

REPORT ON THE REGIONAL EXPERT MEETING ON THE HUMAN RIGHT TO PEACE

April 17, 2009

South African Human Rights Commission

Johannesburg, South Africa

Report prepared by Matiangai Sirleaf

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1. REPORT SUMMARY

Purpose of the Meeting

The main objective of the Regional Expert Meeting on the Human Right to Peace held in Johannesburg, South Africa on April 17, 2009 was to share the draft Luarca Declaration on the Human Right to Peace with Southern African civil society representatives. Another aim of the meeting was to identify and debate with Southern African civil society representatives the right to truth and justice as a component of the human right to peace, in the context of the Luarca Declaration. The meeting was also organized in order to analyze the legal, social, and political rights of victims of human rights violations to obtain redress through the right to an effective remedy, guarantees against non repetition, satisfaction, and reparation. Lastly, the meeting was convened to ensure that cultural sensitivities of the Southern African civil society is represented in the future Universal Declaration on the Human Right to Peace. The full program of the Regional Expert Meeting is included in Appendix I.

Participants

The Regional Expert Meeting consisted of civil society representatives from a broad spectrum. Observers also included representatives of national human rights bodies and international organizations. The total number of people attending the meeting was 26; the full list of participants and observers is included in Appendix II. The working language of the meeting was English.

Organizers and support

The SSIHRL provided the conceptual guidance of the Expert Meeting, selecting the topics for discussions as well as speakers. The ICTJ participated in the selection process of participants, subjects, speakers, and moderators. The ICTJ also facilitated logistical support. The Expert Meeting was sponsored by the Government of Spain, through the Human Rights Office of the Ministry for Foreign Affairs and Cooperation. The Expert Meeting was also supported by the Regional Office of UNESCO, the Regional Office of the High Commissioner for Human Rights of the United Nations, the Regional Office of UNICEF, the Regional Office of UNHCR, the Pan African Parliament, and the host of the meeting the South African Human Rights Commission.

Presentations and discussions

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The presentations and the discussions focused on the right to truth and justice in the context of the human right to peace. The first session summarized the Luarca Declaration. It also examined the historical emergence of the right to truth as a legal concept, at the international, regional, and national level. The session held that the right to truth relates to the obligation of states to provide information to victims, families, and societies regarding serious violations of human rights. The session also found that the right to truth is an integral part of justice. It noted that the right to truth is applicable in not only contexts of knowing information about missing and disappeared persons, but also generally applicable to knowing information about human rights violations and the context in which they occurred. The session surmised that the right to truth is violated whenever particular information is not revealed to victims, through either a judicial process or a truth seeking process. The session observed that the right to truth assists in healing, bringing closure, providing remedy to victims, as well as reparation, and justice. The presentations concluded that the right to truth could be implemented by truth commissions, commissions of inquiry, the disclosure of state documents, facilitating public access to information, and through public trials.

The second session focused on the right to justice. The presentations asserted that there are a range of interpretations regarding what justice is, which includes restorative, retributive, and redistributive conceptions of justice. The session maintained that the various interpretations regarding justice are sometimes used and misused in order to conceal, rather than to promote a broader accountability agenda. It stressed the need to conceptualize a “thick” interpretation of accountability, which does not solely focus on retributive justice. The presentations also highlighted several cross-cutting concerns regarding promoting justice, which include its commoditization, the tendency to promote civil and political rights in debates over socioeconomic rights, and credibility issues with attempts at fostering justice.

The discussion sessions focused on unpacking the concepts “truth” and “justice,” which have multiple meanings. The discussions also observed the thick and thin interpretations of “truth” and “justice,” and discussed how the multiple definitions affect interpretations of the right to truth and justice in the Luarca Declaration. Much of the discussions also focused on issues of implementation and enforceability of the Luarca Declaration. Some participants questioned the relevance of the Declaration to human rights victims and its impact on their lived realities. Questions were raised regarding how to translate the framework of the Luarca Declaration to people on the ground. Inquiries were also raised regarding the retrospective applicability of the rights enshrined in the Declaration, particularly with respect to the right to truth.

The discussions also focused on several inter-connected issues related to the right to truth and justice. This includes understanding the concept of reconciliation, its contested meanings, its relation to truth, and the suitability of pursuing reconciliation in different contexts. Participants explored the relationship between peace and justice, and the contentious issue of amnesties. Additionally, participants examined the applicability of traditional dispute resolution mechanisms in addressing massive human rights violations, in the context of the right to truth and justice. Further, the

discussions raised the problem of focusing efforts at accountability only on the “big men” and not dealing with other levels of accountability, including examining the institutions that facilitate abuses, and those that directly perpetrate human rights abuses. The participants resolved that it is necessary to take a multifaceted approach to issues of “truth” and “justice,” because mechanisms to foster these rights have numerous limitations.

Conclusion

The meeting ended with the provisional adoption of the Johannesburg Declaration (in Appendix III), pending approval from representatives’ organizations by May 8, 2009. The main recommendations for the Luarca Declaration emanating from the meeting, included:

1. Incorporating the usefulness of alternative conflict resolution mechanisms in the Declaration;
2. Recognizing the importance of alternative ethical and important cultural perspectives in the Declaration;
3. Making the subject of disarmament more concrete in the Declaration; and
4. Specifying the definitions of “truth” and “justice” within the Luarca Declaration.

OVERVIEW OF PRESENTATIONS & DISCUSSIONS

Opening Session of the Expert Meeting

Commissioner Zonke Zanele Majodina, Representative of the South African Human Rights Commission, and Member of the UN Human Rights Committee provided welcoming remarks. She noted that the human right to peace is an enabling right, which is novel because it forces us to look at the framework of human rights collectively. She remarked that the new paradigm of human rights is exciting and that she is looking forward to the development of the human right to peace.

