DEALING WITH THE PAST

TRUTH AND RECONCILIATION IN SOUTH AFRICA

2nd edition

RARIA

With updated sections by
Desmond Tutu and Alex Boraine

'I AM READY TO FORGIVE, BUT I NEED TO KNOW WHOM TO FORGIVE AND FOR WHAT'

How will South Africa deal with the perpetrators of serious human rights violations during the apartheid era?

In this book veterans from the resistance in eastern Europe and Latin America and other key commentators share their experiences of justice in times of transition.

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DEDICATION

This book is dedicated to the memory
of the unknown and unsung
victims of apartheid

DEALING WITH THE PAST

TRUTH AND RECONCILIATION IN SOUTH AFRICA

Edited by Alex Boraine, Janet Levy
& Ronel Scheffer

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FOREWORD

South Africans have seen a miracle unfold. We have lived through the institutionalised racism of apartheid; and we have won a spectacular victory over injustice, oppression and evil. It is an achievement that has inspired the admiration of the world. This miracle must endure.

We in the Truth and Reconciliation Commission have been appointed by President Nelson Mandela and the cabinet to facilitate a nation-wide process of healing and reconciliation in this country through contrition, confession and forgiveness. Freedom and justice must become a reality for all South Africans. Those people appointed to the commission have the privilege of helping to heal the hurts of the past. We must transcend alienations and hostilities so that the door can be closed on the past and South Africans can focus on the present and on our glorious future.

For the process of healing memories to have any validity, it is essential that the truth about gross human rights violations comes out into the open. To be able to forgive, one needs to know whom one is forgiving and why. Without the truth we cannot do that, and without forgiveness the future of our country would be dark indeed.

In February 1994, the Institute for Democracy in South Africa (Idasa) held a conference entitled "Justice in Transition: Dealing with the Past" in which participants from countries such as Argentina, Chile, Bulgaria and Germany shared with delegates their experiences of dealing with the painful parts of their histories. The first edition of this book emerged from that conference.

I congratulate Idasa on this, the second edition of *Dealing with the Past: Truth and Reconciliation in South Africa*. This volume,

which comes a year into the work of our commission, features an updated introduction and conclusion. It is a most informative and helpful book, and should continue to be a valuable tool in enabling the South African commission to tackle the crucial task of nation-building that lies ahead of us all.

Archbishop Desmond Tutu
Chairperson
South African Truth and Reconciliation Commission
December 1996

INTRODUCTION

In 1992 a group of South Africans travelling under the auspices of Idasa visited several countries in eastern Europe. The objective was to witness at first hand societies in transition from totalitarianism to democracy. The countries visited included Germany, the former Czechoslovakia and Hungary.

We saw the devastation resulting from the communist system, extreme authoritarianism and the denial of fundamental human rights. But we also became aware that a new problem in the field of human rights had emerged in eastern Europe. Although each country was different, the new leadership in all three was wrestling with the question: How do emerging democracies deal with past violations of human rights? In particular, how do new democratic governments deal with leaders and individuals who were responsible for disappearances, death squads, psychological and physical torture and other violations of human rights? This last question was made even more complex by the fact that some of the perpetrators were part of the new government and/or security forces or held important positions in public life.

In the four years since that journey to eastern Europe, South Africa's own voyage towards a democratic society has been marked by events worthy of national celebration, including democratic elections for all levels of government and the adoption of a new Constitution.

As to the enormous task of dealing with our brutal past, the promulgation of the Promotion of National Unity and Reconciliation Act on 26 July 1995 and the establishment of the country's Truth and Reconciliation Commission on 15 December 1995, when its 17 commissioners were appointed by the president, stood as evidence that our nation's compass was firmly set on

taking up the challenge of navigating that rocky, but essential, course. Since then a staff of 343 people has been employed by the commission.

The commission has a maximum of two years to complete its work and three months to write a full report. During this time it must chart the gross human rights abuses committed by all sides during 33 years of apartheid rule (1 March 1960 to 10 May 1994) and tackle the controversial issue of granting, or refusing, amnesty to perpetrators. The cost of running the commission is expected to total R150 million.

In documenting our past, the first edition of *Dealing with the Past,* with its insights into the shapes, successes and failures of truth commissions in the new Europe and South America, has proved an invaluable resource to those navigating the murky waters of justice in times of transition. It is based on the first major conference ever held in the country on the topic.

Another conference, also held under the auspices of civil society, was held some months later. This time most of the participants were from South Africa but there were key participants from Chile and Argentina as well. The proceedings are available in a book titled *The Healing of a Nation?* published by Justice in Transition, an organisation which, during its 18-month existence, helped to shape the content of the commission through its efforts to create a climate for debate on how best to tackle South Africa's past.

This second edition of *Dealing with the Past* coincides with the first anniversary of the existence of our Truth and Reconciliation Commission. It has been a year characterised by the heart-rending testimonies of thousands of people who have appeared before one of the commission's three committees, the Human Rights Violations Committee. The commission set itself a strenuous schedule of country-wide hearings to hear about 1 250 people testify in this first year. A total of about 5 700 statements were taken. To add to the demands on commission staff, each hearing was preceded by weeks of preparation including public education, statement-taking and research.

The experience of documenting the commission's work has

been powerfully described by journalist Antjie Krog: "Voice after voice; account after account – the four weeks of the truth commission hearings across the country were like travelling on a rainy night behind a huge truck – images of devastation breaking wave upon wave on the window. And one can't overtake, because one can't see; and one can't lessen speed or stop, because then one will never progress" (*Mail & Guardian* Vol 12, No 21).

One deeply disappointing aspect of the public hearings is that, while packed halls have been in evidence on many occasions, white South Africans have shirked their responsibilities by staying away. This has lessened the possibility for reconciliation.

A poll by the Human Sciences Research Council in July 1996 showed that most South Africans think the commission will promote reconciliation. But opinion was divided among the 2 241 respondents along racial lines with this view being held by 70 percent of Africans, 59 percent of Asians, 53 percent of coloureds and only 26 percent of whites.

A number of political parties have made submissions to the commission accounting for their actions during the apartheid years. Follow-up hearings will be held so they can be questioned on these submissions.

In addition to the emotional tidal wave that comes with the work of the commission, there have been storms and gales along the way in the form of legal challenges:

- A constitutional challenge to the amnesty provisions in the legislation setting up the commission was brought on 30 May 1996 by the Azanian People's Organisation and the families of slain activists Steve Biko, Griffiths Mxenge and Fabian and Florence Ribeiro. The Constitutional Court subsequently found that provisions for criminal and civil amnesty were valid, including a section that indemnified the state against civil liability for crimes committed by its agents.
- An urgent application to interdict the commission's Amnesty Committee from granting amnesties to perpetrators of human rights violations was dismissed by the Cape Town Supreme Court on 9 May 1996.
- In a third case, a major administrative obstacle to the

commission's work was removed when a full Bench of the Cape Supreme Court found that the commission was not required to notify alleged human rights violators that witnesses intended testifying against them.

Part of the unique nature of the South African commission lies in its efforts to avoid an amnesty which would amount to impunity. As such, amnesty applications must be made on an individual basis and are dependent on accountability and disclosure. It was hoped that the combination of the judicial stick and the commission's carrot would emerge as a potent force in flushing out former operatives who had adopted a wait-and-see approach. Adding to the pressure to apply for amnesty by 10 May 1997 was the possibility of perpetrators being exposed by other witnesses or by the commission's 60-strong investigative team. At the time of publication the committee had received about 3 500 amnesty applications but the vast majority of these were from convicted prisoners.

On the judicial front Eugene de Kock, former commander of the security police's C-10 counter-insurgency unit based at Vlakplaas farm outside Pretoria, was sentenced to 212 years in jail after a 21-month trial. Because of the non-political nature of some of De Kock's killings, he will serve time in jail even if his amnesty application is successful. Importantly, De Kock fingered high-ranking officers and political figures when testifying in mitigation of sentence.

But in another key trial, former defence minister Magnus Malan and his 15 co-accused were acquitted of all charges related to the 1987 KwaMakutha massacre. The bitter recriminations that followed judgment serve to highlight the immense difficulties of proving culpability in court during an era of transitional justice. The expense, too, is staggering with taxpayers having to fork out R9 million for the team that defended Malan and his co-accused.

Still unfolding is the case of Dirk Coetzee, the first commander of the security police hit squad based at Vlakplaas, who has testified before the Amnesty Committee and is also being charged in court for some of his actions.

The nation held its breath when, in the face of criminal charges,

former chief of police Johan van der Merwe and five security police officers appeared before the Amnesty Committee. Van der Merwe told the committee that the bombing of Khotso House had followed an order from then police minister Adriaan Vlok, who had told him it came from former state president PW Botha. In a subsequent meeting between Archbishop Desmond Tutu and Botha, Botha protested his innocence.

On the issue of reparations, it is the task of the commission's third committee, the Reparations and Rehabilitation Committee, to make recommendations to parliament. One of the most common requests from victims is for information – about the abuses they suffered, the identity of perpetrators, the whereabouts of missing relatives. There have also been many requests of a monetary nature, including for medical expenses and bursary funds. In an indication of the burden of pain some victims have been carrying, some have asked for the return of missing body parts of tortured, mutilated loved ones so that proper burials can take place.

In a country where so many people were victims, the commission has little chance of fulfilling the high expectations held by some people as regards reparations. As part of our philosophy that suffering cannot be measured in monetary terms alone, the committee is also investigating community reparations in the form of clinics, community centres, monuments and symbolic reburials.

Looking back at the historical background to the conference on which this book is based, I am struck by how far along the route of dealing with the past we have already come. In 1992, at the time of the first Idasa trip, we at first gave no real thought to the situation in South Africa.

This changed during a memorable and disturbing evening in East Berlin when we listened to a senior official describing for almost three hours something of the extent of the Stasi files. There was an indication that almost everyone in East Germany – whether they be officials, clergy, business leaders, labour representatives or ordinary citizens – was involved in one way or another in informing for the state. Later that night, the discussion in our group began to shift away from eastern Europe to the transition taking place in South Africa and its long history of serious violations of fundamental human rights. As in eastern Europe, there were divergent opinions

among the South Africans present. But there was general consensus that not nearly enough attention had been given to this problem and that we should enable the debate to begin within our country.

On a subsequent visit to eastern Europe, which this time included not only Germany and Hungary but also Poland and the Ukraine, there was a further opportunity to try and understand where the debate had shifted. It was clear yet again that, after much discussion, many conferences and debates, there was still wide disagreement as to what action, if any, should be taken in coming to terms with the past in various parts of that continent.

In a discussion with Aryeh Neier, who had for many years been the executive director of Human Rights Watch and is now president of the Open Society Institute, I was encouraged to look at the literature relating to the debate not only in eastern Europe but also in Latin America in an attempt to approach the situation in South Africa in a more formal way.

After the visit to eastern Europe, I had an opportunity to visit New York to meet Wendy Leuer, Tim Phillips and Eric Nonacs of the Project for Justice in Times of Transition based at the Foundation for a Civil Society. They gave me further insight into discussions which had taken place over a series of important conferences. Three major conferences had been held. The first took place in Budapest under the title "Truth and Justice, the Delicate Balance", the second in San Salvador under the title "Reconciliation in Times of Transition" and the third in Salzburg under the title "Justice in Times of Transition". A subsequent conference was held in Venice on the same general theme.

One of the people I had met in South Africa and in New York was an exceptional writer, Lawrence Weschler. His book *A Miracle, A Universe: Settling Accounts with Torturers,* which focused on the situation in Brazil and Uruguay, was of enormous inspiration in contemplating our problems in South Africa. The final chapter of the book, entitled "Afterword", is included as an appendix to this publication by kind permission of the USA Penguin edition.

Soon after returning from New York, I invited a small group of South Africans to reflect on what could be done to bring some focus to the debate in our country. Members of this group came

from human rights, legal and religious circles, and included survivors of human rights abuses.

After some discussion, we decided that despite the enormous pressures of the 1994 democratic election – or perhaps because of the importance of the election and this particular subject – to go ahead with a two-stage conference. The first project would be a preparatory conference which would focus on the experiences of eastern Europe and Latin America, to give us a better appreciation of the complexity and extent of the problem and sharpen our options in South Africa. It is this first conference, held in Somerset West in the Western Cape, which is the subject of this publication. We received enormous assistance from a variety of sources, in particular from Neier, Weschler and the Project on Justice in Times of Transition in New York.

We were extremely fortunate in securing a very distinguished panel of participants from eastern Europe and Latin America. Their inputs make up a large section of this book and have given us a pool of knowledge on which to draw over recent years. We are deeply indebted to them for their willingness – and in many cases, even eagerness – to visit South Africa and share their experiences. We also invited human rights organisations, academia, the churches and politicians. Unfortunately Barney Desai of the Pan Africanist Congress (PAC) was unable to attend but he telephoned me on a number of occasions expressing his interest and concern, and referred me to a letter which he wrote to a Cape Town newspaper.

In that letter, he remarks: "The cries of torture and abuse still ring in our ears. The fallen are deeply etched in our collective memory. The millions who were forcibly removed from their homes remain bewildered and disorientated. The abused know their abusers and they are now the accusers. They seek justice; they seek retribution for the atrocities committed against them." He adds that while the PAC would support the establishment of a commission to investigate human rights abuses, it is important that "the violators be named and put on trial. It is imperative that justice is seen to be done."

I have quoted fairly extensively from Desai's letter because his position was probably tougher than any of the views expressed by South Africans who attended the conference. It is important that all

voices are listened to as we seek to deal with the past in South Africa. Significantly, and not surprisingly, Desai's calls for justice and trials were a precursor to some of the views expressed by the Ribeiros and others in their constitutional court application.

Breyten Breytenbach – poet, writer, painter and former prisoner – was unable to accept our invitation to speak at the conference. However, he submitted a manuscript after the conference and it appears in Appendix I. In his inimitable style, Breytenbach's questions and comments go very deep and afford an effective counter to any attempt to ignore or trivialise the past. His reference to a Russian proverb – "injustice is like having an eye gouged out, but looking away is losing both eyes" – exquisitely sums up the demand for truth and justice.

In deciding to go ahead with the conference we recognised that there were enormous risks in even beginning to put the spotlight on the problem of calling to account the perpetrators of human rights violations in the country. We had regularly heard then president FW de Klerk and many of his cabinet colleagues urging South Africans to forget the past, to turn the page and start anew. Many ordinary people, mostly whites it seemed, also felt it was unhealthy to focus on the past. It was important for the country to build a new future and therefore bury the past with all its unhappiness and hurt. It is worth bearing in mind how fluid and uncertain the pre-election period was. In February 1992, at the time of the conference, delicate negotiations about our political future were still in progress.

One must, of course, guard against allowing any attempt to deal with the past to deteriorate into a witch-hunt. At the Nuremberg trials, it was clear that in many instances due process was ignored and the human rights of the violators were in turn violated. But unlike Nuremberg, the South African commission is not a court which can mete out punishment.

There is of course another side to the question – one that is raised over and over again by victims coming before our commission. At the conference on which this book is based, Mary Burton – now a member of the commission – referred to a conference convened by Human Rights Watch in December 1989 to celebrate the 40th anniversary of the signing of the Universal Declaration of Human Rights. She recalled a priest who spoke

about his experiences in Uruguay and about the need for healing. He told of a woman he had counselled after the disappearance of her child. She said to him: "Father, I am ready to forgive, but I need to know whom to forgive and for what." It is a yearning that we, too, have heard repeatedly during the work of the South African commission.

Another belief articulated in the legislation setting up our commission is that the suffering of hundreds of thousands of South Africans over many years cannot be ignored and that we have a duty to restore to them a semblance of dignity by exposing the past. In addition, is it possible for healing to take place in this country without dealing with past violations of human rights?

In his Matthew O'Tobriner Memorial lecture, Chilean law professor Jose Zalaquett referred some years ago to the dilemmas involved in transitional political situations and the problems and risks involved in dealing with the past. He asked his listeners to consider a plausible hypothetical case involving South Africa. "What would happen if Nelson Mandela were to gain political power following a negotiated agreement that permitted whites to retain important quotas of military and police control and a measure of political veto?" In this then hypothetical case, Zalaquett was wiser than he knew. This is exactly the dilemma that has faced South Africa in dealing with the past in recent years. Zalaquett argues that the international community would be unlikely to demand that, in such circumstances, the new South African government prosecute all those in authority who had engaged in apartheid. But he also says the government might wish to consider "the disclosing of the full truth about apartheid, preserving the collective memory of the odious past, seeking compensation for the victims of the greatest abuses and perhaps investigating some particularly heinous crimes".

Such wisdom informs not only the contents of this book, but also the route taken by South Africans towards truth and reconciliation.

Alex Boraine
Deputy Chairperson
South African Truth and Reconciliation Commission
December 1996

CHAPTER ONE

WHY DEAL WITH THE PAST?



Adam Michnik and interpreter Helena Luczywo

KEYNOTE SPEAKERS

'The road through negotiations and reconciliation has its price too. When you get up from the negotiating table you may have to defend your former enemy, now your partner, from a lynch mob. In truth what you are defending is the principle that all citizens have the right to live in the same state.'

ARYEH NEIER: Serbs and Croats have never begun the process of ending the past; instead they live it over and over, writes Michael Ignatieff in his book on nationalism. He argues that if the new Croatian state, proclaimed in May 1990, made one central mistake on the road to war, it was that of failing to publicly disavow the fascist Ustache state that held sway in Croatia during World War II. There was also never any acknowledgment of excesses committed at the Croatian equivalent of Auschwitz, a concentration camp called Jasenovac where between 250 000 and 300 000 people were exterminated in ovens.

