventions of 1949, articles 2 and 3;
(ii) Additional Protocols of 1949, article I (protocol II) and article 1 (4)(Protocol I);
(iii) International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, 1996(1, Article 20;
(iv) Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY)Articles 2, 3
(v) Rome Statute of the International Criminal Court, Article 8.

3.3 The term armed conflict has been defined by the ICTY in the Tadic(2 and Furundzija(3 cases in the following terms.
"[A]n armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state".

3.4 On the facts of the present case it is impossible to suggest that there was an "armed conflict" in Surinam in 1982.
Clearly there was no conflict between states. Nor was there "protracted armed violence between governmental authorities and organized armed groups." At the most there was an attempted counter-revolutionary coup backed by peaceful demonstrations on the part of trade-unions and students. However, it is more likely that the military simply arrested, tortured and executed a group of leaders of civil society that it believed to be threat to its retention of power.

4. DID THE ACTS CONSTITUTE A CRIME AGAINST HUMANITY IN 1982?

4.1.1 There can be no question that the crime against humanity was recognized as an international crime resulting in individual responsibility well before 1982.(4 Evidence for this is to be found in the Nuremberg and Tokyo Charters, the jurisprudence of the tribunals applying these Charters, the decisions of the military courts established by the victorious powers after World War II, resolutions ofthe General Assembly of the United Nations confirming the Nuremberg principles, the legislation and judicial decisions of many states (including the Netherlands) reaffirming the concept and the writings of scholars. The evolution of this crime into an accepted crime under customary international law engaging individual responsibility is thoroughly described by M. Cherif Bassiouni in his seminal study Crimes Against Humanity in International Criminal Law (2nd edition, 1999).

Linkage with war or armed conflict

4.2.1 The Nuremberg Charter of 1945 defined crimes against humanity in Article 6 (c) as:

"Murder, extermination, enslavement, deportation, and other inhumane acts
committed against any civilian population, before or during the war, or
persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated" (italics added)(5.

On the face of it, this provision suggests an intention to punish persons for atrocities committed before

1939, but the Nuremberg Tribunal preferred, out of respect for the principle of legality, to limit crimes against humanity to crimes committed during and in connection with the war.(6

4.2.2 Control Council Law No. 10, enacted by the Allies after World War II to govern criminal prosecutions in their respective zones in occupied Germany also contained a provision on crimes against humanity but unlike the Nuremberg Charter's provision it failed to link crimes against humanity to the conduct of the war.(7 Moreover, it expressly named torture as an act constituting the crime against humanity.

4.2.3 The linkage between crimes against humanity and a state of war appears to have disappeared well before 1982.(8 Thus in 1968 the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity prohibited the prescription of crimes against humanity "whether committed in time of war or in peace"(Article 1).
The ICTY Appeals Chamber observed in the Tadic (Jurisdiction) Case:
"The obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict.... It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all."(9

The Statute of the ICTY provides in Article 5 that the Tribunal shall only have competence to prosecute persons for crimes against humanity committed "in armed conflict." Commentators are, however, agreed that this limitation was designed to deal with the special circumstances of the former Yugoslavia and is not intended to suggest that a new nexus, in the form of armed conflict, has been imposed on crimes against humanity.(10

This is confinned by the Statute of the ICTR(11 and the Rome Statute of the ICC which contain no such limitation.(12

Customary international law today recognizes that a crime against humanity may be committed in time of peace. There is no requirement that it be committed in time of war or armed conflict. Whether this was the position in 1982 is not entirely free from doubt, particularly in respect of armed conflict. Control Council Law No.10 abandoned the nexus between crimes against humanity and war; the Genocide Convention (1948) and Apartheid Convention (1973) stress that these species of crime against humanity are not conditional on a state of war or armed conflict; and the 1968 Convention on the Non-Applicabi1ity of Statutory Limitations to War Crimes and Crimes against Humanity envisages that crimes against humanity may be committed in time of peace. Moreover some jurists, including Kooijmans(13 and Rüter(14, writing before 1982 expressed the view that crimes against humanity could be committed in time of peace. Nevertheless, as far as I am aware, there is no recorded case of a prosecution for the crime against humanity (or for that matter genocide or apartheid) committed in time of peace before 1982 before either an international tribunal or a national Court.(15 The ICTY and ICTR, and national courts in severa1 countries, have tried a large number of cases for genocide and crimes against humanity in the past decade but these have been associated with an armed conflict (former Yugoslavia) or large-scale massacre / civil war (Rwanda). Whether the torture and kil1ings in Paramaribo in 1982 would have been categorized as a crime against humanity in 1982 is therefore unsettled. M Cherif Bassiouni, a prominent academic expert in this field, even expresses doubts as to whether contemporary customary international law recognizes crimes against humanity in the case of "purely internal conflicts and tyrannical regimes which produce significant victimization".(16

Whether the torture and killings in Paramaribo in 1982 would have been categorized as a crime against humanity in 1982 is not therefore completely beyond doubt.

Constitutive Elements of the Crime

4.3.1 All instruments defining crimes against humanity since the Nuremberg and Tokyo Charters have

expressly included murder and torture as acts that may constitute a crime against humanity .
(i) Control Council No. Law 10, Article II.
(ii) Draft Code of Crimes against the Peace and Security of Mankind (1996) Article 18.
(iii) ICTY Statute (1993), Article 5.
(iv) ICTR Statute (1994), Article 3.
(v) ICC Statute (1998), Article 7.

4.3.2 In order to qualify as crimes against humanity such acts must be committed against the civilian population.(17
In the first instance this indicates that the acts must not be directed against combatants in armed conflict. Secondly, it is designed to show that the acts must not be isolated acts but must instead be col1ective in nature. This was emphasized by an ICTY Trial Chamber in Tadic when it stated that "the emphasis is not on the individual victim but rather on the collective, the individual being victimized not because of his individual attributes but because of his membership of a targeted civilian population ".(18 This is confirmed by the Rome Statute which declares that the requirement that there be an attack directed against any civilian population for the crime against humanity "means a course of conduct involving the multiple commission of acts .... against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack"(Article 7(2)(a)).

4.3.3 Not any act of murder or torture against a civilian population will qualify as a crime against humanity. In addition there must be evidence that the acts were committed as part of state (or organized non-state) action or policy in a systematic, widespread or large scale manner.

4.3.4 The requirement that the acts be part of state (or organized non-state) action or policy does not appear in any of the instruments defining crimes against humanity apart from the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind which requires that the acts be "instigated or directed by a government or by any organization or group" (Article 18). Bassiouni in Crimes against Humanity in International Criminal Law (1999), however, argues that the crime must be committed by state actors or non-state actors who have some of the characteristics of the state in their ability to exercise dominion and control over territory and people, and to carry out their victimization in a way that reflects a policy that is analogous to state action or policy.(19 It is this element of "state action or policy" that constitutes "the jurisdictional element that makes 'crimes against humanity' a distinct category of international crimes".(20
Although this requirement is controversial, it is not necessary to consider it further for the purposes of the present opinion as it seems clear that the December 1982 crimes were committed by state actors.

4.3.5 Most instruments defining the crime against humanity since Nuremberg(21 have focused on the requirement that the act be systematic, widespread or large scale as the necessary jurisdictional element that distinguishes crimes against humanity from other international crimes and the national crimes of (say) murder, torture etc. Decisions of national courts have also emphasized this requirement.(22
It is not necessary that the acts be both widespread (large scale) and systematic.(23 This is clear from the texts of international instruments which speak of widespread or systematic acts(24, the commentary on Article 18 in the ILC Draft Code(25, judicial decisions(26 and the debates in the Rome Conference preceding the adoption of Article 7 of the ICC Statute(27 which, in Article 7 adopts the formula of "widespread or systematic attack"(italics added).