Dr. Comfort Ero, Deputy Director, Africa Program, of the ICTJ also provided introductory remarks. She remarked that the right to peace, justice, and truth are critical to the work of the ICTJ, and is the reason why ICTJ helped to organize and participate in the Regional Expert Meeting. She stated that it was particularly important to hold the meeting in South Africa, given the role that its civil society has played in championing issues of social justice.

Mr. David Johnson, OHCHR Regional Representative, similarly provided initial comments. He remarked that the right to peace as described in the Luarca Declaration is vital for all and needs further elaboration. He thanked the SSIHRL for its efforts in helping to define the elements of the right to peace, which standard setting bodies like the United Nations have not stated authoritatively. He commented that the right to truth and justice is necessary in post-conflict countries or countries coming out of military rule, and that it transcends cultures. He concluded that addressing violations in a transparent mechanism is the best way to deal with these issues, noting that failure to deal with truth and justice will undermine sustainable peace, and that truth and justice were vital to break the cycle of violence.

Dr. Hernando Valencia Villa, Member of the SSIHRL, provided concluding remarks to the session. He summarized the efforts of the Spanish Society to promote the right human right to peace. He also drew participants' attention to the 2010 international conference, which may adopt a draft Universal Declaration on the Human Right to Peace.

FIRST SESSION: THE RIGHT TO TRUTH IN THE LUARCA DECLARATION ON THE HUMAN RIGHT TO PEACE

Speaker, Dr. Hernando Valencia Villa, Member of the SSIHRL: The Luarca Declaration on the Human Right to Peace and the World Campaign on the Human Right to Peace

Dr. Villa briefly summarized the work of the SSIHRL, which is a young and small association of law teachers, experts, and activists in the field of human rights law, who have taken on the enormous task of creating a new Universal Declaration within the UN system on the right to peace. He remarked that the SSIHRL has been involved in a long effort over the past three years, to prepare all the draft materials for the Declaration. Dr. Villa pointed out that the SSIHRL has held several meetings in Spain, which led to the adoption of the Luarca Declaration. He cited October 2006 as the beginning of the global campaign on the human right to peace, wherein the SSIHRL embarked on numerous consultations with regional experts (reflected in the Johannesburg Declaration). He remarked that the purpose of the consultations were to add the ideas of others into the Luarca Declaration as well as to develop an international consensus on the basic terms of the human right to peace. Dr. Villa also asserted that the various consultations serve to expose the Declaration to the critique and comments of many. He surmised that thus far, the SSIHRL has found tremendous interest and receptivity to the Declaration. Dr. Villa stated that the SSIHRL plans to hold additional regional meetings on the right to peace in Morocco and Cairo, in order to have as many perspectives from Africa as possible. He noted that the SSIHRL has already held consultations in Senegal and Cameroon.

Dr. Villa then provided a synthesis of the Declaration, reviewing the 18 articles and providing some commentary. He noted that the Declaration defines the holders of the right to peace as individuals, groups, and peoples, so that the right to peace is simultaneously an individual and collective right. He explained that individuals are entitled to peace as one of the basic social goods, but at the same time, the right to peace must be exercised in a collective fashion because we are not "islands." He commented that the Declaration incorporates the challenging new concept of human security, which goes beyond narrow conceptions of national security. He clarified that the right to live in a safe and healthy environment was incorporated in the Declaration out of the growing concern and commitment to the environment. Dr. Villa expounded on the right to disobedience and conscientious objection, which he stated encouraged plurality and diversity, and noted that it was important to protect difference, provided that the exercise of the right takes place in a pacific context. He pointed out that massive population movements and the concern with immigration necessitated the incorporation of the rights to refugee status, to seek asylum, and to emigrate peacefully.

Dr. Villa focused on the three final provisions of the Declaration relating to its enforcement. He observed that there is a functional relationship between rights and obligations, and that they are two sides of the same coin. He stated that the SSIHRL would like to propose a strong Declaration, and similarly wanted an effective Working

Group, if it the UN system eventually adopts the Declaration. He noted that the Working Group would consist of 10 members of leading international experts and authorities with the requisite experience to oversee the enforcement of the right to peace. He maintained that the Declaration is not only about words, but also about practical and effective mechanisms and procedures to protect the rights enshrined in the Declaration, and all the other human rights from the perspective of furthering peace.

Dr. Villa observed that South Africans in particular know very well the importance of the right to peace, from the history of their transitional process, and the Truth and Reconciliation Commission, with all of its attending lights and shadows, which serves as one of the leading points of reference for a country struggling to find its own way to achieve, democracy as well as social justice and peace. In this vein, he remarked that the SSIHRL is committed to having a strong declaration relating to the rights of victims to truth, justice (punishment of perpetrators), and the right to reparations. He commented that the right to an effective remedy includes truth, justice, and reparation. He observed that the UN General Assembly adopted Resolution 60/147 on the rights of victims for the first time in history, and argued that this maybe representative of international “hard law,” since it was adopted with unanimity.

Speaker: Ms. Yasmin Sooka, Executive Director, Foundation for Human Rights: The Right to Truth in Article 10 of the Luarca Declaration in Light of the Southern African Experience

Ms. Sooka noted that a discussion on the right to peace is particularly appropriate on a continent rife with conflict that has resulted in incredible misery. She observed that is laudable to have laws that seek to enforce peace, since we have laws that regulate war. She defined “truth” as knowledge that is officially sanctioned and officially acknowledged. Nevertheless, she recognized that it is important to interrogate what we mean by the “truth.” Ms. Sooka observed that there are traditional distinctions between truth as social and truth as forensic, or narrative. She pointed out that the right to truth may be interpreted as the right to an official statement of what happened, which would relegate it to a matter of use of language by the state, which may not correspond with what people understand to be the “truth.”