Ignatieff writes: "In the euphoria of independence, [the president of Free Croatia, Franjo] Tudjman tried to unite all of Croatia's tortured past into what was called a 'national synthesis', so he never went to Jasenovac. He never got down on his knees as Willie Brandt did at Auschwitz. If he had done so Serbs and Croats might have begun the process of ending the

past instead of living it over and over. Because Tudjman did not come here, Serbs in Croatia were manipulated by Belgrade and by their local leaders into believing that the new Croatia was the fascist Ustache come again."

The question of how one recognises and acknowledges the past was central in Croatia. It was central in many of the countries of Europe, or the former Soviet Union, now being torn apart by conflict. It is central world-wide, wherever there has been great repression.

There are two crucial reasons for confronting the past. Firstly, as a civilised society we must recognise the worth and dignity of those victimised by abuses of the past. If we fail to confront what happened to them, in a sense we argue that those people do not matter, that only the future is of importance. We also perpetuate, even compound, their victimisation.

The second reason has to do with establishing and upholding the rule of law. It is important to send a message to the effect that everyone is subject to the law. The rank and office of those who victimised others must not be allowed to immunise or insulate them from society's efforts to confront the past.

A third reason is the question of deterring future abuses. This is a problematic issue because it involves predictions. The myriad factors that play a part in future events as well as the limited capacity of human beings to foretell the future make predictions difficult. However, one cannot dismiss the question of deterrents entirely and so it belongs on the list of reasons for confronting the past, but at a lower notch than those already mentioned.

Then the question arises: If one is going to confront the past, does every situation require the same method of doing so? The obvious answer is no, that the methods must vary according to the circumstances.

The first consideration is that of the severity of abuses, whether one is dealing with a government that has engaged in systematic abuses of the most horrifying nature or one whose abuses have been sporadic and of a lesser order of evil. In the

human lexicon we think of genocide as the most horrendous crime. It seems to me that there is never a circumstance in which we can fail to devise the most serious efforts to try to deal with the question of genocide. Perhaps, approaching the question of genocide, is that of crimes against humanity. These, as defined at Nuremberg, include murder, extermination, enslavement, deportation, rape and other inhuman acts committed systematically on racial, ethnic, religious or political grounds. These deserve the most significant responses; lesser abuses can be dealt with in lesser ways.

Another factor that will count in determining an appropriate response is the passage of time. It is relevant whether the abuses took place a year ago or 50 years ago. Yet if the abuses are of the variety that took place at Jasenovac during World War II they must be dealt with. If a passage of time has occurred with respect to lesser abuses, then a different response may be necessary.

Also to be considered in dealing with accountability is the problematic factor of the extent to which culpability for abuses can be focused on particular individuals. Some of the most difficult problems in dealing with the abuses of the past have arisen in the states of the former Soviet empire. This is partly because of the nature of the totalitarian system which tended to diffuse responsibility for abuses. Hundreds of thousands of people were implicated in the administration of repression and similar numbers were victims of repression. It was often the case that people simultaneously implemented and were victims of repression.

Another factor is the extent to which the law requires a remedy for particular forms of repression. The law that governs international armed conflicts – the Geneva Convention of 1949 and the protocols in particular – requires that states shall search for those who committed grave breaches (i.e. war crimes) and shall submit them to courts which should judge them. There is thus an affirmative obligation, as a matter of international law, to deal with the category of abuses that constitutes war crimes.

The Genocide Convention requires that there shall be prosecution and punishment of those who engage in genocide.

The International Covenant on Civil and Political Rights, on the other hand, is more vague on this score. It states that a remedy shall be available for violations, but it is not specific about prosecution and punishment. The Convention Against Torture is more specific in calling for the prosecution and punishment of those who engage in torture.

If one is building a society based on law, following the requirements of international law is one of the ways in which one should go about dealing with the question of accountability for past abuses.

Another point on this list is that if one believes that the recognition of the worth and dignity of the victims is among the crucial reasons to provide accountability, then respecting what they want seems to be a significant factor in determining the form of accountability that should be provided. The difficulty, of course, is that the victims may be many and may not speak with a single voice. Determining what they want is thus hardly an easy matter. But one should be able to make some assessment of what kind of demand is emerging from them.

The next issue to be examined is the means of providing accountability, and here a list can also be made.

There is perhaps universal agreement that the truth about abuses of the past must be known. Truth has come to have great significance in debates about this issue, partly because they took place first, and with some of the greatest intensity, in Latin America where many abuses were specifically designed to be secret, to deceive and to permit deniability. (Some similarities with the South African situation may be discernible in this regard.)

We associate such abuses in Latin America with disappearances and death squad killings. These were specifically evolved by governments to enable them to deny their responsibility. Disappearances involved people who travelled in unmarked vehicles, in civilian clothes, operating at night or when they were not being observed. They took their victims to secret detention centres, killed them in secret, disposed of their bodies in a clandestine manner and denied the families any

information about the fate of the victims. Everything about a disappearance was calculated for purposes of deniability.

Death squad killings were slightly more open but typically involved men in civilian clothes who denied being agents of the government or tried to convey the notion that they were not. Governments then denied responsibility for death squads as they had denied responsibility for disappearances. They often alleged that the "disappeared" person had simply migrated or joined an opposition or guerrilla group.

The significance of truth in dealing with forms of abuse devised for purposes of deniability is fairly obvious. It is a way of exposing the fraud perpetrated by those who engaged in these abuses. Truth is the essential means for pinning responsibility on the authors of such crimes and demonstrating who was responsible. These disappearances were not freelance activities; they were organised activities sponsored by governments. The truth process by which commissions in several Latin American countries have investigated such disappearances and pinned responsibility on governments is calculated to deal with the essential nature of the abuse that took place.

Acknowledgement is another of the significant ways of dealing with great abuses of the past. It is not enough that the truth should be known, because in many places it is in fact widely known who was responsible. Even if there have been efforts to engage in secretive and deceptive ways of killing people and to provide deniability, everybody in a sense knows who was responsible for these disappearances. What is required beyond truth, therefore, is acknowledgement.

That acknowledgement is perhaps more significant than just a recognition of the truth is illustrated by the example of Tudjman failing to acknowledge the abuses at Jasenovac. Acknowledgement is also a way of providing an assurance to the victims that at least those perpetrators have recognised their own guilt and, in that fashion, have suggested that their wrongdoing is of a form that will not be repeated.

Another way of confronting the past is to provide reparations for victims. Reparations, I think, are not an enormously

important part of the process of dealing with the past but they are of some significance. Many people will take the view that there can be no reparations for mass killings of the past. However, there are victims who can be helped, in a monetary fashion or with opportunities. Certain kinds of abuses, such as the mass deportations that Stalin engaged in during World War II, lend themselves to reparations. The victims can regain land or if the same land is not available they can get economic assistance to help them re-establish their lives after the great damage done to them.

Another way of dealing with the past is to disqualify perpetrators of great abuses from various positions in the country or government that comes to power after a period of such abuse. Disqualification has many problems, one of which is that it has often taken place without due process of law and thus creates its own form of unfairness. This is in part because it is relatively easy for a government to engage in disqualification. It may be too tempting and easy to disqualify too large a number of people. On the other hand, where a fair procedure is used to determine who should be disqualified and where there is a requirement that very serious abuses should be proved, it seems that disqualification is an appropriate method for trying to deal with past abuses.

Finally, there is the question of prosecution and punishment – of justice. The debate has often been whether truth should be the aim of accountability or whether justice should be the aim of accountability. I would argue that in the case of the most severe abuses it is necessary to provide justice. I would go further and say that in some circumstances it is only justice that can be an appropriate acknowledgement of the past. An example would be the crimes taking place in Bosnia.

The characteristic of those crimes, as opposed to the crimes that typically took place in Latin America, is that, far from seeking deniability, the authors of those crimes have been blatant. Their purpose has been to use the blatancy of the crimes to sow terror, to further the purpose of ethnic cleansing by driving people away because of the terror. For example, rapes in Bosnia typically took place in front of witnesses so that knowledge of the events would spread and so frighten people

away from these towns. This had the effect of advancing the process of ethnic cleansing. There is no way of confronting abuses of that sort except by seeking to end the impunity which has shielded those who have engaged in these crimes.

In the case of the most serious crimes, of war crimes and where international law requires that there should be an effort to prosecute and punish those responsible, it is just to go forward with an international tribunal to prosecute and punish those responsible. This is the only possible response to crimes such as those that have taken place in Bosnia.

However one proceeds in dealing with the abuses of the past, those abuses must not be compounded. The methods must be beyond reproach and must adhere to considerations of fairness and due process. Efforts must be taken to ensure that those who held the highest responsibility for the most serious crimes are prosecuted and punished, not those who simply carried out orders. The effort to hold some responsible for grave abuses must individualise guilt. It is crucial to avoid holding people guilty collectively – as classes, races, ethnic or religious groups – because this will inevitably prompt a new round of abuses. That is in itself the antithesis of the effort to establish justice.

JOSE ZALAQUETT: A pool of world experiences is contributing to an understanding of the lessons to be learned about justice in the process of transition. For those grappling with these problems such an understanding can point to possible solutions. More importantly, it can help shape the correct attitude, both ethically and politically, among all participants.

Dealing with past injustices and human rights violations is both an ethical and a political task. This is true not only for politicians but for human rights activists as well, and herein lies the first general lesson. Human rights organisations have always been involved in political tasks, not in the partisan sense, but in the larger sense. However, in transitions they must face the type of dilemmas that politicians face. How does one choose the best course of action rather than simply point out that a norm is being violated? How does one maximise specific resources in order to

achieve an end when one does not have the power to achieve it completely?

It is one thing for human rights organisations to be above the fray of politics in the face of a dictatorial government, but to do so in a political transition is a different matter. At times human rights organisations take the high ground during political transitions by stating: "This is what the articles of the Universal Declaration of Human Rights and other instruments say. You do it. I don't care how."

This indicates that they have not grasped the following problem: In a transition one is dealing with a situation where meeting ethical requirements and political constraints creates dilemmas. Though it is not up to human rights organisations to arbitrate these dilemmas in the way required by politicians, they should at least be aware of how such dilemmas impinge upon principles.

New politicians coming into positions of authority should also be aware that the transitional situation entails reconciling ethical imperatives and political constraints. They should tackle this issue according to the general principle of the ethics of responsibility. Politicians should always be mindful of the likely outcome of their actions; they are dealing with an exercise in maximisation, not simple righteousness.

Cases examined in this conference will prove that if a politician follows an ethical imperative beyond what the political means allow, a backlash may result. Politicians cannot then make the excuse that they attempted the best if in the end they delivered the worst.

The second general lesson to be learned is that from an ethical standpoint the purpose of dealing systematically with the legacy of atrocities is moral reconstruction – to put back in place the moral order that has broken down or has been severely undermined, or to build up a just political order where none has existed in historical memory.

Building or reconstructing a morally just order entails building a political culture and setting in place values,

institutions and policies that will guard against the recurrence of the type of atrocities committed in the past. This has an assertive role in that certain values and institutions are affirmed. It also has a preventive role: One may not be able to ensure that there will be no recurrences of past abuses but at least one can create a system to act as a bulwark against such repetitions.

Such moral reconstruction also serves a reparative function. Reparation must be made as far as possible for past evils and it may take several forms. At a societal level, putting in place a more just order could in itself be a reparation in some cases. Reparations, both for society and individual victims, can also be made by a variety of symbolic or material means, as explained by Aryeh Neier.

The third lesson is that different measures of truth, justice, forgiveness and so on are tools to advance the twin goals of prevention and reparation in a process of moral reconstruction. Other measures, including certain institutional and political arrangements, are similarly tools rather than ends in themselves. Some of these tools are so imperative in certain circumstances, if the moral objectives are to be advances, that they have come to be deemed of absolute value. If this is the case – both with punishment concerning crimes against humanity and with the truth concerning great evils that are being denied and concealed – it does not alter the fact that they are tools.

This is not a purely philosophical or theoretical question. The reason it is so important to insist that they are tools is because we may otherwise get tied to certain solutions, whereas the combination of the different tools and the degree to which one is used over the other rests on the moral objective of reconstructing or building an order.

The fourth point is that, just as from an ethical standpoint the aim is moral reconstruction, from a political standpoint the purpose is maximisation. This is an ethical and political task. Maximisation means achieving the best that is possible in the circumstances.

We need to examine certain measures in relation to the pool of relevant experience. At the outset, I would like to adopt the

approach that, *all things being equal*, forgiveness and reconciliation are preferable to punishment. This is not a pious renunciation of justice. What it means is that if both avenues could result in moral reconstruction, reparation and prevention, there would be a moral superiority of forgiveness over punishment. This is stressed by all major traditions and religions. But sadly all things are never equal and it is unlikely that an approach consisting of forgiveness and reconciliation would be sufficient.

More importantly, forgiveness and reconciliation are not mere words; they are conclusions of a process rooted in moral reconstruction. The common factors of all processes of forgiveness in major religious traditions are that a wrongdoing is known, that it is acknowledged, that there is atonement and the perpetrator resolves not to do it again, and that reparations are made. Penance, in that context, is not essential. Penance is sometimes equated with reparations, sometimes with atonement. If all these steps in the process take place then the moral order has been reconstructed. Once the perpetrators themselves have accepted the norm as being important and it is restored, forgiveness may proceed. But certainly forgiveness cannot entail ignoring the past or issuing a blanket impunity since that does not begin to fulfil the requirements of the process.

Forgiveness and reconciliation should thus be understood as the conclusions of a process of reconstructing the moral order that is more healthy than punishment. But if the process cannot be achieved in this "healthier" way, then in many circumstances punishment can achieve that purpose as part of the process. The relative exception to that is crimes against humanity.

One should begin by reconciling oneself to the idea that amnesties are possible. However, several things should first take place:

- amnesty should possibly serve the ultimate purposes of reparation and prevention;
- it should be based on the truth, or one cannot really know what the pardon or amnesty is for;
- there should ideally be an acknowledgement of that truth; and
- the amnesty must be approved democratically in the sense that it must be the will of the nation to forgive.

It follows that self-amnesties, those designed to conceal rather than reveal the truth, are spurious and illegitimate.

There is a duality here between the individual victims and the nation. Both are important. The victims and their relatives deserve respect and should be consulted with the utmost consideration. But at a societal level the process of moral reconstruction is in the hands of the society and victims should thus not hold veto powers in this regard. We are not talking here about the intimate pardon which only an aggrieved person can give and which certainly concerns the victim. However, both are related and there should thus be a special place for the opinion and feelings of the victims.

Amnesties should not violate the imperatives of international consciousness, as would be the case with crimes against humanity. An issue that deserves special examination at this conference, and by South African society in the future, is that of how the definition of crimes against humanity applies to the system of apartheid.

One does not want to undermine the international definition, but when a crime is attributable to individuals, groups, a unit or a branch it is simply not the same as when carried out with the support of a large part of a sector of the population, notwithstanding the worthy opposition within that sector. There is a need to clarify this conceptually and morally, or we may become trapped and say: "This is a crime against humanity. These must always be punished. So let's never renounce the prosecution of anyone at an executive level who had anything to do with apartheid." I don't need to dwell on what that would mean politically and practically in a country such as South Africa.

The next conclusion is that it is particularly important to reveal the truth when there have been grave abuses that remain concealed or unsolved. In the case of apartheid it was usually known what abuses had taken place. They were blatantly visible and were rationalised by the state rather than denied. In such a case, acknowledgement is more important than the truth. It may, however, be useful to produce an historical record that functions as an accounting of apartheid.

A society cannot reconcile itself on the grounds of a divided memory. Since memory is identity, this would result in a divided identity. In South African society, for example, there may not be a shared opinion as to how deaths in custody took place. It would thus be important to reveal the truth and so build a moral order.

Clearly, key aspects of the historical and ethical past must be put on the public record in such a manner that no one can in good faith deny the past. Without truth and acknowledgment, reconciliation is not possible.

All acts entailing an undermining of the moral order must be part of that truth-telling. It is not a question of comparing abuses quantitatively, of putting the crimes of apartheid on one side of the scale and abuses in the camps of the ANC on the other. It is also not a matter of allowing abuses from opposing sides to cancel out each other.

In Chile over 2 000 killings and disappearances by the government were exposed and 90 killings of unarmed people by opposition groups. But quantities were not at issue; everybody understood that the enormity of the crimes was different. The point was that any wrongdoing had to be exposed or acknowledgement would be incomplete.

On the issue of reparations, there is a nuanced difference between my view and that of Neier. I believe reparations are indeed very important because they convey an acknowledgement of victims' dignity. But reparations must be made in such a manner that people do not receive them as an entitlement, payment or trade-off. In some countries reparations have been offered as a way of keeping people quiet. This was because truth was not revealed or because other measures were not implemented. That is essentially wrong. If the victims understand that the process has been serious enough, they feel entitled to legal reparations signifying official acknowledgement of their entitlements and needs. In that sense, provided that the ground has been laid with truth-telling, reparations can have an extraordinary importance.

Leaders should carefully gauge how far they can go because there must be a measure of consistency. Once you start pulling a

thread of the knot of reparation, you may continue without an end in sight. This is particularly true if the majority of the population has been aggrieved. For this reason it may be worth considering whether reparations in South Africa should be emphasised more in their symbolic and spiritual aspects than in their material ones. Though I hold no firm opinion on this question, I think it is worth bearing in mind that since reparation must be consistent, it may be beyond the means of any society to repair properly what has been a grievance inflicted upon the majority of the population. There may be ways of distinguishing particular injuries but this must be done in a manner that is understandable to the entire population so that no one has reason to wonder why only some received reparations.