In the Prosecutor v Akayesu the ICTR stated that

"The concept of 'widespread' may be defined as massive, frequent, large
scale action, carried out collectively with considerable seriousness and
directed against a multiplicity of victims. The concept of' systematic ' may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as a policy of a state. There must, however, be some kind of preconceived plan or policy."(28

The concept of "systematic" was elaborated upon in Prosecutor v Blaskic, in which an ICTY Trial

Chamber held that "systematic" embraces four elements:
* the existence of a political objective, a plan pursuant to which the attack is perpetrated, or an ideology, in the broad sense of the word, that is, to destroy, persecute or we aken a community;
* the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
* the preparation and use of significant public or private resources, whether military or other;
* the implication of high-level political and/or military authorities in the definition and establishment of a methodical plan.(29

The plan, said the Tribunal, may be inferred from a series of events, such as "the general historical circumstances and the overall political background against which the criminal acts are set."(30

4.3.6 There is no requirement that the acts be carried out in a discriminatory or persecutory manner.(31

4.3.7 The torture and murders in Paramaribo in 1982 appear to fall within the definition of crimes against humanity. They were committed by the military authorities in Surinam (state actors) against a group of civilians who were targeted not because of their individual attributes but because of their status as leaders of the Surinam intellectual elite. Moreover, they were committed in a systematic manner as part of an organized plan, involving public resources, aimed at destroying potential opponents of the military authorities.

Mens Rea

4.4.1 A person charged with a crime against humanity must clearly have the necessary mens rea to commit the crime.(32 It is not necessary that such person have knowledge that his conduct is within the definitional requirements of the crime but he must have knowledge of the facts and circumstances necessary to bring his conduct within the definition of the crime. I was not asked to advise on this matter and in my view it would be premature to embark on an enquiry into Bouterse's state of mind on the available facts. Suffice it to say that Bouterse's military training must have given him a clearer picture than the average person of the existence and nature of the crime against humanity. If the Court is called upon to consider this matter it will find guidance in the decisions of the Ontario Court of Appeal(33 and the Canadian Supreme Court in R v Finta.(34

Statute of Limitations

4.5.1 In 1945 it was anticipated that Nazi and Japanese war criminals would be brought to trial expeditiously. Consequently neither the Nuremberg Charter nor the Tokyo Decree contain provisions on statutory limitations. Control Council Law No.10(35 did, however, provide that accused persons were not entitled to the benefits of any statute of limitation in respect of the period 1933-1945. In 1968 the General Assembly of the United Nations adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity(36 which provides that no statutory limitations shall apply, inter alia, to crimes against humanity "irrespective of the date of their commission" (Article 1) and obliges states parties to adopt legislation to ensure that statutory or other limitations shall not apply to the prosecution and punishment of such crimes (Article 4). Only 43 states have ratified this Convention. (Neither Surinam nor the Netherlands have ratified it). In 1974 European states, objecting to the applicability of the Convention to crimes "irrespective of the date of their commission" on the ground that it offended the principle of non-retroactivity, adopted the Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes(37 under the Council of Europe, which stipulated that the Convention would be applicable only to offences committed after its entry into force. Only the Netherlands has ratified this Convention.

4.5.2 The Draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission at First Reading in 1991 provided that "no statutory limitation shall apply to crimes against the peace and security of mankind".(38 This provision was, however, dropped from the Second Reading of the Draft Code in 1996(39, on the ground that the principle of imprescriptibility did not apply to all crimes covered in the code, but only to the most serious crimes,

such as crimes against humanity.(40

4.5.3 The Statutes of the ICTY and ICTR do not contain provisions on statutory Article 29 of the ICC Statute does, however, provide that "crimes within the jurisdiction of the Court shall not be subject to any statute of limitations". This includes crimes against humanity.

4.5.4 National legal systems are divided on the question of statutory limitations. Common-law countries which know no prescription for murder and other serious crimes have no statutes of limitation for crimes against humanity and war crimes. Several civil law countries, on the other hand, have such statutes.
In 1979 the Parliamentary Assembly of the Council of Europe produced a Report on Statutory Limitation of War Crimes and Crimes against Humanity, designed to encourage states to ratify the 1974 European Convention on statutory limitations, which showed that there was no statutory limitation for war crimes and crimes against humanity in Austria, Denmark, France, Ireland, Italy, Liechtenstein, the Netherlands and the United Kingdom. However there were statutory limitations for such crimes in Belgium, Greece, Malta, Norway, Portugal, Spain, Sweden, Switzerland and Turkey.(41 Since then a number of states have amended their laws on statutory limitations for crimes against humanity. For instance in 1999 Belgium adopted a statute declaring crimes against humanity to be impresciptible.

The question of statutory limitations for crimes against humanity has come before national courts. In the Barbie Case the French Court of Cassation held that the French Statute of 1964 excluding crimes against humanity from statutory limitations was declaratory of international law.(42 In the Priebke case the Rome Military Court held that the principle of the non-applicability of statutory limitations to war crimes and crimes against humanity had the status of peremptory norm or norm of jus cogens.43

4.5.5 The notion that international crimes such as crimes against humanity have the character of jus cogens has important implications for statutory limitations. In the Furundzija case the ICTY Trial Chamber stated, obiter, that the prohibition on torture (a species of crime against humanity) is a peremptory norm or jus cogens with the result that it could not be covered by a statute of limitations.(44 A similar attitude is adopted by the report of Louis Joinet to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which boldly states that "prescription should not apply to serious crimes under international law , which are by their nature impresciptible".(45

4.5.6 Whether customary international law prohibited statutory limitations in respect of crimes against humanity in 1982 cannot be answered with absolute certainty.(46 The 1968 Convention on the Non-App1icability of Statutory Limitations to War Crimes and Crimes against Humanity has not been widely ratified. However, the principal objection to this Convention in respect of crimes committed before 1968 is that it is retrospective. This consideration does not apply to crimes committed in 1982. In my opinion the 1968 Convention was, at least, declaratory of customary international law as it stood in 1968 with the result that crimes against humanity committed thereafter were imprescriptible. In their very nature such crimes, which have the character of a norm of jus cogens, are imprescriptible.

Universal Jurisdiction

4.6.1 Customary international law accepts that a state may exercise "universal jurisdiction" over certain international crimes committed outside its territorial jurisdiction and not involving its nationals, either as actors or victims, or indeed its national interest. In such a case the state acts as the agent of the international community in the prosecution of an enemy of all mankind in whose punishment all states have an interest.(47

4.6.2 That crimes against humanity, which form part of the corpus of customary international law, are crimes that may be tried in accordance with the principle of universality is accepted by judicial decisions(48, the International Law Commission(49 and the writing of jurists.(50

4.6.3 There is therefore no doubt that under customary international law the Netherlands is permitted

to exercise jurisdiction over a crime against humanity with which it is not linked by territoriality or nationality when the suspect is present in its territory.(51

4.6.4 There is no treaty which obliges a state to prosecute a person suspected of a crime against humanity present on its territory.(52 Whether customary international law imposes such an obligation is debatable. Some authors have argued that states are obliged to prosecute those suspected of having committed crimes against humanity present on their territory.(53 Support for this argument is found in the fact that related conventions dealing with war crimes, genocide, apartheid and torture specify such a duty.(54 Further support is found in General Assembly resolutions 2840 (XXVI) of 1970 and 3074 (XXVIII) of 1973. In the former on the Question of Punishment of War Criminals and Persons who have Committed Crimes against Humanity the General Assembly urged all states "To ensure the punishment of all persons guilty of such crimes, including their extradition to those counties where they have committed such crimes". In the latter on Principles of Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity the General Assembly reaffirmed the application of the principle of aut dedere aut judicare to crimes against humanity .

While the Netherlands may be under an obligation to try or prosecute a person suspected of crimes against humanity this is of course limited to the situation in which the person is present in its territory.There is no obligation on the Netherlands (or any other state) to request the extradition of a suspect (e.g. Bouterse) from another state in order to exercise jurisdiction over him in accordance with the principle of universality.

Conclusion

4.7.1 The crime against humanity was a crime under international law, involving individual responsibility, well before 1982. The conduct attributed to Bouterse appears to fall within the definition of the crime under customary international law in 1982. (Para 4.3.7.)
However, it might possibly be argued that customary international law, as reflected in state practice, did not recognize such a crime outside war or armed conflict in 1982. (Para 4.2.3.)
Under customary international law the crime has not prescribed (as it is imprescriptible) and is subject to universal jurisdiction. (Para 4.5.6.)
If Bouterse was found within the territorial jurisdiction of the Netherlands it would be incumbent on the Netherlands, as a matter of policy, to try or extradite him. Whether there is a legal obligation requiring such action is, however, highly debatable. (Para 4.6.4.)

