



CONFERENCE PROCEEDING REPORT ON THE CONFERENCE ON THE UNITED NATIONS CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCES

26-27 February 2008, Pretoria, South Africa

Hosted by Lawyers for Human Rights (South Africa) in association
with Aim for Human Rights (Netherlands)



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NOTE FROM THE DIRECTOR

Lawyers for Human Rights (LHR), together with Aim for human rights (Holland) and thanks to the generous financial support of the CWCI, hosted a two-day conference on the newly adopted United Nations Convention for the Protection of All Persons from Enforced Disappearances on 26 and 27 February 2008. The conference sought to facilitate an initial dialogue between the South African government and civil society organisations in the country, as well as civil society organisations in the region, which could act as a catalyst for future ongoing dialogue and debate on this issue.

The Convention was adopted in December 2006 by the UN General Assembly. Since its opening for signature on 6 February 2007 to date, 72 countries have signed it, including 21 African countries¹. South Africa has not yet signed the Convention, despite its active participation in the discussions prior to its adoption.

At this stage, three countries have ratified the Convention²; 17 additional ratifications are required before the Convention can enter into force. If ratified, this Convention would have a number of positive implications for South Africa and the rest of the region. It could provide a powerful tool to prevent disappearances, ensure reparations and help bring those responsible to account at a time when enforced disappearances continue to occur in all parts of the world.

With these issues in mind, the conference had the following objectives:

- to reflect on enforced disappearances as a human rights concern in South Africa and Southern Africa;
- to introduce the Convention and its mechanisms to selected governmental and non-governmental representatives from South Africa and the region; and
- to initiate a dialogue between the South African government and civil society on the importance and implications of ratifying this convention.

The report that follows contains a detailed account of the conference's proceedings. We hope that this report will serve as a reference tool for civil society organisations, government representatives, and other interested persons, for ongoing engagement on the issue of enforced disappearances and the UN Convention.

We would like to highlight that, as a result of the conference, three organisations in Southern Africa have recently joined the International Coalition Against Enforced Disappearances (ICAED)³, namely: Breaking the Walls of Silence (Namibia), the National Society for Human Rights of Namibia, and Lawyers for Human Rights.

¹ These countries include: Algeria, Burkina Faso, Burundi, Cameroon, Cape Verde, Chad, Comoros, Congo, Gabon, Ghana, Kenya, Madagascar, Maldives, Mali, Morocco, Niger, Senegal, Sierra Leone, Swaziland, Tunisia and Uganda.

² The countries are Albania, Argentina and Mexico. Mexico ratified the Convention on 18 March 2008.

³ Please go to www.icaed.org for details about the work of the Coalition and up-to-date information on the UN Convention and enforced disappearances.

We are also pleased to note that, as announced at the conference, the South African government intends to sign the UN Convention by April 2008. We are committed to working towards ensuring that the dialogue initiated by the conference, between government and civil society – as well as amongst civil society organisations in the region - continues as South Africa moves towards the ratification and domestication of the Convention.

We have attempted to capture the conference proceedings as accurately as possible and apologise for any potential errors which may be reflected in this report.

A handwritten signature in black ink, appearing to read 'J. van Garderen', is written over a light blue rectangular background.

Adv. Jacob van Garderen
Director, Lawyers for Human Rights
Pretoria, March 2008



CONFERENCE PROGRAMME

The UN Convention for the Protection of All Persons from Enforced Disappearances: Its implications for South Africa and the region

Kievits Kroon Country Estate, East Kameelsdrift, Pretoria, 26-27 February 2008

DAY 1: TUESDAY 26 FEBRUARY 2008

- 8H00-9H15** Registration for conference
- 9H15- 9H30** **Introduction and Welcome**
Adv. Jacob van Garderen, *LHR National Director*
- 9H30- 10H15** **Keynote Address:** The importance of the Convention and current status of the Convention in South Africa

Pitso Montwedi, *Chief Director: Human Rights and Humanitarian Affairs, Department of Foreign Affairs*
- 10H15 -11H15** **Analysis of the Convention: Brief background and highlight of key areas**

Federico Andreu, *General Secretary, International Commission of Jurists*
- 11H15 – 11H45** TEA BREAK
- 11H45-13H00** **Placing the Convention within International Law & Regional impact of the Convention**

Prof. Michelo Hansungule, *Centre for Human Rights, University of Pretoria*
Arnold Tsunga, *Director, Africa Regional Programme, International Commission of Jurists*

Moderator: Jacob van Garderen
- 13H00 – 14H00** LUNCH BREAK

- 14H00- 15H30 Panel Discussion: Contextualising the phenomenon of disappearances**
 Jody Kollapen, *South African Human Rights Commission*
 Shari Eppel, *Solidarity Peace Trust*
 Carlos Sersale, *Ambassador, Argentine Republic*
 David Johnson, *Office of the High Commissioner for Human Rights*

Moderator: Adv. Rudolph Jansen
- 15H30- 15H50 TEA BREAK**
- 15H50 – 16H15 Summary of Proceedings and Closure**
 Abeda Bhamjee, *Attorney*
- 18H00 - 20H00 Cocktail and Exhibition: Opening of *Images for the Memory/ Imágenes para la Memoria***
 Exhibition (Argentina) and Khulumani Exhibit on Disappearances (South Africa)

 Adv. Jacob van Garderen, *LHR National Director*
 Marjan Stoffers, *Aim for Human Rights*
 Carlos Sersale, *Ambassador, Argentine Republic*
 Marjorie Jobson, *Director, Khulumani Support Group*

DAY 2: WEDNESDAY 27 FEBRUARY 2008

- 9H00-9H15 Welcome, brief summary of previous day**
 (Breakaway - regional/local civil society organisations – see prog. below)
 Adv. Jacob van Garderen, *LHR National Director*
- MAIN SESSION: Practical implications of the Convention for South Africa**
- 9H15-11H00 Panel Discussion: Placing the Convention within South Africa's legal and political context** (focus on the Convention vis-à-vis the Constitution; and Extradition and Deportation)

 Adv. Anton Katz, *Cape Town Bar*
 Prof. Max du Plessis, *University of Kwa-Zulu Natal*

Moderator: Prof. John Dugard
- 11H00 – 11H30 TEA BREAK**
- 11H30 – 13H00 Panel Discussion: Challenges and Shortcomings of the Convention**
 Yasmin Sooka, *Foundation for Human Rights*
 Marjorie Jobson, *Khulumani Support Group*
 Madeleine Fullard, *Missing Persons Task Team, NPA*

Moderator: Oupa Makhalemele, Centre for the Study of Violence and Reconciliation

**PARALLEL SESSION: REGIONAL AND LOCAL CIVIL SOCIETY ORGANISATIONS
WORKING ON DISAPPEARANCES: *Exploring possibilities for collaboration***

9H15-10H15	Introduction of organisations present: (focus on national context; organisation's work in the field of disappearances and in relation to Convention).
10H15-11H00	Discussion: Limitations in the work on disappearances and future opportunities (especially with regard to the Convention).
11H00 – 11H30	TEA BREAK
11H30 - 12H30	Discussion: Highlight of key issues that are, or will be, the major focus of organisations' work on disappearances
12H30 - 12H45	Brief introduction of the International Coalition Against Enforced Disappearances
12H45 - 13H00	Summary with a focus on possibilities for future engagement

***NOTE: MAIN SESSION and BREAKAWAY SESSION PARTICIPANTS COME TOGETHER
IN PLENARY AFTER LUNCH***

13H00- 14H00	LUNCH BREAK
14H00- 14H45	<p>Discussion: Where to from here? Government timelines, commitments and possibilities for continuation of dialogue with civil society for signature and ratification of Convention</p> <p>John Makhubele, <i>International Affairs, Department of Justice & Constitutional Development</i></p>
14H45- 15H15	TEA BREAK
15H15- 15H45	Report back from parallel session (regional breakaway meeting) Venitia Govender, on behalf of <i>Aim for Human Rights</i>
15H45- 16H15	Closing and vote of thanks, filling in of evaluation forms Marjan Stoffers, <i>Aim for Human Rights</i>

COMPILATION OF CONFERENCE PROCEEDINGS

DAY 1: TUESDAY 26 FEBRUARY 2008

WELCOME

Welcome by Jacob van Garderen, *Director, Lawyers for Human Rights*

There are many familiar faces, colleagues, distinguished guests, and government representatives from the National Prosecuting Authority, the Department of Defence, SAPS, Home Affairs, Justice and Constitutional Development, Foreign Affairs, and Parliamentary Portfolio Committees. There are also a number of representatives from NGOs from within South Africa and the region, and we want to give you all a warm welcome to our conference.

For some, the theme of this conference might be surprising – why focus on disappearances 13 years after democracy? Are enforced disappearances still an issue? Why is it necessary to host a conference with this theme at this point in time? The theme of enforced disappearances remains a very important human rights concern not only in South Africa but also in other parts of this region and Continent.

The purpose of this conference is to start a dialogue between the South African government, civil society organisations (both from South Africa and the region) and experts from around the world to discuss the importance and significance of this Convention. As we know, the issue of enforced disappearances is not a new issue or phenomenon. We have seen enforced disappearances occurring in a very organized manner since WWII, when large numbers of people disappeared during the Nazi regime. We have also seen this phenomenon occurring in Latin America, particularly in Argentina and Chile, and also in South Africa. Our own Truth and Reconciliation Commission Report dealt with the issue of enforced disappearances and abductions.

Enforced disappearances remain a very critical human rights concern in South Africa and in the rest of the Continent – they are currently taking place in 25 out of 47 countries in the African Continent. Throughout the conference, we will have a number of presentations putting flesh to the concept of enforced disappearances, whose occurrence violates a number of basic human rights including: the right to security of the person, right to dignity, right to a fair trial, and a host of other rights. We must look at, and consider, this new UN Convention on the Protection of All Persons from Enforced Disappearances with a view to starting to understand the implications for South Africa in adopting this Convention (signature and ratification).

In this regard, it gives me great pleasure to introduce Mr. Pitso Montwedi who is the Chief Director of Human Rights and Humanitarian Affairs at the Department of Foreign Affairs, who has been actively involved in the process of drafting and negotiations on the UN Convention on Enforced Disappearances. For the last five and half years, Pitso has been the South African government's human rights advisor in Geneva. He is also Director for Civil and Political Rights and International Crime within the Department and the Chairman of the Central Drug Authority (CDA), which co-ordinates the work of national and provincial government departments and stakeholders in combating substance and drug abuse. Even though Pitso is not providing an official statement

from the South African government, he brings with him a lot of experience arising from his participation in the negotiations process that he is willing to share.

KEYNOTE ADDRESS: THE IMPORTANCE OF THE CONVENTION AND CURRENT STATUS OF THE CONVENTION IN SA

Pitso Montwedi, *Chief Director: Human Rights and Humanitarian Affairs, Department of Foreign Affairs*

Let's start by saying that I am here largely because I am familiar with this collective and have a passion for this subject. I will also say to you that my political principals in my Department believe that the work that had to be done by South Africa at an international level was excellently done with regard to this instrument, namely the Convention. This current engagement, which is aimed at public awareness internally in our country and at popularizing the instrument, is welcome to make sure that we move as one together in dealing with outstanding issues to ratify this instrument. As I have explained, part of it is a domestic responsibility and squarely in the purview of the Department of Justice. John Makhubele (International Affairs, Dept of Justice) will deliver a statement to you in that regard.

If we undertake a collective reflection on the overall value of the recently adopted Convention on Enforced Disappearances, we need to start by mentioning, as you probably know, that the Convention was adopted on 20 December 2006 by the UN General Assembly (GA).

The Department of Justice will provide answers about domestic processes that South Africa will need to follow, tomorrow. We would like to thank Lawyers for Human Rights first for the initiative they have taken and second for organizing this event and inviting us to share our experiences at this occasion.

At the outset, I should say that the UN human rights system took a long time to decide on an additional instrument to regulate enforced disappearances. Many countries active in the UN system believed that the challenge of disappearances was a region-specific challenge and therefore a regional instrument would have been the ideal way of going forward – so this was one challenge. The second challenge was that many countries within the UN system believed firmly that provisions on the Convention against Torture and Other Cruel Inhuman and Degrading treatment were adequate enough as provisions to cover enforced disappearances as well. We had a long time at the UN working hard to summons consensus and move forward on a consensual basis. Federico Andreu is here and he knows better than me the struggles we undertook at the UN. We returned to the UN in 1995 and at that time some of these processes were ongoing already. The sub-commission on the promotion and protection of human rights did sterling work and laid the first foundations that led to the adoption of the Convention. Moreover, the Working Group on Involuntary Disappearances played a key role.

Why is this Convention or instrument important? South Africa was heavily involved in a struggle for fundamental rights and freedoms. During that struggle, many of our activists disappeared and made that struggle more important. In February 2007, we had a partnership with the government of Argentina and one of the issues that we focused on was the issue of enforced disappearances. This Convention is important for reasons of our own history. South Africa got back into UN structures in 1995, at a time when there were important instruments being negotiated, the Optional Protocol on the Convention Against Torture and got into that process and participated actively. Much later,

the government of France, with the help of relevant international NGOs, began to approach us as South Africa and we shared the vision of this new instrument. It was in 2000-2001 that we began this process in earnest.

Looking at the instrument, as this country, we believe it is a very important instrument that is forward-looking which has adequate provisions in key areas:

- 1) In the area of protection, it provides extensive protections for victims,
- 2) The Convention contains provisions that address remedies such as reparations, based on principles of international human rights law and
- 3) The instrument includes provisions to combat impunity. As a forward looking instrument, there is very little to fault on the Convention.

We as South Africa tried unsuccessfully to incorporate into the instrument some provisions that would look at serious questions of healing and reconciliation. I am sure that all in the room will agree that enforced disappearances are not something that happen on their own, they are usually precipitated by tensions that take place over a period of time, and these tensions result in conflicts - violent conflicts most of the time - and during that period, the crime of enforced disappearances takes place. It is important, therefore, important for us as South Africa, to consider the victims of enforced disappearances, who suffered torture and many other things who were put beyond the protection of the government. It was important for us that among the undertakings in the instrument, would have been to look back because as a forward looking instrument there is little at fault, but looking back there are crimes of enforced disappearances that have not been resolved. In places like Latin America they are particularly affected by that challenge. To the extent that it would help to resolve some of these cases, it would have been good for the instrument to contain provisions on the question of healing and reconciliation. If you use that, not as a justification for impunity but for a specific period, if people came forward and gave information and helped resolve some of these challenges, then it would have been something worth considering. However, there was a strong feeling that the instrument should not allow for pardons that political authorities would use as a blanket cover for acts committed that caused great deal of pain, and the victims have a right to the truth, which is a key provision in the Convention. The right to the truth may be encouraged if we had provisions of that nature. But when the Convention did not include those provisions, as South Africa we were not overly worried because domestically we instituted those processes to look into our history, where people can account for what happened, and what happened to the disappeared. Save for cases such as those of Stanza Bopape – who is still unaccounted for, the TRC process has helped us a lot.

While the right to information, the right to the truth and to know what happened to their loved ones were applied, there is a sense that the perpetrators in this country have been pardoned and forgiven but the victims are saying that we face a serious challenge on reparations – a question of availability of resources. I think the government is ready to deal with those cases.

South Africa voted in favour of this Convention. Actually, the instrument was adopted on 20 December 2006 without a vote due to the excellent efforts of numerous organisations, the French government and ourselves. After this event, we came home and informed the Head of State that the instrument has been adopted and we sought presidential approval. Last year, we could not sign the instrument because we did not have the instruction to do so. Minister Skweyiya was in France but he could not sign at the time due to the lack of instruction, but now we are ready.

On 20 January 2008, we obtained the approval by the President that the Convention can be signed. As we seek the most appropriate occasion for our Minister to sign, we have an agreement with the Department of Justice to go ahead with domestic processes to ensure that we come up with a bill to criminalize the offence of enforced disappearances. These processes might take place concurrently as we go forward. But as soon as our minister is in Paris, we will sign the instrument. We have impressed on our colleagues that countries have looked to South Africa to ratify and be amongst the first to do so, and hopefully we will be in a position to do so.

Finally, as the Department, we take this instrument and other human rights instruments very seriously. We are committed to complying with our international human rights obligations and we'll do our best at ministerial level to move as speedily as possible to ratify the instrument.

Lastly, I'd like to express my thanks to our domestic organisations that have shown an interest in this instrument and other human rights instruments - the more that our people know of their rights, the better for us as a country. Public awareness and campaigns, by both of our Chapter 9 institutions and NGOs are truly appreciated.

Some of my colleagues have joined me, and all of us will be ready to answer questions about South Africa's role in the negotiations of this instrument. We want you to be clear on what South Africa has done in this process.

QUESTIONS & ANSWERS

1. The speaker mentioned signing the Convention three or four times, creating the impression that South Africa will sign and domesticate the Convention. However, he only once mentioned that South Africa would ratify the Convention. Can this be clarified, given that signing is not the same as ratifying?

I can only confine myself to answer on the question of signing since this process falls within the ambit of my department. Insofar as the ratification process is concerned, the process involves internalizing in our own domestic legislation some of the key provisions of the instrument. We might need amendments or new legislation altogether. Those are issues that our own Department of Justice would answer because we do not have any domestic mandate as Foreign Affairs. We can only speak about our Minister encouraging our Minister of Justice that it will be in our best interest to comply with these interests and to be seen as a country that complies with such instruments.

2. Could we be provided with an indication of timelines for the ratification of the Convention, taking into consideration the domestic law that might be required to domesticate the Convention between signing and ratification? Sometimes lead time can be quite extensive.

Given my answer above, with regard to timelines, I will, between now and tomorrow, speak to our colleagues so that tomorrow the Department of Justice can provide a roadmap of stages towards the ratification of the instrument. I see now why my bosses were afraid that this question would come up and we would not be able to answer it adequately.

3. Since we live in a global community, what was the role of other partners in SADC in relation to the Convention?

On the role of SADC countries, I must say that the bulk of the work on this instrument, from the time of the Declaration to the time of the instrument itself happened in Geneva and SADC countries are only now beginning to have resident missions in Geneva. Countries like South Africa, Zimbabwe, Mozambique and Botswana have established missions recently, but we still don't have representation from Namibia and Malawi. A lot of Southern African countries do not have resident missions in Geneva and unlike in New York, where we have SADC as a formal structure within the UN system, we have not yet done so at the level of Geneva. I can say that in terms of SADC during the negotiations of the instrument, the only country that was prominent was South Africa – it was only towards the conclusion of the instrument that other SADC countries came in but they did not have any reservations on the instrument. We focused on the degree to which the instrument would provide protection to victims and that there was no impunity for the committal of the enforced disappearance offence. I can't say that SADC countries had any specific issues to put forward or pick up – South Africa, for instance, wanted to bring in the dimension of healing and reconciliation to address some of the past cases – but we did not quite succeed with that – other countries did not bring specific issues with them.

4. How did the Department of Foreign Affairs interact with other South African government departments during the negotiations, such as Home Affairs, Safety and Security, etc? Because it seems to me that now that the Convention is open for signature all of these other departments will have some input into the way forward domestically.

Our own processes worked in a way that we negotiated on the basis of instructions/directives from headquarters as diplomats. If we had lacked instructions, we would have been weak in our negotiations. As soon as the draft of the Convention was produced, as Foreign Affairs we sent it home with express instructions that the Department of Justice should gather an interdepartmental team at home and bring in those departments whose mandates would interphase with the Convention's provisions. We believe that they did so because they gave us instructions as to what articles were acceptable and which amendments we should make. It would be good to ask the Department of Justice tomorrow when they are here to explain that process of consultation with domestic government departments, since they would have been the facilitators of that process – they highlighted which elements were in conformity with domestic law and which would need amendments.

5. I wanted to ask about the retroactive application of the Convention – was this issue debated at all or was it a closed subject?

On the question of retroactive application of the Convention, I know that there are several provisions in the instrument that refer to statutory limitations – maybe my dear colleague, Federico, will deal with that issue. For us at home it did not pose problems because we had our own TRC process that looked at a specific period to deal with our challenges. But I know that if a state party undertakes to provide a statute of limitation that limitation should not negatively affect the period/the duration of the period that should be looked at during which the crime was committed. As South Africa, we did not have a vested interest in this matter.

6. Is South Africa going to actively promote the Convention within the region and how will it do so?

With regards to promoting the Convention in the region, the issue is going to be to determine what authority would be best suited to deal with that. In our view, the SADC Ministers of Justice forum would be the ones to drive that process. As you know, SADC has a number of segments and we do have a standing forum of SADC Ministers of Justice so maybe if driven within that context it will be able to achieve the desired result of promoting public awareness of the instrument.

7. In your presentation and answers to questions, you mentioned SADC. But what role did the AU play? Did they take a position? What about the US?

The African Union did not have any common position on this issue. We did not have any common position. I remember that in the negotiations, the two very prominent African countries were South Africa, taking one position, and Egypt taking another position. Everything tended to be defined between these two main players. The AU did not have a common position.