Lastly I would like to look at the very general lessons to be drawn from political attitudes or considerations.

The new political authorities should be mindful of constraints that result from a situation where the adversary has power – armed power, control of the civil service or political support. But the new authorities must also gauge whether they are dealing with a lapse in democratic traditions or a situation where the minimum conditions for a fair order never reached acceptable levels. The appropriate response will be different. In the case of a lapse, such as in Chile or Uruguay, everybody holds some degree of responsibility. Of course, the responsibility of the person who pulled the trigger is different from that of political groups that led the country into chaos and facilitated a coup d'état. Still, everybody has a degree of responsibility.

Politicians should bear in mind that the second case is different – not because they should be more severe in this instance, but because they should count as a gain the very overcoming of the past situation. This is not to say that truth and justice should be done away with, but that one should be careful not to risk precisely the step forward that has been achieved. It is far easier for countries like South Africa that have never known a fair order to slip back to previous practices than it is for those rooted in democratic traditions.

A second political point is that leaders should never forget that the lack of political pressure to put these issues on the

agenda does not mean they are not boiling underground, waiting to erupt. They will always come back to haunt you. It would be political blindness to ignore the fact that examples of this abound world-wide.

Another political point is that the policies adopted must be sustainable. It is worse for a political leader who enjoys legitimacy to have to go back on what he proposed than to achieve less than would have been ideal. In Argentina the president aimed too high. As a result he faced a backlash and had to put the stamp of a democratic president on ugly impunity measures.

The ethical and political rationale for policies to deal with the past should be explained clearly, with one exception. You should not give explanations that weaken your position. You cannot say publicly "I am impotent to do these things" because you compound your impotence. With that exception, policies should be as transparent as possible.

It is important to act promptly. The new authorities should reap the profits of the momentum and legitimacy they enjoy to take the initiative and propose policies.

Finally, the measures themselves must be fair. Politicians should wherever possible take the high moral ground, even in procedures. If a commission is appointed everyone should be represented. If politicians try to get "pals" into these positions the public will feel that a game is being played with a matter that is of the utmost ethical importance.

The lessons discussed here are general and do not prescribe easy solutions, but it would be misleading to be more detailed. Each country should try to adopt the best possible attitude and devise its own solutions.

ADAM MICHNIK: In dealing with the problem of justice in the period of transition to democracy it is necessary first to define what can be classified as transition to democracy. I agree with Aryeh Neier that while the massacres in Bosnia continue, the international community should use all possible means of moral

pressure, especially as it does not have military force at its disposal. But the situation in Bosnia is not a transition to democracy. Transition to democracy involves extricating a society from dictatorship by means of negotiation, compromise and mutual concessions, not by revolution or violence. The aim is to build a democratic state in which all participants in the conflict can find a place.

The essence of my reasoning is that you make peace with your enemy, not your friend. Each party sits down to negotiations with a certain image of the enemy and a language of political debate is formed. Both parties try to find a common set of values to which everyone can refer. These may be national values, religious values or values of the common state, but the negotiations are nevertheless between hostile parties.

The image of the enemy is a moral and political burden because you are negotiating with someone whom only yesterday you called an oppressor, a murderer or a terrorist. You promised your followers that this person would be severely punished as a reward for the oppression they had lived through. Your followers, meanwhile, are telling you justice requires punishment. They ask: "How can you negotiate and talk to a person who is responsible for all the disasters of our people?"

My answer would be that I am negotiating because I have chosen the logic of peace and abandoned the logic of war. This means my enemy of yesterday must become my partner and we will both live in a common state. He may still be my opponent but he is an opponent within peace, not within war.

My opponent and I each have our own story about the past. The history of Poland will be told in different ways by those who functioned in the communist structures and by those in the anti-communist opposition. The history of Israel will be told differently by Israelis and Palestinians. The history of South Africa will be told differently by Afrikaners and blacks.

A certain type of settling of accounts is inevitable and it concerns murderers, torturers and those who, in an obvious way, broke the law. But a demand to settle accounts always becomes an instrument in the fight for political power.

It is only possible to lawfully extricate a country from dictatorship when there is a consensus in the political centre. In the Middle East the political centre consists of Prime Minister Yitzhak Rabin and PLO leader Yasser Arafat. It is easy to imagine Israeli radicals accusing Rabin of treason and Palestinian radicals accusing Arafat of the same. The result of this radicalism in demanding the settling of accounts is always the same – the destruction of the political centre.

History shows how that which is presented as a demand for justice can become a tool in the battle for power. This tool was used by the Jacobeans in the French Revolution, by Bolsheviks in the Russian Revolution, by Iranian fundamentalists and by the most primitive anti-communists in central and eastern Europe. In the rhetoric of people who demand settling accounts with the past, the words "purity" and "cleansing" turn up.

A Polish writer once defined communism as a cross between a religious sect and a gang of bandits. A characteristic feature of this kind of thinking is to part with a rational analysis in favour of political fanaticism. There is nothing more dangerous for a transition than the logic of political fanaticism, especially when articulated as a belief in a new political ideology. Instead of the idea of a democratic state based on compromise and individual civil rights there is ethnic fundamentalism in which people argue that "in the interests of justice my nation has the right to its own state".

As long as the fight against dictatorship continues, the idea of human rights and that of the right of the nation will appear side by side. What is happening in Yugoslavia now is a good example of where the idea of ethnic cleanliness of the state leads. It was in Yugoslavia that we heard the slogan "Serbia for Serbs and Croatia for Croatians". In South Africa the cries of "Africa for Afrikaners" and "Africa for Africans" bring to mind the danger of a new apartheid.

Historical justice cannot be carried out by way of political decisions. It can only be done through a public, pluralistic debate in which all points of view are represented.

I agree with Jose Zalaquett that reconciliation is a priority at such a time. I support the idea of mutual amnesty because it opens up the road to peace. Of course, amnesty is not equivalent to amnesia and thus the past must be carefully written up and remembered.

On the road out of dictatorship each solution has its price. The road of justice – which often turns into the road of revenge and war – has bloodshed as its price. But the road through negotiations and reconciliation has its price too. When you get up from the negotiating table you may have to defend your former enemy, now your partner, from a lynch mob. In truth what you are defending is the principle that all citizens have the right to live in the same state. ■

CHAPTER TWO

EXPERIENCES UNDER REPRESSION IN SOUTH AFRICA



Mbuyi Mhlauli (left) and Nomonde Calata

PERSONAL ACCOUNTS

'The real reparation we want ties in with the constitution, the vote, with dignity, land, jobs and education. If we get all those things and there is a sense of forward movement and the creation of a nation and a real, shared dignity in this country, then I think the pressure simply to punish, to penalise and have commissions of truth becomes much less.'

ALBIE SACHS: I took a vow early on that I would not be an exhibit. I have previously spoken and written about my experiences and have had no problem in doing so. But in the context of this panel I want to testify in my subjective capacity about how one thinks about the process of change and about one's life. I would like to add that I do not like the word "victim". I prefer to speak from the point of view of one of the many millions of people victimised in different ways by apartheid.

I will start with a parable. I had just come back to South Africa after 23 years of exile and eight years of statelessness. I went to a jazz club on Cape Town's Waterfront called *Rosies and All That Jazz*, a place where I could feel free, where I could hear good music and meet people I liked. Mostly when you are in South Africa you are in "white"

South Africa or "black" South Africa. This was one of the few places where I felt I was in South Africa.

The instrumentalists were tuning up and there was a big crowd. You could shout greetings to friends across the room. The mood was relaxed. Then I saw somebody standing in front of me wearing a jacket and tie and he said: "Are you Albie Sachs?" He was a white man, a little younger than myself. I replied: "Yes." He said to me: "Verskoon my." (Forgive me.) I didn't hear him properly as the drummers were now beating out a tattoo. Again he said: "Verskoon my."

I was very thrown. I didn't know how to respond. I wanted to reply to him in Afrikaans but I had been out of the country for 23 years. Just as some of the exiles from Latin America speak beautiful English, I speak quite good Portuguese, so what came into my head was Portuguese instead of Afrikaans. In a mixture of English, Afrikaans and Portuguese I said to him: "Hierdie bonito klub is my verskoning." (This lovely club is my forgiveness.) I really meant that but I also felt uncomfortable with his statement although at the time I did not really know why.

In retrospect I can say that I did not feel it was necessary for him to apologise to me simply because he was an Afrikaner. The responsibility did not rest at the door of a language group, a race group or a community. It would not help for him to accept a kind of collective responsibility, particularly by addressing me in Afrikaans. I thought of Bram Fischer and many other Afrikaans-speakers who paid with their lives in the struggle.

The main reason for my discomfort at his apology was that I had been a volunteer. I came from a privileged section of South African society. I chose my role and my life. I knew that in doing so I was confronting the state and that it could – and maybe would – hit back at me. I wanted to be a free person in a free country. I have lived my life according to my choice and I am proud and happy, not only to have done that, but to begin to see the fruits now.

What I should have said to him was: "If you want to ask forgiveness of anybody, don't direct it at me. What about those millions of people who didn't have the option? They

didn't choose to be oppressed. They were born into oppression and died in oppression. If you want to ask anybody for forgiveness, even if you like as a white person, as an Afrikaner, do it to a community that has been historically oppressed, not just to an individual who suffered from oppression."

I rationalised all that afterwards to a certain extent. The net result at the time was that we both sat down feeling uncomfortable. In a way I regret I didn't find a way of embracing him and saying, "Thank you. I appreciate what you are saying." It would have been good at a human level to have done that, yet I could not. Something blocked me.

At times your intuition in relation to questions of justice, reparation and healing is more powerful than your conscious knowledge. You drag in such knowledge and theorise to justify something which you believe, based on your whole life experience, is right and appropriate.

My second story concerns events at the World Trade Centre. We were in the last hours of negotiating the final settlement of the constitution and in front of me were two people who did not ask forgiveness. The one was Roelf Meyer, the key person on the other side. He did not negotiate substantial questions, rather the process: the timing, priorities and a steadfast way to get results. We had people on our side doing the same thing and we needed these counterparts. It was not simply a matter of an agreement on shared values aimed at preventing society from being torn apart. There had to be agreement on the process of transition; how decisions were to be taken and implemented.

In that context it was far more important to me to acknowledge the role Meyer was playing to enable us to bring about the transition, the repairing and the healing we want, than to say: "Roelf, I know that you were part of the State Security Council which almost certainly agreed to my elimination as Albie Sachs." The attack involved a cross-border raid and certainly would have gone up to a very high level. I would see no benefit at all in raising

that question. It belonged to a different era. Now the issue was: What are we doing to heal South Africa?

The imbalance became even more pertinent later when I discussed the language question with the second person who did not ask forgiveness, Neil Barnard. He headed National Intelligence and was a strategist, not just a member of the Security Commission.

He sat across the table from me and I knew he could go to a computer, type in "Sachs, Albie" or "Al" or whatever and he would know my history since I was 17 and first became involved. He could pick up all this information and use it in negotiations or the election campaign. There was a sense of continuing inequality. Yet it was more important that we settle the language question.

I have an historical curiosity to know what is going on in his mind, but none of that really matters. What matters to me is acknowledgement, not in the form of medals, praise or membership in parliament. These things may or may not come. What I seek is acknowledgement that what we did was right and that the values we stood for were correct. We belonged to a weird generation: We got into trouble not for being bad, but for being good, and that was wrong.

One wants public acknowledgement in ways that are meaningful, that reach your heart and reach you as a human being. This would entail acknowledging that not just you as an individual but your generation, your endeavours, your dreams and your goals were fundamentally right and human. All of it fitted in with internationally accepted norms of morality and good conduct and were right for this country. If that is acknowledged – as well as the pain, the damage, the hurt done in resistance on the other side – an immense forgiveness and magnanimity will be waiting to come out.

It is enormously frustrating to me to know there are millions of people who want to share this country, to share their humanity and open up their hearts – not just Mandela who is noted for this. But they cannot do it because the other side will not acknowledge that apartheid was more than a

mistake. It did not only cause pain – it was fundamentally humiliating and inhuman. It was cruel. It is one thing to acknowledge the facts of apartheid, it is another to acknowledge the pain, humiliation and indignities it caused.

Such acknowledgement need not be done in a self-lacerating way. It would be meaningless if someone said, "Albie, I am sorry I blew off your arm." I would even feel uncomfortable with this sort of apology. It would be different if someone said, "Albie, I am sharing this country with you and we are building it up, making it a decent place for everybody to live in. I am worried that there are millions of people without electricity, water and decent homes, and that there is no security on the streets." Then I would be reached, and that is the positive side which, I feel, is so often missed.

In South Africa it is not just a matter of dealing with a criminal, aberrant regime that seized power and abused the people. We are dealing with a cruel, unjust system that goes back to colonialism, to slavery, to dispossession, to wars of conquest and to the whole cultural deprivation and crushing of people. The real reparation we want ties in with the constitution, the vote, with dignity, land, jobs and education. If we get all those things and there is a sense of forward movement and the creation of a nation and a real, shared dignity in this country, then I think the pressure simply to punish, to penalise and have commissions of truth becomes much less.

Although I strongly support a commission of truth, for all the reasons I have given, the danger is that it should never be a substitute for the truth in people's lives, for real dignity and the real overcoming of apartheid.

Everything that has happened to me since the day the saxophones were tuning up has confirmed that in a way I was right and in a way I was wrong. I was wrong in that I could not spontaneously embrace the man before me and give him some kind of acknowledgement. But I was right to feel that the real confession and the real transformation we want lies in the way people conduct themselves today in South Africa. What is needed is real acknowledgement of the rights and dignities of

others, the ending of the violence and the granting of a decent life to everybody. I would like to see our emphasis devoted towards this type of healing and repair.

PAIZOAH GCINA: Tonight I will talk about something I do not enjoy talking about – my past. I am the daughter of the late Daniel Gcina who was detained on Robben Island in 1960 when I was nine years old. He came out of jail when I was 24 and already married. During the time my father was on the island, and even after his release, we were harassed by the police. My father left the country but was brought back because he travelled under a false identity.

My uncle, who had been looking after our family, was later also detained on Robben Island and my mother, Sulezi Sheila Gcina, had a tough time looking after three daughters. My father and uncle are no longer alive due to the ill-treatment they received in jail.

My life is now concerned with trying to help women succeed in running businesses in Port Elizabeth. It was a city that depended on industry so when many companies left it became a dark place and many husbands were not working. Family life broke down because of poverty. A woman would be left with five children to look after, her husband probably out drinking. In the morning she would get her children ready for school and open up her business at 8am. When the children came home she would still be selling food, trying to find the means to help her family survive.

I run business programmes, such as bookkeeping, for these women and charge very little. Mostly what they need is financial help to succeed in their efforts.

MICHAEL LAPSLEY: While in Zimbabwe about a year ago I received a message to the effect that there was a parcel for me at the Nigerian High Commission. As the victim of a letter bomb, I have good reason to be suspicious about parcels, but out of curiosity I eventually went to fetch it. The parcel was not sealed so I could open it without risk. Inside was a stole of the type

worn, in the Christian tradition, by priests. This was an exceptionally beautiful stole and inside was a note explaining that it had been made by the Mothers of the Disappeared in Chile. The note said: "I am not sure what it is, but I am sure you will know what to do with it." It was signed by Albie Sachs.

Whenever I wear that stole it reminds me that poor people face life-and-death struggles all over the world, especially in Asia, Africa and Latin America. The struggles of these millions of people are often not told. At times we in South Africa are in danger of thinking only of our struggle and sacrifices. We have the opportunity at this conference to hear something of the struggles of others and that is important for us. Our commonality is the central question of healing the memories. Those who have held power in this land and unfortunately continue to have some power, speak of forgiving and forgetting. But I believe the question is not "How do we forgive and forget?" but "How do we heal our memories?"

I was born in New Zealand and came to South Africa as an adult. When I reflect back on my arrival here I think that was when I stopped being a human being and became a white man. Whiteness became like leprosy, something that would not wash off. I knew a lot about apartheid beforehand but I had never really understood what it would mean to be structurally an oppressor. In my naivety I thought I could just come and be a human being and that others would be oppressed and oppressors. So my decision to join the struggle for liberation was a decision to join the struggle for the recovery of my own humanity. I was not doing black people any favour. I was struggling to be a human being, in solidarity with people of colour who had been denied their humanity.

After three and a half years I was expelled from South Africa. I went to the frontline states, Lesotho and Zimbabwe, and joined the African National Congress. For many years I played a pastoral role for ANC members in exile.

In about 1987 the Zimbabwean government told me I was on a hit list of the South African state. This was slightly curious because although I was a member of the ANC I was known not to be a member of its military wing. In what way was I a threat

since my work was essentially theological? It entailed explaining to people in South Africa and abroad that apartheid was an option for death, carried out in the name of the gospel of life, and that it was thus an issue of faith to say "no" to it and to be part of that struggle for life.

For about three years I had armed police guards 24 hours a day courtesy of the Zimbabwean government. This ceased after Zimbabwe was assured there would be no further cross-border attacks from South Africa. Then 2 February 1990 arrived, ANC leader Nelson Mandela was released, political organisations were unbanned and there was an inevitable euphoria. Some of us thought: "We have survived." Yet a part of us said: "Let us not be naive." Those of us not left in the graveyards of the frontline states relaxed and started thinking of returning to build a land of peace.