5. DID THE ACTS CONSTITUTE TORTURE IN 1982?

Torture in Armed Conflict.

5.1.1 Torture was clearly punishable as an international crime in war or armed conflict well before 1982, both under customary international law (as an act that might qualify as a crime against humanity) and the Geneva Conventions of 1949 and the 1977 Additional Protocols.(55

Torture in Time of Peace Today

5.2.1 There can be little doubt that torture is today recognized as an international crime under customary international law. Judicial decisions and academic writings assert this and a number of conventions confirm it. The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the 1985 Inter-Arnerican Convention to Prevent and Punish Torture (ratified by Surinam on 12 November 1987) crimina1ize torture per se while the ICTY, ICTR and ICC Statutes criminalize it as a species of crimes against humanity .

Torture in Time of Peace in 1982

5.3.1 Torture was probably punishable under international law in time of peace in 1982 as a species of

crime against humanity as a result of the unlinking of crimes against humanity from war and armed conflict. See above paras 4.2.1 -4.2.3.

5.3.2 In my opinion torture was recognized as an independent crime under customary international law before the kil1ings in Paramaribo in 1982. This opinion is based on the fol1owing evidence, viewed cumulatively.

(a) Both international and regional human rights conventions prohibit the use of torture. Of particular importance are the 1966 International Covenant on Civil and Political Rights (Article 7) and the 1969 American Convention on Human Rights (Article 5(2)). Surinam ratified the fonner on 28 December 1976 and the latter on 12 November 1987. Although these Conventions do not provide for individual crirninal responsibility for violations of the prohibition on torture they do emphasize the special nature of these prohibitions by rnaking them non-derogable in time of national emergency.(56
Moreover the monitoring body of the International Covenant on Civil and
Political Rights, the Human Rights Committee, has strongly suggested that there is a duty on Member States to punish torturers. In 1984 in Muteba v Zaire the Human Rights Committee found that Zaire had violated the prohibition on torture in Article 7 and held that it was "under an obligation to conduct an inquiry into the circumstances of [the victim's] torture, to punish those found guilty of torture and to take steps to ensure that similar violations do not occur in the future."(57

(b) The General Assembly of the United Nations adopted a number of resolutions between 1973 and 1976(58 which denounced torture. Of particular importance is the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment(59, which defined torture in substantially similar terms as the definition contained in the 1984 Convention Against Torture, called on all States to take effective measures to prevent torture and declared that "each state shall ensure that all acts of torture are offences under its criminal law". Efforts to criminalize the use of torture by treaty under international law were well underway by 1980.(60

As a result of these development a United States Circuit Court of Appeals held in 1980 that the prohibition on torture had become part of customary international law.(61

(C) In 1969 the Vienna Convention on the Law of Treaties in Article 53 gave conventional blessing to the notion that certain international law norms enjoy the character of peremptory norms -that is constitute part of jus cogens. Today the prohibition on torture is accepted as such a norm62 and it is probable that it enjoyed this status before 1982. According to the judgment of ICTY Trial Chamber in Furondzija:
".... at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every state is entitled to investigate, prosecute, punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction".(63

(d) The 1984 Convention against Torture (to which Surinam is not a party, but the Netherlands is) and the 1985 Inter-American Convention to Prevent and Punish Torture (ratified by Surinam on 12 November 1987), which oblige states to criminalize acts of torture under their criminal law and to try or extradite torturers purport to be declaratory of existing customary internationallaw in respect of the prohibition on torture and its criminalization.
Only the machinery established by the Conventions to enforce this prohibition is constitutive. The Preamble of the 1984 Convention refers to the prohibitions on torture in the International Covenant on Civil and Political Rights and the 1975 General Assembly Declaration on Torture64 and declares that the Convention is adopted "to make more effective the struggle against torture".(65
The Inter-American Convention is even more clear in its Preamble. It "reaffirms that all acts of torture.... constitute an offence against human dignity" and a violation of fundamental human rights and notes that for the rules contained in human rights instruments "to take effect, it is necessary to draft an Inter-American Convention that prevents and punishes torture."

(e) Several speeches of the Law Lords in the seminal Pinochet(66 decision before the English House of

Lords confirm that torture was a crime under international law before 1984.
(i) Lord Browne-Wilkinson
"I have no doubt that long before the Torture Convention state torture was an international crime in the highest sense.... The Torture Convention was agreed not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal, the torturer, could find no safe haven."(67
(ii) Lord Hutton
"...it is unnecessary to decide when torture became a crime against
international law prior to [1988], but I am of opinion that acts of torture were clearly crimes against international law and that the prohibition on torture had acquired status of jus cogens by that date."(68
(iii) Lord Millett
"The Republic of Chile accepts that, by 1973, the use of torture by state
authorities was prohibited by international law and that the prohibition had the character of jus cogens or obligation erga omnes."(69

The Nature of the Crime of Torture in 1982

5.4.1 Torture is defined in Article 1 of the 1984 Torture Convention as follows: "For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public officialor other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

This, in substance, corresponds with the definition of torture contained in the 1975 Declaration on the Protection of all Persons from Being Subjected to Torture which reads:
"For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners."

It is impossible to state with certainty what the ambit of the international crime of torture was before 1984, and, in particular what it was in 1982. Essentially there are two possibilities. First, that it existed in the form of the 1975 definition, adopted by consensus in the General Assembly, as confInned by the 1984 Convention against Torture.(70
Secondly, that it did not include "any act" of torture but only the widespread or systematic use of torture, as required for the crime against humanity, of which the crime of torture formed a part. This view was confirmed by Lord Millett in the Pinochet case when he declared:
"The 1984 Torture Convention did not create a new international crime. But
it redefined it. Whereas the international community had condemned the
widespread and systematic use of torture as an instrument of state policy, the convention extended the offence to cover isolated and individual instances of torture provided that they were committed by a public official. I do not consider that offences of this kind were previously regarded as international crimes attracting universal jurisdiction."(71

5.4.2 On the facts of the present case torture was committed under either definition as the acts of torture were systematic and intentionally committed by public officials either for the purpose of obtaining confessions or intimidating or coercing the arrested persons.

Statute of Limitations

5.5.1 The international crime of torture is not subject to statutory limitations, for two principal

reasons.
First, because of its ties with crimes against humanity in respect of which there is no statutory limitation.
It would be ridiculous to permit statutory limitation in respect of acts of torture characterized as an independent international crime while at the same time prohibiting such statutory limitations where the acts are characterized as crimes against humanity.
Secondly, because of the jus cogens character of the prohibition on torture which excludes statutory limitations. Support for this proposition is to be found in an obiter dictum in the Furundzija case.(72

Universal Jurisdiction

5.6.1 The 1984 Convention against Torture recognizes the principle of universal jurisdiction, at least for states parties, in Article 5 in providing that a state shall exercise jurisdiction where the offender is present in its territory.