Ms. Sooka provided a summary of the legal basis for the right to truth. She stated that the right to truth is a legal concept relating to the obligation of States to provide information to victims, families, and societies regarding serious violations of human rights. She held that the right to truth is violated when particular information is not revealed to victims, either through a judicial process or a truth seeking process. She noted that the right to truth plays a role in healing, bringing closure, and providing remedy, reparation, and justice. Ms. Sooka asserted that the right to truth has been used to contest blanket amnesty laws, and to challenge widespread violations of human rights. She also observed that the right to truth has been implemented by truth

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commissions, commissions of inquiry, through the disclosure of state documents, through public access to information, and public trials. She maintained that the right to truth is an integral part of justice.

She traced the long and tortuous history to recognize the right to truth, culminating in its incorporation in the updated Principles to Combat Impunity, which declares that people have the right to know the circumstances that led to the perpetration of crimes, and provides that irrespective of any legal proceedings victims have the right to know the truth. She also cited the United Nations Human Rights Commission Resolution 66 of 2005, which recognizes the importance of ensuring the right to the truth in order to contribute to ending impunity and to promote human rights. She discussed the study of the United Nations Office of the High Commissioner for Human Rights, which outlined the basis, scope, and content of the right to truth under international law. She observed that the study on the right to truth concluded that the right is inalienable and autonomous, linked to duty of state to conduct effective investigations and to provide remedy, and that it is a non-derogable right not subject to limitations.

Ms. Sooka affirmed that the right to truth initially developed in the context of missing persons and enforced disappearances. She cited the 1977 Additional Protocol I to the Geneva Conventions, which refers to the right of families to know the circumstances of their loved ones that went missing during the conflict. She claimed that the situation of enforced disappearances led to the broader interpretation of the right to truth in other circumstances. She observed that the Inter-American Commission on Human Rights, and the UNHRC drew upon this right in order to uphold and vindicate the right to justice, effective remedy, and reparation. Ms. Sooka maintained that since then the right to truth has moved beyond providing information of missing and disappeared persons, to include information about human rights violations and the context.

Ms. Sooka argued that the right to truth has only recently been enshrined as a right under customary law and as a general principle of law. She noted that initially the right to truth was not regarded as customary law because beyond the norm of providing victims and their families with information about the circumstances of a missing person nothing broader was done. She maintained that the right to truth has been recognized by many courts, and instruments, as well as through the establishment of truth commissions. Further, Ms. Sooka averred that an analysis of international humanitarian law confirms that the right to truth is a customary law that is applicable in both international and non-international armed conflicts. She referred to the numerous resolutions of the UN General Assembly on those subjected to enforced disappearances, discussing the desire to know as a basic human need, and as a basis for developing the right to the truth. Ms. Sooka also claimed that the right to truth has been inferred from a number of human rights treaties. She noted that the UN Secretary General has stressed the right to the truth for human rights victims, as well as for society, and that numerous reports submitted to him reiterate the need for the truth. Ms. Sooka referenced the Joint Principles as affirming the inalienable and

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imprescriptible right to the truth, to know about past events and about the circumstances and reasons, which led to gross human rights violations.

Ms. Sooka asserted that the right to truth has emerged in various regions. She mentioned the European Court of Human Rights, inferring the right to truth in relation to the right to be free from torture. She also quoted the African Commission on Human and Peoples' Rights, inference of the right to truth, in relation to the right to fair trial and legal assistance, as well as constituting part of the right to an effective remedy. Ms. Sooka referred in length to the work of the Inter-American Court on Human Rights and its jurisprudence on the right to truth, as an autonomous right, which it linked with other obligations of the American Convention, such as the prohibition on torture.

Ms. Sooka maintained that the right to truth has been confirmed in state practice. She noted that this can be observed particularly on the Continent with the establishment of truth commission where serious human rights violations have taken place. She recognized that while this may provide evidence of wide spread practice, it is unclear if the establishment of truth commissions is based out of a sense of legal obligation to provide the truth. She expounded that most of the instruments refer to the truth about what happened in the past, but mostly in the context of reconciliation processes, to contribute to democracy, and to deal with impunity. Ms. Sooka explained that a number of peace agreements provided for truth commissions, which further questions whether state practice in establishing truth commissions is based on a sense of legal obligation or for political motives. She observed that most constitutions do not explicitly recognize the right to truth for human rights victims, but that some constitutions promote the freedom of information generally. Ms. Sooka discussed how freedom of information laws has been used to obtain information on human rights violations. She criticized states for usually seeking ways to limit this use by claiming national security concerns in order to restrict the amount of information released. She concluded that the right to truth is an inalienable right that cannot be limited irrespective of national security considerations.

Ms. Sooka then turned her attention to the application of the right to truth on the Continent. She stated that the South African process called for full disclosure, which allowed the truth to be told during the amnesty proceedings. However, she noted that the proceedings limited public participation in the process, closing most proceedings to the larger society, and only allowing the victim in at times. She also discussed the failure of the South African Truth and Reconciliation Commission to deal with South Africa's crimes in the region. Ms. Sooka criticized the South African government's current pardons process for perpetrators of political crimes, which would effectively promote further impunity in the country. She discussed the experience in Sierra Leone, wherein the Truth Commission for Sierra Leone based its arguments on access to detainees in the Special Court for Sierra Leone's custody based on the right to truth. She surmised that other countries in southern Africa do not seem to demonstrate the realization of the right to the truth, and that victims have been limited in attempts to actualize this right. She noted that in Mozambique nothing has been done, and that in Angola there is an elitist discourse regarding reconstruction as

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reconciliation. Ms. Sooka briefly discussed the Zimbabwean commission of inquiry's report into the 1983 massacre in Matabeleland, whose report was never publicly released. She also lamented that there was no mention of truth and justice in the current peace agreement in Zimbabwe. She concluded that in spite of the reluctance of governments in the southern African region to engage with issues of truth seeking and dealing with crimes of the past, there have been some efforts by civil society organizations to formulate regional strategies.