With regard to the US role, there were various challenges. The US did not support the Convention in the beginning – neither did Japan. For the US, the sticking point was that they opposed the right to the truth. Whilst victims might have the right to know it might not necessarily be the truth. It was incumbent upon all of us to lobby for their support and convince them of the political cost of voting against it. However, the proof will be in the eating, and those countries that were less enthusiastic about the Convention will come at the tail end of the processes of signature and ratification. This is similar with all human rights instruments – some would take the position that we should not bother to draft and adopt this instrument because it will not be ratified. But South Africa's position is that it is an addition to the body of law that regulates human rights globally. This instrument makes important provisions that protect victims better, gives them remedies and makes sure that there is no impunity and violations. As South Africa, we don't just look at this instrument and focus on simply becoming a state party, the big thing for us is that these instruments reinforce, add and complement the two international covenants (ICCPR and ICESCR) and that we have a regime that protects victims better.

EXPERT ANALYSIS OF THE CONVENTION: BRIEF BACKGROUND & HIGHLIGHT OF KEY AREAS

Federico Andreu, *Secretary General, International Commission of Jurists*
(Address delivered in Spanish; translated into English by Florencia Belvedere)

I firstly wish to thank LHR and Aim for Human Rights for making it possible for me to be at this conference and I apologise for not speaking in English but for relying instead on Spanish, my mother tongue.

Firstly, I'd like to give you some history on the Convention. As they say in Latin America, this convention comes from very far back. We can trace it back as far as 1981 to a colloquium that was held in Paris. This colloquium was organized by family members of people who had disappeared in Chile and Argentina, organized by their exiled family members. Then in 1982 the family members of disappeared people formed an organization in Latin America called FEDEFAM and they organized another conference. In 1984 another initiative was spearheaded by lawyers and organizations in Colombia. In 1987 and 1988 in Buenos Aires there was an initiative which again brought these groups together to push for a convention both for the UN and the Organisation of American States (OAS). In 1992 we managed to finally adopt a declaration on the protection of all persons from

enforced disappearances with the UN, and in 1994 the Organization of American States (OAS) adopted the Inter-American Convention on the Protection of all Persons from Enforced Disappearances.

From 1995 onwards many of the efforts from lawyers and family members were focused on getting a UN convention on the subject. Around this time the UN subcommittee on Human Rights started the process that led to the eventual processes around the convention. From the subcommittee the proposed convention was transferred to the Human Rights Committee and we had to face a number of obstacles delaying this convention. It was key that there was informal lobbying of states which pushed for the issue to be taken seriously within the committee. There were a number of Latin American states involved: such as Argentina, Chile, Mexico, amongst others; and a number of European states: France, Belgium, Italy, Spain; and a few Asian: Sri Lanka and Bangladesh; and a few African countries. South Africa played the most important role on the continent in mobilizing other states.

In 2002 there was a working group dealing with the issue. Between 2002 and 2005 it took it upon itself to draft the convention inspired by the original declaration of the 1980s. The project was put before the Human Rights Committee and in 2006 the convention was adopted.

In relation to other treaties and agreements, this convention is very broad in terms of its protection and its scope. It puts a lot of emphasis on the protection of victims and the rights of family members of victims. Even though it is a human rights instrument, it incorporates a lot of criminal aspects which differentiates this convention from other human rights treaties. If one looks at the monitoring mechanisms of the Committee on Enforced Disappearances, its functions have not been seen before in the UN system; its tasks are unparalleled. This treaty has created two key new rights: the absolute right not to be disappeared (Article 1); and the second right is the right of every victim and every family member of a victim to know the truth.

It is important to note that even though the convention has not yet come into force, it has been incorporated into the International Court of Justice (ICJ) and national courts, for example the Inter-American Court on Human Rights already takes it into consideration in dealing with cases of human rights violations, and the Supreme Courts of Nepal and Colombia have used it as a key reference on international human rights law. This is very important because at the level of international courts the convention is being used as a reference which is politically important.

There are five key areas in the Convention that set out the obligations of states to protect persons against enforced disappearances:

1. Fight against impunity;
2. Investigations;
3. Prevention of the phenomenon of enforced disappearances; in particular, Article 17 which goes further than any other treaty;
4. Rights of victims;
5. Children are a special focus, their abduction and disappearance from parents who have themselves disappeared.

The convention also establishes a Committee on Enforced Disappearances with six key functions:

1. Implementation of the convention through reporting back of states and monitoring of the convention. The interesting aspect is on periodic reporting. The Committee can request that

reporting happen much more often than other treaties, so it is very flexible, and the Committee can request reporting even every two months;

2. Importantly, something that is contained in the Convention, often regarded as humanitarian assistance and which no other UN human rights treaty has incorporated so far, is that family members have the right to approach the Committee to request it to find or investigate if someone has disappeared, or has reason to believe that someone has disappeared. There is then not just an obligation on a state to report back to the Committee but also family members can approach the Committee to start a process;
3. The Committee can request states to institute temporary provisional measures which is also a new function;
4. The Committee also has a judicial function where victims can approach the Committee on individual cases; and interstate complaints can also be lodged; this process is not secret or confidential but is open to the public;
5. The Committee can investigate where there is strong belief that there is the existence of the crime and where the Committee has the capacity to have a presence in the country;
6. There is an early warning system to try to prevent ad pre-empt the situation of enforced disappearances which also differs from other treaties.

Another option which the Committee has is to place on record at the UN General Assembly that there is something happening in a particular country to be investigated further and for them to produce reports.

Other treaties usually stop short with crimes against humanity, with a focus on the condemnation of the state committing the offence. This convention, however, creates the possibility of criminal sanction at international criminal tribunals, which takes the matter further.

There are two key articles, namely articles 28 and 37. Article 28 requires the Committee to coordinate with other UN bodies and entities, as well as with regional bodies, for unified jurisprudence on enforced disappearances.

Article 37 provides that the convention cannot be interpreted in such a way that it can take away from protections that already exist, or the norms for the protection of victims. This is important because as Mr Pitso Montwedi mentioned, there is a view that there are a few issues on which the convention is silent. Amnesty is one example. There could not for instance be amnesty without a process of reparation and reciprocity in which victims have a right to be heard and their say is respected. This provision was not included in the convention. One of the countries against it was Algeria. Article 37 helps to deal with that silence. A number of bodies, including the Working Group on Enforced Disappearances, are against the idea of amnesty for perpetrators of enforced disappearances.

I will now discuss in more detail the five key areas of the convention:

The fight against repression and impunity:

The convention defines the offence of an enforced disappearance in three elements which do not always have to be together. They are the deprivation of liberty in any form (article 2); the refusal to acknowledge the deprivation of liberty or the concealment of the whereabouts of person which

places them outside law; and acts which are committed directly or indirectly by elements of the state, one of the elements though not constitutive, that place a person outside the protection of the law.

The convention, unlike the Rome Statute, does not say how long the deprivation of liberty should be. The Rome Statute has much more precise and focused provisions on deprivation of liberty, but the convention is broader. The convention is also specific not only regarding committing the crime but also ordering it to happen, facilitating it, the possibility of it happening and any other criminal participation in the act. It also looks at similar types of offences that agents of the state, directly or indirectly, or armed groups of a society may commit. The convention does not recognize the acts of armed groups but places an obligation on states to recognize and investigate those events.

Article 5 recognizes that the wide spread, systematic practice constitutes a crime against humanity and will attract consequences under international law. In terms of individual criminal liability this article highlights that perpetrators cannot invoke a defence based on superior orders. It also establishes the role and responsibility of the superior authority for criminal negligence. This means a superior is criminally responsible if he knew or should have known that the crime of an enforced disappearance was about to be committed, being committed, or had been committed and did not do anything to prevent or cease it happening or to stop the perpetrators. It is a clause that comes from humanitarian international law that is in this treaty. It also places the obligation on every state to introduce into its own legislation that this offence is not only a grave offence, but also, and more importantly, a criminal one.

There is only a limited scope for the reduction of a sentence if a perpetrator assisted to find information or find a person who is a victim. With regard to the statute of limitations, the convention does recognize that crimes against humanity should not be affected by the statute of limitations; but if those offences do not fit as a crime against humanity, then in those instances, the statute of limitations would apply. It must then start counting from the moment the actual disappearance has ceased to happen, and then every victim or family has the right to an effective remedy.

In terms of competence to establish jurisdiction, there are provisions in a number of human rights treaties where the courts where the perpetrator or victim is found have universal jurisdiction. There are also a number of articles in the convention that deal with extradition. There are classical or common provisions, as well as provisions which call on states to include the crime of enforced disappearance as an extraditable offence, and Article 13 which outlines that for the purposes of extradition between state parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. This article therefore states that a request for extradition based on such an offence may not be refused on these grounds alone.

Investigations:

There are a number of clauses dealing with international cooperation and mutual assistance which also relate to humanitarian issues which is a novelty of the convention. The assistance extends to searching, locating or assisting a body, including other aspects in the area of exhumation, identification and restitution of remains, international cooperation, and investigation of crimes (article 12).

The state has an obligation to investigate through an independent, impartial authority which needs to be guaranteed to victims and family members. The authority must have specific functions and powers and must have access to every document and every place where a person might be kept. It must also have the power to sanction anybody who gets in the way of an investigation.

Prevention:

The area of prevention is the most outstanding new area in terms of international treaties. Firstly there is a blanket prohibition against the secret detention of any person, and the right of every detained person to communicate with people outside whether they are family or authorities. This refers to *habeas corpus* as a non-derogable right. This right is not only exercised by the victim or the family of the victim, but by anyone who has a legitimate interest in the whereabouts of an individual.

The convention also regulates issues of deprivation of liberty within the framework of prevention. People may only be detained in official places of detention. There must be an independent authority that has access to these places and is able to supervise the detention.

Every place of detention must have a record of all the people detained there and the convention specifies the minimum data to be contained in such records. The convention also provides that any false information must be criminally sanctioned by the state and that any competent authority and international bodies must have access to these records. The convention also provides for the right of families to have access to the information contained in these records and registers. In some situations this right can be limited, especially in respect of families, but regardless, even if there is a restriction on the right then the family members have the right to approach a court or tribunal to argue whether it is reasonable.

Rights of victims:

Victim's rights include *habeas corpus*, right to information and right to the truth. Article 24 establishes a very broad definition of victim. It establishes the right to truth and the right to be informed of the progress of investigations, and places an obligation on the state to continue investigations and in the case of death to be involved in the process of restitution of remains. The rights to restoration are dealt with in a modern and more encompassing way than in other treaties. The convention establishes the power of a state to establish provisional measures to protect the integrity and well being of family members who are trying to seek the truth including social assistance, property, and the right to family, and it also provides for the right of association of family members who have disappeared.

Children:

There are children who are born in captivity to mothers who have 'disappeared', and then subsequently stolen from those mothers; and children that disappeared with their parents but are later stolen or their identities changed. The convention provides for criminal punishment in situations where a child's identity is falsified, and emphasizes the return of a child and reunification of a child with the original biological parents. The convention is very strong against countries facilitating adoptions or putting children in care without insuring that biological children can be placed with their parents first. This is a complicated area and it is not the best solution for children

to be returned to their biological parents in all cases. For this reason the convention deals with these issues in terms of general principles placing the emphasis on the best interests of the child.

QUESTIONS & ANSWERS

1. How does the convention differentiate between enforced disappearances victims and trafficking victims?

Enforced disappearances and trafficking are very similar, but one aspect that trafficked persons do not always have is the secret detention and deprivation of liberty. This is not always found with trafficking victims. The specific purpose and intention of a trafficking company in the first place also differentiates it from enforced disappearances. There is the aspect of commercial gain in trafficking at an economic level which you do not often find with a victim of an enforced disappearance. This being said, the absolutes of the perfect definitions do not usually exist, they are just academic exercises, and there will be overlap between these types of victims and there could overall be common elements but trafficked persons can still be differentiated.

2. What is the role of non-state actors? It is mentioned as a footnote that they are supposed to be dealt with in terms of internal legislation, for example the FARC in Colombia. In South Africa normally non-state actors are involved. The convention seems to be focused on the Latin American experience.

There was a big debate regarding non-state actors. On one hand there was a group of states including Russia, Peru, Turkey, Colombia and Algeria that asked that the definition of the crime of an enforced disappearance should also incorporate non-state actors. The other majority group led by Latin American countries neither denied that non-state actors engage in this type of offence nor the seriousness of the offence and character of enforced disappearances, but argued that there are a series of responsibilities on the state that cannot be extrapolated to non-state actors. For example, the convention could not require armed groups to have places of detention with records and registers. There was a political problem here. The last article to be adopted (Article 13) reads that: 'when non-state actors are involved in committing an offence which appears as an enforced disappearance that the state has an obligation to investigate and deal with that offence'. There is a distinction between having to investigate an offence while keeping it specifically from a particular offence of an enforced disappearance.

3. In terms of the statute of limitations, when enforced disappearances take the form of widespread crimes against humanity, how does this reconcile with the non-retroactivity of these conventions? Article 37 says there is no prescription for any state to take measures. Second question: do you think such an instrument will have a role in post conflict situations when enforced disappearances are part of a conflict? Can the convention play a role in post conflict solutions?

The convention reflects international human rights norms that whenever an offence is defined as a crime against humanity there can be no statute of limitations. If an offence does not fall within the framework of the definition of a crime against humanity then it is up to the state to introduce a statute of limitations, but there may also be states which do not have such statutes. There is still an important emphasis from some states not to adopt a statute of limitations.

Approximately 50 or 60 states, either through their own legislation or based on their own case law do not recognize statutes of limitations at this point. For example, the Inter-American Court is progressively recognizing that there cannot be a statute of limitations on offences of the character of enforced disappearances. There are also a number of international entities and bodies that increasingly refuse to accept introducing a statute of limitations in such instances.

Every treaty is applied non-retroactively as a general principle. It is an established norm of international human rights law. Article 15(2) of the ICCPR provides for the non-retroactivity of criminal law, that a provision cannot be applied if an offence was not an offence at the time it was committed. It could possibly be applied retroactively through national legislation, if the offence was defined as a criminal offence under general international law. This does not violate the principle of non-retroactivity because that conduct was already defined as criminal under international criminal law. The provision which exists in a number of international law instruments was introduced in the Nuremberg jurisprudence. For example in Venezuela, cases took place under the new constitution which provides that enforced disappearances must be punished. The acts were committed when Venezuela was already party to the Inter-American Convention against Enforced Disappearances, but the domestic law was only adopted later. The Supreme Court applied article 15(2) retroactively without violating the principle of retroactivity.

The convention is silent on non-retroactivity but follows international law principles that the competency of the Committee on Enforced Disappearance to deal with inter-state complaints and investigate comes into force with the convention. The clause regulates the operation of the Committee. There are a number of examples from Chile on the Committee of Human Rights where the Committee does not speak on cases that happened before it came into force, but this is changing given some of the jurisprudence of the Inter-American Court, that enforced disappearances are permanent offences which continue through time with its effects. So the Committee has powers to investigate any offences that are committed before it comes into force to take up these issues.

The role in a transitional society is very important and very fundamental because the convention recognizes the rights of victims to justice, information and truth and in many cases of political transition these rights are overlooked in the name of reconciliation. These are rights that are fundamental to any process of reconciliation, and that is where the added value of the convention comes into play.

4. In the example of Zimbabwe, if somebody is abducted in the morning and tortured, and disappears for three days, does that person qualify to be called a person who disappeared in terms of the statute?

If someone disappears for three days then they could be considered to be 'disappeared'. The offence starts from the time a person disappears. If in the course of three days a person is subjected to torture, then told that he/she will be released because they have no information but is then killed, then there could be three offences committed: disappearance, torture, and killing.

PANEL DISCUSSION: THE CONVENTION WITHIN INTERNATIONAL LAW & REGIONAL IMPACT

Panellists: Prof. Michelo Hansungule, *Professor of Law, Centre for Human Rights, Faculty of Law, University of Pretoria.*
Arnold Tsunga, *Director, Africa Regional Programme, International Commission of Jurists*

Moderator: Jacob van Garderen, *Director, Lawyers for Human Rights*

Prof. Michelo Hansungule, *Professor of Law, Centre for Human Rights, Faculty of Law, University of Pretoria*

I would like to focus my presentation on three key aspects namely: the place of the Convention in international law, the impact of the Convention on the region, and how to use international law to address continuous human rights violations in Africa.

If we start by focusing on the place of the Convention within international law, the speakers before me have substantially addressed this question. Nonetheless, it is important to highlight that the Convention is a treaty of international law under the Vienna Convention (1969, 1989) on the law of treaties. This means that based on the Vienna Convention, the current Convention is a Covenant, a charter, an agreement that shares the spirit of the Vienna Convention of 1969 and 1989. We can distinguish the Convention from a Declaration (like the Universal Declaration of Human Rights), in that a declaration would not require to be ratified. In contrast, whatever terminology we might want to use to describe it, the present Convention has a requirement that it should be ratified. One can compare the Convention to the African Charter on Human and People's Rights. The African Charter is a treaty.

The Convention on Enforced Disappearances provides for a mechanism for individual complaints within the Convention. This is different from the International Covenant on Civil and Political Rights (ICCPR), which contains mechanisms in optional protocols separate from the Covenant. In contrast, the Convention on Enforced Disappearances has an internal mechanism for complaints. Consequently, a state becomes obliged to assume obligations to lodge complaints once it ratifies the Convention, whereas with the Covenant, states must also ratify its accompanying protocols.

The Convention is similar to the ICCPR in the sense that in each case not only does a state need to ratify the instrument but also needs to make separate declarations to accept the competence of the committee to receive complaints. This is a separate procedure that is different from the African Charter. In the African Charter, the simple ratification brings into force all those mechanisms. But with the Covenant, a state needs to accept Article 36 and prepare a declaration to accept the competence and the complaints.

The Convention is an important instrument that was introduced in an area not previously addressed, save for general principles of international law. One could also use the Universal Declaration of Human Rights. For instance, if the Working Group on Enforced Disappearances is intending to ensure compliance with provisions of the Convention, this provides a mechanism so that states can be held accountable, not in the legal sense, but in the political and moral sense. The Working Group is not based on treaties but on the Universal Declaration of Human Rights. One of the bases of the Convention is the UDHR even though it is not a binding document. In contrast, the Convention

has brought in normative standards that have binding obligations. After 20 states ratify it, it can come into force. A process of ratification will also allow states to enter reservations.

The Convention is important for Africa because under the African system we do not have specific instruments to deal with the issue of enforced disappearances. We can use the African Charter but it is general, it applies to various other issues in addition to enforced disappearances. It means that ratification of the Convention in Africa will create the opportunity for victims of enforced disappearance to deal with this issue specifically.

In terms of the previous disappearances during colonialism and apartheid, they seem to have not been addressed in the Convention because it states clearly that it will apply to disappearances after the Convention has taken effect. Given this scenario, how can we use the Convention as an instrument of international law in relation to practical issues we are facing? It is not so much for disappearances that might happen, but in South Africa there are over 500 people who are still unaccounted for. How relevant is the Convention? It is not going to apply to disappearances that took place before it came into force. Moreover, it requires 20 states for ratification and its entering into force - a long way to go and we still cannot apply it against violations that have already taken place. In the meantime, we can use the African Charter – it does not provide for an exclusionary clause – there is the principle of *ratio tempus*.

There are three cases from the European Convention that try to explain the meaning of the *ratio tempus* policy. Usually, complaints have to be brought to the European Court of Human Rights within six months from the time of exhaustion of domestic remedies. If they are not within this period, they fall outside. However, in one case, a case involving Cyprus, the Court provided a liberal interpretation of this. The Court agreed to attend to cases more than 6 months from date of reporting if no investigation was undertaken to establish the missing cases. If one could prove that no investigations had taken place by the state, then the Court would ignore the 6 months limitation and entertain the complaint. The Court interpreted this to be a continuous violation if no action was taken by the state to establish the whereabouts of missing persons. Based on this case, one could go to the African Court (in respect of those countries that have ratified the relevant protocols) or to the African Commission – Protocol to African Court (Article 34, para 6) and bring jurisprudence from Europe for cases to establish the whereabouts of persons outside of the 6 months' period.

One of the distinctions between the European Convention and the African Charter is that the 6-months' limitation does not exist in the African Charter. It depends on the interpretation by the African Commission, which is a bit softer. There is probably still room to bring in the colonial or apartheid-era disappearances, not using the Convention or the jurisdiction of the Committee, but the African Charter. Even if the Convention comes into force, the Committee will still fail to address past disappearances. States could possibly use Article 5 of the Protocol establishing the Court, where it has jurisdiction to apply and interpret relevant instruments ratified by the state. In this case, states can use the Convention on Enforced Disappearances if they ratify it. For instance, South Africa could possibly use the UN Convention on Enforced Disappearances at the African Court and rely on European jurisprudence. The Convention is very explicit on the *ratio tempus* principle but the African Charter is open on this. It should be possible for groups in South Africa to bring a complaint before the African Commission or the African Court of Human Rights, using the African Charter – asking for an investigation by South Africa which is more thorough than the TRC. There is still a basis for complaining, notwithstanding the TRC's work – there is a list of names still

existing as a basis for the lodging of a complaint. In the African Court there is a limitation as to who can bring a complaint.