On 28 April 1990, two days before the first talks between the ANC and the government, I was opening a pile of mail that had accumulated in Harare while I was away on a speaking tour of Canada. Inside a manila envelope were two religious magazines, one in English and one in Afrikaans. When I opened the English magazine the detonating device for a letter bomb was set off. It was so powerful that the ceiling in three rooms collapsed and a hole was blasted in the floor. Miraculously, I survived. I am thankful I did not lose consciousness and can still remember exactly what happened. I felt the presence of God with me as I was being bombed. I lost both my hands and an eye and my eardrums were shattered. For a very small amount of time I thought it would have been better to have died. I had never met anyone without hands so I did not know that life could be meaningful.

I was faced with some important questions and one of them was: Do I allow my life to be consumed with hatred, bitterness, self-pity and desire for revenge? I was saved from that by the prayers and love of many people, not simply religious people, but people of faith from South Africa, Zimbabwe, Europe, Cuba, Latin American and Palestine who sent messages of support. That enabled me to make the bombing redemptive, to bring life out of death and good out of evil. I also realised that if I was to spend the rest of my life looking for revenge or hunting for those who

had sent me that letter bomb, it would consume me. The result was that early on I was able to say: "I am going to live my life as fully, as joyfully, as completely as possible and that is my victory." I see myself not simply as a survivor, but as a victor over what was done to me. I see that those who sent me the letter bomb are either still trapped in their guilt, or they have been so dehumanised that it does not matter to them.

Before the bombing I was to have worked for a bishop. When I returned to Zimbabwe seven months later to take up the job he said: "But you are disabled now. What can you do?" I answered: "I think I can be more of a priest with no hands than I ever was with two hands."

There are also important theological questions in this debate. South Africa abounds with bad theology and this has been the case for hundreds of years. Part of our debate and national discourse has always been, and still is, about theology. There is much talk about forgiveness and we are told we are either in favour of forgiveness or in favour of revenge. I want to reject these as the alternatives. I do not want revenge. If someone commits a murder and you say that person should be put on trial, does that mean you want revenge, or does it mean you believe in the simple processes of justice?

In my theological tradition if you commit sin and recognise it as such then the next step is to confess, repent and amend your life. The positions I would take are slightly different from those of Sachs. I have a problem with those who committed the evil being allowed to stay in power.

A few months ago I became aware from a television report that it was possible F W de Klerk would become a vice-president in the new government. The next morning I woke up realising I had had a nightmare. For me personally it was a nightmare.

My own bombing took place after 2 February 1990. It was part of the "new South Africa" as have been the deaths of thousands of people. The central theological point here is that we are dealing with a regime that has not repented. In my tradition, repentance involves amendment of life, not a glib and

cheap way of speaking about the past or about a "new South Africa" that is like putting on a clean shirt.

At a personal level I believe that those who committed the crime of apartheid should be punished. But I also think it may be politically expedient, and even correct and necessary, that that punishment does not happen. It should happen, but it may be in the interests of the nation as a whole that it does not happen.

I also believe that the truth needs to come out. The victims I see every day in my work want the truth to be told and acknowledged. This in my view applies to the abuses by the regime, on a colossal scale, and the abuses by the liberation movement on a minute scale. It is a distinction between the size of a flea and an elephant. The flea may be real but it is nonsense to pretend that the two are the same size. However, because there is always the temptation for the oppressed to behave like their oppressors, we may not allow the healing of memories and coming to terms with the past to be the preserve of politicians alone. This is because the questions are not simply political questions, they are also spiritual questions that have to do with the soul of a people and every aspect of what it means for us to be human beings.

Others have made the point that the question of amnesty needs to become a question of public debate for the nation. There should be input from every aspect of our society because if we do not come to terms with the past it will haunt us for generations.

After the bombing I was hospitalised first in Zimbabwe and then in Australia where I had to see a psychologist. Somebody from her department came to me and said, "This woman has problems seeing you because she is a white South African." When I did see her the situation was bizarre. She was supposed to be my psychologist but instead I had to become her priest. I said to her: "It is not a problem for me that you are white. Incidentally, I happen to be white myself. I belong to the ANC and we are struggling against apartheid. However, I do have a problem if you say you believe in apartheid."

I believe that De Klerk has particular responsibility for death and dying, for death squads and hit squads. But it is also true that

the white community as a whole has particular problems that it believes in its heart, and unless the white community is able to address this, it will never find healing and wholeness. There is a collective dimension that we have to put on the table on the road to finding healing and wholeness as a people.

NOMONDE CALATA: I am standing here as a widow of apartheid. I was married to Fort Calata. We lived in Cradock under pressure. We both lost our jobs. He lost his job at the time he was detained under the Internal Security Act and I lost mine when I was found guilty of wearing a "Free Mandela" T-shirt.

We were harassed each and every day of our lives. The authorities knew we were unemployed but still they would come knocking at our door asking for rent and threatening to kick us out of the house. We had two little children then and Fort was in detention.

But through harassment I learned to be hard. I learned that whenever they came at midnight, or any time they liked, to let them stand outside for hours knocking at the door. I would tell them: "Don't knock at the windows. Knock gently, then I will open up the doors for you." They would come and search the house, turn everything upside down and take me in for questioning. My two little children would be left there. The police would bring me back after several hours.

My husband was released on 10 October 1984 and did not have a job when he came out of prison. We both were sitting at home but we coped. Then in 1985 the pressure became more intense. I was expecting another baby and I remember that on 27 May there were many security police and soldiers around. They surrounded the township, searching houses such as ours, that of Matthew Goniwe and other activists. I remember a certain major of the security police asking me where my husband was.

Fort was not in Cradock then but had gone to Johannesburg for treatment for his shoulder. I told the major: "Fort is not here. He is in Johannesburg." The man said to me: "You can hide him but I am telling you, very soon I will get hold of him."

Then on 27 June a strange thing happened. Fort and Matthew and the others went to Port Elizabeth for a United Democratic Front briefing and did not come back that evening. I thought they may have decided it was late and they would sleep in Port Elizabeth. But later in the week they still had not turned up. I started to worry. I found out about my husband's murder when I read it in the newspaper. The police were the first to know that our husbands had been killed.

It was very sad because Fort had just returned from Johannesburg and we had spent only four days together before he was murdered. Also, I was very pregnant. Luckily the child and I survived. She is about eight and a half years old now. She keeps on asking questions. She wants to know who her father was. It is hard to explain to her. At times she comes and says: "Can't you draw a picture for me? Can't you tell me? Can't you say something that he said?" That is very, very hard.

That is what I want to say about living under repression. ■

CHAPTER THREE

ACKNOWLEDGEMENT, TRUTH & JUSTICE



Lawrence Weschler (left) and Jose Zalaquett

KADER ASMAL (MODERATOR): In 1987 a conference on children, repression and apartheid was held in Harare under the auspices of the International Defence and Aid Fund for Southern Africa and other non-governmental organisations. It was a moving experience in which about 300 South Africans took part. Some of them recounted a catalogue of violence, torture and obscene ill-treatment of the 15 000 to 16 000 children detained during the State of Emergency and from 1984 onwards.

This horrific description of organised torture, ill-treatment and disappearances led to a suggestion that I prepare an indictment against apartheid. I spent two and a half years working on it in the context of an attempt by the United Nations to stage a tribunal on apartheid, similar to that on the issue of war crimes in Bosnia-Hercegovina.

The events of 2 February 1990 put an end to the indictment because South Africa had entered a period of negotiations. The nature of the settlement in this country became important because it acutely affected how one would choose to deal with the past. As a result of these historic developments, my work towards the indictment became a matter for the record only and not for consummation.

During the process of negotiations that has taken place in South Africa over the past two years, and particularly in November 1993, there was an attempt to establish a general amnesty in South Africa. In intense negotiations at a bilateral level, it became abundantly clear that those responsible for apartheid did not intend to acknowledge the past in any way. As for any expression of regret, the principle negotiator, also former head of the National Intelligence Service, refused to express any sentiment about past events. He told me simply: "I have no regrets about the past."

ARGENTINA

'In Argentina the relatives of the disappeared want justice because, like Albie Sachs, they feel their loved ones got into trouble for being good, not for being bad.'

JUAN MENDEZ: The Argentine experience of dealing with the past is worth studying in detail because it arguably went furthest in establishing accountability. Several of the top men in the all-powerful military junta were sentenced to between seven and eight years in prison after being convicted in a court of law and with respect for their rights to due process. This was no mean accomplishment.

Argentina's success was due in part to a series of fortunate circumstances that prevented the military from imposing its conditions on the transition as extensively as military establishments elsewhere were able to do in the same period. The Argentine example is also interesting because it started out with ambitious goals and then backtracked markedly in some respects midway through the process. As a result, many people in the country's human rights movement consider the experience on the whole to have been a failure. I am not among them: I believe that on balance it was extremely positive. It is worth analysing why the reversals took place.

In 1976 a military junta led by General Jorge Videla deposed President Maria Estela Martinez de Peron whose government, though democratically elected, was brutal and corrupt. The new

rulers faced public disorder and serious urban guerrilla warfare on both sides. They responded by abolishing congress, dismissing the entire Supreme Court and many judges in the lower courts, and by appointing new judges. Parts of the constitution were amended by executive fiat. A far-reaching system of repression was conducted deliberately and from the highest level although relatively few people were involved in its actual implementation. These "task forces", as they were called, obeyed a strict chain of command and were under direct supervision and constant control. What these factors produced in Argentine culture was the phenomenon of "disappearances". Though not exclusive to Argentina, it was probably most widely used there.

The main target of these disappearances and murders were the armed guerrillas. But the military defined subversion in much broader terms and the net it cast ensnared many who posed no threat to the security of the population – priests, lawyers, academics, professors and anybody who, in the words of Videla, espoused ideas contrary to Western and Christian civilisation. People were sometimes arrested and held without trial for long periods and without any possibility of release. Only a few were released into exile and only then after long terms in detention.

In 1983, when Argentine society was once again restored to democracy, the fallout of these features of repression had to be confronted. It is interesting to examine the reasons for President Raul Alfonsin's surprise election victory over the majoritarian Peronist party at this time. Firstly, Alfonsin distanced himself further than did his rival from the military, and secondly, he captured the mood in Argentine society favouring a redressing of past wrongs, particularly with regard to the fate and whereabouts of the disappeared.

Alfonsin repealed the military's self-amnesty law passed in the waning days of the dictatorship. He also established a commission headed by respected writer Ernesto Sabato. In under a year, this panel of independent figures published an excellent report dealing exclusively with the phenomenon of disappearances. The report of the National Commission on the Disappeared did not deal with individual cases but rather exposed the mechanisms and controls behind the disappearances

as well as the manner in which the disappearances took place. About 350 concentration camps used for these purposes were identified.

Trials began immediately after the release of the report, in most cases because victims and non-governmental organisations filed lawsuits. Alfonsin identified three levels of responsibility: those who gave the orders, those who committed excesses in implementing the orders, and those who simply followed orders. Only the first two categories were considered liable for punishment. Trials were to be held first in military courts and then on appeal in civilian courts if necessary. Implementing this legislation proved to be problematic as regards the excuse of due obedience to orders. In reality it did not act as a bar on prosecutions because only at the time of the verdict could a factual determination be made as to whether the excuse was indeed valid or not. In congressional debate the appeal to the civilian court was made mandatory: If the military court did not act within six months, the civilian court could take over the case in a procedure known as "avocation" in Argentina.

It was against the background of this legislation and the commission's report that the chiefs of the three successive juntas that ruled Argentina from 1976 onwards were brought to trial. Alfonsin deserves credit for having ordered this trial. The case, which began in 1985, consisted of a riveting session of oral hearings that lasted about five months and captured the country's attention. The junta chiefs faced more than 700 charges of illegal detention, murder, torture and kidnapping – the legal term for disappearance in Argentina – and were given due process rights. A total of 200 to 300 witnesses were called in a case that saw the ultimate conviction of the chiefs.

Not all nine members of the three juntas were found guilty. Four were acquitted mainly because the evidence against them – especially from the latter years of the dictatorship – was not sufficient to convict them for crimes committed at the beginning of the dictatorship. In addition, the air force was found to have played a secondary role as compared to the army or navy. Junta members from the air force were therefore treated more lightly.

The only other case to come to judicial decision was a significant one consolidating a number of complaints against General Ramon Camps who had been chief of police of the province of Buenos Aires. His was the largest law enforcement body in the country. Camps and several accomplices were convicted. Like Videla and Admiral Emilio Massera, Camps was sentenced to life imprisonment.

The Alfonsin government had hoped the Videla sentence would mark the end of the accountability scheme. However, in what was known as "Item 30", the Court of Appeals in Buenos Aires stated that it had learned of many crimes committed by the defendants' subordinates. It thus ordered the prosecution of chiefs and deputy chiefs of the many security areas into which the country had been carved for purposes of repression. The role of the military court had been to put a lid on such cases; it had not tried a single military officer. As a result these cases found their way to the federal courts of appeal.

It was at this point in the process that Alfonsin's government started to experience pressure from the military and responded by backtracking. The government had expected this problem to arise and had tried to tone down the accountability process even before the first indications of pressure from the military. In this sense, I believe Alfonsin was rightly accused of issuing double messages: Society was promised accountability but the military was told that a political solution would be found for their trials and tribulations. A direct order was issued to prosecutors to try to close down the hundreds of cases that had been filed. This backfired because civilian prosecutors in Argentina regard themselves as part of the judiciary, not of the executive branch, and therefore do not accept orders from the executive.

After the decision against Videla, a law was forced through congress in the face of much resistance from government ranks. It cut short all prosecutions in which preliminary *prima facie* culpability had not been determined within 60 days. This move backfired for two reasons. Firstly, there was a flurry of activity to bring in new evidence and charges, and secondly, judges did not want to be saddled with the responsibility of allowing this deadline to lapse. Sixty days after the law was passed there were more than 450 military officers in the dock. The debacle caused

the now-infamous Easter 1986 uprising in which junior officers protested about the prosecution of their comrades and demanded that the trials be stopped.

In spite of popular opinion against the military and in defence of democracy, Alfonsin yielded to military pressure and forced through a new obedience law making it virtually impossible for anyone other than chiefs or sub-chiefs of security zones to be prosecuted. To his credit, Alfonsin did resist further pressures. When he had to relinquish the presidency six months prematurely in 1989 because of economic troubles, the Peronist government demanded a pardon for all those who were still facing prosecution or serving sentences. Alfonsin had rejected this demand.

His successor, President Carlos Menem, eventually issued two pardons. The first, in 1989, was aimed at halting all prosecutions still pending with the exception of those people already convicted of crimes as well as a general captured in the United States and brought back to Argentina to face trial. But in December 1990 Menem pardoned these people too. Since 1990 there have been no further convictions and no possibility of further prosecution. There has been some degree of compensation and a scheme is being developed at present for people who were held in administrative detention.

But the debate about accountability never quite ends. During Christmas 1993, Menem submitted for promotion the names of two notorious torturers from the navy. The public debate that followed forced him to withdraw the names. Then, in February this year, two Italian judges were in Argentina serving subpoenas and interrogatories in connection with a case filed in Italian courts against Argentine military officers for crimes committed against Italian citizens during the "dirty war" in Argentina. As a result of military pressure, the Menem government tried to stop this process but the accountability debate flared up again. It is noteworthy that in Argentina public opinion polls have always been overwhelmingly in favour of accountability and against amnesties, pardons and other impunity schemes.

I do not agree with Jose Zalaquett that Argentina is a case where "too much was attempted". It was indeed a mistake and

an embarrassment to have backtracked, but I do not agree that this was necessary in the context of the political realities of 1986 and 1987. With more vision, courage and will it would not have happened. Also unnecessary were the final cut-off point, the due obedience law and, most definitely, the subsequent pardons.

In his analysis, Adam Michnik suggests that there are cases in which the nature of negotiations and transitions could be responsible for softening of initial aims. This is not the case with Argentina. The conflict was not between democratic forces and the military. If there was a conflict at all it was between small armed groups who by 1983 had been totally defeated and were not part of negotiations. No negotiations, not even a constructive negotiation for the transfer of power, took place in Argentina. That was fortunate in that it probably explains the relatively larger scope of accountability in Argentina.

In Argentina the relatives of the disappeared want justice because, like Albie Sachs, they feel their loved ones "got into trouble for being good, not for being bad". For this reason crimes against humanity must always be exempted from negotiations. No one in Argentina has defended the idea of amnesty for terrorism or crimes committed while raising arms against the government. In the society there has never been support for a *quid pro quo*, although in political sectors the symmetry example has been used, unfaithful to truth as it is.

Argentina was not a case of the vanquished trying the victors or the victors trying the vanquished. It was a case of a society of mostly innocent people trying to restore a measure of justice and recognition for the plight of the victims.

URUGUAY

'This is such a sick little country, all torn and twisted and broken, with so much of the brokenness concentrated around this notion of knowledge, of knowing.'

LAWRENCE WESCHLER: As the result of various economic and political trends in Latin America in the 1950s, 1960s and early 1970s, Uruguay became the scene of a remarkable totalitarian transformation.

The military had until then played a minuscule, unimportant role in the country's affairs: Its primary function had been to pick up trash on the beaches. Most members of the senior officer corps had fought on the Republican side in the Spanish Civil War.

But in the late 1960s the economy hit a crisis which the political establishment failed to deal with. Young people engaged in acts of political terrorism that were at first romantically motivated but became increasingly violent. The country went into a state of panic and in 1973 the military took over, instituting an almost perfect totalitarian system for the next 12 years.