Discussion:

Moderator, Commissioner, Zonke Zanele Majodina, Representative of the South African Human Rights Commission, and Member of the UN Human Rights Committee.

Q1: Article 12 of the Luarca Declaration provides for the right to development, considering that there is already a UN Declaration on the Right to Development and that many other elements of the right to peace, are provided for elsewhere, what value is the Luarca Declaration adding? Particularly looking in Africa, how will this declaration promote peace?

Dr. Villa's Response:

The novelty of this Declaration and the campaign for its adoption as international law is that we are trying to situate the human right to peace, in a much more complex context. The Declaration provides a more contemporary and rich understanding, with many of the real life relationships between peace and relevant aspects of economic, social, political, and cultural life. The incorporation of other well-known rights into this Declaration as aspects or elements of the right to peace provide a more relevant formulation, definition, and Declaration. Of course, the issue is not only the formulation, of new norms and rights, but also the application and the enforcement of all of these in the international sphere. As practical people, we may tend to take for granted the very formulation of rights and tend to see legal declarations and legal instruments as devoid from reality. However, it has been a long struggle, with many victims sacrificed, just to have the instruments we have today, which are of value in and of itself because they establish human dignity and civilization.

Ms. Sooka's Response:

The right to development is one of the weakest concepts in transitional justice, in dealing with conflicts of the past. Critiques of the South African Truth and Reconciliation Commission focus on the Commission's failure to deal with the political economy of apartheid. If you look at the legacy of the Commission in South Africa today in dealing with these issues, you can see the problems with the narrowness of our work. We did not look at the systemic nature of violations, and the beneficiaries who are complicit in the violations of the past.

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Q2: What is the retrospective applicability of the rights enshrined in the Declaration, particularly the right to truth, which is inherently a backward looking exercise in most situations? What types of tensions will there be in engaging with historical issues, particularly regarding trying to access information from the state?

Dr. Villa's Response:

The right to truth is in tension between the need to settle account with the pasts and the need to look forward. The Declaration is not seeking a retroactive application of the law, because we are not thinking exclusively in transitional processes. We tried to include the elements of the right to peace, as we understand it, and tried to propose a universal framework. We have to offer as much truth and justice to the victims first, and to society in the second place as we can, and every society has to find its own formula, a local combination of all the elements of transitional justice: truth, memory, justice, reconciliation, reparation, and lustration.

Ms. Sooka's Response:

Access to information laws can be used to gain information, while not necessarily the truth; it may give you something to work with. In South Africa, victims initially said let's have the truth and then we can move on, but then they realized that the truth was not enough and they wanted something more.

Q3: Why does the Declaration not criminalize the design, manufacture, selling, and buying of arms because that is what escalates a conflict?

Dr. Villa's Response:

The greatest failure and defeat of international humanitarian law, has been the failure to prohibit and to suppress nuclear arms. It is a shame and a personal failure that we have not been able to wipe out nuclear weapons.

Q4: How effective was the South African Truth and Reconciliation Commission, did it really make an impact given the current situation? What was the effect of the conditional amnesty?

Ms. Sooka's Response:

Perhaps the Commission was naïve, because we anticipated that if there were such a generous offer as amnesty, individuals would come forward, because they would want to take advantage and free themselves. However, people came forward to apply for amnesty only if they believed they were going to be found out. Certainly, if we did not have the trial of a prominent perpetrator going on at the same time where several names were revealed, the amnesty

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process might not have been as successful as it was. The Attorney General in South Africa did not understand that our approach was meant to be a “carrot and stick,” and that in a sense the prosecutions process would prompt individuals to go into the amnesty and truth telling process. In the end, the country was the loser, as disclosures made by people during the amnesty proceedings were limited. The process was such a legal and adversarial process, that people were trying to demonstrate that they were not guilty. Latin American truth commissions, who were mostly transitioning from military rule, so they focused on civil and political rights, influenced the Commission. Thus, we did not look at how land distribution and the forcible displacement of people affected communities. We did not examine the educational system amongst others. The result was that the individualization of guilt during the amnesty process led to the perception that that individual white Afrikaners were to blame which absolved material beneficiaries of responsibility. We needed to have hearings on what apartheid was actually about, which was systemic violations that may have been more effective. Moreover, prosecution guidelines and the pardons process in South Africa have given perpetrators another bite of the cherry, further entrenching impunity. The effect of the amnesty may have created the sense that any crime committed can be given an amnesty, particularly when you look at issue of corruption and the arms deal discourse about whether those that participated in the arms deal should be given amnesty. We need to interrogate the conditional amnesty seriously.

Q5: Where are we regarding reparations in South Africa?

Ms. Sooka’s Response:

Reparations were regarded as only a state obligation, so the material beneficiaries of apartheid felt they were absolved of responsibility. In South Africa, the Government only provided material reparations, but the Government has not implemented community reparations and other aspects recommended by the Truth and Reconciliation Commission.

Q8: Given how the concept of reconciliation is used in the southern African region, how did South Africans at the time understand the concept of reconciliation?

Ms. Sooka’s Response:

In South Africa, elites used reconciliation to propagate the myth of the rainbow nation, but the nation is not reconciled. Reconciliation came at the expense of redress. Thus, today South African victims of apartheid have had to take their claims for redress to the U.S. relying on the Alien Torts Claim Act. The South African Ministry of Justice actually filed an amicus brief in support of the businesses, but some Commissioners filed an amicus in support of victims. The U.S. court has ruled that victims have the right to bring the case.

Dr. Villa’s Response:

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Reconciliation is a contested word with different meanings in different societies. In the last 20 to 25 years, it has been the code word for the status quo in Argentina, and utilized by the Right against uncovering the past, and repairing the victims. Additionally, those who do not want to do anything for the victims of Spain's civil war during Franco's regime use the word reconciliation. The word is also problematic in other contexts, thus, we must take "reconciliation" with a grain of salt.