Arnold Tsunga, *Director, Africa Regional Programme, International Commission of Jurists*

I want to focus on the issue of the realisation of human rights – embodied in the prevention of enforced disappearances - within the context of the rule of law, and the need for us in Africa to move towards greater democratization. The UDHR is part of customary international law and it has assumed the force of a Convention. There are three preambular paragraphs that are foundational of why it is important to protect human rights. If human beings are not going to resort to a rebellion against tyranny, then human rights must be protected according to the rule of law. You will search in vain in many international instruments where the correct framework, or the standard, that must be protected is the rule of law – the rule of just law.

In Zimbabwe, as activists we have seen that international instruments are of a minimalist approach – with a focus on the minimum that the government must respect, below which there would be human rights violations. One thing which has emerged from the discussions today has been that in terms of leadership in the development of this instrument, we see that initially Africa did not take sufficient leadership even though our continent is littered with enforced disappearances, pre- and post liberation. Most of the governments that have come to power have been unable to build and strengthen institutions of democracy, and enhance the quality of independence. They have been unable to create an atmosphere for the greater realization and protection of human rights. I will come back to what this instrument can do for Africa.

For instance, we can see what is happening in Kenya and there is no one who feels that they can rely on the courts, on instruments of international protection to assist. It is important for us to celebrate the leadership South Africa has taken in pushing for this Convention – it is good for Africa to be seen to be pushing for the adoption of standards to protect the very essence of human dignity. It is another question as to whether South Africa will always be seen to be playing a progressive role internationally. There are many countries operating under oppressive regimes – such as Burma – where the role of South Africa is explained but not understood or not explained well – such as South Africa's objection to allow a multilateral body to take steps to address serious violations for human rights in domestic spheres – to support international scrutiny for those countries to be able to enjoy human dignity.

Civil society and international organisations have made efforts to get country specific attention within the Human Rights Council. The Africa bloc have been able to speak with colleagues from South Africa on this issue but don't quite get how it always happened that it is not desirable to do this, especially when decisions need to be made on how people are being treated. Maybe we need a better explanation.

This Convention is extremely good. The regional impact is going to be dependent on the signing and ratification of the Convention. A lot of work on the part of civil society will be needed to agitate for its signing and ratification. We need to see the domestication of the instrument into national law because in many common law countries this Convention will not be self-executing and therefore need amendments to legislation. We need to see civil society groups documenting cases of enforced disappearances to deal with impunity. We need systematic and structured efforts to protect evidence for cases of enforced disappearances. We need to see the strengthening of civil

society capacity to deal with enforced disappearances. There is a perception that enforced disappearances are someone else's problem but this shows the need for continuous training. This highlights the need for the strengthening of domestic check and balance institutions, for separation of powers, for the existence of an independent prosecuting authority, army, intelligence, etc – in essence, the need to be accountable to the law and not the ruling party or political heavyweights.

There is the case of Uganda where commandos were deployed to re-arrest people who should have been released. We need balance and separation of powers. We need a strengthening of sub-regional rule of law institutions such as the SADC tribunal, East Africa Court of Justice, so that they can take over where there are no effective domestic remedies. South Africa has an extremely well-functioning judiciary. In part, for this reason, the use of sub-regional institutions is not a priority for the country, and the strengthening of instruments is not seen as a very strong priority, so we need African institutions that can deliver justice.

In Zimbabwe, we used the African Commission but we also exposed it to the power of politicians – we need countries like South Africa to defend such institutions. One concern is that African Commission recommendations are not binding – governments are meant to comply but those governments that do not believe in democracy easily ignore the recommendations and get away with it at the African Union (AU). The AU should be defending such institutions, but African Heads of State become paralysed when regimes do not respect these norms.

SADC as an institution has no presence in Geneva – countries have individual presence. Amongst some of those, there is no appreciation for the push that South Africa makes. In many cases, South Africa is taking unilateral leadership, which is good, but it is in the interests of Africa to participate. Otherwise, such actions tend to emphasize a 'big brother' role for South Africa. In the negotiations, Egypt was seen as taking an opposite position to South Africa, for instance. This should go back to the AU; however, it is unlikely to expect that, if it takes a robust position, bodies such as the African Commission would get support from the African Union. The AU would not support it if countries are divided. We face a similar problem with SADC.

The Convention raises key programmatic issues of interest for civil society.

Firstly, in the area of culpability, establishing coercion will not be an easy process. Those who are complicit in enabling enforced disappearances need to face the consequences. It will be useful to establish if there is culpable commission or omission that creates opportunities for ongoing work – especially as enforced disappearances are seen as a continuous offence. This could be the basis for continuous work; organisations need to be creative on taking work forward and using the argument that these offences need to be resolved.

Secondly, action against the perpetrator should be taken in any country – not only where the offence took place but where it has effects or where the perpetrator has relocated – to mount criminal proceedings, universalizing the Convention. This will require greater networking to track down perpetrators.

Thirdly, habeas corpus is very important for human rights defenders.

Fourthly, the Convention has a wide definition of victims – a disappeared person and anyone who has suffered as a result of the disappearance. This creates *locus standi* whose lack in some instances can bar access to justice and remedies.

Lastly, I would just like to say that promotional activities, such as the one we are participating in, are going to be dependent on the political will and level of openness of the various governments. I am impressed that the South African government is not only willing to participate in the drafting of Convention but also to participate in awareness activities such as this one.

QUESTIONS & ANSWERS

1. Someone who is affected by the commission of an enforced disappearance – seen as a continuous violation or continuous crime – could make reference to Article 17 (1) of the UDHR preceding the Convention and the *ratio tempus* (Article 10 or 11) and also Article 15 of the ICCPR relating to the question of non-retroactivity. Enforced disappearances as a continuous crime relating to Article 7 (2)(i) of the Rome Statute is a process that starts with the disappearance of a person in the refusal to explain what happened to the person – why if Namibia ratifies in 2002 and crimes occurred before that and continue to happen, why won't the case be brought in terms of Rome Statute? What are the effects of the crime? How do you prove them? Are they torture?
2. How can post-conflict states be able to really come on board to implement the Convention and other instruments? Usually the political context is very fragile and the focus is not on building independent institutions to deal with problems of the past but on building social and economic institutions. How are we going to make governments accountable? We have problematic state institutions, especially in transition states.

Many African states are very weak so the issue of enforced disappearances, besides looking at it as an issue of justice, needs to be addressed politically by creating a forum where people can discuss it. I think that is a remedy. You might not get a remedy like a court remedy, but if there is agreement that there will be a truth process, a reconciliation process, then that can be a remedy. A TRC might help answer the problem of finding out what happened to a person but it is unlikely to provide other remedies.

3. I served on the TRC committee which dealt with applications for political pardons. People did not come forward and tell it all – there is an unfinished work. There are many reasons for that – some advised by their leaders not to apply for amnesty – others didn't trust the process and there were also specific criteria for disclosure. How retroactive is this Convention going to be? One of the speakers was mentioning 6 months? How far back is it going to cover?

What the Convention is saying is that it is not for its Committee if the violation happens before the state has accepted the Convention. When you compare this with other conventions, one of the distinctions that come out, we do not have Article 35, we do not have that in ICCPR – it is not as clear as this in the Convention on Enforced Disappearances. Perhaps this was part of the trading that took place. To get states to adopt it, certain expectations had to be met and this is why there was this explicit exclusionary clause – it will depend on how it is interpreted. I tried to persuade you to go more to the African Charter than to the Convention on Enforced Disappearances. One can

use a progressive interpretation but as Article 35 stands out it does not provide room for violations of enforced disappearances that took place before the state has accepted the Convention.

In terms of how long, in Europe the 6 months referred to is to bring cases based on the European Convention – 6-month rule. There is a certain arbitrariness to it – but with the Cyprus case there is no specific date and the Court has applied instead the principle of continuous violation – they do not apply the 6 month rule if this offence falls within the 6 months. Arguing before the African Court or African Commission, perhaps these are some of the cases to be used to gain support for a longer statute of limitations.

Statutes of the International Criminal Court (ICC) are worded on the same sense – idea is to limit the flow of cases because if you leave it open perhaps that body (Committee of 10 experts) would not manage to handle all the complaints on enforced disappearances. The number is often arbitrary; however, this does not obviate progressive interpretations. Crimes against humanity are still continuing, in terms of not being investigated, remedies not dealt with, but one has to argue this. This is why the cases of Europe are interesting – worth arguing as in Cyprus where they were successful. Some of the African mechanisms might be better than the UN Convention on Enforced Disappearances for purposes of retroactivity.

4. I just have a comment and that is: Why are Conventions decided in a way that is insensitive to survivors? Enforced disappearance is a crime that has its own root causes and shows a continuation of what has happened in the past. We continue to design conventions that become more insensitive to survivors of missing persons.

LUNCH BREAK

PANEL DISCUSSION: CONTEXTUALISING THE PHENOMENON OF DISAPPEARANCES

Panellists: Jody Kollapen, *Chairperson, South African Human Rights Commission*
Shari Eppel, *Solidarity Peace Trust*
Carlos Sersale di Cerisano, *Ambassador, Republic of Argentina*
David Johnson, *Office of the High Commissioner for Human Rights*

Moderator: Adv. Rudolph Jansen, *Pretoria Bar*

Adv. Jansen introduced participants and made the following remarks: When one deals with the political and social context of enforced disappearances, one thinks that there is a specific recipe when this type of offence becomes systemic, namely: an illegitimate government, unaccountable security forces, prosecutorial and investigative branches that are not effective and a judiciary that blindly plays along. But things have changed, it is sad that in the new millennium, the leading democracies in the world seem to have thrown the basic principles of lawful actions out of the window to suit their short term political needs. For instance, the more recent phenomenon of special renditions gives a new dimension and creates more focus on enforced disappearances and how countries must cooperate in this area.

Jody Kollapen, *Chairperson, South African Human Rights Commission*

This conference is a first in the region and certainly in South Africa. The issue of disappearances formed the core of the work of Lawyers for Human Rights in the 1980s and therefore it is very appropriate that LHR is leading this initiative.

Enforced disappearances were part of the *modus operandi* of the South African state. When we made the transition to a multiparty democracy, underpinned by a progressive Constitution, we established a TRC, which was a watershed in the context of South Africa. While its aim was justice and truth, we are paying lip service to the rights of victims; justice and accountability. We were convinced that the trade off was necessary to build a future based on reconciliation and justice (not on prosecutions but on knowing the truth of the past). Were the right trade offs made? This issue was so contentious at the time that the family of the late Steve Biko brought a challenge to the Constitutional Court on the constitutionality of the TRC legislation. Justice Mohammed emphasized that against a system of secrecy and authoritarianism, the TRC would assist with truth – encouraging survivors to unburden their grief and receive the collective recognition, discover what happened to their loved ones and find out who was responsible, uncover what happened to many disappeared who still remain unknown. When Manfred Nowak reported on the phenomenon of enforced disappearances in 2002, he articulated similar sentiments. It emerges from his study that enforced disappearances is one of the most serious human rights violations, a systematic attack on civilians that is a crime against humanity – crime directed not only at disappeared persons but also their families, children, spouses who continue to live in situations of extreme insecurity, torn between hope and despair. They are victims of enforced disappearances.

This is the international context of the phenomenon of enforced disappearances and continues to remain a challenge. In the final report of the TRC, there are 477 persons listed with their whereabouts unknown. For the families of those people the words of the Chief Justice remain of little consolation, because they did not materialize. Many South Africans have had to live with the anguish of not knowing what happened to their loved ones. That sentiment that victims feel is encapsulated in a poem by Ariel Dorfman, which is contained in the final report of the TRC [Note: parts of the poem state: Is there any news, ask if they have heard anything – her eyes will be saying, soon it will be three years, but I am not a widow, I won't marry you, I am not a widow, I am not a widow, yet...."]. That sense of anguish, that opening of the wound, demonstrates why we are here today.

We need to respond to the phenomenon of enforced disappearances and the absence of real mechanisms to deal with this issue. Nowak was a proponent that in the absence of a legal instrument to deal with enforced disappearances, accountability and response to meaningful demands of victims remains an important issue in the agenda of the human rights community. One welcomes the introduction of the Convention. We cannot say, 14 years into democracy, that human rights are guarded and secure. They are contested at the best and worst of times. In the short history of our country, we have seen conduct from the state, not systemic but which goes against the spirit of the Constitution, such as the cases of Khalfan Mohammed (extradition of a citizen of Tanzania to the US to stand trial in terms of World Trade Centre bombings, where the Constitutional Court found the South African government acting unconstitutionally, since Mohammed could face the death penalty being imposed). One would expect our government to learn but recently we have had the case of Khalid Rashid – the judgment of the High Court (TPD) is appalling.

The Convention is important in the context of South Africa in terms of two elements:

1) Prosecuting guidelines to give amnesty to people who have been perpetrators: The Guidelines would not be able to have been given effect if they have to comply with various aspects of the Convention, especially if the crime involved is an enforced disappearance.

2) President appointing a committee to deal with presidential pardons: Applications are being received until April 2008. If the Convention comes into force, if those pardons are granted, then we will have to deal with the implications of the Convention.

Mr. Kollapen related the story of Nokuthula Simelane who was a courier for the ANC and in 1983 was taken into custody by the security forces. As he stated, no one knows her whereabouts – people have applied for amnesty and nothing has been known. Others say she was killed and buried somewhere in an unknown site. Twenty four years later her family is unable to close this chapter. From the perspective of the SAHRC, to underpin the right to life and enhance the protection against the deprivation of liberty, the Convention provides a mechanism to deal with such violations. We welcome the main features of the Convention. There is still a debate on the accountability of non-state actors who act outside the sphere of the state and there might be a need to interpret the work of the Committee and whether the state can report on measures taken to deal with the issue of non-state actors.

The Convention is useful in many respects. For instance, Articles 6 and 17 focus on limiting secret detention and the establishment of a register and full access. There is also a parallel discussion in South Africa to ratify the Optional Protocol on the Convention against Torture. If this happens, then South Africa will have to create a national mechanism to visit all places of detention and this would complement the provisions of Article 17. Article 24 is consistent with provisions of the rights of victims, and the rights of family members of the disappeared. The Convention provides an important response to issue of enforced disappearances. It creates a framework for the state to criminalize the offence and cooperate with various bodies.

Given the history in South Africa, we should take the lead in the process of popularizing the Convention in the country and the region and we should push to ratify it as soon as possible, given our history, our moral duty, and how we have become part of the war against terrorism and how easy it can be to discard basic rights in this battle. Kidnapping is no longer that, but rather extraordinary rendition. Inroads are being made into human rights gains – I am amazed on the level of standard setting that we have achieved; however, in the area of compliance we look very weak – ratifying the Convention would go a long way to giving meaning to the right to life, protection from arbitrary detention and - having read the Mohammed judgment - we would have presented a whole set of arguments to attorneys and have provided for a totally different outcome. It would not have been appropriate for the judge to ask him where he would like to go. It is politically correct and morally correct, and a commitment that South Africa would give effect to its human rights obligations.

Shari Eppel, *Solidarity Peace Trust*

I'd like to thank South Africa for the role it has played in promoting this Convention at UN level. I think that from the region it is extremely important that South Africa does ratify this Convention for various reasons:

- 1) We need South Africa to lead the way in the SADC region: The human rights history of many of our neighbours is one of enforced disappearances and as a psychologist I know the generation effect of enforced disappearances on families and communities – so we need South Africa to lead the way.
- 2) Looking at Articles 9-11 it seems that we can use South Africa in the future to prosecute our own officials. We come from countries where impunity is entrenched. For instance, if our Minister of Home Affairs is implicated in an enforced disappearance, the South African government is legally obliged to arrest him and indict him for being involved in an enforced disappearance. That might not happen right away, given the protection that some of our ministers might get amongst ourselves. Civil society will have to play an important role here. We would need one or two such arrests to send the message that the era of total impunity may be coming to an end.

Let me speak a little bit about Zimbabwe's history in brief: Zimbabwe experienced 100 years of violence and oppression to the 1890s and that continues to date in our case. We are not in a position to lobby our own government. We have not signed the Torture Convention. The first era under the Rhodesians, there were few very prominent disappearances. They had the 1975 Act which allowed them to do what they wanted with impunity such as kill people and display the bodies as a lesson to them. There was not a pattern of enforced disappearances – there were scores of disappearances and I am sure there are many undocumented disappearances.

There have been tens of thousands of people missing in action – there has been a lack of closure, even though, legally, people who are missing is not the same. In Zimbabwe, the systematic use of enforced disappearances occurred post-independence – in Matabeleland – immediately after independence, linked to the reintegration of the army - ZANLA and ZIPRA. ZIPRA members were tortured in the army. This created a situation that gave Mugabe the pretext to send in the Fifth Brigade – ex-ZANLA. Massive numbers of people were massacred and I have documented this over the years.

By 1983, there was endemic violence; people were asked to dig their own graves. We have obtained information about who is buried where. There are mainly young and older men – we have a good record of where graves are. Linked to protests from the Catholic Church, there was a withdrawal of the Fifth Brigade. In 1984 it was redeployed, relying on a strategy that was more clandestine. People were driven to detention centres where people would be tortured and murdered – thrown down mineshafts (between 500 and 1000 disappeared) but thousands died in 1984. From January to March/April 1984 there was epidemic violence and enforced disappearances and further complaints. The Fifth Brigade was redeployed in 1985 based on a policy of just disappearing people. It took community leaders (linked to election in June 1985) – local headman, elected councillor, etc. The pattern was that someone would come (troops), knock on the door, ask whoever was in the house to show that person the way and then led the person onto an army truck and that person was last seen at that point. It ran into 500 disappearances at that time, but this is a conservative figure. We keep figures conservative considering that perpetrators still hold power in Zimbabwe.

In 1989, one in four persons claimed to have someone disappeared (based on a random survey that we conducted). Some of these are people who are missing in action but some are enforced disappearances – we really don't know the scale. On the impunity front, we have had one amnesty after another: 1979, 1980 and 1985 predominantly, and then another amnesty leading to the violence

of 2000. There is a pattern of the government of the day being given impunity through legislative amnesties or de facto amnesties (no rule of law). One cannot get anyone charged and held accountable. There have been enforced disappearances since 2000 by the Mugabe regime, but some of this information is problematic – involving the youth militia and war vets (hand of the state). There was a disappearance in Bulawayo in June 2000, an MDC polling agent who received many threats from war vets. He reported the threats to the cops. The war vets came to the house, dragged him out, beat him, he was further dragged out in front of his family, and thrown in the back of a truck. His family ran off to truck (belong to war veterans' association), asked the police to arrest these people, and the police refused. The Convention would make them liable for such an offence. The family asked for a search warrant the next day, but Patrick has never been seen again – it has been 8 years. We are still working with the family to deal with the devastation.

Another point to make is that in 1980, the Catholic Commission for Justice and Peace nearly disbanded. It scaled down its operations because Mugabe emphasized reconciliation, and therefore there would be no need to document violations. Within 5 years, 20000 people had been massacred. No government should ever be trusted to be nice. Future governments should not be trusted. It is important to introduce as many restraints as we can on governments that tend to get power hungry and stay in power.

Carlos Sersale di Cerisano, *Ambassador, Republic of Argentina*

Argentina and South Africa have an unfortunate history to share. We have worked together in Geneva and we had a bilateral seminar about a year ago at the Centre for Human Rights at the University of Pretoria. Since then, we have established a permanent consultation mechanism for human rights issues. We are proud to see Argentina green in this map [green = ratification of Convention] – after Albania – although the Malvinas should also be green. They are still occupied by the British colony.

Argentina and South Africa continue to cooperate in the area of human rights. For instance, the Argentine Forensic Anthropology Team works closely with Madeleine Fullard and the Missing Persons Task Team within the NPA (National Prosecuting Authority). Let me share with you a bit about our experience with disappearances and the Convention.

Mr. Sersale read from a prepared presentation which is contained in Annexure A, in both English and Spanish, at the end of this report.

David Johnson, *Office of the High Commissioner for Human Rights*

I'd like to argue that international standards can work in the field. I want to talk about lessons learnt in Nepal and some local nuances. I want to concentrate on four main lessons. By way of background, between 2002 -2004, Nepal had the highest number of new cases of enforced disappearances per year. Anywhere from 50 to 70 new enforced disappearances per year were registered with the Working Group on Enforced Disappearances (WGED). We used this to shame the government and the army which was behind this. By the end of 2005, this phenomenon had virtually ended. A lot of work was done in a period of two years. It was not a smashing success, but a success nonetheless.

Nepal was characterized by a classic guerrilla war, where one party didn't lose the elections; it was not even registered, but took to the hills – perfect for guerrilla war – a blueprint perfected by Mao. This Maoist party, by 2003 was responsible for large numbers of casualties. By 2004, the Maoist side was very unpopular. There was recruitment of 12-16 year old children – took children out of school – especially boys – and they got enlisted even if they did not want to.

By 2004, the monthly death toll in Nepal was high. There were a cluster of human rights violations that were happening together – detention, torture, disappearances, executions. In dealing with disappearance issues, there were more missing people than bodies. There was a process of tagging disappearances and putting pressure on cases of torture. As UNHCHR, we arrived in December 2004 to put pressure on Nepal. We only got those cases because NGOs were very good at reporting them and submitting information. There were threats with reprisals for people if they cooperated with UN mechanisms.