During that period Uruguay had the highest rate of political incarceration in the world. As the country was small and had no tradition of violent self-defence, the military was able to impose almost total surveillance over the entire population. A matter as small as the election of a soccer team captain had to be

approved by the military. It also took over teacher aide positions in all educational institutions, effectively giving the military representation in every classroom from elementary school to college level. Each citizen was classified as "A", "B" or "C" depending on his or her trustworthiness. Those classified "C" were pariahs and could not be employed without risk of a government audit. At the core of this totalitarianism was a prison system which arrested citizens, brutally tortured them and eventually remanded them for long periods. Ironically, the name of the main prison was Libertad, which means liberty. It was run by behavioural psychologists with the express intention of driving the inmates insane.

When Uruguay emerged from this dark period it had a horrible legacy to deal with. Because the country was so small, there were continuous face-to-face encounters between torturer and victim in the streets of small towns.

The history of the beginning of the democratisation process in Uruguay in the mid-1980s is interesting. Whereas in Argentina a military defeat led to the downfall of the regime, in Uruguay an economic defeat was responsible. The junta basically flew the airplane of the Uruguayan economy into a cliff and then handed over the steering wheel to the civilians. A negotiation process took place in which the military in effect chose its interlocutors. The three principle political forces in civilian Uruguay are the Colorado party, the Blanco party and the Frente Amplio. In essence, the military chose to deal with the Colorados. The Blanco leader, who by all indications would have won an election at that moment, was imprisoned when he returned from exile. Similarly, the leader of the Frente Amplio was not allowed to take part in the poll. A series of secret negotiations took place and there is a serious question as to whether secret agreements were arrived at during these talks.

When the election was held in November 1984 the Blanco and the Frente parties were not allowed to field their leaders as candidates. Predictably, the head of the Colorado party, a man named Julio Mario Sanguinetti who was the principle architect of the negotiations, won as president. He took over in March 1985 and immediately signed an amnesty for all political prisoners, emptying Libertad prison and other prisons. The amnesty

explicitly did not include an amnesty for torturers or security police. However, the government itself declined to prosecute.

Under Uruguayan law the torture victims were allowed to launch prosecutions against their alleged torturers. And they did so. Arguably this would have been the point at which the matter should have been taken to a head. Instead, the government chose to allow these trials to take place within the military court system where they languished for the first year. When it became clear that the military courts were not going to take the necessary action, such as enforcing subpoenas and so forth, these cases were transferred to civilian courts. In 1986 the civilian courts started issuing subpoenas for soldiers, both as witnesses and as accused. At this point the military announced that it would not obey the subpoenas.

This was, in effect, a passive coup and a great crisis for the emerging democracy. A tremendous drama then unfolded for parliament which had in effect a gun to its head. In December 1986, just before the start of the summer vacation in Uruguay when everyone goes to the beach, parliament passed a last-minute "amnesty", a bill declaring the expiration of the state's punitive authority. They thought everyone would go on vacation and forget about it.

But the situation then became really interesting. I was in Uruguay when the bill was passed and psychoanalyst Marcelo Vignar made some interesting comments to me. He said: "This is such a sick little country, all torn and twisted and broken, with so much of the brokenness concentrated around this notion of knowledge, of *knowing*. 'You can't possibly know what it was like.' 'We didn't know, we didn't realise.' The torturer's 'I know everything about you.' The victim's 'I don't even know what I said, what I did ...' The torturer's 'Scream all you like, your resistance is completely futile, no one will ever know.' This point about no one's ever knowing was the very subject matter of the torturer's discourse. Do you understand? That's what the torture was *all about*. That's why an amnesty will be so terrible, because it will perpetuate the torture itself."

The political classes now thought there would be nothing to worry about. But Uruguay has an unusual law allowing for a

plebiscite if sufficient signatures are gained for a petition. It also has an extraordinary requirement in terms of any other referendum law in the world. Whereas Switzerland, for example, requires three or four percent of the population to sign a petition and California six percent, the requirement in Uruguay is 25 percent.

In February 1987, a group of torture victims and human rights activists started a petition campaign. On the first day of the campaign the military hinted that it would use the petition list in future repression campaigns and encouraged people to sign it. Previously it had organised its "A", "B" and "C" categories on the basis of who had signed petitions 10 years earlier in protest against the American invasion of the Dominican Republic. This was not an idle threat and it was repeated continuously during the petition campaign.

In a country of under three million people with a voting population of two million, some 550 000 signatures were needed. On Christmas Day the following year, the campaigners turned in 635 000 signatures. The election commission then embarked upon a signature-verifying equivalent of a filibuster in which every signature was painstakingly checked and some disqualified for inane and outrageous reasons. The process took a year and happened in full public view with the commission disqualifying signatures day after day. A year later, in 1988, the commission had to admit that of the 555 000 signatures required, 532 000 definitely were valid and 33 000 were "in suspension".

To address the situation, the military had the following plan. On a particular weekend after the start of the summer vacation, it would allow those 33 000 people to show up and if 23 000 could confirm they had signed, a referendum would be permitted. The military then went on television saying that those 33 000 people would be the first to be arrested.

It was a tremendously dramatic moment. In the end, 23 111 people showed up, thus forcing the plebiscite. From the time of the announcement of the April 1989 referendum, centres countrywide campaigned vigorously against overturning the amnesty. The press was united, the congress was united and the military was apparently preparing to reinstate martial law if the

vote went against it. The situation was extremely tense. Six months before the referendum 72 percent of people polled were still demanding prosecutions, but in the end, and under all that concerted pressure, the outcome was that 53 percent voted to sustain the amnesty. Interestingly in Montevideo, the only major city, the vote went the other way. Fifty-four percent voted to overturn the amnesty and, most interesting of all, among young people, who had borne the brunt of the propaganda and had grown up in the totalitarian system, the vote was overwhelmingly to overturn the amnesty.

Alongside this was the situation of a government refusing to deal with the past, adamant that there would not be any settling of accounts. There was a truth-telling of sorts by a truth commission on a private basis. A book, entitled *Uruguay: Nunca Mas* (Uruguay: Never Again) and based on the Argentine experience, outlines the abuses of human rights during the military dictatorship.

Interestingly, the commission used the leading survey operation in the country to do a fairly authoritative social scientific poll of torture victims. A number of absolutely remarkable statistics came out of this, including, for example, the fact that 70 percent of torture victims said doctors had been present during their torture. That in turn had repercussions in the professional organisations. The Uruguayan Medical Association had to deal with doctors who were either torturers themselves or had been tortured, as well as doctors who had tortured other doctors. This raises the following question: To what extent can professional organisations deal with matters that the regime itself is not willing to deal with? Several doctors were thrown out of the professional organisation but the military then took them on at much higher salaries than they would have earned in private hospitals. The civilian government refused to confront the military on this.

Finally, the torture victims and their families took the amnesty to international tribunals – and won. With the assistance of Americas Watch, and Juan Mendez in particular, they went to the Inter-American Court for Human Rights to get a ruling on their government's failure to prosecute their tormentors. It will be of extreme importance for South Africa to get a ruling of that

nature. (The Uruguayan ruling concerned the Organisation of American States and thus applies directly only to America.) While this concept is still at an early stage of international law and has limited effectiveness, it embodies an extremely important principle: A government does not have the authority to issue amnesties that preclude the possibility of prosecution by victims of torture. Take note ANC.

KADER ASMAL (MODERATOR): The ANC has taken note. In negotiations with the government, when we referred to the experience of other countries, we were told that these were far off places that were irrelevant to us. However, the ruling from the Inter-American Court for Human Rights that no government is entitled to preclude prosecutions did not prove to be irrelevant. Under our Bill of Rights access to the courts is also very important. We used that argument and it was one of the rare examples in which legal argument had priority over political positions.

CHILE

'The commission worked for a year. It went nation-wide, talking to families of victims in their homes and holding hearings with staff around the country. This was an important exercise in healing because each person who had previously been shunted away from official buildings was now received with dignity.'

JOSE ZALAQUETT: Argentina, Uruguay and Chile have shared more than just the Southern Cone of South America. In the 1960s Uruguay and Chile were the most developed countries on the continent while Argentina was the most literate, the wealthiest and had strong institutions. The three countries also had the strongest middle class. It is thus arguable that for all three it would have been possible to develop by way of reform rather than revolution. But in the 1960s reform was an ugly word: There was the Castro example and expectations of revolutionary ferment were sweeping the region. What followed was a reaction from establishment forces, a polarisation of society and resultant coup d'états.

Had it not been for these seizures or power, reprehensible as they were, I believe that another form of violent solution could have occurred. My reasoning is that the forces of history were already snowballing down that particular slippery slope. It is important to recognise this because we should try to understand

the thinking of "the other side" and to place ourselves in their shoes even if they committed diabolical crimes. This is not to forgive them but to attempt to understand rationales and explanations, however perverted these may be, in an attempt to overcome problems.

Chile went through its transition in 1990, several years after the other two countries, and in March that year the process was concluded when President Patricio Aylwin came to power. Chile experienced a coup d'état in 1973 and Argentina in 1976. Uruguay experienced what was effectively a coup in 1973. Of the three countries, Chile had the longest running dictatorship. In Argentina the dictatorship came to an abrupt end mainly due to the country's defeat in the Falklands War. In Uruguay the demise of the regime was the result of a disastrous economic situation.

In Chile, however, the dictators somehow weathered the economic crisis of 1981 and 1982. They managed to achieve economic growth that pulled them through to the end of 1990. By then the economy was showing signs of tremendous growth and the transition to democracy coincided with a sense of accomplishment. Some would say, however, that the social cost of these accomplishments was unacceptable and the legitimacy of the exercise questionable. The military view of the transition was that it could not have taken place without a cost. Citing examples of higher casualties elsewhere, the military concludes that it did a good job under the circumstances. Success at the ballot box provides legitimacy. But what do you do if your opponents have the weapons and you have legitimacy? There are constraints on your success and it is crucial to manage these effectively.

In Chile we looked at the Uruguayan and Argentine experiences as lessons from which we had the good fortune to learn. Our conclusion was that Uruguay did not go far enough. The population rebelled because people were given nothing by way of dealing with the past, not even a truth commission. But Argentina overplayed its hand. When the new government took over power it abolished the military's self-amnesty law. The amnesty was illegitimate but by annulling it everyone became punishable. Incentives were not built in – such as plea bargaining or special extenuating

circumstances for those who collaborated – so people felt vulnerable and closed ranks. Only in the specific case of the top leadership did the military not close ranks. Even the rank and file were pleased to see the chiefs under pressure because these were the people who had led them to a humiliating military defeat in the Falklands. It was this defeat that sparked their anger, not the human rights violations. The rebellious military did not roll out the tanks but instead remained within barracks. Though President Alfonsin made rousing speeches before thousands of supporters, his authority dwindled steadily and eventually he caved in.

I respect Juan Mendez's argument that Alfonsin could have adopted a more courageous path, but I cannot see what it would have been at that point. Maybe there was space for it earlier. It is crucial that one's chosen course is sustainable because to backtrack is to lose authority, in both the moral and political sense.

The legacy of human rights violations in Chile included the death of 3 000 people – 2 000 were killed and 1 000 disappeared. The authorities claimed the casualties had occurred in [armed] confrontations but the simple truth was that they were cold-blooded murders. After the initial years of repression, ninety people were killed by the opposition which had organised radical armed resistance groups. State torture occurred on a grand scale and there were a number of other severe violations such as imprisonment, which affected tens of thousands of people. Tens of thousands more were driven into exile and lost their jobs.

The government could not deny some of the abuses but it rationalised them by saying that the emergency situation had necessitated such actions. The state did however deny the disappearances, killings and torture. Later this denied reality had to be placed on record again because the country could not continue with such schizophrenic duality about its past identity. In dealing with the past, the focus has been on these violations because of the impossibility of investigating, for example, hundreds of thousand of violations of freedom of expression or job deprivation.

As soon as President Aylwin took over power he established a commission [the National Commission on Truth and

Reconciliation] of eight people, myself included. Four were chosen from the ranks of opponents of the regime and four were supporters of the regime. Although not in agreement with the killings or torture, the latter believed the military regime had been responding to the Salvador Allende government and the chaos gripping the country. The composition of the commission was a bold move because a report from these eight people would enjoy widespread credibility. In the end the report was also unanimous.

The state gave the commission a staff of 60 people, many of them young lawyers who worked full-time with the commissioners. The mandate was to concentrate on accounting by name for every person who had been killed or tortured or had disappeared. Also to be explored were the circumstances of these events and the way in which the security police, courts and state had operated. The commission also had to make detailed ecommendations for reparations and prevention.

The commission worked for a year. It went nation-wide, talking to families of victims in their homes and holding hearings with staff around the country. This was an important exercise in healing because each person who had previously been shunted away from official buildings was now received with dignity. Beneath the Chilean flag, the families were offered a cup of coffee and an official commission listened to them with due respect. On these occasions the victims and their families broke down for the first time in front of officials.

The military replied to all the commission's inquiries, even if not in substance. Members of the military were careful not to appear to be in contempt of the commission and would assure us of their co-operation in trying to find files. We also had witnesses, including some from the secret police and retired officials. The number of witnesses, 30 in all, was sufficient to inform us of the workings of the secret police. We had the extraordinary records of human rights organisations which, unlike in Argentina and Uruguay, were very strong in Chile. In Brazil human rights organisations were strong due to the presence and support of an umbrella body of churches. In Chile people also worked under this umbrella body from early on in huge numbers and extraordinary documentation of cases existed.

We had court transcripts documenting all proceedings. (Courts did not, however, accept *habeas corpus* applications requiring a person to be brought before a judge to investigate the right of authorities to keep him or her imprisoned.) We had every autopsy report and travel records so we could detect that a few people had been abroad and rule them out as cases of disappearance. This was important because one mistaken case could have undermined the credibility of the whole report. The electoral rolls also helped us trace a few people.

We produced a 900-page report in which we described the concepts, principles and norms used in the investigation. We explained the political context and historical background to how the country had come to that juncture, how the secret police and judiciary had operated and, finally, we gave a chronological list of victims and their fate. We named only the victims, not the culprits. We received some criticism because of this but it was a deliberate decision. In the report we simply stated when and where the atrocity had taken place and what had occurred. We would conclude by stating that all evidence indicated that the person in question had been a victim of human rights violations by agents of the state. The information was sent sealed to the courts which, after investigations, revealed some names.

The reason we did not name the perpetrators – although in many cases we had this information – was that we felt a commission appointed by executive power was not part of the judiciary and could not therefore conduct trials. People were not defending themselves before us. To pass judgment on their guilt would have been the moral equivalent of indicting people without a fair trial. It would have been the wrong message to send to society about future respect for human rights. No matter how strongly one feels about the likelihood of someone being guilty, they have rights and must be presumed innocent. In reality, our action was the moral equivalent of sending them to prison.

The report included recommendations and in this context the importance of the views of the world community is important. We wrote to Amnesty International, the Red Cross, Human Rights Watch as well as the unions, churches and political parties in Chile. We asked them for their views on legal and

educational reform, reparations and new institutions. Our aim was to prevent a recurrence of past abuses.

The recommendations in the report cover some 100 pages of detailed comment. A law was passed entitling every affected family to a life pension. (Children were excepted from this and instead received support until the age of 21.) This is a modest, but decent, pension by Chilean living standards. Children of victims are exempted from military service to protect them from the emotional hardship this would entail. There is provision for scholarships and health care as well as reparations for returned exiles and those who were expelled from employment. A new commission was formed for a further three years to continue investigating the cases that could not be finalised in the 10 months we had at our disposal.

The president presented the report to the nation on television and atoned publicly on behalf of the state for these crimes. That was another important symbolic gesture. The president did not commit any crime – on the contrary he was in the opposition – but he assumed the continuity of the state and on behalf of the nation asked for forgiveness.

The report was published in a book which was sent with a personal letter from the president to every affected family. The letter was another important gesture in that it was addressed to the individuals and pointed out where in the book the details of their loved ones could be found. The report was also published in newspaper supplements. In general, the matter was debated extensively throughout Chilean society.

Prosecutions proved to be more difficult because the military government had passed an amnesty law covering the worst period of excesses – 1973 to 1977 – during which time the disappearances occurred. (In 1977 the worst features of the secret police were weeded out.) The Supreme Court upheld the amnesty and in this way limited prosecutions. Investigations continued in order to establish the fate of the victims but success was limited because of lack of co-operation from the military.

To bring you up to the present, prosecutions are taking place for the post-1978 cases and there is also a prosecution for a

single case predating 1978, the assassination, by bomb, of a Chilean diplomat and an American woman associate. This case was not covered by the amnesty because it involved a crime committed in the United States. It was also exempted so as not to offend the US. The secret police chief and his deputy were jailed for this crime and are appealing their convictions. A further 20 to 25 people have been convicted for post-1978 cases and they too are appealing.

EL SALVADOR

'Any organisation that questioned official policies was labelled as a subversive guerrilla group. This ideology generated executions, separations, disappearances and killings in the ranks of the opposition. It followed a pattern of state violence against the society.'

ROBERTO CANAS: Unless a society exposes itself to the truth it can harbour no possibility of reconciliation, re-unification and trust. For a peace settlement to be solid and durable, it must be based on truth.

A commission of truth has four main objectives: to avoid a recurrence of violent acts in the future, to overcome impunity, to avoid a cover-up of past events and to overcome the structural causes of these abuses. The commission of truth in El Salvador comprised three foreigners, a fact which assisted its credibility and reduced the chances of the commissioners being pressurised by the military or the state. According to the members of the commission, they were not in fact subjected to any such pressure.

For six months the commissioners worked to find trustworthy witnesses in a country where people remain fearful of giving evidence on past abuses. The commission opened offices in many cities in El Salvador. It also heard testimony outside El Salvador and received documentary proof of violations from international organisations and other countries.

The general conclusion reached was that the terrible acts of violence committed in the country's past would not have occurred had the country's justice system worked effectively. In El Salvador, as in Chile and Argentina, the past abuses did not result from the actions of a small group of people. Instead, they fitted the description of state terrorism.