5.6.2 The prohibition on torture is an obligation erga omnes, that is an obligation in whose enforcement all states have a legal interest. Consequently it is a crime, like the crime against humanity, with which it is historically linked, that may be prosecuted by any state, wherever it was committed.(73

5.6.3 Customary international law also recognizes that universal jurisdiction applies in the case of torture as a consequence of the jus cogens character of the prohibition on torture.74 This was stressed in the Pinochet case. Lord Browne- Wilkinson declared:
"The jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences jus cogens may be punished by any state because the offenders are 'common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution': Demjanjuk v Petrovsky (1985) 603 F Supp 1468,774 F 2d 571."(75

Lord Millett stated:
"In my opinion, the systematic use of torture on a large scale and as an
instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984. I consider that it had done so by 1971."(76

5.6.4 Article 5 ofthe Convention against Torture obliges a state to exercise jurisdiction over an offender when he is present in its territory and it does not extradite him. Judicial decisions also stress the requirement of presence for the exercise of universal jurisdiction. In Furundzija the ICTY stated that "every state is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction" (italics added).(77 In the Pinochet case Lord Millett declared, in respect of the exercise of universal jurisdiction, that
"The limiting factor that prevents the exercise of extra territorial
criminal jurisdiction from amounting to an unwarranted interference with the internal affairs of another state, is that, for the trial to be fully effective, the accused must be present in the forum state."(78

5.6.5 It is not clear whether this requirement prevents a state in whose territory the offender is not present from requesting extradition of the offender from a state in whose territory the offender is present, but which elects not to try him itself, when the sole basis for the exercise of jurisdiction is the principle of universality. Some have argued that it is objectionable to allow extradition requests of this kind as this would permit a particular state to act as "policeman" of the world by requesting extradition of torturers from any country. This objection was not raised in the Pinochet proceedings and a number of English courts were prepared to entertain a request from Spain to exercise jurisdiction on grounds of universality.(79

A state that requests extradition of a torturer would probably be wise to stress the presence of some connecting factor between it and the crime to ensure that this objection would not be raised against it. Article 5(1)(c) of the Convention against Torture recognizes that the passive personality principle may provide a basis for the exercise of jurisdiction if the state in question "considers it appropriate."

Although the municipal law of the Netherlands does not permit the exercise of jurisdiction on this ground it may nevertheless consider such a ground as the basis of an extradition request, in lieu of or in addition to, universal jurisdiction. This matter is further considered in para 8.

Aut Dedere aut Judicare and the Duty to Prosecute

5.7.1 There is clearly an obligation on parties to the 1984 Convention against Torture to try or extradite torturers present in their territory.(80 Previously such states were entitled to prosecute or extradite but were not obliged to do so.(81 Under the Convention against Torture states are obliged to prosecute even where there has been no refusal of an extradition request.(82

5.7.2 While the Netherlands is under a legal obligation to try or extradite a torturer present in its territory where the crime was committed after the Torture Convention came into effect for the Netherlands on 20 January 1989, doubts may be expressed about its obligation to try or extradite a person who committed the crime oftorture before 1989. In support of this restrictive view it may be argued that the ratification of a treaty has no retrospective effect and that treaty obligations commence upon ratification.(83 The Vienna Convention on the Law of Treaties provides in Article 28 that:
"Unless a different intention appears from the treaty or is otherwise
established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

5.7.3 I am not satisfied that the obligation aut dedere aut judicare contained in the Torture Convention is not retrospective to acts of torture committed before 1989.

5.7.4 Torture was a substantive international crime before 1984, albeit subject to the requirement that it be systematic or widespread to accord with constitutive elements of the crime against humanity. The purpose of the Torture Convention was to codify this crime, extend it to cover individual acts of torture and to provide machinery for the effective enforcement of the prohibition on torture.(84 The enforcement machinery is of two kinds. First, the obligation aut dedere aut judicare(85; and, secondly, the institutional machinery created by the Convention providing for establishrnent of a Committee against Torture to receive and consider reports and complaints.(86

5.7.5 The institutional machinery created by the Torture Convention is constitutive and cannot have retrospective effect. This was confirmed by the Committee Against Torture when it held that it was not competent to consider complaints relative to acts of torture occurring in Argentina before it became a party to the Torture Convention.
The Committee held that:
"its competence with respect to communications is defined by Article 22 of
the Convention Against Torture, whereby that competence is limited to
violations of this Convention and does not extend to the norms of general
international law."(87

5.7.6 The obligation aut dedere aut judicare, however, is not necessarily constitutive and prospective. On the contrary it may be likened to the obligation that a state incurs when it enters into an extradition agreement to extradite fugitives in its territory suspected of having committed crimes in the requesting state before the entry into force of the treaty.
That an extradition treaty has retrospective effect is supported by the jurisprudence of many countries, including the Netherlands.(88
In Gallina v Fraser a US court stated that:
"It appears to have been established a long time ago that extradition treaties, unless they contain a clause to the contrary, cover offences committed prior to their conclusion.(89

In 1947 in the case of In re Colman (Court of Appea1 of Paris) a Belgian citizen resident in France challenged his extradition to Belgium for crimes arising out of collaboration with the enemy in World War II. He argued that the extradition agreement between Belgium and France, which was signed in

1947, had no retroactive effect to the time that the acts occurred. In rejecting his plea the court held: "The offender cannot invoke the principle of non-retroactivity of laws. He has no right not to be surrendered for facts which were not provided for, at the time of the consummation of the offence, by the Franco-Belgium Convention to which he is not a party, as long as both French and Belgian law render criminal and punish offences at the time when they were committed."(90

5.7.7 In my view the principle aut dedere aut judicare is procedural and its extension to cover an act of torture committed before 1989 in terms of a multilateral extradition agreement (the Torture Convention) does not offend the rule of legality any more than does the application of a bilateral extradition treaty that entered into force in 1989 to a crime committed in 1982. To interpret the Torture Convention to allow pre-1984 torturers to travel freely would run counter to the object and purpose of the Convention, namely to bring to trial all public officials suspected of committing torture - whenever it might have been committed. In these circumstances the general principle contained in Article 28 of the Vienna Convention seems to be inapplicable.

5.7.8 The Pinochet case does not provide an obstacle in the way of such an argument. There the House of Lords did not consider the question whether the United Kingdom was obliged in terms of the Torture Convention to try or extradite Pinochet for crimes committed before the entry into force of the treaty in the UK in 1988. Instead it held that the rule of double criminality contained in the 1989 Extradition Act did not permit Pinochet to be extradited to Spain for crimes committed before 1988.

5.7.8 Bouterse is not present in the Netherlands. There is therefore no obligation on the Netherlands to exercise criminal jurisdiction over him under intenational law. Nor is the Netherlands under a legal obligation to request his extradition from Surinam or any country that he may visit. On the other hand, if Bouterse were to visit the Netherlands, I am of the opinion that the Netherlands would be obliged to try or extradite him under the Torture Convention.

PASSIVE PERSONALITY AS A BASIS FOR JURISDICTION

6.1.1 Customary international law permits a state to exercise criminal jurisdiction where the victim of the crime is a national.(91

6.2.1 International law would therefore permit the exercise of jurisdiction over Bouterse for the murder of Frank Wijngaarde, a Dutch national tortured and mudered at Paramaribo in December 1982. Dutch municipal-law rules, however, do not allow the exercise of jurisdiction on grounds of passive personality.(92 For this reason the possibility of prosecuting Bouterse for mUfder of a Dutch national is not considered.

6.3.1 Multilateral treaties creating international crimes increasingly recognize passive personality as a basis for the exercise of criminal jurisdiction. The Torture Convention in Article 5(1)(c) recognizes that the passive personality principle may provide a basis for the exercise of jurisdiction if a state party "considers it appropriate." The Netherlands, if its own municipal law recognized this jurisdictional ground, could exercise jurisdiction over Bouterse for the crime of torture on the basis that one of the victims of the 1982 killings was a Dutch national.

OTHER JURISDICTIONAL GROUNDS

7.1.1 Customary international law permits a state to exercise criminal jurisdiction where the effect of the crime is felt in its territory(93; or where the crime threatens its own safety and security (protective principle).(94 It is clear that the 1982 killings in Paramaribo had a profound effect in the Netherlands. See above para 1.8.
Customary international law would therefore permit the Netherlands to exercise jurisdiction over Bouterse on these grounds.

THE PROSECUTION OF BOUTERSE IN THE CONTEXT OF DUTCH LAW

8.1.1 In my opinion Bouterse could be prosecuted in terms of customary international law for the 1982 murders. I am not, however, giving advice to an international tribunal on how to proceed but to a Dutch court that is bound to apply its own national law.
It is not my mandate to advise on Dutch law, a task for which I am in any event unqualified. On the other hand, I believe it is incumbent on me to make certain tentative comments on the basis of my limited understanding of Dutch law. This would seem to be required by the question posed in paragraph 5.5.7 of the decision of the Amsterdam Supreme Court of 3 March 2000.