There are four key lessons to take from this experience:

- 1) The importance of involving and invoking UN procedures
- 2) Linkages to the UN peacekeeping operations: The UN spends a great deal on this. Armies skim off the pay off their soldiers from peacekeeping millions that get put into a fund. The irony is that the army that is responsible for human rights violations is serving under the UN flag. The issue hits home. The army fund was itself put under pressure. We worked with the PPKO. UN partners were reluctant to get involved in this area, especially when publicity started hitting, of the army serving under UN and yet involved in human rights violations – they did not like that, tried to get those persons out. We tried to institute a vetting mechanism for peace-keeping operations (there was limited NGO involvement even though key in getting the issue launched). We worked with a Hong-Kong based NGO, and Amnesty wrote letters on how to do the vetting – this vetting, even if it was not finalised, was enough of a threat to force officers to start cleaning up their act. The US and UK were also involved in the process – they did not want accusations and violations.
- 3) Need for effective institutional arrangement: going from single human rights officer in Nepal, to what became the largest human rights monitoring situation in the world. Through the pressure on disappearances – the government conceded to a monitoring operation – looking in retrospect at the record of collaboration, the operation made the conscious decision to clean up the act. It established a human rights monitoring operation and opened our doors for persons and NGOs to report cases – arbitrary detention cases. We would even hear from the guerrillas that this was happening. We would react within one day and send official communications to the army, which up to now had been a whitewash – not doing much of anything. Then they became a partner in weeding out disappearances and summary executions. We would confront them that they knew that persons had been taken and convince them to acknowledge cases.
- 4) Use of well-documented cases: One cannot press for prosecution of everyone accused of torture, disappearances, etc. Instead, we focused on well documented cases. There was the case of a 14-year old girl whose mother - one week before the girl was taken - had witnessed the killing of a 16-year old girl by security forces. Within 3 hours of being in custody, the girl was dead. It was an important case where the family was insistent – not just asking for compensation – the mom became a fugitive, and at a high level confronted the army, had a high profile meeting – the case is still an emblem of disappearances in Nepal – her body was exhumed, from a peacekeeping training centre.

There are critics that will point out that there are problems with the Convention, but it is important to note that had the Convention been in force, it would have been a more effective tool to use in addition to the work of the Working Group on Enforced Disappearances.

QUESTIONS & ANSWERS

1. Focusing on people who were tortured, what will be the impact of this Convention if South Africa signs and ratifies it? Is it going to have any impact in the country and internationally? What can be done to popularize this Convention?

Signing of the Convention will not change the immediate reality. We need to have a commitment to what is in those Conventions and have the political will to give effect to those Conventions. For instance, South Africa has not ratified the ICESCR – even though much of it is incorporated in our Constitution – what makes a difference is how we engage our democracy. If we look at the matter of Rashid – there was no national debate in South Africa. At the end of the day, government can dismiss it by saying it is just a small group. We need to have ordinary people being involved, providing standards to build something better.

For instance, there are a number of refugees here, many of them for economic reasons, many for political reasons. South Africa is facing a massive problem and not dealing with it effectively, our current approach is to deport. It does not work. We need to deal with political refugees through refugee law, but there is a level of public exhaustion on these issues, so public sentiment to deal humanely with these issues is very slow. People were hosted in a community hall and then Home Affairs came and deported a bunch of them the next day – hauled them away. I almost felt complicit in that, because had they not stayed in the community hall they might not have been arrested.

In terms of the Convention, the importance of South Africa in the SADC region and South Africa's obligations to ratify the Convention, historically this is a milestone. It is people like us that keep servicing people who are disappeared – they are part of our country. It is important for NGOs in the region to lobby the government. South Africa is part of the global community – it is its moral obligation to push.

2. I am thinking of persons who might have been abducted, disappeared, tortured and then dropped by the side of the road. Are you collecting any data of those cases in Zimbabwe? How many of those are human rights defenders? Are there human rights defenders who are being refouled to Zimbabwe?

There are hundreds or thousands of people who get arrested, and then reappear (something that takes between 3-4 days). I don't know that they have been documented per se – many are likely to be captured as an unlawful detention rather than a disappearance. The Zimbabwe Human Rights Forum produces monthly reports on these kinds of cases. It would probably run into thousands of cases. In terms of human rights defenders, you would need to include those who are politically active, who participate in political activities, in terms of HR defenders – especially organisations like the NCA, WOZA, where people have been arrested 11-20 times. They face repeated arrests and then they are released. Normally we know where they are but sometimes we don't for a few days and then they are released. There are cases of refoulement, but not very many. At the moment, the status is fairly chaotic but there have been 1-2 moderately high profile cases of people who have gone back

and have been tortured. However, I don't know that there is a large number of substantiated cases of this sort.

SUMMARY OF THE DAY'S PROCEEDINGS

Abeda Bhamjee, *Attorney*

The conference has discussed the phenomenon of enforced disappearances, its history in Latin America and other states, how the need for an international convention developed and we focused on some new trends of enforced disappearances developing.

The conference also touched on rights of security, dignity, not to be tortured, be subjected to cruel and degrading treatment, the right to legal personality, and various other rights. It also highlighted how historically, there is some basis for challenging disappearances through other instruments such as the ICCPR, the UDHR, and the African Charter, amongst others.

We explored some of the key rights contained in the Convention, such as the right of a person not to be subjected to an enforced disappearance, and the recognition that, in certain circumstances, enforced disappearances constitute crimes against humanity. We also discussed the broad definition that is accorded to victims. Not only direct victims but also, which is very rare, the rights of family members of victims, as well as the right to know the truth.

The convention requires states to take certain steps to make enforced disappearance a criminal offence which is punishable by appropriate penalties, and to limit the statute of limitations on these offences, to hold any person involved in disappearances criminally liable, and the inability to rely on the argument of superior orders for being complicit in this crime.

The convention also places obligations on states to assist, extradite, or hand over a person to a competent authority or surrender the person to an international criminal court. The Committee on Enforced Disappearances has also been given a number of broad based powers to investigate.

There were several discussions on regional instruments that can be used to bring matters to international institutions and bodies. There were also several comparative discussions on the experiences in Zimbabwe, Argentina, and Nepal, all of which highlighted that enforced disappearances are an issue around the world and that it is sometimes very hard to bring perpetrators to book and have relevant mechanisms to rely on.

We should be working together as civil society to bring these issues into the public domain as well as to get the convention ratified by member states.

DAY 2: WEDNESDAY 27 FEBRUARY 2008

PANEL DISCUSSION: PLACING THE CONVENTION VIS-À-VIS THE CONSTITUTION, EXTRADITION AND DEPORTATION

Panellists: Anton Katz, *Cape Town Bar*

Max du Plessis, *Law Faculty, University of Kwa-Zulu Natal*

Moderator: Prof. John Dugard

Note: A copy of the paper presented by Anton Katz and Max du Plessis can be obtained directly from LHR.

Anton Katz, *Cape Town Bar*

While it may seem that we are sitting in some form of ivory tower, the reality is that what we talk about today could have a material and substantial effect on people's lives. They could be affected by government action – this could be decided by the signature and ratification of the Convention.

I'd like to share some factual experiences, while Max will apply principles of the Convention to those factual scenarios. In other words, when those facts arise, how will they play out if South Africa incorporates this Convention into its legislation?

Firstly, I would like to touch on a couple of principles. There was a time when the South African government argued - usually it is the Department of Home Affairs (DHA) or Safety & Security - that the Constitution does not apply to foreigners or illegal foreigners. There was an emphasis on the notion of sovereignty to exclude foreigners at its will. Slowly, that principle was rejected by the courts but DHA kept on with the idea of no rights to foreigners.

To illustrate, Eddie Johnson voted in the 1994 election. He had a fight with his landlady – who caused him to be arrested and charged as being an illegal foreigner – based on an unlawful ID – and was given a suspended sentence. As immigration officers detained him, he was asked by DHA to tell them where he was from. He argued he was from South Africa. However, 18 months later he was still in Pollsmoor arguing that he was being subjected to arbitrary detention. The government's response was: 'you hold the key to your freedom – tell us where you are from'.

In 1997, the Cape High Court argued that detention not for purposes of deportation would be arbitrary, and therefore let him get out. The Constitution applied to Johnson whether he was South African or not. Despite this finding in 1997, right up to 2002 the government continuously adopted the notion that illegal foreigners do not have the protection of the Constitution. Lawyers for Human Rights instituted a case in the Constitutional Court which found that even those foreigners at ports of entry - not yet allowed into South Africa - have constitutional rights. There has been a significant downplay of the notion that foreigners do not have constitutional rights. Foreigners have constitutional rights – this is the first point that I want to make.

In terms of the second principle, I want to talk about the Kiliko Case (CPD). In this case, asylum seekers complained to court that DHA was not allowing them to become asylum seekers technically – they were left without permits, subject to arrest, detention and deportation because they could not get through the door and get Section 22 permits (in terms of the Refugees Act). The Cape High Court found that the practice and policy of DHA of applying for these permits was unlawful and unconstitutional. That judgment made an important point for this conference – it made the point that South Africa was a party to various refugee conventions since 1995, had implemented national legislation in 2000 and in considering whether constitutional rights had been violated, the court

commented that the availability of facilities to consider permits would be inconsistent with the international instruments to which South Africa had become a party. Not surprisingly, it stated that the court should have regard for international instruments to which South Africa is a party. In the Kiliko case, therefore, there was this move that South African international obligations need to be taken into account when determining constitutional rights.

Distinction between deportation and extradition:

In South Africa, deportation is dealt with by DHA; whereas extradition is dealt with by the Department of Justice (DOJ). There are different government departments that are tasked with these 'legal animals'. The Constitutional Court has said that deportation is a unilateral decision by the state on its territory, if a state chooses to ensure that the person leaves the territory of the state – the nature of the deportee should be irrelevant. Extradition is a bilateral event between two states, where one requests the other to surrender and hand over a person. The person need not be a foreigner of the requesting state. Extradition for minor offences should not occur; there also cannot be extradition to face a political offence

There are a whole series of differences between the two (extradition and deportation). By the nature of things, deportations are easier, cheaper and quicker than extraditions. In the latter, the procedures used require some judicial consideration whether the person should be handed over to the foreign state. The requirement of judicial involvement is not necessary in deportation. Because deportation is quicker and easier, states turn to the deportation scenario to achieve that which should be achieved through extradition. If the US wants a person for fraud, they should ask for an extradition request. There are a whole series of procedures to follow and to avoid extradition. In contrast, deportation tends to be quicker. In SA have had cases where deportation occurs and it is unlawful.

In these scenarios where humans are dealt with in a cross-border context, the currency is time, there is a notion of delay, and of losing slowly v. winning quickly. I want to turn to the Mohammed facts. It is a case that ended up in the Constitutional Court. It struck me how bad the facts were.

The Mohammed case was a pre-9/11 case. The war on terror had not arisen as we know it today. It was alleged that Mohammed had been involved in the bombing of the US embassy in Dar es Salaam. He allegedly arrived by truck in South Africa and applied for asylum under an assumed name. In the meantime, there was an investigation in the US and he was indicted for this crime. Even though the authorities were not looking for him, in Cape Town someone saw a picture of him with an assumed name. So based on this information, DHA decided to wait for Mohammed to arrive to get an extension of his Section 22 asylum seeker permit and arrest him then, rather than immediately. Based on the version of events provided by the immigration officers, when Mohammed arrived, they called him in at 5th floor of the Foreshore building (where the Refugee Reception Office is located), told him that he was under arrest, that he had the right to remain silent and the right to a lawyer. Of course that warning was not recorded in any statement or documents introduced to the court. They took him into the lift; there was a car waiting for him to go to Cape Town International Airport. Officers interrogated him for a couple of hours on the bombing of the Planet Hollywood in Cape Town, found that he had no involvement in the activities in Cape Town, and handed him over to the FBI in Cape Town. They suggested that it would be futile for him to ask for a lawyer or approach a court because they knew what he did, namely that he came to South Africa unlawfully and was implicated in the bombing. They asked him whether he would like to go to Tanzania or the US and he allegedly indicated that he would rather go to the US because in

Tanzania he feared for his life. Twenty-four hours later, Mohammed was before a federal court in New York, supposedly with an assurance of no death penalty from the Americans.

Mohammed was put on trial for the bombing. His lawyers in New York approached South African lawyers on death penalty issues. South African lawyers approached the Cape High Court for a declaratory order to declare the removal unlawful – was it a deportation or an extradition? One does not hand over a person to a foreign state in a deportation – this was a bilateral interchange between the US and South Africa. Even if it was a deportation, it was not proper for it fell outside of the Aliens Control Act. The Cape High Court dismissed the application on the basis that Mohammed was an illegal foreigner outside of South Africa.

The case was taken on appeal to the Constitutional Court, which found in favour on all five grounds. It was not a lawful deportation, for the purposes of the death penalty, it didn't matter if it was a deportation or extradition (the fact was that the person was handed over and removed). So what type of relief could Mohammed obtain since he was facing trial in NY? He was entitled to a declaratory order but Mohammed did not ask for an order for the South African government to bring him back. The court said it would not be inappropriate to ask for this, but decided against it.

The Mohammed case is important in relation to other cases. For instance, recently persons were arrested and taken to the Botswana border, where they were going to be put on trial for their lives. South African lawyers threatened to bring a case against the handing over of these people by the South African government to Botswana. The letter went out to various government departments, including Foreign Affairs, Justice, Safety and Security, Home Affairs. At the end of the day, one government department argued that the handing over was not unlawful but the Botswana government sent them back – now they have been properly extradited on condition that the death penalty is off the table.

In terms of the Khalid Rashid case, the government version of what happened is what is put on record – so there is already a dispute of the facts. When it comes to the Rashid case, the facts which the government said were the facts is that an immigration official had information that there was an illegal foreigner who needed to be removed from South Africa. In the middle of the night, with the help of the police, immigration arrived at Rashid's house and arrested him for the purposes of deportation. It was not an issue about investigating whether he was an illegal foreigner, it was for deportation. This happened on 31 October 2005. He was taken to the police cells and he was then interrogated by Mr. Swartland for the purpose of determining his immigration status in South Africa. So, the sequence of events was as follows: Rashid was arrested for the purposes of deportation, taken to a police cell, and then interrogated. There should not be an arrest for deportation until the status of the person has been determined – arrest is a harsh act. On the government facts, then, there was a problem.

According to the government's version of the facts, Swartland (immigration officer) interviews Rashid and concludes that he is in South Africa unlawfully and subject to deportation. In that same version, it is stated that Rashid says that he does not need a lawyer and does not want to appeal and does not need an interpreter. The government then says that, as a result of this interplay, he was on 6 November 2005 handed over to officials representing the Islamic Republic of Pakistan (one of them being the Head of the Anti-Terrorist Unit in Pakistan) and put on a plane at Waterkloof Air Force base.

One of Rashid's friends brings an application in South Africa arguing that what happened to Rashid was unlawful. It is argued that Rashid was not seen for 6 months and now his family is trying to find him. The Pretoria High Court (PTD) said that it was interesting but that it was a lawful deportation. It added that there is a need to break with criminality - Rashid didn't have a permit, he signed away his rights and we know he is in Pakistan because the government handed him over to a Pakistani official at the Waterkloof Air Force base. Eighteen months after this event, Rashid is found in Pakistan with claims of torture. The case is subject to an appeal process; I am not sure where it is going.

If the Convention had been signed and ratified and South Africa had obligations arising from it, it may have - and would have had - an impact firstly, on the officials, in the sense that they could have been subject to a number of sanctions on the basis of criminality. Officials might not have been so quick to arrive in the middle of night. Secondly, the court would have been brought into the Constitutional line in terms of the rights of foreigners, due process, etc.

Max du Plessis, *Law Faculty, University of Kwa-Zulu Natal*

I want to consider the Convention through the lens of the Rashid facts. It was a parsimonious approach by the court in terms of the violation of Rashid's rights. Anton suggested that had the Convention been ratified, the decision of the High Court might have been different. In this regard, I want to deal with a hypothetical scenario and analyse the effects of five provisions in the Convention on the outcome of the Rashid case.

Analysis of the effects of five provisions

First provision: Article 2

Article 2 contains the definition of an enforced disappearance: amounts to an arrest, detention or abduction or any other form of deprivation of liberty by agents of the state or by groups of persons acting with authority or acquiescence of the state. There is also a concealment of the whereabouts of a person, which places the person outside the protection of the law. When one reads this definition, it is plausible to suggest that what happened to Rashid amounted to an enforced disappearance.

There was one piece of evidence admitted in the High Court, issued by the Islamic Pakistani High Commission in Pretoria who were put under pressure to explain what had happened. In this statement, dated 14 June 2006, which is part of the court record/evidence they said: A Pakistani national was arrested by South African authorities, he is wanted in Pakistan for suspected links with terrorists, he was handed over to Pakistani officials and he is in the custody of the government of Pakistan. This does not imply a simple deportation.

Second provision: Article 16

Also of relevance is Article 16 which sets out the principle of non-refoulement: most states cannot send someone to another state where foreseeable that the person could face harm or be subjected to an enforced disappearance (Article 16(a) and (b)).

The phraseology comes from the Convention Against Torture (CAT) and it is important to understand how it has been interpreted by the CAT committee. It has been interpreted on substantial grounds in the sense that it should be beyond mere suspicion but also not the high test of

highly probable – emphasis on reasonable grounds to believe that a person would be returned and face the harm under CAT or the Convention on Enforced Disappearances.

How does one assess to decide if these reasonable grounds exist? There are a number of decisions that have looked at this in great detail: For instance, in the context of CAT's own findings, it has been argued that there is a need to consider reports of recognized human rights organisations and country reports (such as Human Rights Watch reports, Amnesty reports and others). In this context, a particular concern, given the Rashid case, is that there are reports that Pakistan has been involved in the practice of extraordinary renditions and acts of torture in relation to those suspected of terrorism or terrorist activities. Because an enforced disappearance has been recognized as torture, it is important to recognize that the CAT committee stated that applicants should not be returned to countries that are not party to the Convention Against Torture. Pakistan is not a party and CAT has a rule on this which states that because of the risk of torture, if he were returned and become the subject of torture, then there would be no recourse to petition because Pakistan is not a state party.

Anton and I have to refrain in our discussions from determining an outcome on the appeal process on Rashid. So far I have referred to two provisions in the ED Convention that might have been used to change the outcome of the case. If the Convention had been used, there are two further provisions that could be useful to understand the question of remedy.

If one could show that Rashid was a victim of an enforced disappearance, then one would look at the relief to comply with the Convention: A court, under the South African Constitution, has a duty to (must) declare unconstitutional the conduct of the state. If it can be shown that officials were involved in the enforced disappearance, then the court would have to declare as much (172(1)(a)). Subsection (b) deals with just and equitable relief. What would this be? The South African Constitutional Court has adopted the principle of accountability that if a court is faced with unconstitutional conduct, it will demand that government officials remedy that. In Mohammed, there was a finding of unconstitutionality and a demand by the court that the government must do whatever in its powers to remedy the situation.

Third and fourth provisions

In this regard, there are two relevant provisions through the Convention:

- 1) **Article 12:** Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation.
- 2) **Article 6:** Partly reads: 'Each State Party shall take the necessary measures to hold criminally responsible at least (a) any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance; (b) a superior...' In other words, after an investigation, the state party must hold criminally liable anyone implicated in an enforced disappearance.

These two provisions could ensure accountability under the Convention and they resonate with the Constitutional norm of accountability. Consistent with this, a court could order an investigation to happen, with a view to arrest and prosecution of those implicated.

Anton has shown that there has been a steady progression for the protection of foreigners' rights – which reached its zenith in Mohammed. It was a very important precedent, notwithstanding the fact that Mohammed was unlawfully in the country and he was an admitted terrorist. In South Africa, when the Constitutional Court case was heard, the court protected his rights as far as it could.

Fifth/Final provision

There is a final principle or provision in the role for the courts: Article 1 (b) states that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency (which would cover terrorism), may be invoked as a justification for enforced disappearance.

There is a theory that courts must refer to elected representatives – it is very seductive. However, this can lead to the abuse of power; judges have a duty in times of crisis to act. Even good democracies that pride themselves on their human rights' record, even such democracies have a blind spot – in terms of war, perceived conflict - and have adopted practices that disregard human rights. As someone wrote, as government struggles to deal with terrorism, all governments harbour a blind spot – above the law, government becomes the terroriser. Courts must be reminded of their guardian role – courts need to affirm the rights of foreigners against elected representatives and the general public in such situations.

The point has been made that even when there is a threat of national security, the government must act in accordance with the law. Human rights lawyers, NGOs and others push the court to be guardians but, when they act as the High Court did in the Rashid case, they must remember that in cases of enforced disappearances there is no justification, as the Convention says, for such executive conduct. That is the final link between the Rashid facts and the Convention itself – not even terrorism can undermine the role of judges. Judges in times of crises exercise oversight, counterpoint, balance. In that process, it is too often forgotten to uphold standards of human rights, not only for foreigners but for everyone.

QUESTIONS & ANSWERS

1. How would you apply the Rashid facts obtained from the Pakistani government to the second part of Article 2 (i.e. refusal to acknowledge whereabouts)?

We pointed out that the Convention states that a person must not be subjected to an enforced disappearance. The section does not seem to indicate that an enforced disappearance must happen within a particular state only; in other words, an enforced disappearance is not limited to happening within states but could also happen between states. In this sense, a government would have a duty not to be implicated in the removal of someone to a third state – it is plausible to say this when a government has assisted in rendering someone to a third state (SA giving over someone to Pakistan). One would need to do what one can to remedy that problem.