Q9: The issue of truth is a complex philosophical concept with many varied understandings, for example, something that has actually happened as opposed to a communal understanding of the truth. What do we mean when we say people have a right to truth, when you have so many varied understandings of the truth?

Dr. Villa's Response:

When we talk about the right to truth, we are referring to public truth concerning crimes, abuses, and human rights violations of the past. The only truth that is legally binding in a civilized society with legal, political, and moral consequences is judicial truth, which also includes truth commissions.

Q10: What does the Luarca Declaration actually do for victims? When we speak about the Universal Declaration of Human Rights, it is 60 years since its development, the world is still in chaos, and not much has changed in the lived experience of peoples. How will we ensure effective implementation of the Luarca Declaration? People are suffering and living in states of violence and injustice.

Ms. Sooka's Response:

The benefits of this instrument, is it is a wall we must keep up. We have to be vigilant, as we are doing the work of generations. Our job is to translate these instruments into remedies for ordinary people. The issue of reconciliation has also been problematic in Africa. It is not that Africans do not want accountability, or want the cycle of violence and impunity to continue. When you look at Latin America, you see that the Inter-American system has been pushing for the preservation of victims rights and its jurists are in the lead in articulating the right to truth, and advocating for it. However, when you look at the African regional mechanisms, it is not that we do not have the instruments to deal with accountability in Africa, we do, but the instruments lack capacity. For example, the African Court on Human and People's Rights was established, the judges appointed, yet nothing has been done to date. Some Africans do not even have access to the Court because our countries have made reservations. We need to organize civil society so that reconciliation and healing in Africa will not be the code word for not having accountability.

Dr. Villa's Response:

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The question you ask is what all human rights defenders ask themselves everyday. Yet, without the human rights movement, the transitional process in South Africa would not have been possible. The establishment of the International Criminal Court is another triumph of the movement. The prosecution of heads of state, for example, Taylor, Fujimori, and Milosevic, the very idea of bringing heads of states before international courts and having them respond for their abuses against their own peoples is a contribution of the human rights movement. We have just 60 years trying to do human rights, since WWII, before then impunity was the law of the land, we are trying to construct an international and regional protection system. We need to have patience, and insist like Cicero that the task begins every day.

SECOND SESSION: THE RIGHT TO JUSTICE IN THE LUARCA DECLARATION IN LIGHT OF THE SOUTHERN AFRICAN PERSPECTIVE

Speaker: Dr. Hernando Valencia Villa, Member of the SSIHRL: Introduction to the Topic

Dr. Villa maintained that he prioritizes justice with a clear awareness that justice must be based on peace and peace based on justice. He remarked that the word peace derives from the Latin word *paccare* and it means both to pacify, and to pay. He surmised that the history of the word peace teaches us that peace means not only to pacify, that is to avoid or overcome conflict, and political violence, but also to pay the debts we have amongst us with respect to justice. Dr. Villa commented that the right to justice has been in the making within international public law in the last 20 years. He recalled that the United Nations General Assembly has adopted a resolution of Basic Principles and Guidelines on the Rights of Victims to Truth, Justice, and to Reparation. He summarized the development of the right to the truth in international law. Dr. Villa then observed that Article 10 of the Luarca Declaration is a reformulation of the legal tradition regarding the right to an effective remedy against human rights violations in general. He mentioned the right to obtain justice, the right to know the truth belonging to victims, members of their family, and society in general, as well as the right to attain redress in accordance with international law. Dr. Villa remarked that some authors speak of two generations of transitional processes. He asserted that the first generation occurred during the 1980s and 1990s, wherein a lot of emphasis was placed on truth and reconciliation. While the second generation he maintained began since the new millennium, where the emphasis is increasingly on reparation and punishment. He noted that the issue of reparation is becoming incredibly more complex and difficult to implement than it was 10 years ago. He highlighted the Peruvian experience, in which President Fujimori was convicted of various human rights violations and condemned to 25 years in prison, as a 70-year-old man. Dr. Villa concluded that every occasion in which we can have a minimum of justice done in this planet of ours we should.

**Speaker: Piers Pigou, Director of the South African Archives Project:
The Right to Obtain Justice in Article 10 of the Luarca Declaration in Light
of the Southern African Experience**

Mr. Pigou began by discussing the dislocation of the discourse on justice and its meaning from people on the ground. He observed that as human rights activist and human rights defenders trying to translate the right to justice into the practical realities of peoples' lives is a critical challenge. He explained that these kind of discussions need to be more connected to the lives of individuals. He remarked that it was interesting to see the different consultations embarked upon for the Luarca Declaration.

Mr. Pigou asserted that there is no such thing as a "southern African" perspective, since there are a diversity of viewpoints on justice. He maintained that there is a range of interpretations regarding what constitutes justice, and questioned whether justice in the Luarca Declaration was restorative, retributive, or redistributive. He argued that the various interpretations and their corresponding uses and misuses, could be used to cover rather than to promote a broader accountability agenda. He stressed the need to have a "thick" interpretation of accountability, which is not just retributive. He hypothesized that his opinions maybe influenced because of having worked in South Africa, where the judicial options have historically been so limited. Further, he indicated that judicial processes are not designed to get to "truth," and focus on a particular type of truth. Mr. Pigou conceded that the narrowness of what constitutes the "truth" is even witnessed in truth commissions. He emphasized the need to look at what issues need to be addressed relating to historical legacies of injustice.

Mr. Pigou's presentation enumerated a number of critical issues in pursuing the right to justice. He queried how to obtain justice when credible justice systems have not existed in the past, for example in South Africa. He also cautioned that one has to examine what is possible in each society, and that each society must find its own way of dealing with justice. Mr. Pigou remarked on a number of determining factors regarding what is feasible in pursuing justice that must be taken into account. He noted that many southern African countries have legislative frameworks and these include things that give effect to the right to justice, for example, the South African Constitution is often referenced as one of the best in the world, and provides statutory and non-statutory infrastructure to deliver on justice. He warned that the capacity to deliver justice varies radically in other countries, as well as within countries, particularly in rural areas where there can be critical access to justice issues.