Prosecution under Customary International Law as part of Dutch law

8.2.1 Customary international law is part of Dutch municipal law.(95 It might therefore be argued that a Dutch court could prosecute Bouterse on the ground that he has committed a crime of universal jurisdiction under customary international law and that this is part of Dutch municipal law. Support for such a step is to be found in the speech of Lord Millett in the Pinochet case(96 where he held that torture was a customary international crime of universal jurisdiction by 1973 and that an English court had extraterritorial criminal jurisdiction on the basis that customary international law is part of English municipal law.
Statutory authority for the exercise of extra territorial criminal jurisdiction was therefore unnecessary. (Lord Millett conceded that this view was not shared by his fellow judges who required statutory authority for the exercise of universal jurisdiction.)

8.2.2 Such a course is unlikely to be followed as Dutch law, like English law, appears to require a national statute which translates international law obligations into municipal law where the criminalization of human conduct is concerned.(97

Crimes against Humanity and Dutch Law

8.3.1 I have expressed the opinion that Bouterse might be prosecuted for a crime against humanity under customary international law. Here I have concluded that the events of December 1982 might constitute a crime against humanity, a crime subject to universal jurisdiction. I have also expressed the opinion that crimes against humanity are not subject to statutory limitation.

8.3.2 Dutch municipal law governing crimes against humanity is still rooted in the Nuremberg era. The 1952 Wet Oorlogsstrafrecht does not criminalize crimes against humanity as such but, in Article 8, deals with crimes against humanity as a circumstance aggravating war crimes. Such a crime must be a manifestation of a policy of systematic terror or illegal acts directed against the population or a group of the population. Crimes against humanity, in terms of this law, can be committed only during war or armed conflict.(98 It is not, however, necessary, as was previously believed, that the Netherlands be involved in such a conflict.(99

8.3.3 The events of December 1982 in Paramaribo did not occur in a war or armed conflict. It would therefore be difficult to prosecute Bouterse for crimes against humanity as Dutch Law stands at present.

Torture and Dutch Law

8.4.1 The Netherlands ratified the Convention against Torture on 21 December 1988 and the Convention entered into force for the Netherlands on 20 January 1989. The Netherlands gave effect to its obligations under this Convention in 1988 in the Uitvoeringswet Folteringverdrag (Torture Act). This Act defines torture in language similar to that of the Torture Convention (Article 1.1) and provides for life imprisonment where the torture results in death (Article 1.3). Article 5 recognizes the principle of universality:
"De Nederlandse strafwet is toepasselijk op ieder die zich buiten Nederland aan een van de in de

artikelen 1 en 2 van deze wet omschreven misdrijven schuldig maakt."

Article 10 provides that the Act is to come into force on the date on which the Convention comes into effect- that is 20 January 1989.

8.4.2 The Netherlands has generally been hesitant about accepting the obligation of universal jurisdiction and has on several occasions attached reservations to its acceptance of treaties providing for universal jurisdiction; thereby limiting its acceptance of the principle of universal jurisdiction. It did not, however, attach any such reservation when it became a party to the Torture Convention.(100

8.4.3 I have expressed the opinion that Bouterse's involvement in the acts of torture of December 1982 might make him punishable under customary international law for the crime of torture, which is subject to universal jurisdiction, and in respect of which there is no statutory limitation. Clearly Bouterse would be punishable under the Uitvoeringswet Folteringverdrag of 1988 if his conduct had occurred after 20 January 1989. The question that must be addressed, however, is whether he might be punished under the 1988 Act for acts committed in 1982. No doubt the immediate response to such a suggestion is that this would be retroactive and violate the principle of legality, a principle of both customary international law and national law. The matter does, however, require closer consideration.

8.4.4 The Convention against Torture is declaratory of existing customary law in so far as its prohibition, punishment and definition of torture are concerned.(101 This applies particularly to the crime of torture in so far as it meets the requirements of the crime against humanity of which it was, and still is, an integral part. Thus it might persuasively be argued that the 1988 Torture Act could be applied retrospectively to cover conduct that was illegal under Dutch law before 1989 but was not criminalized under the name of torture -such as assault, murder, etc.(102

8.4.5 The question then arises whether the Netherlands may exercise jurisdiction on grounds of universality over the events occurring in 1982 in terms of Article 5 of the 1988 Torture Act. Some may argue this would offend the principle of retroactivity. On the other hand, it might be argued that the acts constituting the crime of torture were punishable in the Netherlands under other names and that Article 5 is a procedural provision which extends extraterritorial jurisdiction to the prosecution of such crimes without offending the principle of legality. Here retrospective effect could be given to the exercise of jurisdiction in the same way that retrospective effect is given to the granting of extradition in respect of crimes committed before the adoption of an extradition treaty.(103
This is an issue to be decided by a Dutch court applying its own rules of interpretation, general principles and traditions. It may, however, be helpful to consider the experience of the Canadian courts in applying a statute which gave retrospective effect to crimes against humanity committed outside Canada in the face of a prohibition on retroactive legislation contained in the Canadian Charter of Rights and Freedoms. Here the courts upheld the validity of the Canadian statute on the ground that it did not violate the prohibition on retrospectivity because the conduct in question was "criminal according to the general principles of law recognized by the community of nations."(104 In so deciding the courts drew a helpful distinction between a retroactive statute, which violated the Charter of Rights and Freedoms, and a retrospective statute which did not.

"The distinction between a "retroactive" statute, as opposed to one with a "retrospective" application, is significant. According to the definition contained in 44 Hals. 4th ed., p. 572, a retroactive penal statute is one which is "intended to render criminal an act which was innocent when it was committed".

David H. Doherty (now Mr. Justice Doherty), in an article entitled "What is Done is Done: An argument in Support of a Purely Prospective Application of the Charter of Rights" (1982),26 C.R. (3d) 121, defines both "retroactive" and "retrospective" statutes as follows [at p. 125]:
A retroactive statute is one which is proclaimed to have effect as of a time prior to its enactment. The statute operates backward and changes the law as of some date prior to proclamation. ..
A retrospective statute is one which proclaims that the consequences of an act done prior to proclamation are to be given a different legal effect after proclamation as a result of the enactment of the statute. It operates only in the future, after proclamation, but changes the legal

effect of an event which occurred prior to proclamation.

Keeping these definitions in mind, there is clearly a difference between a retroactive and a retrospective application. A retroactive application takes an act or omission that was not previously criminal, and retroactively deems that act or omission to be criminal as at a later date. A retrospective statute, on the other hand, does not create new offences. Rather, as in this case, it merely operates to retrospectively give Canadian courts jurisdiction over criminal offences committed outside of Canada."(105

If a Dutch court were to give a retrospective interpretation to the 1988 Act to permit Bouterse to be prosecuted for torture committed in 1982 on the basis of universal jurisdiction it would not violate Artic1e 15 of the International Covenant on Civil and Po1itical Rights which provides that nothing in the prohibition on the retroactivity of criminal law "sha1l prejudice the trial and punishment of any person for any act or omission which at the time it was committed, was criminal according to the general principles of law recognized by the community of nations."(106

EXTRADITION

9.1.1 Bouterse is presently in Surinam and is unlikely to visit the Netherlands. If he were to visit a third state with which the Netherlands has a multi1ateral (e.g. Torture Convention) or bi1ateral extradition treaty, the question might arise whether the Netherlands could request the extradition of Bouterse for torture on the basis of universal jurisdiction. On the authority of Pinochet, in which the European Convention on Extradition provided the basis for extradition, there would appear to be no objection to such a request.(107 Moreover, Artic1e 5 of the 1988 Dutch Torture Act would appear to permit this as it does not require the presence of the accused in the Netherlands for the exercise of jurisdiction. However, as indicated above(108 the requested state may object to the Netherlands request on the ground that a closer connecting factor is required for extradition.

9.1.2 In such a case the Netherlands might request extradition on the passive personality principle, which is increasing1y accepted today as a ground for the exercise of criminal jurisdiction and is recognized by the Torture Convention itself in Article 5 (1) (c), or the protective principle. See above paras 1.7, 1.8 and 7.1.1.