According to the Salvadorean commission, the violence in that country had at its origin a political concept that made political opposition synonymous with subversion and actions of an enemy. Thus people who espoused ideas contrary to those of state officials were at risk of being eliminated in the manner of enemies at arms in a war. Any organisation that questioned official policies was labelled as a subversive guerrilla group. This ideology generated executions, separations, disappearances and killings in the ranks of the opposition. It followed a pattern of state violence against the society. Other factors that contributed to the abuses, according to the commission, were the absence of a rule of law in El Salvador and the fact that the military held sway over civilian power.

In its recommendations, the commission placed much emphasis on the position of military chiefs and civil servants who were responsible for abuses or concealed information about them. The commission recommended that they be barred from public office for a period of 10 years and excluded from military positions for life. The aim of this was to try to reform the justice system, to ensure the right to due process and respect for human rights and to foster fulfilment of the law.

As regards reparations, the commission recommended that a fund be established for the families of victims. Also proposed were a public holiday and the erection of a national monument featuring the names of the victims. These would be acts of remembrance and, in the case of the public holiday, a forum for reconciliation and truth. Finally, a post was created for an ombudsman of human rights and a new policing system was introduced.

On the question of balancing what is ethically correct with what is politically possible, my comment is as follows: Ethically it is imperative to punish those responsible for violence and

politically it is possible and correct to work for the eradication of all instruments of terror and to create a system of guarantees to ensure that the abuses of the past will not be repeated. ■

CHAPTER FOUR

RECONCILIATION & AMNESTY



Tina Rosenberg and Wiktor Osiatynski

LAWRENCE WESCHLER (MODERATOR): On the subject of the choice between remembering and forgetting, the great Polish poet Zbigniew Herbert wrote a poem after World War II in response to the feeling in Poland at the time that it would be hopeless to identify the millions of war dead and that one should thus be done with the past. In a poem called "Mr Cogito on the Need for Precision", he wrote: "We are, despite everything, the guardians of our brothers; ignorance about those who have disappeared undermines the reality of the world."

When I interviewed Uruguayan president Julio Mario Sanguinetti, I quoted this passage to him. Answering me poem for poem, he quoted the 19th century French historian Ernest Renan, who is popular in Uruguay. Renan said nations are built on great rememberings *and* great forgettings. It is necessary at times to forget because, for example, the French would be killing each other to this day had they decided to continue the fight over the St Bartholomew's Day massacre [in which 3 000 Protestants were murdered on the night of 23 August 1572]. In the context of reconciliation there is an important tension between not allowing ignorance about the dead to undermine the reality of the world, and yet to allow space for the living.

However, if issues about the past are not dealt with soon after a transition, they can go into hiatus for six months, a year, even two years before returning in perverse forms. In Poland certain issues were not dealt with at the outset and there was subsequently a situation in which the Minister of the Interior started dumping the political equivalent of toxic waste into the system. The message is: Be careful. Just because things look all right does not necessarily mean that they are.

By way of a separate piece of advice, I would suggest that the key to dealing successfully with huge, amorphous topics is to hone the questions.

POLAND

'Sadly, the period of communist abuses in Poland has still not been acknowledged by the former communists. I fear that as a result the issue may continue to haunt us in the future.'

WIKTOR OSIATYNSKI: When South African speakers described to this conference their experiences under repression, they brought back to me my own personal pain of repression. My father-in-law was killed by the Soviets in 1939 and his death still haunts my wife who is now in her fifties. This is in part because, like Fort Calata's child, she never had the chance to know him. From my wife's point of view, the situation was aggravated by the fact that for more than 50 years atrocities such as the killing of Polish officers by the Soviets were not acknowledged.

What South Africa and Poland have in common is a heritage of suffering and the subjugation of an entire nation. In 1950, my first year of school, there were 42 children in my class, only 27 of whom had parents. The other 15 were orphans; most of their fathers had been killed during the war. Of those who had parents, the fathers of 12 were in prison.

The atrocities that took place during the rest of my life in Poland have never matched those of my childhood – the wounds of war, followed by wounds of the so-called revolution and the beginning of what could be called the "terror period" of the communist revolution and communist regime.

In the light of this and after watching the film *A World Apart* during this conference, I must make a disclaimer about communism. On the one hand I disapprove of the wholesale condemnation of communists world-wide. Many communists in Poland before World War II were simply honest people fighting for a better life. For this they were jailed and killed. That was the case with a predominant number of communists in South Africa and other colonial countries. But there is a crucial difference between communists in opposition and communists in power. Because of human nature, something changes in people when they come to power. Human nature easily degenerates and verges towards the dictatorial, using state power to perpetrate abuse and to prevent any attempts to deal with this abuse. The particular problem with the communist system in this regard is that it does away with checks and balances and challenges to itself. In my view, the attempts to settle accounts with the communists in Poland failed totally. If I appear judgmental about the communists, please accept this disclaimer.

There were three distinct phases of communism in Poland. The first involved the coercive use of terror during the Stalinist period. During this time the fathers of my school friends were jailed, tortured or killed.

The late 1950s, 1960s and 1970s saw the development of what has been called "socialism with a human face". Crucial about this phase was that coercion was still there to be used against the opposition; and this is what made settling of accounts difficult. The main instruments of control over society switched from terror and repression to primarily economic control, control of the media, control of association and of rights. Rights were treated as benefits. For example, citizens could be easily controlled in their bid to get a passport or to get an item from abroad. The state was all-powerful with regard to economic activity with the exception of agriculture. It also controlled everything that was key to a better life, even the coupons needed for a car or scarce goods.

After the 1970s, there was for the first time room for opposition. People started taking risks including the risk of jail, torture, abuse and even death. But there was also space for people to live a relatively decent life without being part of either

the opposition or the system. This was what most people did: They tried to lead a full life without being compromised or collaborating. That was the choice I made – to be neither in the party nor in the opposition. As a leader of the independent Polish journalists' association in 1981, I did not perceive myself as a fighter and would not claim that history. For people like me it was important that countless shades of grey were available, but we also had to make difficult choices as a result.

Regarding the transition, it is important to remember that the real limits of the Soviets were never known: It was impossible to tell whether the end result of talks was likely to be a transition to democracy or to a non-communist government. Because of this, during negotiations it was hard to even dream of the end of communism. (Adam Michnik probably did but he did not say so in public.) This had implications for dealing with the past: Issues such as responsibility for crimes against humanity and other abuses could not be negotiated.

The mode of transition is crucial for future solutions because it limits, even defines, future options. In Poland at least three key aspects of the transition impacted on dealing with the past.

There are those who are astonished that leaders from opposing sides – with one side responsible for the introduction of martial law in Poland in 1981 – could sign an agreement only eight years later. But after studying the issue and interviewing key players I must conclude that it was in fact a pre-condition for a peaceful solution that the leaders on both sides should have been the same ones. This became clear to me when I talked to Wojciech Jaruzelski at length after he stepped down from his position as first Polish president following the transition. Had Solidarity's contravention of the contract after the 1989 election led him to feel at any point that it was his role to defend the contract, by force if necessary, to protect communist power? He replied that it had not because he had learned that force did not work. This was probably one of the best things to happen at the negotiating table.

Much later, at the time I was transcribing the tapes of the interviews with Jaruzelski, I noticed that when referring to the party prior to the negotiations he said "we" and "us". But when

he spoke about the party after round-table talks [between Solidarity and the communists] in mid-1989 he used the pronoun "them". This indicates that during the negotiations the parties established a certain closeness. Yet they felt a distance from radicals on both sides – the conservative party apparatchiks and the radicals in the underground or opposition. I believe this explains to some extent why the post-communist government simply closed the door on the past. That, in a sense, was the commitment to the contract. Furthermore, the communists were still in control of the security forces, police and military.

The negotiations also gave participants an opportunity to deal with their personal resentments. They could witness their adversaries weakening and then losing, first in negotiations and then in elections. But this also created a gap between the new leaders and others in the opposition who did not take part in the process. This had repercussions.

In the first year after the talks I declined an invitation to take part in a conference on dealing with the past: I did not think it was much of an issue. But a year later it became a crucial concern and I realised I had been completely incorrect.

The process in Poland of "decommunisation", of barring those who took part in the communist regime from holding office, was to take place through a lustration procedure. This, however, became riddled with political infighting. It was brought to parliament by the Minister of the Interior in a manner later judged unconstitutional by the constitutional tribunal. The minister revealed the names of secret police confidants, including President Lech Walesa, the Speaker of Parliament and several other top politicians at the time. The entire process was condemned by the same parliament that had made the resolution about lustration.

Four of the six draft bills on decommunisation and lustration were later rejected by the parliamentary commission. All recommendations dealing with decommunisation were set aside and two drafts of lustration, dealing with tracing and revealing the names of confidants or informers of the secret police, were tabled in parliament for future consideration. However, no law was ever passed on this.

There was extensive debate and infighting about the lustration issue. Many legal organisations, including the Helsinki Foundation for Human Rights, said it was almost impossible to achieve lustration in an honest way. A small group of experts whom I chaired also came to this conclusion. We recommended that if parliament wanted to continue with lustration it should observe six procedural requirements to give it a statutory base. The court was the only institution that could deal with the right to defence, presumption of innocence, the assumption of unreliability of the secret police archives and the right to compensation in the case of false accusations. We finally came up with a procedure that could meet these basic human rights conditions.

A stalemate ensued and political players lost interest in the issue. In the 1993 election two parties that had their roots in the communist period were returned to power. As a result there has not been much hope for decommunisation, lustration or dealing with the past. President Walesa, who is on the losing side, has called for decommunisation to be tackled now because it did not work earlier. This means we could have yet another politically-ridden attempt to deal with the past.

Sadly, the period of communist abuses in Poland has still not been acknowledged by the former communists. I fear that as a result the issue may continue to haunt us in the future.

HUNGARY

'Unlike Poland, there was no strong opposition to communism in Hungary. In fact in 1989 the communists had difficulty finding a core dissident group to negotiate with. This in turn had repercussions in the period after free elections.'

ANDRAS SAJO: There are no perfect conditions for justice to take place, but transition in particular produces a special set of conditions for imperfect justice.

The history of Hungary is in many respects similar to that of Poland except for the fact that in 1956 there was a war of resistance against the Russians lasting only a few days. After this, two or three percent of the adult population left Hungary and up to 30 000 people were given long jail sentences. Between 1 500 and 3 000 were killed, many of them executed.

After 1963 many prisoners were released and the strange phenomenon of "goulash communism" emerged. Unlike Poland, there was no strong opposition to communism in Hungary. In fact, in 1989 the communists had difficulty finding a core dissident group to negotiate with. This in turn had repercussions in the period after free elections.

Those who handed over power in 1989 on behalf of the communists had not had much of a hand in systematic oppression. There had been sporadic cases of mental asylum placements but the human rights code of Hungary was, for

example, remarkably good in terms of lack of torture. However, among the older generation there was much bitterness. This was due not only to the oppression of 1956 but to a situation that was extremely complex. During the Stalinist period many communist torturers were themselves later tortured, thereby becoming victims of the same system. In addition, such events had occurred many years previously.

After the free elections it was agreed that some kind of justice had to be rendered, but under Hungarian law even murder becomes subject to a statute of limitations. Some of the victims were given financial reparations, for the abuses of 1956 or the previous period, but no one was particularly satisfied with the amounts involved.

LATIN AMERICA

'Most governments have made the political call that to leave the past alone is the best way to avoid upsetting a delicate process of transition or to avoid a return to past dictatorship. The attitude is that there is a dragon living on the patio and we had better not provoke it.'

TINA ROSENBERG: The kind of reconciliation that lets bygones be bygones is not true reconciliation. It is reconciliation at gunpoint and should not be confused with the real thing. Faced with the issue of dealing with the past, most governments have made the political call that to leave the past alone is the best way to avoid upsetting a delicate process of transition or to avoid a return to past dictatorship. The attitude is that there is a dragon living on the patio and we had better not provoke it.

It is arguable whether this is correct in the short term. In some isolated cases it may be the correct approach for a long-term transition. One example in this regard is that of [post-Franco] Spain which democratised its society without facing the past in any serious way. However, Spain was helped tremendously by two considerations. Firstly, most of the repression in the country took place decades before the transition and, secondly, the Spanish political leaders had before them the example of the glittering horizon of Europe encouraging them to take certain measures to democratise. Thus outside pressure made them behave more like members of a normal society.

In the case of most Latin American countries, we can argue about whether or not there is a short-term gain to be made by placating the military, but certainly this does carry a long-term risk, something South Africans must be considering as well. The military in Latin America never sees that there is a cost to its behaviour – to murder, torture or defiance of civilian rule – and therefore it has no incentive to abandon these practices. The military is thus able to pass this poisonous ideology on to new recruits and to perpetuate the myths of the military ideology in Latin America.

I would like to steal from Lawrence Weschler to propose a definition of true reconciliation. He has often said that for a victim of torture or violence to be freed from jail or released from hospital is not the end of the healing process, only the beginning. Societies as a whole are like that. Being freed from the prison of dictatorship does not mean that a society is suddenly ready to bury its past. People are only ready for reconciliation if they are ready to live a normal life in a normal country. An Argentine military officer who has killed and tortured, but has never acknowledged his crimes or felt there is a reason to repent his actions, is not ready for reconciliation. If he still believes he did the right thing and still behaves in a manner that would allow him to repeat his crimes, then he is not ready to put the past behind him. Any reconciliation in his society is not true reconciliation.

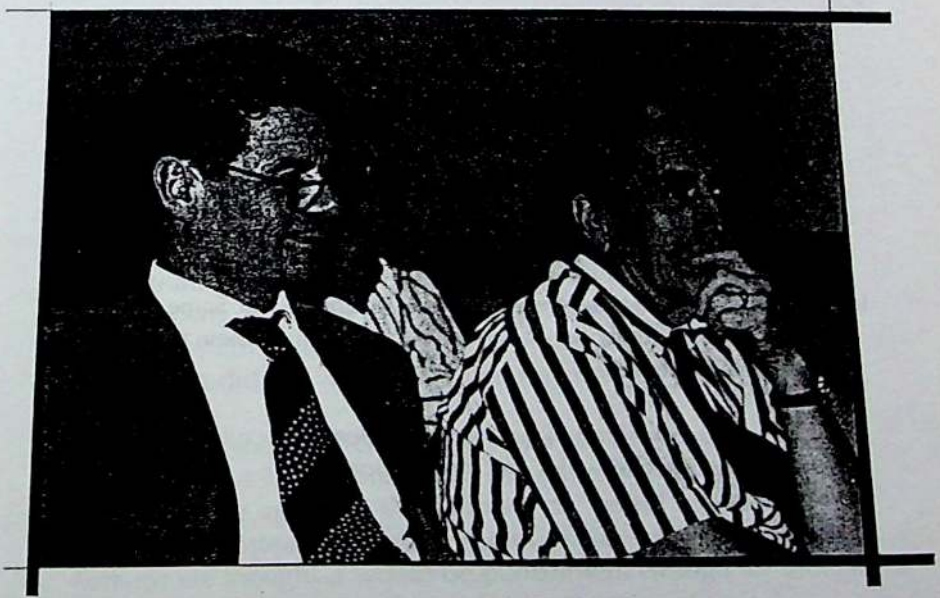
If, conversely, the victims in a society do not feel that their suffering has been acknowledged, then they too are not ready to put the past behind them. If they know that the horrible crimes carried out in secret will always remain buried, and if they are so despairing of the prospects for justice or even acknowledgement that they are possibly willing to take justice into their own hands, then they are not ready for reconciliation. This is an important problem related to reconciliation: If people do not feel that justice will ever be done then the door is opened to private acts of vengeance and retribution, and that can be dangerous for a society. Obviously in no country will every military officer and every victim reach this point, but we have to bring the great majority of victims and perpetrators to the point where they are ready to live together. But before that point there is a lot of remembering to do.

We have heard and will continue to hear about different ways in which this work of memory, acknowledgement and justice can be carried out. Truth commissions, legal trials and disqualification measures are some of them. Another is freedom of information legislation that allows citizens to write to the government to ask for detailed classification of files kept on themselves, on events that are pertinent to their lives or to acts of repression in the country. This has been a healthy development in the United States and would probably be healthy in South Africa as well.

Beware of the words "amnesty" and "reconciliation". As Adam Michnik pointed out, amnesty is often confused with amnesia and, I would like to add, reconciliation can often be confused with recurrence. The desire for maintaining short-term equilibrium can have great long-term costs. It can damage the legal system, the rule of law and future civilian control of security forces. It can lead to private acts of revenge by victims despairing that justice will ever be done. It allows criminals to pass myths down to their political followers and new recruits. It leaves victims unhealed and unable to contribute to the building process of their society. In Latin America, and there are probably parallels to be drawn with South Africa, false reconciliation risks allowing a centuries-old cycle of crime and impunity to continue. ■

CHAPTER FIVE

STATE SECURITY FILES & DISQUALIFICATION



Joachim Gauck (left) and Gottfried Wust

VAN ZYL SLABBERT (MODERATOR): The issue of disqualification is an intriguing one. While in Lusaka, I met an ex-ambassador of the German Democratic Republic who cannot hold any job in former East Germany and is now living on the dole. I wonder how many people will be living on the dole for similar reasons in the South African context?

A government of national unity will face problems of investigation and reconciliation. To overstate the case of Kader Asmal's demand for a commission of truth and reconciliation, let us imagine a scenario in which the government of national unity has appointed him as chairperson of that commission. Suppose he is placed in the position of having to prosecute the chief of the defence force, the very person responsible for maintaining stability after the elections. What implications would that have for the continuing peaceful operation of the state?