Mr. Pigou maintained that the ability to implement the intentions of the frameworks that we have created would be impacted by several crosscutting concerns in southern Africa, which may pollute the justice agenda. He identified the commoditization of justice, where it is increasingly the most expensive option, making it only available to those that can afford it. He also observed that efforts to address impunity and accountability must be cognizant that it is politically expedient to maintain processes that do not promote accountability. Mr. Pigou noted that while justice

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processes deal with retroactive activities, they also affect contemporary political agendas. He criticized the tendency to promote civil and political rights over and above socioeconomic rights in justice debates. He acknowledged that the core contents of socioeconomic rights are not well understood, and as such, civil and political rights have proven easier to adjudicate. Lastly, Mr. Pigou discussed the important credibility issues posed by the retributive agenda, with people that have limited experience of what justice means, since it is an intangible for many and not part of their lived experience.

Discussion:

Moderator: Dr. Comfort Ero, Deputy Director, Africa Program, International Center for Transitional Justice

Q1: Even though there are challenges, how can we move forward? How do you hold your government accountable?

Dr. Villa's Response:

The fundamental challenge of the human rights movement is to become political actors in some relevant sense. The human rights movement in most of the world is democratic, but not necessarily popular. To be sure, we have the right with us, but we need to convince governments, political parties, and leadership. We need to develop new strategies and tactics in order to be relevant, by inserting and incorporating the human rights discourse broadly. One of the necessary tasks is the development of accountability such that reform and building of judicial systems are legitimate and effective at both the national and international level. Most human rights violations and serious crimes can be prosecuted, and repaired within the relevant countries by national courts, tribunals, and judges. Yet, just in case national justice does not work, we have created international tribunals and courts to fill in the gaps, until national judicial systems are strong enough to handle at least the most serious crimes in every country.

Mr. Pigou's Response:

The methods mentioned by Dr. Villa are good means. Yet, given the scale of atrocities committed, it still leaves much wanting, which leaves room open for traditional practices that have not been utilized sufficiently. A good example is the community reconciliation process utilized in East Timor, which worked well.

Q2: How can you have peace in a society without a mechanism that actually brings accountability? Will there be peace in Zimbabwe without prosecuting Mugabe?

Mr. Pigou's Response:

We need to focus on a number of different levels of accountability, and not just look at the “big men,” those that did not point triggers, if you are going to avoid things happening again. We need to focus on more than just Mugabe since the process is much larger; we also need to address the security infrastructure, and apparatus in Zimbabwe. Currently, the justice system is not in a position to deal with accountability. Yet, how receptive will people be to an external system? The issue of justice may have to wait, in order for the domestic judicial system to have capacity.

Ms. Sooka’s Response:

In Sierra Leone, there is a blanket amnesty for everybody else except those deemed to bear the “greatest responsibility,” which meant that the Government was powerless to deal with the everyday perpetrator, which created numerous problems. We need to do more on closing the impunity gap and need to develop domestic capacity.

Q3: Looking at the case of Rwanda where the country had hundreds of thousands of perpetrators imprisoned, and the formal criminal justice system could not cope, Rwanda had to resort to *gacaca* courts, which have also faced problems. How do you assess the use of this traditional practice in Rwanda?

Mr. Pigou’s Response:

The modernized *gacaca* process in Rwanda is a once off thing, which is very different from the traditional practice. I can imagine that there are places where *gacaca* have been successful, but more research needs to be done on its effectiveness.

Ms. Alexander’s Response:

In some places *gacaca* does really work, and other places, it does not. It is important to note that the same variance can be found in the formal justice system, and there is no ideal model. *Gacaca* is one of the methods by which Rwanda has tried to deal with accountability and reconciliation, but there is also a National Unity and Reconciliation Commission, which monitors government institutions to see how they implement reconciliation policies. The *gacaca* process purposely did not include lawyers, and picked community leaders to serve as judges who received extensive training. People have to listen to the proceedings and the community has to deal with issues, with attempts to murder or crimes of property destruction, which renders a particular level of accountability. Peace beyond justice is the ultimate question in Rwanda, and how the current minority government deals with questions of ethnicity is key.

Q4: When you have mass crimes, we need to interrogate whether traditional mechanisms of justice are a good substitute for dealing with accountability.

Mr. Pigou's Response:

Will traditional justice mechanisms substitute or supplement? While not romanticizing, traditional processes, we need to have a proper discussion on what they mean and how they have mutated based on how governments have co-opted them over the years. However, traditional processes can be adapted and anchored in different processes, for example in East Timor individuals registered applications in court, which was an innovation from the traditional practice.

Q5: The notion of judicial truth and objectivity is an ideal and unreachable dream, as those involved in judicial systems are human beings like the rest of us, so judicial truth is also subject to biases and prejudices. In addition, there is a Western understanding of what democracy is, that has been imposed on a continent that has its own ways of dealing with conflicts. We need to work hard on developing an African model and understanding of democracy that is pluralistic.

Dr. Ero's Response:

What is the African conception of democracy? We need to question statements of African exceptionalism, because it becomes a force for our politicians to use. African governments signed up for the International Criminal Court, is it that they did not understand the consequences? We should not create excuses for our leaders.

Q6: Given the limitations of all of the methods of ensuring the right to truth and justice, which we have discussed, should we not be advocating for a multifaceted approach, which relies on a number of mechanisms to address these issues? Why is the notion of reconciliation promulgated in Africa with such feverishness, when nobody expected the Jews to reconcile with the Nazis post-WWII?