2. Would you consider Rashid's case as an enforced disappearance or an abduction, if the Convention were to be ratified by the South African government?

On the assumption that South Africa becomes a party to the Convention, what happened to Rashid would have been an enforced disappearance. It relates to the previous question that Max answered,

given that Rashid's whereabouts were known. I am not sure if at the first arrest it constituted an enforced disappearance— since it was illegal and there was no explanation for it in the actual case. When you say abduction, I suppose it could include arrest, detention and deportation.

Prof Dugard further explained that an abduction involves a kidnapping. For instance, a foreign state kidnaps or seizes a person from a place where he or she is resident. Usually, there is no concealment in this process; it lacks the secrecy associated with an enforced disappearance. This being said, there is a very thin line between an abduction and an enforced disappearance.

3. What is the value of the Convention prior to its ratification? Would a South African court have regard for the Convention if it were signed but not ratified?

(A. Katz): In the Makwanyane case, the Constitutional court stated that the court might have regard for international agreements. In light of this, the court should take into account the provisions of the Convention even though South Africa has not yet signed or ratified it. The courts are becoming more inclined to accept the argument that South Africa's international obligations are at stake, such as we saw in the Kiliko case. The reality is that it would be easier to argue that there is an obligation to consider it.

I wanted to touch on something linked to the issue of the wheels of government moving slowly for the process of ratification to be effected. I would like to go back to what Max said that the courts only have the power to rule on these cases when human rights lawyers make it possible for courts to rule on such cases. There's another role to lobby parliament and put the legislative framework in place for such a Convention. The DOJ might not cause the Convention to be ratified until the legal framework is in place, so that obligations can be complied with. For instance, South Africa signed international refugee conventions, but it took several years for the government to pass its own legislation and implement it. In general, the DFA is keen not to have that situation repeated. So there is also an important role for NGOs to push for the national legislation to domesticate the Convention in the meantime.

(M. du Plessis) I do think that there is scope to suggest that this is a Convention that the court must take into account and to use the Convention as a lens through which to consider the facts. We have not used it enough in our papers to highlight key areas.

With regard to the issue of Pakistan, at first the South African government did not say that Rashid was anywhere. Later on, it disclosed that he had been sent to Pakistan. From the outset, there was a period of time when the definition of an enforced disappearance certainly fitted. An enforced disappearance as a crime is continuous, and because it came to an end, it doesn't mean that it was not committed. There is a remedy available.

4. Can you reflect on how this Convention might find its way into domestic legislation? How it could impact on immigration legislation, or to amendments to the Refugees Act or the Immigration Act?

(Prof. Dugard): Article 18 of the Law of Treaties (Vienna Convention) suggests that during the period between signature and ratification, courts should give effect to the object and purpose of the Convention. The question that arises is how the court will respond to government giving effect to

Article 18? When it comes to enforced disappearances, one needs to consider the context within which they occur, for instance, under a security/terrorism context. While South African courts have been good insofar as they have adhered to human rights standards in non-security related cases, I fear that the courts will be less enthusiastic about international human rights norms when anti-terrorism is influencing this context. There is a real possibility of this.

(A. Katz): In terms of dealing with the incorporation, Jody Kollapen suggested that South Africa has a dualist approach to international law. There is a need for implementing legislation as this Convention is not self-executing. In a case like the enforced disappearances convention, if South Africa becomes a party and does not implement it through its own legislation, there is likely to be a problem in prosecuting someone guilty of a crime of enforced disappearance. It would be open for immigration officials to say that there is no crime because there is no law defining an enforced disappearance as a criminal offence.

In terms of changes, it is necessary to consider changes to the Immigration Act, changes to the Criminal Procedure Act, the Extradition Act – there is a whole host of legislation that needs to be considered. I want to pick up on something that John Dugard mentioned in relation to South Africa's response to human rights in the context of national security issues. There was a case which involved Kenneth Good, an Australian professor in Botswana who had a permit for two years, had just renewed it for another two years to teach in Botswana. Shortly thereafter, he got a knock on his door, and he was required to leave the country because the president of Botswana declared him an undesirable inhabitant. His lawyers got an interdict to stop that from happening and there were appeals. One challenge was to the constitutionality of legislation (there was no hearing, no reasons given). The response from the government was that it was linked to national security and that the government could not tell him why he was being deported because that would compromise national security. A few days before, there was a bomb attack in UK, we knew that the court would refer to this and say we do not want another 9/11 scenario. Four out of five judges agreed with the president; we should not be shocked at this kind of response. We lost in that matter but the matter has now gone to the African Commission.

(M. du Plessis): In terms of changes, for instance, Articles 4,5 and 6 of the Convention will require DOJ and Safety and Security to decide how to criminalize their conduct. Article 5 is already criminalized – South Africa adopted this through the Rome Statute Act. Article 23 is likely to require, at a number of government levels, training of officials on the dangers of enforced disappearances. Article 73 dealing with the compilation of records and registers and data keeping will require a one-by-one assessment of responsibilities by different departments (Correctional Services, Safety and Security, Home Affairs) to consider their obligations.

5. How do you see the use of the Convention for a class of people or for those who cannot represent themselves? For instance, at the Musina Holding Facility, there are no records kept of these people and basic standards are not respected. How would you do an application for people who are identified by being rounded up and detained?

(A. Katz): There was a case in the High Court which dealt with the issue of pensions (Duza case), brought on a class action basis, where Froneman argued that it was not possible to bring this as a class action because it was not possible to identify who were denying pensions. Cameron JA, argued that officials could come to Court as a class, and the court would order the government to compile a

list of who is being denied pensions. It emphasized that government has a duty to identify the people who would benefit.

LHR's case in the Constitutional Court dealt with the grounds on standing. Standing in the public interest might be better than on behalf of a class of persons because the latter is a harder group to identify. With this in mind, refugee cases might be easier if they are brought in the public interest. When LHR can act in the public interest, an enforced disappearance class would fit into this.

(M. du Plessis): Given that the Convention places an obligation to identify those who might be disappeared, it would be useful to consider class action because in such cases one doesn't just want to say that one is acting in the public interest, one also wants relief for those subjected to this (in terms of being released, being allowed to make bail applications, etc), so one would want the state to identify who the state is holding in its cells.

6. In a context where states aim to adopt anti-terrorist measures, governments are seeking to be less limited in their means to arrest people and move them around while at the same time the Convention would create obligations on the opposite direction. Does South Africa have anti-terrorist measures that would have to be removed if it adopts the Convention on Enforced Disappearances?

(A. Katz): In terms of South Africa's anti-terrorist legislation, arrest does not go outside of the Criminal Procedure Act. People who are arrested under counter-terrorist legislation can appear within 48 hours. In terms of arrest and detention, South Africa complies with international obligations.

(Prof Dugard): I am a veteran of the apartheid years, where to fight for human rights and obtain redress for human rights violations, we had to have recourse to the common law, since there was limited international law and South Africa was not a state party to international instruments. Today, we are experiencing a new dimension of human rights litigation which allows lawyers to appeal to the Bill of Rights and international conventions. The difficulties that you, as lawyers and human rights defenders, face are not dissimilar, because all governments are subject to inertia and there is a need for the respect for human rights more so than in the past. I think you will agree that we have had the rare opportunity to be guided by two experts in South Africa on extradition, the Constitution, and immigration matters and you will agree with me that both Anton and Max have done a great job in highlighting the problems that we face.

TEA BREAK

PANEL DISCUSSION: CHALLENGES AND SHORTCOMINGS OF THE CONVENTION

Panellists: Madeleine Fullard, *Missing Persons Task Team, NPA*
 Yasmin Sooka, *Foundation for Human Rights*
 Marjorie Jobson, *Khulumani Support Group*

Moderator: Oupa Makhalemele, *Centre for the Study of Violence and Reconciliation*

Mr. Makhalemele introduced the panellists in the order in which they were going to speak as follows:

Madeleine Fullard was a former researcher and report writer for the TRC from 1996 to 2001. She is now the NPA Head of the Missing Persons Task Team which was established to trace people who disappeared during the apartheid era and she has written several articles on enforced disappearances in South Africa.

Yasmin Sooka was a commissioner with the TRC in South Africa, worked with the truth and reconciliation process in Sierra Leone, and in other countries in the region. She continues to be very vocal on issues of transitional justice at different levels. She is the Executive Director of the Foundation for Human Rights and prior to that she was the Deputy Chairperson of the Human Rights Violations Committee.

Marjorie Jobson has been a board member of the Khulumani Support Group since 1997 and the Executive Director since 2006. She is a medical graduate and associate of the University of Pretoria's Gender Studies unit. She advocates for economic rights and is serving on the commission of cultural and domestic communities.

Madeleine prepared a power point presentation to link the issues discussed at a theoretical level on the Convention with challenges faced by people working in the field of enforced disappearances and working with their families. The presentation focuses on the work of the Task Team and raises the challenges that the work suggests for the Convention:

Madeleine Fullard, *Missing Persons Task Team*

Our work arises out of the work of the TRC and not the Convention on Enforced Disappearances. The TRC was mandated to investigate killings, torture, severe ill treatment and enforced disappearances which occurred between 1960 and 1994. It received about 22 000 cases. It was an impossible instruction for 60 investigators to resolve in 18 months. When the TRC closed its doors it had solved many cases of enforced disappearances through the amnesty committee where people came forward and disclosed their involvement with people they had abducted and killed. However, there were problems with the absence of forensic experts and there are still many cases unresolved. The TRC final report said there should be ongoing investigations and it recommended the setting up of a Task Team in the National Prosecuting Authority to continue investigations.

There is a list of 477 cases, which is not complete, from the TRC database. We estimate that there are between 1000-2000 missing persons, as opposed to enforced disappearances. The different kinds of missing persons include enforced disappearances, for example people abducted by security forces and that was the last time they were seen. There are less than 100 cases of these. A large cluster of people went into exile and their fate is unknown, or they died in exile, or they entered the country again and died at the hands of security police or died of malaria in exile, for instance.

There is a large cluster of people that we are not able to make a determination on. Our unit engages in cross-over work, which does not only deal with enforced disappearances. The Red Cross and the Red Crescent have a much broader concept of missing persons which we also address, as we try to address the human loss consequences of war in all its dimensions in South Africa. For us it is not

easy to draw categories because until investigations are completed and a case is solved, it is difficult to know which category a specific case should belong to.

Our goal is the retrieval of remains for families, their restitution and reparations, although we do not exclude prosecution if there are clear cut grounds, but prosecution is not the main goal. People are buried inside or outside of the country. Within the country, they are formally buried in cemeteries in unmarked graves or secretly buried by the perpetrators.

The Convention does not speak to the possibility of disclosure by perpetrators. The sad fact is that we are not going to find people unless perpetrators tell us where to look. We cannot excavate an entire farm. For families often what is most important is finding out the truth and recovery of remains. This is important for families who want closure.

We have a partnership with the Argentine forensic team of anthropologists. They were the first to apply forensic sciences to human rights cases and apply the ethos of connection to family restitution and the rights of family members. They are world experts and have assisted in the recovery of remains for families of missing persons throughout the world. They have placed a strong emphasis on training teams and South Africa has benefited from this.

The bulk of the work of the unit is related to investigation, not exhumation. About 80% is devoted to investigations from written sources, such as reports from different organisations, judicial investigations, police dockets, mortuary and cemetery reports, autopsy reports, fingerprints, photos, and articles in the press, amongst others. Our work also relies on oral sources of information such as interviews with family members, witnesses, friends, fellow activists, dentists, physicians, those who committed the crimes. We also rely on family members to obtain ante-mortem information about the physical structure of the missing persons. We also take cheek swabs for DNA. Organisations can still take swabs for 10 or 20 years to be used in future investigations to achieve matches. Most work is done in outhouses of police stations going through documents, cemetery registers, and unidentified person registers.

We have been working on a case of four ANC guerrillas who were shot dead in the Kruger Park and buried in Nelspruit in unmarked graves, still to be exhumed. We are interviewing survivors, and checking unmarked graves in cemeteries. In the Mamelodi cemetery we were looking for the remains of Looksmart Ngudle, the first person to die in police custody in September 1963. Thousands of people were buried three-deep in a field, and we actually traced the grave and the family was able to bury their father after 40 years.

One of the principles we adhere to is the involvement of families. The process is for them and they have the right to participate at the cemetery and to be present. For many families to visit the actual sight of death is very important; to take soil to bring the spirit back to their home and perform rituals. During the actual exhumation, most countries, Argentina included, start the wrong way using bulldozers, but archaeological techniques and smaller tools are required.

There was a case where four MK operatives were captured, tortured and then electrocuted to death one by one in front of each other, and then exploded and all the pieces were buried together in one coffin at the Winterveldt cemetery. Through DNA testing we were able to identify the bodies and return them to their families to bury. One of the mothers who reburied her son died six months later.

Forensic examination determines the cause of death and identifies the injuries because even in cases of amnesty hearings acquiring evidence which contradicts evidence at the hearing is important. For example, in a case where the TRC was told that a victim died from a heart attack from torture, the forensic examination shows that the person was shot by a bullet in the head. We also rely on dental information and try to match it to remains for the purposes of identification. During this process, we report back to families and, when possible, discuss and review the exhumation and forensic analysis photographs.

In the former Yugoslavia there was wide scale use of DNA identification with mass testing, and after the 9/11 attack, every piece was DNA examined. In Africa there are piles of skulls and no identification which shows the positioning in life and death. In the casualties of war in Africa, black bodies should have the same identification as white bodies, for example in Yugoslavia versus Rwanda. There is very little forensic expertise in Africa, and we are trying to train young black archaeologists and pathologists. We are working to set up a unit at the University of the Western Cape in this regard.

The most important part for families is the official acknowledgment by an organ of state. The Department of Justice works to serve families to acknowledge people who are relatively unknown, but there is no street named after them. In some cases, there is an official acknowledgement where, for instance, a mayor hosts families and has a lunch to acknowledge the family and the matter is reported in the papers.

There has been collaboration with the Freedom Park Memorial where family members have donated items such as clothing, bullets, coins and other artefacts found in the graves belonging to missing persons for the purposes of display with the story of the deceased.

Approximately 20 000 people died in South Africa in this period but the estimate is that only a third came to the TRC. Between March 2005 and October 2007, the Unit has exhumed 50 human remains, 30 have been identified, and DNA test results are being awaited for others.

We assisted the Namibian government, together with the Argentine Forensic Team, two years ago when mass graves were discovered. South Africa has a particular responsibility to Namibia, because most records are in South Africa and South Africa is responsible. Most graves were damaged by bulldozers and it is not possible to do individual investigations. We sent a report to Namibia to set up a national team but we have had no response yet.

Related to the goals of our work, the process of exhumation, training and skills development, is at a broader level to combat impunity (by producing proof and a body of evidence), to contribute to truth seeking and to eliminate the possibility of denial by building a body of evidence that can be used in court, and to contribute to symbolic reparations, through the recognition of loss, enabling families to access reparations and participating in memorialisation processes.

Our long term goals are to establish a network of skills to create a body for Africa so it is independent of international skills, to make sure that practices also conform to best international practices. Last year an African forensic anthropology team was launched, and we hope to work with partner organisations to keep building a more regional and continental character. We are also working towards building a DNA laboratory that is able to process bone samples and do

mitochondrial analysis, and ensuring that investigation, exhumation and forensic identification practices confirm to best international practices.

One of the obstacles we have faced is that the aftermath of war does not fit into tiny boxes of killing, torture and enforced disappearances and there are a number of difficulties in recognising an enforced disappearance case. Human rights organisations focus almost exclusively on enforced disappearances as opposed to missing persons but for the families concerned there is little difference, the experience is the same. The human rights community's norms of enforced disappearances are to move to more humanitarian concerns of dealing with families in the aftermath of violent conflict.

Another obstacle that we face in relation to the Convention is the issue of retroactivity. The Convention makes no impact on that at all. One of the challenges is how to use the Convention to build momentum and increase visibility of the issues, but we still have the challenge of dealing with conflict on the continent and the Convention does not assist us with the debates on retroactivity.

Moreover, most violence is committed by non-state actors, which the Convention does not address. It is also necessary to address the obligations and concrete responsibilities of the state thereafter, especially in states in transition. Who is going to do the work? We need to look at the diverse nature of conflicts on the continent. The Convention still reflects the Latin American experience of enforced disappearances and in years to come we are going to have to tackle some of these issues.

Yasmin Sooka, *ex-TRC Commissioner & Head, Foundation for Human Rights*

Listening to Madeleine, I at least have the satisfaction that one recommendation of the TRC was taken.

Disappearances in the South African context are important because of our own history and the question of enforced disappearances under the apartheid government. Disappearances were more widespread in the early 1990s, and the government reacted to ensure that they passed laws to cover all actions no matter how immoral they were, including how they responded to any threats to the state, as people were detained in prisons and hanged. Torture was widespread and seemed the norm for the police who acted with excessive zeal and enthusiasm. These practices in the 70s to the 80s culminated in many deaths in detention. When these involved high profile activities, not unsurprisingly, the deaths in detention drew greater attention to apartheid policies. There was huge scrutiny from the active human rights community which used every opportunity to take these matters up nationally and internationally and lawyers often took the government to court with unsuccessful results. Nonetheless, this was successful in drawing attention and the spotlight internationally. For example, the death of Niel Aggett drew the attention of the international community.

Speaking to the National Party you can actually mark when government took to death squads and other means, under PW Botha, to avoid the unwanted publicity even though laws were passed to legalise their activities.

The function of the death squads was that those who were labeled enemies of the state were taken out. The semantic debate of the term 'uitgewis' related to what President de Klerk meant by the term to remove the person. Craig Williamson said 'to kill' drew attention to language used to justify

violations, and another example is the term 'boarding' used by Americans to justify that boarding is not torture.

Death squads meant that people were detained, tortured, and usually dead under stealth and deceit. The state carried out false explanations that people were abducted in exile in a third country or turned state operatives, which placed great pressure on families of disappeared people and their party that people were informers.

There was a young activist that the state put electric wires to his chest. There was an elaborate pretence of two units. One disposed of his body, took it to Komatipoort River, but it was impossible to prove what actually happened. One of the policemen put on his shoes and ran through the mud, then the police took markings to allege that he had escaped, but he had lead weightings so it would have been impossible, but every time there was a bombing it was alleged that he was seen. This shows the scope of their deceit.

The Human Rights Committee began to receive statements from families and the database grew and the committee began to unravel more testimonies from the TRC. The common South African understanding of abduction was a notion of the crime of kidnapping. Great lengths were taken to explain the term of enforced disappearances but the committee was chaired by judges and it was still treated in a very narrow way as kidnapping, which was so ridiculous as applicants were granted amnesty for abductions without addressing the implications of the international dimensions of this crime, one of which is that it is a continuing crime involving a multiplicity of crimes with implications for family and victims.

In the Simelane case, the amnesty applicant did not apply for it and should not have received amnesty for it. There is a sense that there is very little cooperation between different bodies in South Africa. There was a file in the Attorney General's office that, had it been handed to the amnesty committee, lots of questions would have been asked regarding full disclosure, but many people went scot-free. The family of Simelane has been on a twenty year quest to find out what happened. It is one of the matters that the TRC handed to the NPA for further investigations with the idea of future prosecutions in mind, which begs the question of political will to pick up these cases.

The classical definition had to be taken further. The recommendation that a special unit be created in the NPA happened seven years after the committee's recommendations, due to intensive lobbying by civil society.

It takes an extraordinary amount of work to understand what happened to missing and disappeared persons. There are goals with broader humanitarian purposes but this work has not led to prosecutions which, in my view, is the greatest critique, added to the fear that policemen will die without making any disclosure to families about what happened. The NPA will be held responsible for not taking these matters to conclusion.

The problem that we face at present is that the government has not ratified the Convention so there is a great deal of work for civil society. I believe South Africa has had enough amnesties and now we need to focus on dealing with impunity, but has this process been extended similarly to victims? In 1997 we received reports that victims could still receive reparations, but in 1999 government released guidelines that amounted to another immunity and amnesty opportunity for secret plea

bargains. This resulted in civil society groups taking the guidelines to court to challenge the Constitution and the provisions which gave rise to the TRC.

The secrecy around Adrian Vlok's plea bargaining puts into question whether transparency and disclosure are the goals of the nation. Besides the individual victim, the whole nation is entitled to know what happened. The Vlok matter makes for interesting reading and gives one a sense of revulsion at the way the plea bargain was dealt with.

There are many critiques of whether or not we need another Convention and, for our own experience in South Africa, whether there is not enough domestic legislation to deal with this issue. Even the Convention Against Torture dealt with past cases and is not looking at the present torture of refugees and undocumented migrants. If South Africa ratified the Convention it would make for strong grounds to tackle the NPA, but would be restricted in applications to state agents only.

In our own region more than eighty percent of violations are committed by non-state actors. Poverty, illiteracy, fear of reprisals, and no access to justice systems all pose their own problems. A forum of NGOs in Brazzaville called on member states of the African Union to sign and ratify the Convention. Civil society groups need to lobby on disappearances in the region.