A sector of the population that fascinates me is businessmen because in my short political career I approached them a number of times to raise funds for my small party. They refused on the grounds that we were too sympathetic to "terrorists" and "communists". But I have since noticed a number of those businessmen now playing a prominent role in discussion groups and affirmative action; they seem rather close to the next government. What happened to these businessmen? Some of them made fortunes out of Armscor and now they seem to have lost their memories.

These are the kind of questions that demand scrutiny under the theme of security files and disqualification.

GERMANY

'Placed next to each other the files cover a distance of 180 kilometres. The reason for the sheer volume of paper is not because the East German secret service was more brutal than its Nazi counterparts, but that it went one step further in the bureaucratisation of the process and the bureaucratic grip it put on society as a whole.'

JOACHIM GAUCK: When the population of East Germany rose up against the communist dictatorship in 1989, there were regular protests in front of the offices of the state security services. To demonstrate in this location was as significant as to do so in front of the central buildings of the Communist Party. It meant that, without holding an ideological debate, we could make known our belief that it was not socialism, but a dictatorial Stalinist system that we were living under. We wanted that to change; we did not want those people in power any longer.

But there was a difference between our demands and those voiced in the 1956 revolution in Hungary. We did not shout "secret service agents to the gallows" or "secret service agents to the ghetto". Instead we urged "secret service agents get to work". Perhaps we thought it would be punishment enough for them to have to work like ordinary people.

In December 1989 we occupied the secret service buildings after hearing that the most sensitive documentation was being destroyed. In Marxist terms, we regarded these files as documents containing the knowledge required to exercise power. Our aim was not only to put these files into a museum, but also into the hands and minds of the people. This objective became law in the East German parliament even before German reunification in August 1990. All parties, including the post-communist party, said they wanted to use these files to come to grips with the past – politically, judicially and historically.

In political terms, every person had to have the right to see what the secret service had recorded about him. We also wanted to keep those who had worked officially or as informal co-operators for the secret service out of important positions in the new government – those of civil servants and parliaments at local, regional and national level. Legally, we wanted to make it possible for people to use their files to clear their names and for the files to be used to prosecute those who had broken the law. In historical terms we wanted to prevent the creation of myths and to preserve the material for scientific study and recording.

The Treaty of Reunification between East Germany and West Germany, which tried to deal conclusively with all the questions of unification, scrapped the files law passed by the East German government. This followed arguments that the inner peace of the country would be threatened if we were to proceed in the way prescribed by the law. In a later development, however, it was agreed that new legislation on the subject would be prepared after final reunification. This new law was passed in 1992 and we are working with it now. Although there are minor problems with it, it has been widely accepted in Germany.

The law enables individuals to find out what information there is on them in the files. Over 3 000 people are employed in the office in charge of these files and we are processing some two million requests for information in the files. We have had about 700 000 requests from individuals and the remainder from public prosecutors, parliaments and civil servants screening job applicants. This is an expensive exercise costing about DM250 000 million (R500 million) each year. The vast amount of paper necessitates a large staff: Placed next to each other the

files cover a distance of 180 kilometres. The reason for the sheer volume of paper is not because the East German secret service was more brutal than its Nazi counterparts, but that it went one step further in the bureaucratisation of the process and the bureaucratic grip it put on society as a whole.

As far as we know, there are no longer any former secret service officers in the police force or secret service. People who worked as so-called informers for the secret service are not automatically expelled from their jobs as judges, civil servants or other positions. This only takes place after a procedure of examination has been followed.

From 1933, the start of the Nazi dictatorship, the parliaments of East Germany and Germany consistently obeyed their dictatorial leaders. Later, large-scale decommunisation was not achievable so we wanted, as an example, to at least expel those in the secret service and thereby deal with the section of the population that, over and above just living in the system and making little adjustments so to speak, took an active part in supporting the dictatorial government.

Our task has been made more difficult by the fact that not all the informal collaborators of the secret service signed written contracts. Some of them would simply meet or report regularly to another person. They did not really know what was done with the information. About one percent of the population agreed to co-operate informally with the secret service and in time the number of officers and official members grew to about 90 000.

When we conduct our examinations we do not divide people into categories of "guilty" and "innocent" in the moral sense. The examination determines whether a person is suited to a specific position in public life in the current context. We did not want to confuse this issue at the initial stage of the process with the question of moral or theological guilt. But this qualification does of course play a role in the legal dimension.

Access to the files has given us an opportunity to study the mechanics of a system of repression. We know how it was established and can see day-to-day utilitarian communism at work. This is important as the archives in many other countries

are still closed, including those of the KGB in the Soviet Union and those in Hungary. The system of opening up the files to the public has enabled people to see for themselves what really happened, yet also to understand that they cannot as individuals mete out justice. It is a system that has worked – people have *not* exercised "self-justice". Private discussions are taking place between many former victims and perpetrators. Obviously those who have lost their positions of power are not too happy about this, but then the ruling class is never happy about relinquishing power.

Our policies make sense because on a very personal level there can still be forgiveness; but forgiveness does not mean that you retain your former position without having to answer for it.

Lastly, the files have also served at times as testimony to the courage of ordinary people who managed to evade the system and thereby be of no service to its masters. In this they were like the Czech literary character Svejk, a soldier who was by no means a hero, but managed to avoid serving his superiors in small and witty ways.

BULGARIA

'The process in Bulgaria and Poland has been described as creeping decommunisation, but I am not sure that this is true. I do, however, feel that the past is somehow returning to haunt us; that those things that were not rooted out have come back to stay.'

DIMITRINA PETROVA: In Bulgaria abuses of the past were kept secret. Not only were many people unaware of events that took place in the Stalinist camps in the late 1950s and early 1960s, but most did not even know that these terrible places existed. After a party decision in 1962 the camps were closed. Today the abuses of the past seem very distant, particularly the physical violence that took place. In the 1970s and 1980s the "violence" was a matter of mental torture suffered under communism rather than actual physical violence.

A critical factor for the files issue was that there was a year of joint government by communists and opposition forces after communist leader Todor Zhivkov's reign ended in 1989. A purely anti-communist government then ruled for a year before being removed without an election being held. It is difficult to say who is in power now. The last election was won by an anti-communist coalition. The government was elected by parliament with a mandate of the third largest political formation – the Turkish minority party. It is supported by the ex-communists and opposed by those from the anti-communist opposition. The

government is weak and everyone criticises it, even the former communists. But it does not have a strong opponent and somehow endures. This situation will probably continue until Bulgaria's next election in 1995.

While there was no explicit physical violence in the waning years of communism, violence of what may be the worst kind is now increasing. It is a new phenomenon, perpetrated by the police and directed at minorities such as the gypsies and the Turks. As a result I am, in fact, obsessed with the present. My work involves legal defence of the gypsy minority targeted by the police, and cases where the police have failed to protect the gypsies from mob law and lynching. I also deal with cases resulting from another new and threatening form of violence in which private security groups are available for hire. Behind these sinister organisations are paramilitary groups, members of the former state security service and military, and even former sports champions. As a result the level of political violence is rising.

The process in Bulgaria and Poland has been described as "creeping decommunisation", but I am not sure that this is true. I do, however, feel that the past is somehow returning to haunt us; that those things that were not rooted out have come back to stay.

I am not sure there was ever acknowledgement of the past from the point of view of the victims of communism. Many symbolic gestures were made by the former Communist Party, now known as the Socialist Party. Some victims were compensated and some torturers were even brought to court. But if you were to ask Bulgarians whether acknowledgement took place, half would say "yes" and the other half "no". In addition, this would not reflect a simple split between former communists and anti-communists. This leads me to believe that reconciliation and acknowledgement should be sought at an individual level.

The fate of the files in Bulgaria has been the exact opposite of what happened in Germany. The timing and nature of the transition process seems to be a key factor in determining whether a country's files will be used to serve the interests of justice and remedy past abuses, or whether there is likely to be gross misuse of the files.

During the period of transitional government the former Minister of the Interior held the position of vice-president. Most of the files were under his control and there was no transparency in this sphere. It is believed – and I concur – that some of the files were destroyed. New files on present or future political opponents appeared and it now seems impossible to rely on the files or what has remained of them.

As a member of the parliamentary commission on human rights, I went to seek out the files. But gaining access to them was a struggle because the powerful Ministry of Internal Affairs and the military were still in the hands of the former communists. In addition, the files were kept in various institutions in a complicated system of archives and duplicated in obscure ways. It was chaotic and also discouraging to me personally. I was involved in other issues which I considered to be more important.

In Bulgaria, that moment at which it would have been possible to go to the archives and inspect state security files never arrived. Similarly, a person of unquestionable moral integrity was never elected to head a truth commission or something similar.

The first generation of anti-communist opponents somehow overlooked the issue of dealing with the files at a time when it was crucial to do so. We felt it was a dirty game, something obscene that no one with self-respect would touch. Perhaps the fact that many of us were intellectuals had something to do with this. Also I remind you there had been no severe physical violence during the preceding two decades. Perhaps because of our attitude the issue was left largely to the more ambitious and more populist second generation of anti-communist politicians and journalists. They misused and exploited the issue for cheap sensation and to settle political scores. Real control of the files was lost.

Every day another newspaper would reveal another name of someone alleged to have been a collaborator. Journalists made no attempt to prove anything but simply quoted "reliable sources". Neither was there an attempt on the part of those accused to sue the newspapers. This avalanche of unproven

allegations soon turned into a cheap weapon of political denigration. Bulgarian society quickly became sated with the never-ending exposés and the whole matter turned into a farce.

The former Communist Party press, for example, accused members of the anti-communist opposition of collaborating and vice versa. At a certain point the anti-communist coalition itself split and the two factions began to use the files as a weapon against each other. At one absurd point all 400 members of parliament who had signed the first post-communist constitution were quoted as collaborators in lists by radical right-wing anti-communists!

There were suggestions that this had all been a conscious plan by the communists and state security members to trivialise the issue. By over-dramatising and focusing on it incessantly, people would lose interest. Indeed when my name appeared on one of the lists as a collaborator I could not hold anyone's attention for longer than a minute to discuss the matter. I was not really angry and my intention to sue the newspaper lasted all of a day. Like most people I soon forgot about the accusations. When lawyers in one case did in fact try to sue a newspaper it disappeared, leaving them with no one to sue. There is no press law in Bulgaria, which must have the largest number of newspapers per capita, so the chaos was ridiculous. Songs were even created about the files and one famous ditty went: "Nine million mice expose each other as agents and spies while the fat cats toss up files and drink their coffee with quiet smiles."

The sensationalism and over-exploitation of the files had another negative effect. Every day in parliament the anti-communist opposition would refer to the criminal communist past and the files issue, with the result that the former communists finally ended up empowered by this very denigration.

Perhaps it is important to regard the transition in Bulgaria as having taken place on two levels. The first was real redistribution of power, which was not transparent in Bulgaria. (Zhivkov had been very good at rotating elites to ensure that no one was in control long enough.) The second level was that of the public

sphere. There was no consistency between these two levels: In the public sphere the files issue was being trivialised, while in real terms at the level of redistribution of power the files were being destroyed or falsified in such a way that Bulgaria has now lost that part of its past.

But what is it that we have lost? The grand narrative is not lost because it can be reconstructed; the individual stories may or may not be lost. I regard the files themselves as questionable, even if they were to be in perfect order. What reality do they reflect, the real reality of people's lives or the perceived reality of those who wrote the files? I believe that the past can still be reconstructed in Bulgaria but that there can be no question of relying on the files in future.

If we missed the moment for taking action, then I am guilty of that. We could try to explain our failure by saying that initially we were not in power and could not do much – but later we *did* come to power. I feel in some way guilty listening to the success story of Germany. Yet we were busy elsewhere with other pressing aspects of the reconciliation process. With others in the human rights commission, I was drafting a law aimed at compensating victims of the communist regime. That we did achieve. I was also personally involved in the pardoning of political prisoners on behalf of the Bulgarian president. There were a number of political prisoners, mostly from minority groups, who had resisted the suppression of their ethnic identity and were making use of a constitutional procedure in terms of which the president had the power to pardon prisoners.

But this is not an adequate excuse or explanation. I do not know why somehow, in our intellectual haughtiness, we overlooked the fact that the past could at least be preserved for future generations, if not used as a tool of immediate justice.

On a personal level, I was at the time overwhelmed by the suicide of the director of the City of Sofia police – and I am still haunted by these memories. He killed himself after being heavily criticised by all opposition politicians for arresting and beating up a group of demonstrators, myself included. I could not forget his suicide and as a result it was not easy for me to proceed on

other levels. The picture that stayed with me constantly was that of myself shouting in the face of an apparently quiet, strong policeman who committed suicide the following month.

As is the case with the Czech Republic, there is a law of disqualification in Bulgaria. It concerns academics holding positions in universities or in other research and academic institutions. Many are also excluded from holding leading positions in a variety of government bodies. This piece of lustration legislation was criticised by Helsinki Watch and other human rights groups. The experience in Bulgaria has caused me to conclude that disqualification measures should not be a matter of legislation. The process of preventing people from keeping or from holding positions of power should be limited to the courts. Lustration should operate on an individual basis, exclude any retroactive legislation, avoid collective guilt and attempt to bring to justice those who can be proved guilty of deeds that were crimes at the time they were committed.

Most Bulgarians would agree that this legislation caused more human suffering and feelings of injustice than it did good. The law requires that anyone who wants to hold an academic position should make a personal declaration stating their involvement in past regimes. Many people refuse to do so simply because they regard the whole process as unfair and inhumane. The dividing line between "us" and "them" is no longer former communists versus opposition supporters, but between people with respect for justice and human rights and those making a career out of the law. As a result, Bulgaria's academic institutions and universities now paint a sad picture.

CZECH REPUBLIC

'The contents of the files were not accurate and it was commonly known that some names mysteriously did not appear while others were there falsely. Husbands would suddenly hear that their wives had been collaborators and children would hear of their fathers' involvement.'

KAREL SCHWARZENBERG: The way in which a country and society deals with its past originates in the past itself. It tries to solve problems in the context of past experience.

As was the case with most other central European states, the 20th century was a turbulent period for Czechoslovakia. The German occupation forces invaded the country in 1939 and installed a harsh regime. But, as with every occupation force or colonial regime, there were collaborators within the country as well.

When the German Reich disintegrated in 1945 there were vociferous calls for punishment and revenge. Enthusiastic retribution followed: Not only the real traitors who collaborated with the Gestapo had to pay their dues but also many people who were totally innocent. Accounts were settled after a thorough witch-hunt.

Three years later, in February 1948, the abominable spectacle was repeated after the communist takeover. Cleansing of the

state apparatus and universities took place and countless people were thrown into jail as a result. At one stage roughly 200 000 individuals out of a population of almost 15 million were in jails, forced labour camps or sections of the army which used slave labour. It was the commander's prerogative to decide when an inmate would be freed. Executions and other atrocities also took place. These harsh practices continued until about 1960. After Stalin's death and the changes in the Soviet Union that followed, the Czech regime was not as cruel.

Czechoslovakia subsequently achieved the status of a socialist state. This meant a change of constitution by which the leading role of the Communist Party was entrenched. The defence of the socialist order was the duty of the society and the security apparatus. In effect it was a case of legislating what was already practised, but it was still a change.

After the "Prague Spring" of 1968, the armies of the Warsaw Pact marched into Czechoslovakia and the Soviets installed a new Communist Party leadership which toed the line. A huge purge followed and all those who would not declare that they welcomed the occupation forces were kicked out of universities, schools, broadcast services and so on. For the next 20 years there was peace in Czechoslovakia simply because nobody challenged the regime.

However, the fact that this regime had been reinstated by the head of the occupation army meant that the Communist Party lost credibility among the population. At the start of communist rule, or immediately before the coup d'état, the Communist Party commanded roughly one-third of the vote. During the 1950s and 1960s this was substantially reduced but, as one saw in 1968, there was still some support for the party and many young people believed in its ideals. The occupation was a blow to any remaining support; it dwindled among the rank and file and almost completely disappeared among intellectuals. A period of harsher rule took place in the 1970s but then the situation mellowed again.

A number of phases can be identified. The first, from 1948 to about 1960, entailed outright Stalinism with forced labour camps, executions, long jail terms and torture. In the second

period the labour camps were dissolved, torturing stopped and normal – what we call "bureaucratic" suppression – occurred. In the third phase, after the Russian occupation, the situation became restrictive again and people lost their jobs on a grand scale. Fourthly, the situation eased somewhat in the 1980s. Among the signs of improvement was the fact that children of dissidents were permitted to study.

Finally, in 1989, the whole system of Soviet rule in eastern and central Europe collapsed. Demonstrations against the Czech regime started on 17 November and led to a round-table meeting between the communist government and leaders of the civil opposition. The end of communist rule was marked by the election on 29 December 1990 of Vaclav Havel as the country's new president.

The question of how to deal with the past soon arose. Several laws were promulgated to rectify the effects of the past. The thinking behind this legislation was that the rule of law had been absent between 1948 and 1989, that the instruments of the regime had been used against the people and that the laws passed against the population had been unlawful. Attempts were made to correct the situation with two kinds of laws. Firstly, a law enabled the dissolution of the state security system. All its members lost their jobs but retained their social rights such as pensions.

Then in 1991 Czechoslovakia passed its much-debated lustration law which expires in 1996. As was the case in Germany, this was not a law which criminalised people. It only declared that those who had held certain positions in the past were no longer considered suitable for such posts. Most leading civil service positions were affected: the president, parliamentary and court officials, those in top university positions, ambassadors and so on.