Mr. Pigou's Response:

We need to adopt a multifaceted approach, but also need to follow through on the processes that have been adopted and be consistent. The promise in South Africa was that there would be some kind of justice for those that did not go before the Truth and Reconciliation Commission, but the follow up has not been there. We need to be cognizant of the politics of prosecutions. Further, the idea of contested coexistence and pluralism is important as opposed to an idealized notion of reconciliation. We should be able to disagree, as long as there is some measure of adherence to constitutional values so that the country does not revert to conflict.

Conclusion and Recommendations

Dr. Villa asked participants at the beginning of the meeting to review the Johannesburg Declaration and to think of comments and criticisms. At the closing of the meeting, Commissioner Majodina, read the Johannesburg Declaration, and participants provided feedback. Inputs on the Declaration included:

- Finding another word for “doctrine,” in paragraph 2 of the Declaration;
- Changing the order of words to read “*consultative status*” as opposed to “status consultative,” in paragraph 3 of the Declaration;
- Deleting the word “hermeneutic” in the last sentence of Paragraph V of the Declaration, so that it reads, “Furthermore, the gender perspective, and human rights of women are indispensable to the task of *interpreting and implementing* the Luarca Declaration.”

Participants then unanimously provisionally adopted the Johannesburg Declaration, pending approval from representatives’ organizations. Participants resolved to report back with their final decisions from their organizations to the SSIHRL by May 8, 2009.

Dr. Villa enumerated the main recommendations for the Luarca Declaration emanating from the meeting, which included:

1. Incorporating the usefulness of alternative conflict resolution mechanisms in the Declaration;
2. Recognizing the importance of alternative ethical and important cultural perspectives in the Declaration;
3. Making the subject of disarmament more concrete in the Declaration; and
4. Specifying the definitions of truth and justice within the Luarca Declaration.

Dr. Ero, and Dr. Villa then thanked the speakers, the participants for their contributions, the South African Human Rights Commission for its hospitality, and the Spanish government for its financial support, on behalf of the ICTJ and the SSIHRL and the meeting was adjourned.

Evaluation

Participants present filled out evaluation forms regarding the meeting.

All participants considered as either good or very good: the methodology employed; reading material; relevance of presentations; academic achievement; and facilities offered for personal participation.

Additionally though 90 percent of participants considered the overall organization to be very good or good recommendations made under this section included: being informed with more advanced notice of such meetings, and of experts’ contributions,

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so as to be able to better prepare for the meeting; inviting and ensuring the attendance of a greater number of actors.

Regarding clarity, some 70 percent of participants also considered that greater clarification regarding definitions in the Luarca Declaration would be welcome.

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APPENDIX I: REGIONAL EXPERT MEETING SCHEDULE

PROGRAMME 17 APRIL 2009	
	<p style="text-align: center;">OPENING SESSION OF THE EXPERT MEETING</p> <ul style="list-style-type: none">▪ Ms. Zonke Zanele Majodina, Representative of the South African Human Rights Commission▪ Dr Comfort Ero, Director, International Center for Transitional Justice in Cape Town▪ Dr. Hernando Valencia Villa, Member of the SSIHRL▪ Mr. David Johnson, OHCHR Regional representative
09.00-09.30	
9:30- 10.00	Tea/Coffee
	<p style="text-align: center;">FIRST SESSION</p> <p style="text-align: center;">The right to Truth in the Luarca Declaration on the Human Right to Peace</p> <ul style="list-style-type: none">▪ Moderator: Ms. Zonke Zanele Majodina, member of the UN Human Rights Committee▪ Speaker: Dr. Hernando Valencia Villa, Member of the SSIHRL: <i>The Luarca Declaration on Human Right to Peace and the World Campaign on Human Right to Peace</i>▪ Speaker: Ms Yasmin Sooka, Executive Director, Foundation for Human Rights: <i>The Right to Truth in Article 10 of the Luarca Declaration in Light of the Southern African Experience</i>
10.00-11.00	
11.00-12.00	<i>Discussion</i>
12.00-13.00	Lunch break

	<p style="text-align: center;">SECOND SESSION</p> <p style="text-align: center;"><i>The right to justice in the Luarca Declaration in light of the Southern African Perspective</i></p> <ul style="list-style-type: none">▪ Moderator : Dr Comfort Ero, Director of the ICTJ▪ Introduction of the topic by Dr. Hernando Valencia Villa ▪ Speaker: Mr. Piers Pigou, Director, South African History Archives: <i>The Right to Obtain Justice in Article 10 of the Luarca Declaration in Light of the Southern African Experience</i>
13.00-13.20	
13.20-15.00	<i>General Discussion</i>
15.00-15.30	Tea/Coffee
15.30-16.30	Conclusions and Recommendations
16.30-17.00	<p style="text-align: center;">CLOSING OF THE MEETING</p> <p style="text-align: center;">Johannesburg Declaration Evaluation</p>

APPENDIX II: LIST OF PARTICIPANTS AND OBSERVERS

Alexander, Ms Karin

Institute for Democracy in South Africa

Barensché, Ms Karen

South African Peace Alliance

Ceruti, Ms Ines

The International Grail in South Africa

Clark, Mrs Paddy

International Center for Transitional Justice

Creado, Sister Ludwina

Good Shepherd Sisters

Ero, Dr Comfort

International Center for Transitional Justice

Fokala, Mr Elvis

Human Rights Institute of South Africa

Gonzalez, Mr Jose Manuel

Legal Advisor, Embassy of Spain

Johnson, Mr David

OHCHR

Legodi, Ms Pule

OHCHR

Letlaka, Ms Lydicia

Good Shepherd Mission

Macfarlane, Mr Ian D

South African Friends of Tibet

Majodina, Commissioner Zonke Zanele

South African Human Rights Commission

UN Human Rights Committee

Manthata, Commissioner

South African Human Rights Commission

Maseko, Dr Nhlavana

Traditional Healers' Organisation for Africa

Mfuni Mwanza, Mr Jean-Pierre

Central Africa Conflict Prevention Association

Modise, Ms Agatha

The International Grail in South Africa

Ntshoe, Mr I M

UNESCO

Olsen, Mr Tor-Hugne

Zimbabwe Human Rights NGO Forum

Pigou, Mr Piers

South African History Archives

Puyana, Mr. David Fernandez

SSIHRL and UNESCO

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Scott, Mr Callum

The Damietta Peace Initiative

Shumba, Mr Gabriel

Zimbabwe Exiles Forum

Sirleaf, Ms Matiangai

International Center for Transitional Justice

Sooka, Ms Yasmin

Foundation for Human Rights

Valencia Villa, Dr. Hernando

SSIHRL

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APPENDIX III: JOHANNESBURG DECLARATION