Marjorie Jobson, *Executive Director, Khulumani Support Group*

The adoption of the Convention by the UN General Assembly can now assist human rights movements in this sub region. It is a very welcome and significant milestone towards expanding the transnational legal order to provide for the phenomenon of enforced disappearances.

In South Africa, there are approximately 55 000 human rights victims. The work on the convention is important for clarification of a definition of what an enforced disappearance constitutes and how it can be used by us as an advocacy tool.

We have Khulumani members who were widowed early in the 1980s. People were abducted from their work places and there was no resolution of many cases. Recently, local police in the Vaal region came and picked up one of these women and took her to the local police station to explain what had happened. So there is some form of sensitivity, despite what happened in the TRC where doors were kept closed.

I know that from local advocacy the police in the Vaal region are taking up issues. There have been actions undertaken by widows, for instance, widows in black clothing parked at Home Affairs and did not budge. They were visited by three director generals.

Members have been invited to participate in ceremonies to commemorate unsung heroes. The former secretary of the SAKCC survived poison attacks, and they attended in black and bought a coffin for notes of matters that are still unresolved in their regions.

It is very important that these matters are happening because they deal with people who are not here which is why they can fall off the agenda.

The process was meant to be so victim-centered but it was an enormous struggle in South Africa for victims to be consulted and taken into account. In some cases the state suggests that it did consult victims, but we have no knowledge of these consultations.

For many of these reasons, this Convention is incredibly important, because it has been a very long struggle for the right to reparations, which is very important.

We received funding through the Foundation for Human Rights and got our own experts to write down proposals for reparations for victims. Often the state says people participated in hearings but our members said they were not even asked if all the questions they needed to ask were covered. Someone said she still sees her perpetrator walking around. She knows he went to the amnesty hearings but she does not know if he was given amnesty.

It is encouraging that the definition of victim in the Convention is so inclusive. There is a primary victim, the disappeared person, but it also includes any other person who suffered harm as a result of the disappearance so direct family members and people who were dependent on those victims are included.

Because of the slow process of finding the truth, there is silencing going on in families. Recently someone from the Missing Persons Task Team went to meet with a family without an appointment and had the opportunity to speak to the children who had never been told the story of their disappeared brother. This is how gaps appear.

The Convention expands the glossary of the rights not to be disappeared and the right to the truth, especially for families to know full details. The fact that the crime is recognized as ongoing until the return of the person or of their remains is important. The right of affected persons to form associations is also important.

Other concerns about the Convention is that the reality is that enforced disappearances will continue, so it is important that the government that comes to power through democratic means will still try to enforce these provisions so that it is of a continuing nature to prosecute these matters. Nokuthula Simelane's sister said in her affidavit that they had to live with the daily trauma of the enforced disappearance of a sister and daughter for years.

Peru has an ombudsman for prosecuting human rights cases. Fifty-nine cases were referred from the TRC process. The trend is in rigour in prosecuting, getting arrest warrants, getting evidence, and legal representation of victims.

The prosecuting authority says that individuals can bring private prosecutions if the NPA decides not to, but I cannot foresee any progress in this way as individuals will have no money to do so.

This is a welcome expansion of international human rights law and it is welcomed that our own government shows an intention to ratify the Convention. It is a worry, however, how the rhetoric is invoked, as there can be no reconciliation without redress and accountability.

The paradox of adopting the Convention is the reality that perjury will continue. There will always be people who will pretend that they were not complicit, and they will hamper the domestication of the Convention because they have so much to hide.

Exchange between victims groups is very important, to keep writing down stories, demanding answers from police stations, getting letters from police stations that they filed complaints so that dockets cannot be lost. It is very powerful that people feel they cannot be complicit any longer but are working towards a goal.

The uniqueness of the particular human rights tools that help people find a voice, and prevent forgetfulness is that as a consequence the families of victims have become competent and developed skills and learnt how to hold states constitutionally to account.

QUESTIONS & ANSWERS

(Oupa Makhalemele) When the TRC was established in 1996 it was meant to focus on victims, a promise that has never been fulfilled fully, since we have yet to appreciate the full impact of gross human rights violations impact on victims. One layer of amnesty after another and deals behind closed doors without participation of victims continue to place victims in the dark. It speaks to continuing violations when people are still looking for answers and no space is being provided to the victims for disclosure of what actually happened to start coping with what they have undergone. We will open the floor to questions.

1. This is a very sensitive input, trying to address concerns which are long outstanding. This exercise is long overdue. In the Nokuthula Simelane matter, we are fully aware that the process of the TRC is closed, but since there is new evidence that came out from the family's own investigation, what can be done to assist in that regard? My second question is that in signing the Convention, is it going to be linked to assist and how will that happen? For example, in history, Mpumalanga is situated in a very complicated situation of unresolved cases around Piet Retief, and Nelspruit and the Kruger National Park. What advice would you give to some families who are still traumatized?
2. I would like to ask the NPA to address Yasmin Sooka's critique of no prosecutions, as well as what happens to records obtained once investigations have been concluded?
3. Would the NPA be interested in investigating or prosecuting persons in the future, such as immigration officers who caused people to be detained at Guantanamo Bay?

(Yasmin Sooka) In the Simelane case, a very interesting file existed that was available to the person who conducted the investigations. If this file had been made available to the amnesty committee they might have had very different questions. The perpetrator got away and there is certainly evidence which shows something very different. A person was killed two days before he was meant to testify and the people responsible for the violence during the apartheid years got away with this. Nokuthula's father got somebody to ask questions from parliament and nothing happened. Mr. Simelane tracked down every witness available and presented this to the NPA and they did have a sympathetic reaction, but he was told that no investigators were available so the case was stumped. So there needs to be a unit within the NPA and also more focus from civil society on how to deal with disappearances.

There are many similar cases and amnesty cases, which narrowly deal with the act of abductions which are not seen as a continuing crime with layers and where, in the final act, the state is responsible for that person. So even though the Convention is a useful document the big question is not about signing it, but about how it will be taken into account in our own domestic legislation. It requires much lobbying to take this matter seriously. Within the NPA, for example the plea bargain for Adrian Vlok, was it made because it is a high profile victim? There is an indecency in the country in wanting to make sure that perpetrators escape responsibility, with no discussion on the rights of victims.

What happens to victims after their reparations? In dealing with the Convention we need a group to address submissions to government on the issue to be taken seriously at the interdepartmental level. Government raised very serious questions but it is still a very small group, and the weakness in the ways courts deal with international law, raise questions of concerns that the response from civil society is that some lawyers are seen as mavericks instead of treating it seriously. There is impunity of government officials acting in this country.

(Madelaine Fullard) The NPA only deals with pre-1994 matters. The cases that are not prosecuted tend to be those where people got amnesty. We deal with matters where people still wanted remains, so we found remains. Others deal with guerrilla fighters. Police say they were shot at, and how do we prove otherwise? There are plenty of people with bullets but that is consistent with a shoot-out so it is very difficult to prove. To be very frank, the issue of prosecutions is one of political will. It is very easy to throw stones at the NPA, but I hope that the upcoming hearings will be held in public so that struggles for prosecution will be in the open. As to documents, we are documentation fetishists, so we seize documents wherever we go, ones that were about to be thrown away, and will make provision for them to become part of a national archive but it is tricky because some are confidential.

(Yasmin Sooka): There are different versions. Where the truth is not disclosed we should open criminal prosecutions. This is a fight that demands that we should start again to make the state deal with this properly and which requires intense state lobbying.

(NPA representative): People think that matters are being dealt with because they are high profile, because it was taken to a higher level because of the Wouter Basson link. I recall a conference on the TRC 10 years on. If we had the resource of good investigators to engage in investigations and disclose information, there can be prosecutions. There was one case which was investigated because it was linked to the Wouter Basson matter, but there the DSO and the police investigated fully. That is the only case that was at that stage to proceed with prosecution. I share the same sentiment as you about the prosecution guidelines. We are caught up in that it is very difficult for investigations to take place due to the lack of resources.

(Oupa Makhalemele) I wish to thank the panel for a very insightful contribution and will be watching how civil society, academics, lawyers and MPs take this on and how the Department of Justice responds this afternoon.

LUNCH BREAK

DISCUSSION: WHERE TO FROM HERE? GOVERNMENT TIMELINES, COMMITMENTS AND CONTINUATION OF DIALOGUE

This session was meant to be headed by Mr. John Makhubele, Chief Director: International Legal Relations, Department of Justice and Constitutional Development. Despite confirmation of his attendance, on the first day of the conference LHR was informed that Mr. Makhubele would be unable to attend. In his place, Mr. Makhubele sent a representative, Mr. Herman van Heerden, with a written statement outlining the government's position and timelines regarding the Convention.

Please refer to the DOJ's Presentation Statement contained in Annexure B of this report.

Mr. van Heerden indicated that the Extradition Act and various other pieces of legislation would need to be looked at as part of the process of domesticating the Convention. He emphasized that the legislative branch will need to do a proper evaluation of all legislation that will impact on the Convention and in order to criminalize the offence of enforced disappearance. He added that the indication from the Minister of Justice is that the Convention will be signed in Geneva in April 2008. The instruction is that the Department of Justice will consult with the Department of Foreign Affairs so that Convention can be signed.

In response to a question about the possibilities for civil society organisations to interact with the Department of Justice and work together towards the ratification of the instrument, Mr. van Heerden provided his email address and agreed to convey the request to all relevant persons to enable a meeting to decide on a plan of action.

One of the conference participants indicated that when something is in the pipeline, the stumbling block is not Parliament but rather the legal framework, in the sense that it takes time to process things and present them to Parliament. He asked where the process is now, whether with Parliament or the Department of Justice, and whether some of the outstanding cases from the TRC will be dealt with after signing the Convention.

Mr. van Heerden indicated that the Department had submitted the treaties to the Law Advisors, who in turn submitted them to the office of the President who authorized the Minister to sign the treaty on behalf of the government. Before the Convention can be submitted for ratification, it will first need to get signed and the intention is that it will be signed in April 2008. With regard to the cases of the TRC, Mr. van Heerden indicated that he was not in a position to give an indication of what the situation would be in solving issues outstanding.

One of the participants urged the Department to incorporate the Convention sooner rather than later and questioned whether it was wise for the Minister to have the go ahead to sign when that very process of signature and ratification was under Constitutional review. For instance, he added that the current challenge on extradition treaties could have an impact.

Mr. van Heerden indicated that the Convention could be submitted for ratification in 2008 but after that the Minister must give instructions that the Convention be considered a priority. As to whether Parliament would be able to ratify the Convention in 2008, the DOJ indicated that, in all honesty, it is not likely to be possible. Some treaties might take three months, whilst some take one year. It will be possible for the Minister, however, to indicate that this is a priority to both houses of Parliament.

REPORT BACK FROM PARALLEL SESSION WITH REGIONAL ORGANISATIONS

While the main part of the conference focussed on South Africa, a parallel session was organized to explore ways for wider collaboration in the region. Although the Linking Solidarity programme of *Aim for human rights* was the convener of this session, Venetia Govender opened the meeting explaining why they were at the meeting as participants.

The following persons participated:

- Khulumani Support Group – South Africa
- International Commission of Jurists – Africa director
- Zimbabwe Human Rights NGO Forum – Zimbabwe
- Solidarity Peace Trust – Zimbabwe
- Zimbabwe Lawyers for Human Rights – Zimbabwe
- National Society for Human Rights – Namibia
- Breaking the Walls of Silence – Namibia
- Refugee Law Project – Uganda
- Ditshwanelo: Botswana Centre for Human Rights – Botswana
- Southern African Centre for Survivors of Torture – South Africa
- Institute for the Healing of Memories – South Africa
- Burundian Human Rights League “Iteka”- Burundi
- Journalist Radio Isanganiro – Burundi
- International Centre for Transitional Justice – South Africa
- National Prosecuting Authority Missing Persons Task Team – South Africa
- Equipo Argentino de Antropología Forense – Argentina
- Aim for human rights – The Netherlands

The meeting was facilitated by Venetia Govender, Independent Consultant, South Africa

Objectives of the meeting

After a short evaluation of the history of working on enforced disappearances in Africa and the lessons learned from these experiences, Marjan Stoffers of *Aim for human rights* indicated the objectives for the meeting were modest. The focus of the meeting was on:

- Introducing the context in which each participant was working, particularly focusing on the issue of disappearances;
- Introducing the organisation;
- Providing insights into the type of work done on enforced disappearances;
- Identifying opportunities and barriers for working on enforced disappearances in the region;
- Identifying cross-cutting issues on which some form of loose cooperation could be started.
- Identifying other entry-points for working on Enforced Disappearances than the issue as such.

In addition it was hoped that the meeting at least would stimulate bilateral contacts between organisations in the region that could be of added value.

Sharing Experiences in networking

Venitia invited participants to share their experiences in networking in the region. The following determining factors important for success were identified:

- Networks should have clear objectives;
- Networks should have an active driving force, often in the form of a secretariat
- A strong commitment from network members is necessary

Presentation of country situations

The meeting then focussed on the presentation of country situations (Burundi, Zimbabwe, Uganda, South Africa, Namibia, Botswana), followed by discussions

From these presentations it appeared that every country situation is different in terms of context and dynamics of enforced disappearances both in the past and present, even though there are links and similarities. Consequently, organizations also developed differently in terms of focus and expertise.

In general, a distinction can be made between two types of activities they undertake:

- Public and technical activities engaging the State (lobbying for better protection, writing of reports/monitoring, prosecution ...);
- Personal, involving the victims of enforced disappearances (psychosocial assistance, exhumations ...).

It was noted that organisations have developed different sets of skills that can be used in different contexts. It would be great if there could be cross-fertilisation between organisations, whereby they could put their skills into practice in different contexts.

Another challenge lies in trying to bring these two types of activities together. There is a danger in alienating the victims when things get too technical and the focus shifts towards the 'public and technical' dimension. Victims should clearly never be left out. This is something all organisations were aware of. Apart from South Africa, in none of the countries organizations were aware of the existence of victim's organizations. It is highly probable these organizations do not exist at all.

From the discussions it followed that, despite the fact that enforced disappearances are not seen as a separate human rights issue, the profile of the issue should be raised, because of it being one of the most severe human rights violations that exist. The promotion of the Convention for the Protection of All Persons from Enforced Disappearances in the region is another reason to start extracting the issue from other human rights violations. Meanwhile, from the presentations it is also clear that the dynamics regarding enforced disappearances in the region (Southern Africa, but also the Great Lakes region) are different from the experiences that Latin America went through. There is a feeling that the Convention embodies the Latin American discourse on enforced disappearances. This is very understandable taking into account the strong role victims' organizations have played into the coming into being of the Convention. What is needed is the development of an African discourse on enforced disappearances.

To start with, the lack of clarity about retro-activity of the Convention was identified as a major concern by most participants. Further research on this aspect is needed, because it is extremely important in most of the country contexts. In line with the aspect of retro-activity a call was made to start supporting the setting up of special tribunals in line with the special tribunals for the Former Yugoslavia and Sierra Leone.

It is also clear that working on enforced disappearances is dangerous in a number of countries. Therefore the idea was brought forward to link the issue of enforced disappearances to the issue of Human Rights Defenders, which is very topical.

There is a chronic lack of information on the issue from countries like Lesotho and Mozambique.

Remarks on opportunities for future cooperation

Based on lessons learned and the experience of the participants in working within networks it is clear that any cooperation on the issue should be narrowly focused and involve the organisations' expertise as much as possible. Almost all types of expertise are gathered in the group:

- Mobilisation of victims;
- Data collection and documentation;
- Forensic and anthropological expertise;
- Psychosocial assistance;
- Advocacy and lobby on the national and regional level (making it political);
- Advocacy and lobby on the international level;
- Networking.

Each organisation can benefit and learn from each other's expertise.

All agree that any form of cooperation should be loose. The focus should not be on structures for cooperation (such as a formal network). Information, views and questions should be shared, but there is no obligation to do so. The added value of the exchange should be clear to all. The exchange does not always have to be multilateral. There can be great benefits in bilateral exchange. The combination of expertise in the group make that such bilateral exchange should not be excluded.

Some ideas for networking were put on the table:

- Scoping the problem of enforced disappearances in the Great Lakes region (particularly in Burundi). This means understanding the context in which disappearances take place, identifying the victims, and identifying the first issues one has to deal with. A 'case study' will be set up, identifying the primary questions that need to be answered in order to start addressing the issue in Burundi (and the Great Lakes region). A document will be sent to all, and all are invited to respond from their own expertise;
- Develop an African discourse on the issue of enforced disappearances;
- Use the loose format to flexibly advocate regionally when needed (for example for resolutions at the African Commission for Human Rights). These opportunities need to be identified;
- Work towards direct programme exchange, whereby organisations can visit each other in order to learn about working methods and directly exchange best (and worst) practices. It was explicitly mentioned that, while regional workshops are a great introduction to each other, there should be less focus on this type of exchange and more on direct programme exchange;
- Start addressing the issue of enforced disappearances within the issue of Human Rights Defenders. Strategically this may address some of the barriers of working on the issue of disappearances (as well as some of the barriers of working on HRD). One of the barriers being that disappearances are not separated from the larger gambit of human rights issues

(this is also often the case for the issue of human rights defenders). It may also open up new funding opportunities, particularly with the European Commission.

- Exchanging information with each other, and others, about the possible retro-activity of the Convention.

Due to time constraints it was not possible to discuss all these ideas. All participants agreed that after the meeting the exploration of practical forms of collaboration and exchange of information and experiences should continue. It was agreed to cooperate based on a loose structure where one or two organisations will play a coordinating role. Besides writing a report of the meeting, *Aim for human rights* committed itself to taking the initial lead in the cooperation and facilitation of the exchange and to set up a research project on retro-activity.

VOTE OF THANKS & CLOSURE

Jacob van Garderen, *Director, Lawyers for Human Rights*

Marjan Stoffers, *Programme Manager, Linking Solidarity, Aim for Human Rights*

We would like to thank Aim for Human Rights who, through their discussions with Rudolph Jansen, pushed and discussed the possibility of a gathering of this nature. We applaud your work in this field of enforced disappearances and certainly from the LHR side we enjoyed collaborating with you, especially with Jan, Ewoud and Marjan. Hopefully we can continue to collaborate on the way forward.

Just to provide a brief summary of the day before we go on our way. We started with a discussion of the application of the Convention and how it should find its place within our current context in South Africa, looking at disappearances that took place in the past and new forms of disappearances happening in South Africa and elsewhere in the region. The second panel and the presentations by the Missing Persons Task Team, Khulumani and Yasmin Sooka focused on different aspects of work relating to disappearances and provided enriched context for the Convention. As we look for a way forward, I want to add to what Venitia has said. I certainly have learnt over the course of the two days that this issue is not only a South African issue. We must be creative on how we interact and that we do not rely on a formalized structure, but that we do so at different levels. It is one thing to advocate for the ratification of the Convention in the region, and we must work within our different sectors to achieve that, but also we need to do research in order to broaden our understanding of issues raised, such as that of retroactivity. Going back to what Mr. Hansungule said, it is important for us to find other human rights instruments to fill the gaps where the Convention cannot reach and we may need the assistance of researchers, policy experts, both within government and outside of it. I certainly take the point that it is necessary to develop a Southern African discourse to enforced disappearances and a definition of enforced disappearances that goes beyond the strict requirements set by the Convention. Moreover, we must look at the issue of missing persons, as Madeleine Fullard raised it.

We would have liked to have ready a conference statement but, unfortunately, time did not allow us to do that. We will develop a conference statement which reflects the points made and the nature of the discussion that took place. We will also present a conference report which will hopefully become a reference document to be used for future discussions.

Thank you to our donors CWCI and Aim for Human Rights whose generous support have made this conference possible. I will now allow Marjan Stoffers to say a few words in closing.

Aim for Human Rights is committed to working with all the organisations present here today and those we would like to get on board from Lesotho and Mozambique as a follow up to this conference. This is the start of a collaborative effort in this region. For more than 10 years we have worked with organisations of families of the disappeared to table their issues, to discuss them, to bring them forward and give them the voice to raise these issues. Venitia rightly said so, that in follow up work to this conference the voices of the families of victims must be listened to. Jacob, you and your team at LHR have done a great job to organize this conference. Without your involvement as LHR it could not have been possible to organize an event here in South Africa. As we can see, already positive signals are there. The South African government has committed itself to signing and ratifying the Convention. I also want to thank the panellists from this morning, there was some lively debate and several topics were raised and discussed which provide a good basis to continue working specifically in South Africa. Mr. Van Heerden has already left but I would like to thank him. I want to thank you as participants who have been sitting, listening and discussing to make this event what it has become. I want to thank the guests from abroad and want to give a special thanks to Venitia for moderating the parallel session on the regional issues. I would also like to ask you to fill in the evaluation forms to learn from this kind of event and how they are organized. Thank you all and may you travel back safely to your destinations.

ANNEXURES

ANNEXURE A: PRESENTATION BY THE ARGENTINE AMBASSADOR IN SOUTH AFRICA

ENGLISH VERSION

LAWYERS FOR HUMAN RIGHTS CONFERENCE:

International Convention for the Protection of All Persons from Enforced Disappearances: Implications for South Africa and the Region

26th & 27th February 2008

Presentation by the Ambassador of the Republic of Argentina in South Africa

Mr. Carlos Sersale di Cerisano

Following the atrocities committed within the framework of dictatorships and totalitarian regimes during the 20th century, an international human rights movement was formed. This movement was supported and nourished by thousands of exiled Argentinean citizens, as well as relatives of victims and diverse civil society organisations which, through their everyday work, provided a genuine example of the exercise of an unbiased and democratic defence of human rights.