9.1.3 If Bouterse were extradited in such a case the Netherlands could exercise criminal jurisdiction over him under Article 5 of the 1988 Torture Act which provides for universal jurisdiction -provided Dutch courts were prepared to apply this provision retrospectively. The requested state could not object to this change in the exercise of jurisdiction as the principle of speciality applies only to the crime itself. Here Bouterse would be tried for the same offence -torture -but on a different jurisdictional ground to accommodate the Netherlands' own jurisdictional rules.

SUMMARY OF CONCLUSIONS

War Crimes

10.1.1 The acts that took place in Paramaribo in December 1982 could not be described as war crimes.

Crimes Against Humanity

11.1.1 In 1982 the crime against humanity was a crime under customary international law, involving individual responsibility.

11.1.2 The crime against humanity had probably been unlinked from war and armed conflict in 1982 and could be committed in time of peace.

11.1.3 The crime against humanity was not subject to statutory limitation in 1982.

11.1.4 Customary interntional law, as it stood in 1982, gave a state competence to exercise extraterritorial criminal jurisdiction over a person accused of a crime against humanity when that person was not a national of the state.

11.1.5 It is not necessary for the victim of the crime to be a national of the prosecuting state for it to exercise jurisdiction. This connecting factor would, however, strengthen the jurisdictional basis for the exercise of jurisdiction.

11.1.6 A state is permitted to exercise jurisdiction over a person suspected of having committed a crime against humanity when that person is present on its territory.

11.1.7 It is debatable whether a state is under a legal obligation to prosecute or extradite a person suspected of having committed a crime against humanity when that person is present on its territory.

11.1.8 The acts attributed to Bouterse in December 1982 appear to qualify as a crime against humanity in that they were committed in a systematic manner as part of an organized plan by the military authorities, of which Bouterse was commander, against a group of civilians.

Torture

12.1.1 In 1982 torture was a crime under customary international law, both as a species of the crime against humanity and as an independent crime.

12.1.2 Torture, as a crime under customary international law, was not subject to statutory limitation in 1982.

12.1.3 Customary intemational law, as it stood in 1982, gave a state competence to exercise extraterritorial criminal jurisdiction over a person accused of torture when that person was not a national of the state.

12.1.4 It is not necessary for the victim of the crime to be a national of the prosecuting state for it to exercise jurisdiction. The Convention against Torture of 1984 does, however, recognize this factor as an additional ground for the exercise of jurisdiction.

12.1.5 A state is under a legal obligation to prosecute or extradite a person suspected of torture when that person is present on its territory. This legal obligation extends to acts of torture comnmitted in 1982.

12.1.6 The acts attributed to Bouterse in December 1982 appear to qua1ify as torture under customary international law in that they were systematic and intentionally committed by public officials either for the purpose of obtaining confessions or intimidating or coercing persons belonging to the civilian population.

C.J.R. DUGARD
Leiden, 7 july 2000

1Report of the International Law Commission on the Work ofits 48th Session, 1996, UNGAOR 51st Session, Supplement No 10 (N51/10), p 110.
2 Prosecutor v. Tadic (1996) 35 International Legal Materials (ILM) 32 at 54 (para 70).
3 Prosecutor v Furundzija Case no IT-95-17/I-T; (1999) 38 ILM 317, para 50.
4 In 1977 the ICTY stated that "since the Nuremberg Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned" (Prosecutor v Tadic no IT-94-T-(merits) 7 May 1997;

(1997) 36 ILM 908, 937.
5 82 UNTS 279. Artic1e 5 (c) of the declaration establishing the International Military Tribunal in Tokyo contained an identical provision.
6 For a discussion of the linking of crimes against humanity with the initiation or conduct of war, see M. Cherif Bassiouni International Criminal Law 2nd ed (Crimes) (1999) 552-555,571-574.
7 Control Council Law No.10, Punishment ofPersons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, 50-55, Article 2. This feature of CCL No 10 was stressed in In Re Ohlendorf and others (Einsatzgruppen Trial, (US Military Tribunal, 1948) 15 International Law Reports (ILR) 656,664.
8 Supra note 6 at 573.
9 Supra note 2 at 72, paras 140-1. See too Article 18 ofthe International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, and the commentary thereto, supra note I at 93,96. In R v Bow Street Metropolitan Stipendiary Magistrate and others, Ex Parte Pinochet Ugarte (No 3) Lord Millett stated that the requirement that crimes against humanity be linked to war was a "jurisdictional restriction based on the language of the [Nuremberg] Charter. There is no reason to suppose that it was considered to be a substantive requirement of international law.... The need to establish such a connection was natural in the immediate aftermath of the 1939-45 war. As memory of war receded, it was abandoned"(at 174 g - h).
10 V Morris & MP Scharf An Insiders Guide to the International Criminal Tribunal for the Former Yugoslavia Vol I (1995) 81-3. See too the Report of the Secretary-General Pursuant to Para 2 of Security Council Resolution 808 (1993), S/25704 of 3 May 1993, para 47: "Crimes against humanity .... are prohibited regardless of whether they are committed in an armed conflict, international or internal in character."
11 Article 3. See further V Morris & M P Scharf The International Criminal Tribunal for Rwanda (1998) 202-205; T Meron "International Criminalization of Internal Atrocities"(1995) 89 AJIL 554, 557; Prosecutor v Akayesu Case No ICTR-96-4- T (2 September 1998) p 229 (para 565).
12 Article 7.
13 Op het Grensgebied van Internationaal en Nationaal Recht; De Verjaring van Internationale Misdrijven (1968) 17.
14 Enkele Aspekten van de Strafrechtelijke Reactie op Oorlogsmisdrijven en Misdrijven tegen de Menselijkheid (diss. UvA 1973) 41.
15 The prosecution before national courts of Eichmann, Demjanjuk (Israel), Barbie, Touvier, Papon (France), Menten, Ahlbrecht (the Netherlands), Finta (Canada) etc for crimes against humanity all relate to the events ofthe Second World War.
16 Supra note 6 at 573.
17 This requirement is included in all but one (the 1996 ILC Draft Code, supra note 1) of the instruments defining the Crime against Humanity, inc1uding the Nuremberg Charter.
18 See Prosecutor v Tadic IT 94-1-T, para 644 (1997) 36 ILM at 941); D. Robinson "Defining 'Crimes against Humanity' at the Rome Conference" (1999) 93 American Journl of International Law (AJIL)43 at 48.
19 At 243-6, Supra note 6 at 578-81.
20 Crimes against Humanity at 277. Bassiouni's view gains support from Article 7(2)(a) of the Rome Statute of the ICC (supra para 4.3.2) which requires that the acts be "in furtherance of a state or organization policy" and Tadic (supra note 15) at para 644 (1997) 36 ILM 941. See further Robinson, supra note 18 at 49-50.
21 This requirement does not appear in the Nuremberg Charter but it does feature in the jurisprudence of the Tribunal. In its discussion of crimes against humanity the Nuremberg Tribunal declared: "The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic."Nazi Conspiracy and Aggressian: Opinion and Judgment 84 (US Govt and Printing Office 1947); 1996 ILC Report supra note 1 at 94 footnote 126.
22 Ahlbrecht, Bijz. Raad van Cassatie, 11 April 1949, Nederlandse Jurisprudentie 1949, No.427 at p. 750; Menten. Hoge Raad, 13 January 1951, Nederlandse Jurisprudentie 1981, No.29 atp. 215; Barbie Case 78 International Law Reports (ILR) 137.
23As stated by the French text of the ICTR Statute; see the Akayesu case, supra note 11, p. 235 (footnote 144).
24 ICTR Statute, Article 3; ILC Draft Code (supra note 1), Article 18; Rome Statute of ICC, Article 7.
25 Supra note 1 at 94-5.