DECLARATION OF JOHANNESBURG (SOUTH AFRICA)

ON THE HUMAN RIGHT TO PEACE

Noting that participants of the expert regional meeting on the human right to peace are gathered at the South African Commission on Human Rights, Johannesburg (South Africa) on 17 April 2008 and that the venue has been organised by the regional office of the International Center for Transitional Justice in Cape Town, UNESCO Etxea and the Spanish Society for International Human Rights Law (SSIHRL) with the sponsorship of the Human Rights Office of the Ministry for Foreign Affairs and Cooperation of Spain

Recognizing the progress made by doctrine, international instruments and institutions with the impulse of the international civil society in its desire to move towards the necessary codification of the human right to peace at the international level,

Stressing, in this context, the work performed by the SSIHRL once adopted the Luarca Declaration on the Human Right to Peace on 31 October 2006, and its leading role in the global campaign on the human right to peace (2007-2009), supported by hundred and forty NGOs with status consultative at the Economic and Social Council of the United Nations.

Acknowledging the resolution 406/VIII of the Parliament of Catalonia adopted by the Committee on Cooperation and Solidarity in the session that took place on 26 February 2009 in where it adheres to the Luarca Declaration and fully supports the contents of that document including the Preamble, Part I (Elements of the Human Right to Peace) and Part II (Implementation of the Declaration)

Noting the regional conferences and expert meetings which have already been held in Geneva (World Conference of NGOs for the Reform of International Institutions, November 2006), Mexico (December 2006), Bogota, Barcelona and Addis Ababa, Ethiopia (2007), Caracas and Santo Domingo (2007), Morelia (Mexico), Bogota, Oviedo, and Santa Fe (New Mexico, United States) (2007), Washington, Nairobi, Kenya and Geneva (June 2007), Feldkirch, Austria (August 2007), Geneva (11, 12 and September 21, 2007), Luarca (September 28, 2007), Madrid (October 23, 2007), Monterrey (1 November 2007), Mexico City, Geneva, Las Palmas of Canary Island, Zaragoza and Navia, Asturias (2007), during the session of the Commission on the Status of Women of the UN, New York (February 2008) Parliament of Catalonia,

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Barcelona, Geneva, Dakar, Madrid, Valencia (April 2008), Rome and Gwangju, Republic of Korea (May 2008), Bilbao and Geneva (June 2008), Geneva and Cartagena (July 2008), Paris, Toledo, Geneva, Zaragoza, Montevideo and (September 2008), Oviedo, Alcalá, Turin, New York-Vitoria and Basque Parliament (October 2008), La Plata and Buenos Aires, Argentina, and Bosco Marengo, Italy (November 2008); Luxembourg, Geneva and Barcelona (December 2008); Geneva and Barcelona (January 2009); Yaoundé, Cameroon (February 2009), Geneva and New York (March 2009).

As a result of their discussions and agreements we adopt the following Declaration:

I. The human right to peace should be considered by the international community as an integral part of all human rights and fundamental freedoms of all women and men. The human right to peace has a holistic perspective with an individual and collective dimension.

II. The respect and guarantee of the full enjoyment of the human right to peace is a fundamental prerequisite for the exercise of other human rights, such as civil, economic, political, cultural and social as well as the right to development.

III. The right to truth and justice is a component of the human right to peace, in the context of the Luarca Declaration. Furthermore, victims of human rights violations have a right to obtain redress through the right to an effective remedy, guarantees against non repetition, satisfaction and reparation.

IV. We fully support the Luarca Declaration on the Human Right to Peace, adopted on October 30, 2006 by a drafting committee composed of experts in the town of Luarca (Asturias, Spain).

V. We recognise that this Declaration is being enriched by the contributions from the various regional expert meetings and that take into account the cultural sensitivities of each region. This Declaration should be compatible with the concept of unrestricted universality, interdependence, indivisibility and inalienability of all human rights recognized in international instruments. Furthermore, the gender perspective and human rights of women are indispensable to the interpreting and implementing of the Luarca Declaration.

VI. We urge the celebration of World Peace Conference of civil society in 2010 to discuss a final draft Declaration on the Human Right to Peace that satisfies the desires of the international civil society as a whole.

VII. We also urge the General Assembly of the United Nations to take note of the efforts made by international civil society, and to instruct the Human Rights Council so that it starts the process of codification of the human right to peace with the aim of submitting for its approval a draft Universal Declaration on the Human Right to Peace.

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VIII. We agree to adopt the following additional measures:

1. To enact the "Declaration of Johannesburg on the Human Right to Peace";
2. To invite any person or entity and any international player who agrees with its contents, to adhere to it;
3. To communicate the Declaration of Johannesburg to the President of the General Assembly and the Secretary-General of the United Nations as outlined in paragraph VII supra;
4. To make efforts to ensure that the Declaration of Johannesburg be disseminated to all civil society, academic, governmental, intergovernmental, national and international organisations; and
5. To appeal all international actors and people of goodwill in favour of the international codification of human right to peace to join the World Alliance on the Human Right to Peace.

Johannesburg, 17 April 2009