Within the framework of the struggle of this movement, and after four years of continuous systematic work, on 20th December 2006, the 61st session of the United Nations General Assembly unanimously approved the International Convention for the Protection of All Persons from Enforced Disappearances. This is the first legally binding instrument that recognises, at an international level, enforced disappearances as a crime against humanity whilst it reaffirms the right to reparations, justice and truth.

By means of this new instrument, the international community ratified its commitment with the politics of promotion and protection of human rights. This is in part because this Convention served to fill an existent gap in international law, not only in terms of the prevention of violations of human rights and safeguarding the rights of the victims, but also in terms of the responsibility of states to investigate and punish those responsible.

Far from being an insignificant subject, the Convention represents the consensus reached within the international community in relation to a tragic social phenomenon, which many people had to live through throughout the 20th century.

That search for consensus crystallised, as a process of negotiation and systematic debate, in January of 2003, when an open-ended Working Group was consolidated and started its work. This Working Group was in charge of drafting a legally binding instrument for the protection of all persons from enforced disappearances. The Group was chaired by Bernard Kessedjian, former French Ambassador to the United Nations in Geneva.

Within this Working Group, Argentina, Latin America and the Caribbean, together with other states and geographic groups, played a very active role. In addition, Argentina has become an advocate of

this issue within the framework of the Latin American and the Caribbean Group (GRULAC) within the United Nations.

In this regard, it is important to point out that Argentina played a significant role not only in the drafting of the Convention but also in subsequent negotiations. Soon after the commencement of the inaugural period of meetings of the newly-established Human Rights Council in 2006, the Argentinean and French delegations led a pressure group to push for the approval of the Convention. The Convention's adoption has been set as one of the priority objectives of this new human rights body.

In relation to the above, domestically, a long process of debate and search for consensus has taken place between different governmental bodies and representatives from the most important human rights NGOs in the country. Their contribution has been of great value in the process of negotiation of the text and wording of the Convention.

With the adoption of this instrument, the International Community recognises the right of any person not to be subjected to enforced disappearance and the right of victims to truth, justice and reparation. At the same time, the International Community reaffirms therewith that the systematic practice of enforced disappearance constitutes a crime against humanity.

In this regard, the Convention affirms the duty to define enforced disappearances as an autonomous crime. At the same time, it entrenches the responsibility of states to adopt a series of measures for the prevention, investigation, prosecution and punishment of whoever is accountable for such crime.

On the other hand, with the adoption of the Convention, states commit themselves to reflect on past tragedies and events, with a view to adopting concrete measures to eradicate the social foundations that could encourage the emergence of authoritarian and totalitarian systems, which practise enforced disappearances as a way of exercising political power.

In addition, it is important to highlight that Argentina was the second country in the world, (after Albania), and the first in America to ratify the mentioned instrument. Ambassador Agustin Colombo Sierra deposited the instrument for ratification in December 2007 at the United Nations Headquarters in New York.

Finally, upon ratification of the Convention, Argentina committed itself to lead a worldwide campaign to promote the ratification of the Convention and its prompt entry into force (which requires ratification by at least 20 states).

PART II: SYNTHESIS OF KEY PROVISIONS CONTAINED IN THE CONVENTION:

- The right of any person not to be subjected to an enforced disappearance, including the consequences and responsibilities that attach to states.
- The right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person.
- The right of relatives to recover the remains of their loved ones.

- The establishment of guarantees in terms of the prohibition of clandestine detention of any person anywhere.
- The right to justice for the relatives of the disappeared. This right must be guaranteed through the incorporation and definition of an enforced disappearance within the national criminal/penal code.
- Enforced disappearances constitute a crime against humanity.
- The Convention incorporates a broad definition of “victim” since it includes relatives and those connected to the victim.
- Multiple dimensions of the right to reparation are reaffirmed.
- Reaffirmation of the right of children, who are victims of enforced disappearances, to recover their identity.
- Establishment of an independent monitoring body, the Committee on Enforced Disappearances, with decision-making power for urgent steps to be taken in relation to commission of the crime of enforced disappearances.

PART III: ANNEXURE I

The Argentinean experience with the struggle against impunity

During the past few years, a number of changes have taken place within the international context which facilitated the progressive development of the tools that the international community employs for the struggle against impunity in cases related to the commission of crimes against humanity. In this regard, it is important to recall the role of the English and Spanish Courts in dealing with cases involving Latin-American dictators, the prosecution of Argentinean military members, the development of the ad-hoc criminal courts in Rwanda and the former Yugoslavia and the more recent creation of the International Criminal Court.

A more recent development at the end of 2006 has been the prosecution of Mengistu Haile Mariam by the Federal Court of Ethiopia. The court found the former Head of State guilty of genocide and other crimes against humanity. Mariam was tried in absentia as part of a process that lasted more than twelve years, after Mariam escaped to Zimbabwe following the collapse of his government in 1991.

This contemporary international arena has as one of its two principal pillars, the progressive development of international humanitarian law and, essentially, the development of International Human Rights Law, in particular the role of international protection bodies.

The struggle against impunity: Memory, truth, justice and reparation

Following the arrival of democracy in Argentina, succeeding governments adopted diverse measures with the aim of providing answers to the human rights violations that occurred during the last military de facto government (1976-1983). The creation of the National Commission on the

Disappearance of Persons (CONADEP)⁴ and the trials against members of the military juntas, were two of the most significant measures adopted.

Later measures such as the sanction of the law of Due Obedience (23.521) and the law of Full Stop (23.492) in 1987 prevented the continuation of the open trials against military personnel responsible for the mentioned violations. In line with this course of action, during the 1990s the Argentinean government granted amnesty to prosecuted individuals, based on acts committed or that took place during the last military government.

In spite of this, national courts searched for alternatives to the laws of Full Stop and Due Obedience to continue investigating acts committed, even though they were not allowed to proceed with criminal cases. The result of this was the “Truth Trials”⁵; whose purpose was to gather information about what had really happened to the victims of the military dictatorship.

Starting in 2003, a significant change occurred. For the first time, the three branches of government, one after the other, adopted concrete measures to reverse the process of impunity and instead carry on with the investigation, trial and sanction of the individuals responsible for the violations committed during state terrorism. In this regard, in the same year, the Executive Branch annulled the controversial decree number 1581/01⁶, which imposed a duty to deal with requests for extradition through judicial channels. This decree impeded the ability of the Executive Branch to handle important issues related to these requests.

At the same time, in 2003, the National Legislative Branch declared permanently null and void the laws of Full Stop and Due Obedience⁷, thus opening the possibility to prosecute those individuals responsible for serious human rights violations. After this, in the “Simon”⁸ case, the Supreme Court declared unconstitutional these two laws, thus enabling the reopening of more than a thousand cases of human rights violations that took place during the dictatorship.

In this regard, it is important to highlight the prosecution of ex-repressor Miguel Etchecolaz and his guilty verdict, since it was the first time in which a domestic court described as ‘genocidal’ violations committed inside the national territory.

In addition, on 13th July 2007, the Supreme Court voided the amnesty granted to the ex-commander of Military Institutes, Santiago Omar Riveros in 1990 by then President Carlos Menem. Linked to

⁴ The mentioned Commission published the book titled “Nunca Más!” (Never Again). Although it did not include the list of the people responsible for state terrorism, it is indeed a record of the acts carried out during that time. Therefore, CONADEP can be described as a Commission of Truth; which has established the foundations for future judicial cases.

⁵ One of the first cases was that of the French Nuns who disappeared during the military dictatorship. The Team of Forensic Anthropology has found the bodies of Sister Leonie Duquet and one of the founders of the group “Mothers of Plaza de Mayo”, Azucena Villaflor. This way, the methodology of the called “Flights of Death” was proven.

⁶ This norm arranged the automatic refusal of the requests to prosecute acts that took place during the dictatorship, referring, principally, to the principles of territoriality and *res indicata*. This decree granted impunity to repressors in judicial procedures carried out in other states.

⁷ The invalidity of such laws was declared under the law number 25.779.

⁸ Ruling of the Supreme Court of Justice “Resource of Truth” Simon, Julio Hector and others, illegitimate deprivation of freedom. Case number: 17.768C.

this, it is important to point out that even though the court's ruling pertained to a specific case, the effect of the ruling has the potential of being projected onto other cases of amnesties granted to military personnel and other members of the security forces. In this sense, it sets an important precedent for the future, whenever the Court is asked to deal with similar cases.⁹

Importantly, the Supreme Court judgment puts closure to a period that started three years ago when the Court declared that assassinations, abductions, torture and disappearances, which occurred within the framework of State terrorism, do not fall under a statute of limitations. In this regard, one of the most relevant cases is that of "Arancibia Clavel"¹⁰, heard on 24th August 2004, in which the Court stated that such crimes had to be regarded as crimes against humanity and therefore not subject to statutes of limitation, in line with the Convention on Imprescriptibility of Crimes of War and Against Humanity.

The developments outlined above were complemented by the adoption of an active policy of recovery of historical memory by the state, in line with that which is stipulated in Resolution 2005/66 of the UN Commission on Human Rights on the "Right to the Truth" (presented by the Argentine Republic and adopted by consensus with the support of 48 countries). It was understood that the right to truth is not circumscribed to the rights accorded to victims of massive and systematic human rights violations, but rather encompasses a collective dimension, reflected in the right of the entire society to know what happened in cases of such atrocities.

Along this line, in addition to the truth that clearly arises from legal action, different actions have been carried out related to education and symbolic reparations. The following are emphasized:

NATIONAL MEMORY ARCHIVE

In 2003, the National Executive Branch created the National Memory Archive (NMA), with the purpose of gathering, centralising and preserving information, evidence and documents of the violations of human rights and fundamental liberties, where the state bore responsibility. In addition, the NMA contains historic documents belonging to the CONADEP (National Commission on Forced Disappearances) and Reparatory Laws archives.

On the other hand, the Federal Network of Memory Sites¹¹ was created to communicate the work and exchange of experiences about the methodology and resources between governmental human rights organisations. These are in charge of the administration of the "Memory Sites" of State terrorism at provincial and municipal level.

NATIONAL COMMISSION ON THE RIGHT TO IDENTITY

⁹ Furthermore, in such decree, the Court informs that Amnesty that was granted to prosecuted individuals whom have been not sentenced yet or individuals whom have been convicted is unconstitutional.

¹⁰ Sentence of the National Supreme Court of Justice "Arancibia Clavel", Enrique Lautaro, qualified murder, illegal association and others. Case number: 1516/93-B.

¹¹ Human Rights Secretariat Resolution 14/2007.

Since its creation in 1977, the non-governmental organisation “Grandmothers of Plaza de Mayo”, has been working systematically on the right to identity¹²; which is closely linked to the right to truth and justice.

In 1992, and in response to a request from the Grandmothers of Plaza de Mayo, the Argentine Government created the National Commission on the Right to Identity (CONADI), with the main objective of systematising the search for missing children during the military dictatorship.

This objective was clearly overtaken by the multiple reports of robbery, child trafficking and adults with breached identity¹³. At present, 586 youngsters have approached CONADI to clarify doubts about their identity.

LAWS AND REGULATIONS THAT GRANT BENEFITS TO VICTIMS OF HUMAN RIGHTS VIOLATIONS

Since 1991, several national laws have been passed in order to provide financial compensation to victims of state terrorism. The Human Rights Secretariat is tasked with the enforcement and implementation of such laws. The following are worth highlighting:

a) Law N° 24.043 (amended by Law N° 24.096). This law establishes an extraordinary benefit for persons who were detained between 6th November 1974 and 10th December 1983. This law applies to persons who, being civilians, suffered detentions as a result of acts arising out of military courts, independently of whether they had brought cases before ordinary courts or not.¹⁴

b) Law N° 24.411. This law establishes an extraordinary benefit for cases of enforced disappearance and for persons subject to alleged assassinations, which were caused by military and security forces and paramilitary groups in the course of repressing dissidents before 10th December 1983¹⁵.

c) Law N° 25.192. This law establishes a once-off benefit to persons deceased as a result of the civil uprising against the military dictatorship established after the coup d'état which defeated Ex-

¹² As of February of 2007, the number of children found reached 87

¹³ On provision of Resolution number 1328/92 of the later Sub secretariat of Human and Social Rights, dependent of Home Affairs, a Technical Commission was created to encourage the search of missing children, whose identities were known and the search of missing children born in captivity. Article 5 of this Resolution authorised the Commission to request the collaboration and advice of the National Bank of Genetic Data. In September of 2001, law number 25.457 was sanctioned, therefore granting CONADI a legal framework. At present, the Commission works in the orbit of the Ministry of Justice and Human Rights. In 2004, the National Executive Power created a Special Unit on Investigation of Missing Children as a Consequence of State Terrorism. This unit assists in cases related to this subject and it also has the faculty to initiate its own investigations, following the results to the legal authorities.

¹⁴ As of December of 2007, the Secretariat has received 21.335 applications to obtain this benefit and 15.573 were positively resolved.

¹⁵ As of December of 2007, the Secretariat has received 9.541 applications to obtain this benefit; of which 7.785 have been positively resolved.

President Lieutenant General Juan D. Perón. It limits the period of public and clandestine executions to those committed between the 9th and 12th June 1956¹⁶.

d) Law N°25.914. This law enabled the provision of a special (or extraordinary) benefit for those persons who would have been born during their mothers' captivity (deprivation of freedom), or minors who would have remained detained as a result of their parents' actions, as long as one of the parents had been detained and/or disappeared for political reasons, either by order of the National Executive Branch and/or military courts. This special/extraordinary benefit is increased when there has been a change in the identity of the child or when serious harm has been caused. It covers children born both inside and outside of detention centres and prison premises.¹⁷

All these measures, developed by both the state and civil society, contribute to the closure of a period of struggle against impunity that, with improvements and setbacks, took place in the country since the arrival of democracy. It is also important to point out that the main engine of these changes was the incessant struggle of the human rights movement in Argentina, through its various civil society bodies and organisations, which has played a historic role in the global fight for the defence of human rights.

ANEXURE II

- On 18th December 1992, the UN General Assembly adopted the Declaration on the Protection of all Persons against Enforced Disappearances.
- The 23rd of April 2001, The United Nations Human Rights Commission adopted the Resolution (2001/46), in which was stipulated the creation of a Working Group in charge of drafting a legally binding instrument, for the protection of all persons against enforced disappearances.
- After more than two years of work, the 22nd of September 2005, following the 6th session of the Working Group, a draft of the Convention was tacitly approved, which would then be open for negotiation within the framework of the United Nations Commission on Human Rights.
- In June 2006, the new Human Rights Council adopted, by consensus, the International Convention for the Protection of all Persons against Enforced Disappearances.
- In December 2006, the UN General Assembly adopted unanimously and by consensus the International Convention for the Protection of all Persons against Enforced Disappearances.
- In December 2007, Argentina ratified the Convention.

¹⁶ As of March of 2007, the Secretariat has received 31 applications to obtain this benefit, of which 25 have been positively resolved.

¹⁷ As of March of 2007, the Secretariat has received 824 applications to obtain this benefit, of which 404 were positively resolved.

SPANISH VERSION

CONFERENCIA DE LAWYERS FOR HUMAN RIGHTS: “LA CONVENCIÓN INTERNACIONAL SOBRE DESAPARICIÓN DE PERSONAS: IMPLICANCIAS PARA SUDÁFRICA Y LA REGIÓN¹⁸”

26 y 27 de Febrero de 2008

Presentación por el Sr. Embajador de la Republica Argentina en Sudáfrica, Carlos Sersale di Cerisano

I

Luego de las atrocidades cometidas en el marco de las dictaduras y regímenes totalitarios durante el siglo XX, surgió un movimiento internacional de derechos humanos que se nutrió de miles de exiliados argentinos a la vez que de familiares de víctimas y diversas organizaciones civiles que, con su trabajo diario, dieron un genuino ejemplo del ejercicio de la defensa desinteresada y democrática de los derechos humanos.

En el marco de la lucha de dicho movimiento, y luego de cuatro años de trabajo sistemático, el 20 de diciembre de 2006 la 61ª Asamblea General de las Naciones Unidas aprobó por unanimidad la Convención Internacional para la Protección de Todas las Personas contra las Desapariciones Forzadas.

Se trata del primer instrumento jurídicamente vinculante que reconoce, a nivel internacional, la desaparición forzada como un crimen de lesa humanidad, a la vez que reafirma el derecho a la reparación, a la justicia y a la verdad.

Con este nuevo instrumento, la comunidad internacional ratificó su compromiso con las políticas de promoción y protección de los derechos humanos. Ello en parte porque dicha Convención vino a llenar un vacío existente en el derecho internacional tanto en términos de prevención de las violaciones de derechos humanos y de los derechos de las víctimas, así como en términos de la obligación de los Estados de investigar y sancionar a los responsables.

Lejos de ser un tema menor, la Convención de referencia es representativa del consenso alcanzado en la comunidad internacional respecto a un fenómeno social trágico como el que vivieron muchos pueblos en el transcurso del siglo XX.

Dicha búsqueda de consenso se concretó, como un proceso de negociación y debate sistemático, en enero de 2003, cuando comenzó su labor un Grupo de trabajo de composición abierta encargado de redactar un instrumento normativo vinculante para la protección de todas las personas contra las desapariciones forzadas. Dicho grupo ha sido presidido por el entonces Embajador de Francia ante la Organización de las Naciones Unidas en Ginebra, Bernard Kessedjian.

En tal Grupo de Trabajo, la Argentina, América Latina y el Caribe, junto a otros Estados y grupos geográficos, tuvieron un rol muy activo. La Argentina, de hecho, se ha constituido en el vocero del

¹⁸ Material para intervención del Sr. Embajador de la República en Sudáfrica, Carlos Sersale.

tema en el marco del grupo de América Latina y el Caribe (GRULAC) en el ámbito de las Naciones Unidas.

En tal sentido, cabe destacar que la Argentina tuvo un papel muy importante tanto en la redacción del texto de la Convención como en su posterior negociación. Muestra de ello es que una vez iniciado el período inaugural de sesiones del flamante Consejo de Derechos Humanos en 2006, las delegaciones argentina y francesa lideraron un grupo de presión para que se apruebe dicho documento, cuya adopción ha sido planteada como un objetivo prioritario del nuevo órgano de derechos humanos.

Para ello, en el ámbito interno, se ha dado un largo proceso de debate y búsqueda de consenso entre diferentes entes gubernamentales y representantes de las organizaciones no gubernamentales de derechos humanos más importantes del país, cuyo aporte ha sido de gran valor en el marco de la negociación del texto de la Convención.

Con la adopción de este instrumento, la comunidad internacional reconoce el derecho que tienen todas las personas a no ser víctimas de desaparición forzada, a la vez que reafirma el derecho a la verdad, a la reparación y a la justicia, y confirma, también, que la práctica sistemática de ese delito constituye un crimen de lesa humanidad.

En tanto, la Convención consagra el deber de incriminar las desapariciones forzadas como delito autónomo, a la vez que estipula la obligación de los Estados de adoptar una serie de medidas para la prevención, investigación, procesamiento y castigo de quienes resulten responsables de tal delito

Por otra parte, con la adopción de la Convención sobre desapariciones forzadas, los Estados se comprometen a mirar desde una perspectiva reflexiva las tragedias del pasado y a adoptar medidas concretas para erradicar las bases sociales que pueden hacer re-emerger procesos dictatoriales o totalitarios que apelen a las desapariciones forzadas como modo de ejercicio del poder público.

Asimismo, cabe señalar que la Argentina fue el segundo país en el mundo (después de Albania), y el primero en América, en ratificar el citado instrumento. Lo hizo el Embajador Agustín Colombo Sierra en diciembre de 2007, en la sede de la ONU en Nueva York.

Finalmente, en ocasión de la ratificación de la Convención, el país se comprometió a liderar una campaña mundial para promover su ratificación y pronta entrada en vigor (para lo cual necesita la ratificación de, al menos, veinte Estados).

II

SÍNTESIS DEL CONTENIDO MÁS DESTACADO DE LA CONVENCIÓN

- El derecho de no ser sujeto de una desaparición forzada con todas las consecuencias y obligaciones para los Estados.
- El derecho a la verdad, es decir, el derecho de saber la verdad acerca del destino de la persona desaparecida y de todas las circunstancias sobre este crimen.
- El derecho de los familiares a recuperar los restos de sus seres queridos.

- El establecimiento de garantías en cuanto a la prohibición de la detención clandestina de cualquier persona en cualquier lugar.
- El derecho a la justicia de los familiares de los desaparecidos. Este derecho debe ser garantizado por la incorporación al código penal nacional de la figura de la desaparición forzada.
- Las desapariciones forzadas constituyen crímenes contra la humanidad.
- Se expone un concepto amplio de víctima al incluir también a los familiares y los allegados.
- Se afirma las múltiples dimensiones del derecho a la reparación.
- Se ratifica el derecho del niño - víctima de desaparición forzada - a recuperar su identidad.
- Se establece un órgano de vigilancia independiente; el Comité contra las Desapariciones Forzadas, con poder de decisión autorización para procedimientos urgentes como las características más destacadas.