26 Akayesu, supra note 11, at 235 (para 575); Prosecutor v Tadic, IT-94-1-T (7 May 1997) para 647; (1997) 36 ILM 908 at 942; Prosecutor v Blaskic, Case No IT-95-14-T (3 March 2000) para 207.
27 See Darryl Robinson "Defining 'Crimes Against Humanity' at the Rome Conference"(1999) 93, American Joumal of International Law (AJIL) 43 at 47,51.
28 Supra note 11, p 235-6 (para 580).
29 Case No IT-95-14-T (3 March 2000), para 203.
30 Ibid para 204.
31 Prosecutor v Tadic, case no IT-94-1-A (15 july 1999) p 130, para 292.
32 Bassiouni supra note 20 at 411.
33 98 ILR 520,627-8,542-5.
34 104 ILR 284 at 358-363.
35 Supra note 7, Article 2(5).
36 Resolution 2391 (XXllI) of 26 November 1968; 754 UNTS 73.
37 European Treaty Series, No.82.
38 Report of the ILC, 43rd Session, UNGAOR, 46th Session, Supp. No 10, A/46/10 (1991).
39 Supra note I.
40 YBILC 1994, vol. I at 125, 130; vol. II, part two at 80.
41 Parliamentary Assembly of the CoUncil of Europe, 31 January 1979, Doc. 4275. On the position in the Nether1ands, see R van Dongen "De Decembermoorden berecht?" Nm 9 JUne 2000, p. 1142.
42 78 ILR 134-5,
43 (1998) 1 Yearbook of International Humanitarian Law 352. The Argentine Supreme Court adopted a simi1ar approach when it approved the extradition of Priebke to Ita1y: ibid at 341.
44 Judgment of 10 December 1998, IT-95-17/1-T para 157.
45 E/CN.4.Sub.2/1997/20 Rev./(2 October 1997) at 24 (principle 24). italics added. See too Bassiouni supra note 20 at 224.7.
461 A study by Friedl Weiss published in 1982 conc1uded that crimes against humanity could not be subjected to statutory limitation under customary international law: "Time Limits for the Prosecution of Crimes against International Law" (1982) 53 British Year Book of lnternational Law 162, 194.
47 Attorney-General of the Government of Israel v Eichmann 36 ILR 277 at 298-304.
48 Eichmann Case, ibid; Demjanjuk v Petrovsky 776 F 2d 571 (1985) at 528-3; In the Matter of the Extradition of Demjanjuk 612 F Supp 544 (DC Ohio 1985), 555-8; R v Finta 82 ILR 425,443-44; 98 ILR 520; 104 ILR 284.
49 Draft Code of Crimes against the Peace and Security of Mankind. See Article 8 and commentary there to, supra note 1 at 42 and 46.
50 K Randa1l "Universal Jurisdiction under International Law (1988) 66 Texas Law Review 785; Baggiouni, supra note 20 at 240; 1 Brownlie Principles of Public International Law, 5th ed. (1998) 308.
51 In R v Finta the Ontario High Court of Jugtice stressed that "The condition precedent to the exercise of jurisdiction with respect to such international crimes is that the accused person be found within the territory of the country asserting jurisdiction": 82 ILR 444.
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53M Cherif Bassiouni & E Wise Aut Dedere Aut Judicare (1995) 21; Bassiouni supra note 20 at 217-224; D. Orentlicher "Sett1ing Accounts: The Duty to Prosecute Human Rights Vio1ations of a Prior Regime"(1991) 100 Yale Law Journa12537, 2593.
54 Bassiouni, supra note at 77; supra note 20 at 221-224.
55 Prosecutor v Furundzija, ICTY, Case No 1T-9S-17/1-T; (1999) 38 ILM paras 134-142.
56 ICCPR, Article 4; American Convention Article 27.
57 Report of the Human Rights Committee, GAOR 39th Session, Suppl. No (Al39/40), Annex xm, p 182, at 188.
58 GA Res 3059 (XXVIII) of 2 November 1973; GA Res 3218 (XX(X) of 6 November 1974; GA Res 3452 (XXX) of 9 December 1975; GA Res 31/85 of 13 December 1976.
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60 A Draft Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Degrading Treatment or Punishment was adopted in 1980. ECOSOC Resolution, 6 March 1984, UN Doc E/CN/4/1984/72/Annex I (1980); (1984) 23 ILM 1027. The 1985 Inter-American Convention to Prevent and Punish Torture was also initiated before 1980. See (1986) 25 ILM 519.
61 Filartiga v Pena-Irala 630 F 2d 876 (1980).

62 Furondzija, supra note 55 at paras 153-157.
63 lhid para 156.
64 Supra note 55.
65 Para 6. Burgers and Danelius in their Handhook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) write:
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66 R v Bow Street Metropolitan Magistrate and others, Ex Parte Pinochet Ugarte (Anmesty International and others intervening) (No 3) [1999] 2 All ER 97 (HL).
67 At 109 c-d, g-h.
68 164 b-c.
69 177 b-c.
70 Furundzija, supra note 55 at para 160.
71 Supra note 66 at 178 d- f.
72 Prosecutor v Furundzija, supra note 55 at para 157.
73 Ibid at paras 151, 156. This passage is quoted at footnote 63 above
74 Ibid at para 156. This passage is quoted at footnote 63 above.
75 Supra note 66 at 109 b- c.
76 Supra note 66 at 178 b -c.
77 Supra note 55 at para 156.
78 Supra note 66 at para 175 9 -h.
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80 Articles 5 and 7. See too Furundzija, supra note 55 atpara 145.
81 In the Pinochet case Lord Millett stated: "whereas previously states were entitled to take jurisdiction in resect of the offence wherever it was committed, they were now placed under an obligation to do so"(supra note 66 at 178).
82 Pinochet, supra note 66 at 111 a -b; Burgers and Danelius supra note 65 at 72, 137.
83 R Jennings & A Watts Oppenheim 's International Law 9th Ed (1992) 1234-5.
84 Supra para 5.3.2 (d); and supra the dictum of Lord Millett at note 71.
85 Articles 5 and 7.
86 Part II, articles 17 -24.
87 Report of the Committee Against Torture, UNGAOR, 45th Session, Suppl No 44, UN DOC A 45/44 E 108, at 111 (para 7.2).
88 Swart & A Klip (eds) International Criminal Law in the Netherlands (1997) 92.
89 177 F Supp 856 (D Conn, 1959) at 864-5. See too Cleugh v Strakosch 109 F 2d 230 (9th-Cir 1940) at 335; In re Extradition of D'Amico 177 F Supp 648 (SDNY, 1959); MM Whiteman Digest of International Law, vo16 (1968) 753 ff.
90 (1947) 14 Annual Digest and Reports of Public International Law Cases 139,140; In re Spiessens (1949) 16 Annual Digest and Reports of Public International Law Cases, 275.
91 G R Watson"The Passive Persona1ity Principle"(1993) 28 Texas Int'l LI 1; United States v Yunis No 2) 82 ILR 344, 349-50.
92 B Swart & A Klip, supra note 88 at 58.
93 Lotus Case 1927 Permanent Court of International Justice Reports, Series A, No.10.
94 Oppenheim 's International Law, supra note 83 at 470-1.
95 Nyugat. HR 6-3-1959; NJ 1962, no 2; P.H. Kooijmans Internationaal Publiekrecht in Vogelvlucht 7

ed, chapter 5.
96 Supra note 66 at 177-78.
97 B Swart & A Klip (eds) International Criminal Law in the Netherlands (1997) 27-38.
98 Swart & Klip, ibid at 31-32.
99 See Knesevic case, Hoge Raad, 11 November 1997, NI 1998, 463; (1998) 1 Yearbook of International Humanitarian law 601-07; (1998) 73 NJB 1587-1593.
100 Swart & Klip, supra note 97 at 63-64,69.
101 See above, para 5.3.2 (d) and 5.7.4.
102 See the Australian War Crimes Amendment Act of 1988 and the 1987 Canadian legislation providing for the prosecution of persons guilty of war crimes and crimes against humanity. Both statutes, in providing for the retrospectivity of such crimes, cover conduct that would have been criminal under some other name in Australia or Canada respectively. See Polyukhovich v Commonwealth of Australia 19 ILR 1; R v Finta 82 ILR 429; 98 ILR 520; 104 ILR 284.
103 Supra para 5.7.6.
104 Section 11 (g) ofthe Charter of Rights and Freedoms.
105 R v Finta 82 ILR 425 at 432. This approach was followed by the Ontario Court of Appeal in R v Finta 98 ILR 520, 574.
106 See too Article 7 (2) of the European Convention on Human Rights. See R van Dongen "De Decembermoorden berecht?"23 NJB (9 June 2000) 1137, 1141.
107 Supra para 5.6.4 at footnote 79.
108 Supra para 5.6.5.