III

ANEXO I: ANTECEDENTES NACIONALES EN TÉRMINOS DE LUCHA CONTRA LA IMPUNIDAD

En los últimos años se han producido ciertas modificaciones en el contexto internacional que generaron un progresivo desarrollo de las herramientas de la comunidad internacional para luchar contra la impunidad en casos relacionados con la comisión de crímenes de lesa humanidad. En ese sentido, cabe recordar, por ejemplo, las actuaciones de los Tribunales ingleses y españoles en causas relativas al accionar de dictadores latinoamericanos, los juicios en el exterior contra militares argentinos, los desarrollos de los tribunales penales ad hoc en Ruanda y la ex Yugoslavia, y la posterior creación de la Corte Penal Internacional.

Como desarrollo más reciente, a fines de 2006 la Corte Federal de Etiopía encontró culpable de genocidio y otros delitos de lesa humanidad al ex mandatario Mengistu Haile Mariam, quien fue juzgado en ausencia durante un proceso que duró más de doce años, luego de que huyera a Zimbabwe tras el colapso de su gobierno, en 1991.

Este nuevo escenario internacional tiene como uno de sus principales sostenes al desarrollo progresivo del derecho internacional humanitario (DIH) y, fundamentalmente, al del derecho internacional de los derechos humanos (DIDH), en particular el accionar de los órganos internacionales de protección.

La lucha contra la impunidad: memoria, verdad, justicia, reparación

Tras la llegada de la democracia en la Argentina, los sucesivos gobiernos adoptaron diversas medidas con el fin de dar respuesta a las violaciones de derechos humanos ocurridas durante el último gobierno militar (1976-1983). El juicio a las juntas y la creación de la Comisión Nacional sobre Desaparición de Personas (CONADEP)¹⁹ fueron algunas de las medidas más destacadas.

¹⁹ Dicha Comisión publicó un informe titulado “Nunca mas” que, aunque no incluyó un listado de los responsables del terrorismo de Estado, es una crónica de los hechos acaecidos durante dicho proceso. Así, la CONADEP puede ser calificada como una Comisión de la Verdad, que estableció las bases para futuros casos judiciales.

Posteriormente, la sanción de las leyes de obediencia debida (23.521) y punto final (23.492) en 1987 impidió continuar con los procesos judiciales abiertos en el contexto de las violaciones referidas. En consonancia con este curso de acción, en la década de 1990 se indultó a personas procesadas o juzgadas en el marco de causas relativas a los hechos acaecidos en el último gobierno militar.

A pesar de ello, los tribunales nacionales buscaron alternativas a las leyes de punto Final y Obediencia Debida para seguir investigando los hechos, aún cuando estaban imposibilitados de llevar adelante procesos penales. El resultado de ello fueron los llamados “Juicios por la Verdad”²⁰, que tenían como propósito recolectar información acerca de lo que ocurrió con las víctimas de la dictadura militar.

A partir del 2003, se produjo un cambio trascendente. Por primera vez los tres poderes del Estado adoptaron sucesivamente medidas concretas para revertir el proceso de impunidad y avanzar en la investigación, juicio y sanción de los responsables de las violaciones cometidas durante el terrorismo de Estado. En ese sentido, el Poder Ejecutivo anuló en el 2003 el polémico decreto 1581/01²¹, que dispuso la obligatoriedad de tramitar judicialmente los pedidos de extradición que lleguen al país, privando al Poder Ejecutivo de la competencia de expedirse sobre cuestiones de fondo relativas a dichos exhortos.

Por su parte, en 2003 el Poder Legislativo Nacional declaró insanablemente nulas las leyes de Obediencia Debida y Punto Final²², abriendo la posibilidad de llevar a juicio a los responsables por graves violaciones a los derechos humanos. Posteriormente, la Corte Suprema de Justicia de la Nación en el caso “Simón”²³ declaró la inconstitucionalidad de aquellas leyes, logrando así despejar el camino para la reapertura de más de mil causas por violaciones a los derechos humanos ocurridas durante la última dictadura.

En tal sentido se destaca el proceso judicial al ex represor Miguel Etchecolaz, y la posterior sentencia de condena, dado que por primera vez un tribunal nacional calificó de “cuadro de genocidio” a hechos sucedidos en su propio territorio²⁴.

En tanto, el 13 de julio de 2007 la Corte Suprema de Justicia de la Nación dejó sin efecto el indulto dictado en 1990 por el entonces Presidente Carlos Menem al ex Comandante de Institutos Militares, Santiago Omar Riveros. En ese sentido, cabe señalar que si bien en el citado fallo la Corte se

²⁰ Uno de los primeros casos fue el de las monjas francesas que desaparecieron durante la dictadura militar. En el marco de ese caso, el Equipo de Antropología Forense ha localizado los cuerpos de la religiosa francesa Leonie Duquet y de una de las fundadoras de la agrupación Madres de Plaza de Mayo, Azucena Villaflor, probándose de esta forma la metodología de los llamados “vuelos de la muerte”.

²¹ Dicha norma disponía el rechazo automático de los exhortos por hechos sucedidos en el marco de terrorismo de Estado, apelando, principalmente, a los principios de territorialidad y cosa juzgada. Dicho decreto permitió garantizar la impunidad de represores frente a procesos judiciales realizados en otros países. Ver texto completo de la ley en www.infoleg.gov.ar.

²² La nulidad de tales leyes fue declarada a través de la Ley N° 25.779.

²³ Sentencia de la Corte Suprema de Justicia de la Nación “*RECURSO DE HECHO Simón, Julio Héctor y otros s/privación ilegítima de la libertad...* Causa N° 17.768C”.

²⁴ Hasta el momento, todas las decisiones judiciales que dictaminaron la existencia de un cuadro de genocidio fueron producto de tribunales internacionales (i.e. Nuremberg, Rwanda), o de decisiones judiciales de un tribunal de un país pero respecto a hechos sucedidos en otro (i.e. las decisiones judiciales en España respecto a hechos ocurridos en Argentina y Guatemala).

pronuncia sobre un caso puntual, el efecto se podrá proyectar sobre otros indultos a militares e integrantes de otras fuerzas de seguridad, en la medida en que sienta un precedente importante de cara al futuro, para cuando lleguen a estudio de la Corte expedientes referidos a casos análogos.²⁵

Lejos de ser un tema menor, con la citada decisión la Corte culmina una etapa que se inició hace tres años, cuando ese Tribunal declaró que los asesinatos, secuestros, torturas y desapariciones cometidos en el marco del terrorismo de Estado no prescriben. En efecto, uno de los casos de mayor relevancia ha sido el de “Arancibia Clavel”²⁶, dictado el 24 de agosto de 2004, en el que la Corte resolvió que dichos delitos debían ser considerados de lesa humanidad y por lo tanto imprescriptibles, según lo establecido por la Convención de Imprescriptibilidad de Crímenes de Guerra y Lesa Humanidad.

Todo lo expuesto anteriormente, se completa con una activa política de recuperación de la memoria histórica, llevada a cabo por el Estado, siguiendo lo dispuesto por la resolución 2005/66 de la Comisión de Derechos Humanos de las Naciones Unidas, sobre el “Derecho a la Verdad” (presentada por la Argentina, y adoptada por consenso, con el copatrocinio de 48 países), en el entendido de que el derecho a la verdad no se encuentra circunscrito al derecho que asiste a las víctimas de violaciones masivas y sistemáticas a los derechos humanos, sino que tiene también una dimensión colectiva, reflejada en el derecho que tiene toda la sociedad a conocer lo ocurrido en ocasión de tales violaciones.

En esa línea, además de la verdad que surge claramente de la acción de la justicia, se han llevado a cabo distintos tipos de acciones en materia de educación y reparaciones simbólicas. Entre las acciones llevadas adelante se destacan las siguientes:

Archivo Nacional de la Memoria

En el año 2003 el Poder Ejecutivo Nacional creó el Archivo Nacional de la Memoria (ANM), con el objetivo de obtener, centralizar y preservar la información, los testimonios y documentos de las violaciones de derechos humanos y libertades fundamentales en las que la responsabilidad del Estado estuviera involucrada.

El ANM contiene los documentos históricos de la CONADEP y los archivos de las Leyes Reparatorias.

Por otra parte, se creó la Red Federal de Sitios de Memoria²⁷ para articular el trabajo y el intercambio de experiencias sobre la metodología y recursos entre los organismos gubernamentales de derechos humanos, que a nivel provincial y municipal, y de la ciudad de Buenos Aires, están a cargo del manejo de los “sitios de memoria” del terrorismo de Estado.

²⁵ Asimismo, en el fallo de referencia, la Corte anticipa que resulta igualmente inconstitucional si el indulto se aplicó a personas procesadas que aún no tienen sentencia, o a personas que ya fueron condenadas

²⁶ Sentencia de la Corte Suprema de Justicia de la Nación “*Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros*”- Causa N° 1516/93-B”.

²⁷ Secretaría de Derechos Humanos, Resolución 14/2007.

Comisión Nacional por el Derecho a la Identidad

Desde su creación en 1977, La organización no gubernamental “Abuelas de Plaza de Mayo” ha trabajado sistemáticamente en torno al derecho a la identidad²⁸, íntimamente vinculado con el derecho a la verdad y a la justicia.

En ese sentido, y en respuesta a una solicitud planteada por esa organización, en 1992 el gobierno creó la Comisión Nacional por el Derecho a la Identidad (CONADI), con el objetivo de sistematizar la búsqueda de los niños desaparecidos durante la última dictadura militar.

Dicho objetivo se vio rápidamente superado ante las múltiples denuncias de robo, tráfico de menores, y adultos con su identidad vulnerada.²⁹ Actualmente, 586 jóvenes se han presentado ante la CONADI para aclarar dudas sobre su identidad.

Regulaciones normativas que prevén beneficios a ser otorgados a las víctimas por la violación de derechos humanos

A nivel nacional y desde 1991 se han dictado una serie de normas tendientes a compensar económicamente a las víctimas del terrorismo de Estado, cuya autoridad de aplicación es la Secretaría de Derechos Humanos. En este sentido se señalan las siguientes:

- a) Ley N° 24.043 (modificada por Ley N° 24.096). Establece un beneficio extraordinario para las personas que estuvieron detenidas entre el 6 de noviembre de 1974 y el 10 de diciembre de 1983 Alcanza las personas que, siendo civiles, sufrieron detenciones en virtud de actos emanados de tribunales militares, independientemente de si habían iniciado acciones de daños ante los tribunales ordinarios o no.³⁰
- b) Ley N° 24.411. Establece un beneficio extraordinario para los casos de desaparición forzada de personas y para los supuestos de asesinatos causados por el accionar de las fuerzas armadas, de seguridad o grupos paramilitares en el marco de la represión de la disidencia, con anterioridad al 10 de diciembre de 1983.³¹
- c) Ley N° 25.192. Establece un beneficio otorgado en una única vez para las personas fallecidas por el accionar represivo del levantamiento cívico militar contra la dictadura militar instaurada por el golpe que derrocó al Presidente de la Nación, Tte. General Juan D. Perón, limitando el

²⁸ A febrero de 2007, el número de niños encontrados ascendía a 87.

²⁹ Por disposición de la Resolución N° 1328/92 de la entonces Subsecretaría de Derechos Humanos y Sociales del Ministerio del Interior se creó una comisión técnica destinada a promover la búsqueda de los niños desaparecidos cuyas identidades eran conocidas y de los niños nacidos de madres en cautiverio. El artículo 5 de esta resolución autorizó a la Comisión a requerir la colaboración y asesoramiento del Banco Nacional de Datos Genéticos. En septiembre de 2001, la Ley N° 25.457 fue sancionada, otorgándole a la CONADI un marco legal y, en la actualidad, la Comisión funciona en el ámbito del Ministerio de Justicia y Derechos Humanos. En 2004, el Poder Ejecutivo Nacional creó una Unidad Especial de Investigación de Niños Desaparecidos como Consecuencia del Accionar del Terrorismo de Estado, que asiste en los casos vinculados con este tema y además está facultada para iniciar sus propias investigaciones, debiendo transmitir los resultados a las autoridades judiciales.

³⁰ A diciembre de 2007 la Secretaría ha recibido 21.335 solicitudes para recibir este beneficio y se resolvieron favorablemente 15.573.

³¹ A diciembre de 2007 la Secretaría ha recibido 9.541 solicitudes para recibir este beneficio de las cuales se resolvieron favorablemente 7.785.

lapso de las ejecuciones públicas o clandestinas a las producidas entre el 9 y el 12 de junio de 1956.³²

- d) Ley N° 25.914. Determinó un beneficio extraordinario para las personas que hubieren nacido durante la privación de la libertad de su madres, o que siendo menores hubiesen permanecido detenidos en relación a sus padres, siempre que cualquiera de éstos hubiere estado detenido y/o desaparecido por razones políticas, ya sea a disposición del Poder Ejecutivo Nacional y/o tribunales militares. El beneficio extraordinario se incrementa cuando hubiere mediado sustitución de identidad a los niños o cuando mediaren lesiones graves o gravísimas, y abarca tanto a los nacidos dentro como fuera de los establecimientos carcelarios o lugares de detención.³³

Todas estas acciones, desarrolladas por el Estado y por la sociedad, contribuyen a cerrar el ciclo de lucha contra la impunidad que, con avances y retrocesos, tuvo lugar en el país desde el advenimiento de la democracia. Cabe destacar que el principal motor de estos cambios fue la incansable lucha que mantiene, en el ámbito de las organizaciones de la sociedad civil, el movimiento de derechos humanos de la Argentina, que ha tenido un rol histórico en la lucha mundial por la defensa de los derechos humanos.

ANEXO II

- 18 de diciembre de 1992, la Asamblea General de las Naciones Unidas aprobó la Declaración sobre la Protección de Todas las Personas contra las Desapariciones Forzadas.
- El 23 de abril de 2001, la Comisión de Derechos Humanos de las Naciones Unidas aprobó una resolución (2001/46) por la cual se estipuló la creación de un Grupo de Trabajo encargado de elaborar un proyecto de instrumento normativo jurídicamente vinculante para la protección de todas las personas contra las desapariciones forzadas.
- Después de más de dos años de trabajo, el 22 de septiembre de 2005, al término de la sexta sesión del Grupo de Trabajo, se aprobó, tácitamente, un proyecto de Convención que sería luego abierto a la negociación en el marco de la Comisión de Derechos Humanos de las Naciones Unidas.
- En junio de 2006 el nuevo Consejo de Derechos Humanos aprobó por consenso la Convención Internacional para la Protección de Todas las Personas contra las Desapariciones Forzadas.
- En diciembre de 2006 la Asamblea General de las Naciones Unidas, aprobó por consenso la convención Internacional para la Protección de Todas las Personas contra las Desapariciones Forzadas.
- En diciembre de 2007 la Argentina ratifica la Convención.

³² A marzo de 2007 la Secretaría ha recibido 31 solicitudes para recibir este beneficio, de las cuales se resolvieron favorablemente 25.

³³ A marzo de 2007 la Secretaría ha recibido 824 solicitudes para recibir este beneficio de las cuales se resolvieron favorablemente 404.

**ANNEXURE B: PRESENTATION OF THE DEPARTMENT OF JUSTICE & CONSTITUTIONAL
DEVELOPMENT**

ANNEXURE C: LIST OF CONFERENCE PARTICIPANTS AND PRESENTERS

Name	Institution/Organisation	Telephone	Email
Abeda Bhamjee	Attorney		abeda.bhamjee@gmail.com
Amanda Ledwaba	Department of Home Affairs	012 810 7297	Amanda.Ngwetjana@dha.gov.za
Anton du Plessis	Institute of Security Studies	012 346 9500	anton.du.plessis@unodc.org
Anton Katz	Advocate, Cape Town Bar	012 424 9695	antkatz@law.co.za
Arnold Tsunga	International Commission of Jurists	+41(22)9793800	atsunga2002@yahoo.com
Carlos Sersale	Ambassador of the Republic of Argentina	012 342 4041	carlos.sersale@embassyofargentina.co.za
Chantal Niyokindi	Ligue Burundaise des Droits de l'Homme	+257 22 86 36	chniyokindi@yahoo.fr
Charlotte Young	South African History Archive	011 717 1941	foip@saha.org.za
Claudia Elena Bisso	Equipo Argentino de Antropologia Forense		claudiabisso@yahoo.com
David Johnson	UN High Commissioner for Human Rights	012 354 8682	djohnson@un.org.za
Federico Andreu	International Commission of Jurists	+41(22)9793819	andreu@icj.org
Frances Spencer	Southern African Centre for Survivors of Torture	011 339 2611	spencer.frances@gmail.com
Gabriel Shumba	Zimbabwe Exiles Forum	012 322 6969	zimexilesforum@gmail.com
Hans Peter Boe	International Organisation for Migration	012 342 2789	spretorius@iom.int
Irene Petras	Zimbabwe Lawyers for Human Rights	+263 4 251468	irene@zlhr.org.zw
Jamie Williamson	International Committee of the Red Cross	012 430 7335	pretoria.pre@icrc.org
Jody Kollapen	SA Human Rights Commission	011 484 8300	mmoletsane@sahrc.org.za
John Dugard	University of Leiden		c.j.r.dugard@law.leidenuniv.nl
Jonas Ben Sibanyoni	Parliamentary Committee, Justice & Const Dvpt	021 403 2663	jsibanyoni@parliament.gov.za
Kobus Meiring	National Intelligence Agency	012 427 4490	kobusm@nia.gov.za
Linda Mafu	Amnesty International	012 320 8155	director@amnesty.org.za
Lindi Masemola	Snr Supt, South African Police Services	012 393 7261	masemulal@saps.org.za
Madeleine Fullard	Director, Missing Persons Task Team, NPA	012 845 6694	mfullard@npa.gov.za
Marjorie Jobson	Khulumani Support Group	011 403 4098	marje@khulumani.net
Max du Plessis	University of KwaZulu Natal	031 260 2672	maxduplessis@mac.com
Michael Gallagher	International Detention Coalition	011 327 0811	mgallaghersj@gmail.com
Michelo Hansungule	Centre for Human Rights, University of Pretoria	012 420 4532	hansungule@postino.up.ac.za
Modiri Matthews	Department of Home Affairs	012 810 8201	Modiri.matthews@dha.gov.za
Mpilo Shange	Consortium on Refugees and Migrants (CORMSA)	011 717 4047	mpilosha@gmail.com

Name	Institution/Organisation	Telephone	Email
Mtiken Patrick Sibande	Parliamentary Committee, Foreign Affairs	021 403 3632	psibande@parliament.gov.za
Odirile Itumeleng	Ditshwanelo - Botswana Centre for Human Rights	+267 318572716	odirileitum@yahoo.co.uk
Olivier Kambala	International Centre for Transitional Justice	021 674 0448	olivier@ictj.org.za
Oupa Makhalemele	Centre for the Study of Violence and Reconciliation	011 403 5650	omakgalemele@csvr.org.za
Paul Slabbert	Law Society/Lawyers for Human Rights	012 320 2943	paul@lhr.org.za
Pauline Dempers	Breaking the Walls of Silence	+264 61 256227	bws@iway.na
Phil ya Nangoloh	National Society for Human Rights, Namibia	+264(81)1299886	nshr@iafrica.com.na
Pierre Matate	Institute for Healing of Memories	031 208 1602	pierrenyabahamba@yahoo.com
Pitso Montwedi	Department of Foreign Affairs	012 342 1961	montwedip@foreign.gov.za
Rikky Minyuku	Human Rights Watch	011 484 2640	minyukr@hrw.org
Rudolph Jansen	Advocate, Pretoria Bar	012 303 7400	rjansen@lhr.org.za
Sanda Kimbimbi	UNHCR, Regional Representative	012 354 8301	kimbimbi@unhcr.org
Shari Eppel	Solidarity Peace Trust, Zimbabwe		hazyview@hushmail.com
Sheila Camerer	Parliamentary Committee, Foreign Affairs	021 403 8662	riab@da.org.za
Siviwe Herbert Njikel	Department of Defence	012 355 6236	
Stephen Oola	Refugee Law Project, Uganda	+256 414 343556	oolalawyer@yahoo.com
Tendai Chabvuta	Zimbabwe Human Rights NGO Forum	(+263) 04250511	tendai@hrforum.co.zw
Tesneem Bhamjee	Wits Law Clinic	011 717 8562	tesneem.bhamjee@wits.ac.za
Torie Pretorius	Priority Crimes Litigation Unit, NPA	012 845 6482	jppretorius@npa.gov.za
Triphonie Habonimana	Journalist, Burundi	+257 22250311	habotri@yahoo.fr
Tshepo Madlingozi	Khulumani Support Group	011 403 4098	info@khulumani.net
Tshiamo Moela	Missing Persons Task Team, NPA	012 845 6425	tmoela@npa.gov.za
Valencia Lackay	Department of Home Affairs	012 810 8201	Modiri.matthews@dha.gov.za
Venitia Govender	Independent Consultant	011 837 6683	underthestairs@iburst.co.za
Yasmin Sooka	Foundation for Human Rights	012 440 1691	info@fhr.org.za
Zweli Mkhize	Khulumani Support Group	011 403 4098	info@khulumani.net