11Report of the International Law Commission on the Work ofits 48th Session, 1996, UNGAOR 51st Session, Supplement No 10 (N51/10), p 110.
2 Prosecutor v. Tadic (1996) 35 International Legal Materials (ILM) 32 at 54 (para 70).
3 Prosecutor v Furundzija Case no IT-95-17/I-T; (1999) 38 ILM 317, para 50.
4 In 1977 the ICTY stated that "since the Nuremberg Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned" (Prosecutor v Tadic no IT-94-T-(merits) 7 May 1997; (1997) 36 ILM 908, 937.
5 82 UNTS 279. Artic1e 5 (c) of the declaration establishing the International Military Tribunal in Tokyo contained an identical provision.
6 For a discussion of the linking of crimes against humanity with the initiation or conduct of war, see M. Cherif Bassiouni International Criminal Law 2nd ed (Crimes) (1999) 552-555,571-574.
7 Control Council Law No.10, Punishment ofPersons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, 50-55, Article 2. This feature of CCL No 10 was stressed in In Re Ohlendorf and others (Einsatzgruppen Trial, (US Military Tribunal, 1948) 15 International Law Reports (ILR) 656,664.
8 Supra note 6 at 573.
9 Supra note 2 at 72, paras 140-1. See too Article 18 ofthe International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, and the commentary thereto, supra note I at 93,96. In R v Bow Street Metropolitan Stipendiary Magistrate and others, Ex Parte Pinochet Ugarte (No 3) Lord Millett stated that the requirement that crimes against humanity be linked to war was a "jurisdictional restriction based on the language of the [Nuremberg] Charter. There is no reason to suppose that it was considered to be a substantive requirement of international law.... The need to establish such a connection was natural in the immediate aftermath of the 1939-45 war. As memory of war receded, it was abandoned"(at 174 g - h).
10 V Morris & MP Scharf An Insiders Guide to the International Criminal Tribunal for the Former Yugoslavia Vol I (1995) 81-3. See too the Report of the Secretary-General Pursuant to Para 2 of Security Council Resolution 808 (1993), S/25704 of 3 May 1993, para 47: "Crimes against humanity .... are prohibited regardless of whether they are committed in an armed conflict, international or internal in character."
11 Article 3. See further V Morris & M P Scharf The International Criminal Tribunal for Rwanda (1998) 202-205; T Meron "International Criminalization of Internal Atrocities"(1995) 89 AJIL 554, 557; Prosecutor v Akayesu Case No ICTR-96-4- T (2 September 1998) p 229 (para 565).
12 Article 7.
13 Op het Grensgebied van Internationaal en Nationaal Recht; De Verjaring van Internationale

Misdrijven (1968) 17.
14 Enkele Aspekten van de Strafrechtelijke Reactie op Oorlogsmisdrijven en Misdrijven tegen de Menselijkheid (diss. UvA 1973) 41.
15 The prosecution before national courts of Eichmann, Demjanjuk (Israel), Barbie, Touvier, Papon (France), Menten, Ahlbrecht (the Netherlands), Finta (Canada) etc for crimes against humanity all relate to the events ofthe Second World War.
16 Supra note 6 at 573.
17This requirement is included in all but one (the 1996 ILC Draft Code, supra note 1) of the instruments defining the Crime against Humanity, inc1uding the Nuremberg Charter.
18See Prosecutor v Tadic IT 94-1-T, para 644 (1997) 36 ILM at 941); D. Robinson "Defining 'Crimes against Humanity' at the Rome Conference" (1999) 93 American Journl of International Law (AJIL)43 at 48.
19 At 243-6, Supra note 6 at 578-81.
20 Crimes against Humanity at 277. Bassiouni's view gains support from Article 7(2)(a) of the Rome Statute of the ICC (supra para 4.3.2) which requires that the acts be "in furtherance of a state or organization policy" and Tadic (supra note 15) at para 644 (1997) 36 ILM 941. See further Robinson, supra note 18 at 49-50.
21This requirement does not appear in the Nuremberg Charter but it does feature in the jurisprudence of the Tribunal. In its discussion of crimes against humanity the Nuremberg Tribunal declared: "The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic."Nazi Conspiracy and Aggressian: Opinion and Judgment 84 (US Govt and Printing Office 1947); 1996 ILC Report supra note 1 at 94 footnote 126.
22Ahlbrecht, Bijz. Raad van Cassatie, 11 April 1949, Nederlandse Jurisprudentie 1949, No.427 at p. 750; Menten. Hoge Raad, 13 January 1951, Nederlandse Jurisprudentie 1981, No.29 atp. 215; Barbie Case 78 International Law Reports (ILR) 137.
23As stated by the French text of the ICTR Statute; see the Akayesu case, supra note 11, p. 235 (footnote 144).
24ICTR Statute, Article 3; ILC Draft Code (supra note 1), Article 18; Rome Statute of ICC, Article 7.
25 Supra note 1 at 94-5.
26 Akayesu, supra note 11, at 235 (para 575); Prosecutor v Tadic, IT-94-1-T (7 May 1997) para 647; (1997) 36 ILM 908 at 942; Prosecutor v Blaskic, Case No IT-95-14-T (3 March 2000) para 207.
27 See Darryl Robinson "Defining 'Crimes Against Humanity' at the Rome Conference"(1999) 93, American Joumal of International Law (AJIL) 43 at 47,51.
28Supra note 11, p 235-6 (para 580).
29Case No IT-95-14-T (3 March 2000), para 203.
30 Ibid para 204.
31 Prosecutor v Tadic, case no IT-94-1-A (15 july 1999) p 130, para 292.
32 Bassiouni supra note 20 at 411.
33 98 ILR 520,627-8,542-5.
34 104 ILR 284 at 358-363.
35 Supra note 7, Article 2(5).
36 Resolution 2391 (XXIlI) of 26 November 1968; 754 UNTS 73.
37 European Treaty Series, No.82.
38 Report of the ILC, 43rd Session, UNGAOR, 46th Session, Supp. No 10, A/46/10 (1991).
39 Supra note I.
40 YBILC 1994, vol. I at 125, 130; vol. II, part two at 80.
41 Parliamentary Assembly of the CoUncil of Europe, 31 January 1979, Doc. 4275. On the position in the Nether1ands, see R van Dongen "De Decembermoorden berecht?" Nm 9 JUne 2000, p. 1142.
42 78 ILR 134-5,
43 (1998) 1 Yearbook of International Humanitarian Law 352. The Argentine Supreme Court adopted a simi1ar approach when it approved the extradition of Priebke to Ita1y: ibid at 341.
44 Judgment of 10 December 1998, IT-95-17/1-T para 157.
45 E/CN.4.Sub.2/1997/20 Rev./(2 October 1997) at 24 (principle 24). italics added. See too Bassiouni supra note 20 at 224.7.
46 A study by Friedl Weiss published in 1982 conc1uded that crimes against humanity could not be subjected to statutory limitation under customary international law: "Time Limits for the Prosecution of Crimes against International Law" (1982) 53 British Year Book of lnternational Law 162, 194.

47 Attorney-General of the Government of Israel v Eichmann 36 ILR 277 at 298-304.
48 Eichmann Case, ibid; Demjanjuk v Petrovsky 776 F 2d 571 (1985) at 528-3; In the Matter of the Extradition of Demjanjuk 612 F Supp 544 (DC Ohio 1985), 555-8; R v Finta 82 ILR 425,443-44; 98 ILR 520; 104 ILR 284.
49 Draft Code of Crimes against the Peace and Security of Mankind. See Article 8 and commentary there to, supra note 1 at 42 and 46.
50 K Randa1l "Universal Jurisdiction under International Law (1988) 66 Texas Law Review 785; Baggiouni, supra note 20 at 240; 1 Brownlie Principles of Public International Law, 5th ed. (1998) 308.
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93 Lotus Case 1927 Permanent Court of International Justice Reports, Series A, No.10.
94 Oppenheim 's International Law, supra note 83 at 470-1.
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