The lustration law was also directed against former members of the security apparatus and informers. This group proved to be problematic because the security apparatus was militarised and included civil servants. The security apparatus had also drawn in another category of people who had lent flats for conspiratorial meetings by the secret police. Also at issue was a third category of people considered to be candidates for co-operation with the

secret police. However, this group was excluded from application of the lustration law when the matter came before the constitutional court. Other groups to whom the lustration law applied were members of the people's militia, the armed branch of the party which had members based at each factory, and members of the leading committees of the Communist Party.

As regards the files, their contents were unfortunately leaked. It was at first a matter of one or two files getting out but eventually journalists started publishing all the names in the files. This caused tragedies for many people. The contents of the files were not accurate and it was commonly known that some names mysteriously did not appear while others were there falsely. Husbands would suddenly hear that their wives had been collaborators and children would hear of their fathers' involvement. It was also very difficult to prove one's innocence.

The contents of the files could not be tested in court other than if one had suffered damages such as loss of employment due to disclosures from the files. The law stated that, with the exception of a few top officers, the onus was on the prospective employee to produce proof for the Minister of the Interior that he was not registered in the files as an agent of the secret police.

The issue of the files has since lost importance and plays a very small role these days. Since their wide publication, the files are no longer taken seriously, not even by the people who are registered in them. In a country where the rulers made their mark on virtually the entire society it was almost impossible *not* to cross the paths of the Communist Party or security apparatus.

In the first year after the demise of communism, people were excited about the prospect of dealing with the past. But now they are more occupied with issues of the present, such as economic problems and the possibilities in a free society. That is not entirely surprising. I was a student in Austria and Germany in the 1950s and I remember well how the Allies basically forced people to occupy themselves with the crimes of the Nazi past. But the people themselves, no longer embroiled in the war and working on what was later called the *Wirtschaftswunder* [or "economic miracle", in reference to the rapid economic recovery of West Germany after World War II], were at that moment not in a position to really

examine what had happened.

In Germany the discussion about the past started in academic circles and then newspapers, but it really only developed at the end of the 1950s and during the 1960s. In Austria it started 10 years later. Therefore, though I am sure the past will come back in some way, it will do so only several years later when members of the new generation ask their fathers what they were doing at key periods of history.

Part of dealing with the past involves reparations and laws passed to redress injustices. In Czechoslovakia a citizen could in practice ask that everything which had belonged to him, his parents or grandparents on 25 February 1948, the day of the communist coup d'état, should be returned to him. These laws were changed in certain respects, but still retained their intention to rectify injustice. The thinking was that it would be impossible to create full justice after 40 or 50 years of injustice, so the only practical way to solve the problem was to name a cut-off date. I can assure you that much injustice occurred before 25 February 1948 but no legislation covers this.

After the separation of Slovakia and the Czech federation, the communist regime that held power in Czechoslovakia between 1948 and 1989 was declared unlawful. In addition, the Communist Party and other organisations involved in abuses were declared criminal organisations. Statutory limitations did not apply again between 1948 and 1989 if a political process was involved.

As regards some of the crimes brought to court in the 1960s, some of the worst offenders got away with light punishment because court sentences could not be revised. In practice those who were responsible for the worst crimes were never brought before the courts. ■

CHAPTER SIX

PROSECUTION: WHO & FOR WHAT?



Aryeh Neier

FOUR VIEWS

'Who should be prosecuted? My answer is those with the highest level of responsibility for the most outrageous crimes. The successful prosecutions are those which focus on the top officials. When German border guards are convicted while Erich Honecker is allowed to go free, an appearance of unfairness is created.'

JUAN MENDEZ: Experiences discussed at this conference have shown that achieving complete truth and justice is impossible even under the best of circumstances and with the fewest constraints. It follows that any commitment to truth and justice must be realistic and true to its objectives, not a thinly disguised political weapon.

In addition, it is not only advisable but absolutely necessary to have a societal plan to deal with the issues of the recent past. Such a plan can include partial amnesties and certain pardons. Even decisions not to prosecute some people can be legitimate. But the prerequisite is a clear path from the outset that provides a degree of security for the society, for potential defendants and, most importantly, for the victims of human rights violations. There should be no equivocation. A broad plan lacking such objectives will send the wrong messages to the wrong people. This is in fact what went awry in Argentina and not that too much was attempted from the start. Such a societal plan should

have broad democratic consensus. Furthermore, the complete truth must be sought, or as complete as it can possibly be, as opposed to a partial truth.

The truth does not necessarily emerge from a commission or an exercise in truth-telling. In fact, I would argue that it is misguided to separate truth and justice because prosecutions provide a measure of truth that is more complete and more undeniable than that which is achievable through a truth commission. The pressures in Argentina, for example, were much stronger during the prosecution stage. This was not because of the threat of imprisonment but rather due to the greater likelihood of the truth emerging in an open trial with oral proceedings.

A telling example of this came at the end of the process in Argentina when only one prosecution remained, that against General Carlos Suarez Mason. The other generals left him in the lurch because he had broken their code by leaving Argentina rather that face prosecution. Suarez Mason was eventually brought back to Argentina and put on trial. However, whereas the others had already been excused through the due obedience law and pardons, in Suarez Mason's case the prosecutor suggested a deal to the high command of the military: He would prosecute the case on documentary evidence only, there would be only one day of hearings and no witnesses would be called on condition that there was no objection to Suarez Mason giving evidence.

However, the high command knew that Suarez Mason would try to air everything; he would call his subordinates, confederates and superiors to defend himself and the generals wanted to avoid that. They did not care whether Suarez Mason was prosecuted or not, let alone convicted, but they would not countenance more probing in the light of events that took place during the "dirty war".

An important factor to be considered in regard to the issue of justice is the rights of the victims. In cases of egregious human rights violations, these rights should not be limited to compensation. There is an emerging principle of an inalienable right to justice and access to justice on the part of victims.

It is crucial that trials be conducted with complete and full delivery of due process rights to the defendant. For example, in the case of Haiti we are arguing against a broad amnesty yet we do not want trials immediately because under conditions that currently prevail in that country the perpetrators would not get a fair trial.

In cases of crimes against humanity there is always a clear duty to prosecute and not to give amnesties or pardons. Crimes against humanity are difficult to define but it is generally accepted in international law as a matter of custom that they include disappearances, torture and murder committed on a regular, deliberate and massive scale. In cases involving ongoing armed conflict, similar crimes committed by insurgent forces should not be swept aside or pardoned. There is a certain symmetry to this even if by definition those kinds of crimes cannot be labelled as crimes against humanity. At the very least crimes that leave lasting personal damage should be prosecuted. The reason for this is that the prosecution itself will provide a measure of healing and show the victims that their plight has not been forgotten by the state and society.

Part of the emerging principle of an affirmative duty of states to investigate, prosecute and punish transgressions defined as crimes against humanity is rooted in the jurisprudence of the Inter-American Court for Human Rights and of the Inter-American Commission of Human Rights. Although that jurisprudence has effect in the Americas, it is based on language common to all international instruments and provides a good precedent to be used elsewhere.

But what of crimes or violations – such as administrative detention – that do not leave lasting personal damage? It does not seem that a case can be made under international law that there is an obligation to prosecute in such instances. At this conference we have said that apartheid is clearly a crime against humanity – yet how do you prosecute apartheid crimes? I have no answer to this question but my sense is that, at the very least, aspects of apartheid that deal with grievous violations such as murder, disappearances and torture should be considered crimes against humanity and there should be an obligation to prosecute them.

This of course does not deal with the question of whether one is in fact in a position to prosecute or not. It makes no sense to try to force a government to prosecute when the material situation makes this unachievable. However, it is important to distinguish here between political and institutional limitations. For example, prior amnesties that have been long in existence and have taken hold and produced legal effects are very difficult to overcome. The amnesty in Chile predated the advent of democracy by about 12 years and it would be difficult to declare such an amnesty null and void. But in Argentina the amnesty was enacted in the waning days of the dictatorship. Even before a decision was made to abolish this amnesty, the judges were not applying it.

At the very least we should demand that democratically elected successor governments do not add new limitations to the situation. In this sense I believe there is a clear difference between President Aylwin in Chile, President Alfonsin in Argentina and President Sanguinetti in Uruguay.

Aylwin inherited a situation that was far more conditioned and institutionally limited than was the case for his counterparts in Argentina and Uruguay. When he was asked to pardon and read the truth commission's Rettig report, he told his television audience: "I cannot pardon [on behalf of] the victims. I cannot assume that responsibility." That is very different from what Sanguinetti did in Uruguay when he actively opposed any attempt to provide a measure of truth or justice. That distinction is important because it also sets apart Aylwin from Alfonsin. Even if they started out with the intention of some measure of accountability, in my view they unnecessarily created new obstacles to accountability that were not there at the outset.

While we have to recognise the political limitations to prosecutions, we must also not take them for granted. We should not provide a way out for successor democratic governments and should not simply assume they are inherently powerless. Unfortunately that is what we did collectively in Guatemala when Marco Vinicio Cerezo Arevalo was elected. We gave him so many excuses not to do anything that at the end of his term there was less truth, justice and accountability and many more human rights violations than when he started out.

An adequate judicial system is of course a prerequisite. But sometimes the task at hand is to build a judicial system and one need not necessarily wait for a tradition of impartial adjudication to be established before embarking on the issues of truth and justice. On the contrary, the new judicial system can quickly achieve a high measure of credibility if it deals with these dangerous and difficult questions early on yet with equanimity and skill. When building a new system one should remember that accountability can add to the prestige and authority of the judicial system.

One of the political arguments for prosecution is that if we are building a new democracy we must start with a non-discriminatory application of the law. In the case of serious crimes there should be no privileged defendants. This principle should also apply to those who have worn uniforms in the past or continue to do so. The ability of institutions to deal with such difficult and touchy subjects will instil confidence in the citizenry about the country's capacity to build reliable and trustworthy democratic institutions.

Another important argument for prosecution is the fact that reconciliation can only be achieved after some measure of justice has occurred. There is also the question of whether prosecution prevents repetition. Although this is an important political argument, we cannot predict that there will not be any new violations simply because we have prosecuted and punished. Similarly, nobody can predict that we will avoid new violations if we do not prosecute. There is as much of an argument for closing a cycle of revenge as for closing a cycle of impunity. In Third World societies with the potential for protracted civil conflict this is an important consideration.

The most important ethical argument for prosecutions is the need to respect the plight of the victims, an issue I have already discussed. But there is another ethical argument, one that has been embraced in Argentina, which is that we prosecute murder, torture and disappearances out of respect for the norm that prohibits these crimes. This is extremely important for countries embarking on the creation of a new democracy. It is because we value those particular legal and moral standards so highly in the new society that we will not tolerate any breach of them.

Whom do you prosecute? I believe it is important to start with the real culprits, those who instigated the crimes and made them possible. But here again I will insist that a strict criminal law standard should apply. We need enough evidence to show that an accused person was in fact responsible for a particular crime.

How far do you go down the chain of command? We should uphold the Nuremberg principle that obedience to orders is no defence when it comes to grievous crimes. However, a certain measure of due obedience defence should be available, that is, the traditional due obedience defence that applies if a person participated but had no capacity to control the outcome of a situation. We should also not prosecute those who fall into the category of political supporters, cheer leaders or providers of moral or political support to the perpetrators of these abuses. Prosecutions are not the place to make historical judgments.

TINA ROSENBERG: During the time I have spent in South Africa I have heard from a couple of people that "Nuremberg trials cannot be held here". Nuremberg seems to be the symbol for any kind of justice. A point I would like to make, one that has already been voiced at this conference in the context of prosecutions in Latin America, is that there is more in the spectrum than "a Nuremberg". Most of the countries in eastern Europe that have had the luxury of really trying to deal with their pasts have had some prosecutions. It is not an all or nothing proposition and even a small number of prosecutions can have important symbolic value.

The eastern European dictatorships in general were characterised by widespread torture and murder in the 1950s but since then they have not been marked by great physical violence. I do not wish in any way to diminish the suffering of those who have been tortured or killed subsequently. In Poland, for example, the martial law period claimed about 100 lives in 1981, the most famous victim being Solidarity priest Father Jerzy Popieluszko. These victims are of course just as dead as the victims of massacres in El Salvador, but the difference is that there has been no widespread campaign of physical violence in most countries in eastern Europe since the Stalinist period.

In most of the eastern European countries that went through significant transitions, trials have been held in at least some of the cases in which physical violence occurred. These trials have been fairly non-controversial. They are trials of people who did commit murder and torture. Such trials have not been subjected to the same debates about the politicisation of justice as certain other trials have been.

For example, in Poland the lower ranking security force members who carried out the murder of Father Popieluszko were convicted and sentenced even under the communist regime. Two more generals are currently on trial for having given the orders. Also under way is a trial of security force officials who shot at protesters at the Wujek mine four days after the imposition of martial law. This trial may lead to the prosecution of the man who was Minister of the Interior at the time.

In the Czech Republic the head of the Prague Communist Party served a very short sentence – less than a year – for ordering the beating of demonstrators during the last months of the communist regime. In January 1991, when Lithuania was still part of the Soviet Union, Russian soldiers killed demonstrators who were trying to take over the television station. The Lithuanian head of the Communist Party and his deputy will be tried this summer for ordering those shootings.

A different category of physical violence in eastern Europe is that which took place in the 1950s. Poland, which never had a statute of limitations, has been prosecuting people who were torturers during the early Stalinist period of the late 1940s and early 1950s. The Hungarians recently voted to lift the statute of limitations that had been blocking prosecutions of those involved in murder committed during the 1956 Soviet invasion of Hungary. Bulgaria is holding trials of men who were camp guards at a brutal Stalinist concentration camp.

Even though there may be no legal statute of limitation in these cases, these trials are not necessarily problem free. Many of the defendants and witnesses have died, many of the rest are old and infirm and the memories of witnesses fade. Therefore the absence of a statute of limitations does not completely close the question of whether these cases are appropriate for prosecution.

The single biggest problem facing eastern Europeans in trying to provide justice for past crimes is that of finding the proper charge. The average person in eastern Europe hated communism because it "stupidised" him. The system taught him idiocies, polluted his air, deprived him of such luxuries as bananas and oranges and humiliated him. It was humiliating to have to wave the party flag at parades and watch promotions at work going to people whose only qualification was that they were slavishly loyal to the party. Anyone who spoke out against the system, and many who did not, had their telephones tapped, their mobility restricted, their children banned from school and their writing censored. But where does the criminality lie in that?

The problem is that the things people are mad about in eastern Europe are not necessarily things for which one can easily prosecute. The prosecutions are quite appropriate in cases of murder and torture, but that is not necessarily why eastern Europeans hated communism. One obstacle in trying leaders for crimes involved in tapping telephones and banning children from study is the widely accepted prohibition on *ex post facto* justice: People can only legally be prosecuted for crimes that were illegal at the time of commission. The truly hated acts of eastern European regimes – the secret police shadow, the censorship, the political criteria for all decisions – were not only legal, they were the very basis of the system and did not in most cases reach the level of atrocity necessary to justify prosecuting them after the fact.

Another problem facing eastern Europeans in this regard is the terrible state of their justice systems. This is something many of them have in common with Latin American countries. The eastern Europeans in most cases dismissed many judges from the communist period and have had problems finding qualified replacements. In Czechoslovakia, for example, about 3 000 judges were fired, and in 1992 nearly a third of these positions were still vacant. In Bulgaria the Supreme Administrative Court – one of two courts specified by the constitution – does not exist because of the lack of resources and qualified staff to appoint to the Bench.

In the case of eastern Europe it can be difficult to identify a single author of an act. Trials by their very nature are trials

of individuals. But the crimes of eastern European regimes were largely bureaucratised. They were crimes that could only have been committed by organisations as organisations. These could be termed "criminal regimes" in contrast to Latin America where "regimes of criminals" would be a more apt description in many cases. Often the evidence in eastern Europe does not allow one to trace tapping of a telephone back to the person at the top who gave the order. Even if it is known, for example, that the head of the Stasi in Germany, Erich Mielke, was responsible for a system of tapping telephones, it is nevertheless very hard to say he was responsible for tapping a specific telephone. The problem of evidence in such trials is an acute one.

How have countries dealt with these problems? Many have done so by relying on evidence of corruption which can be used to charge the former leaders. These are usually the easiest kinds of crimes to prove because there is often a paper trail and also these acts were criminal when committed. In Bulgaria, communist dictator Todor Zhivkov was tried and sentenced to seven years for embezzlement. He is serving those seven years in his house because of health problems. Labour union leaders have also been sentenced in former East Germany for fraud and corruption, and trials on these charges are scheduled for other government officials.

There are other examples in eastern Europe where democratic governments have gone to great lengths to try their leaders. The charges are so absurd that they actually have the effect of undermining public confidence in the system of justice. They are like the marksman who shoots first and draws his target after the bullets land. The country that is most guilty of this, ironically, is Germany. With enough money, legal tradition and resources, as well as the absence of any threat of continued power of communists, Germany really should have the luxury of being able to carry out appropriate prosecutions.

A couple of the more egregious problems include the trial of Markus Wolf, who headed East Germany's foreign espionage operation, the equivalent of the CIA. When the Berlin Wall fell, a former CIA chief named George Bush was president of the United States. Wolf was put on trial for running agents in West

Germany and charged with treason. Treason is usually interpreted as the betrayal of your country, not the failure to anticipate which will be your country so you can avoid betraying it. Many in Germany found this legal charge completely mystifying but Wolf was convicted and sentenced to six years for treason.

Another strange case was that of Mielke who was convicted and sentenced to six years in jail, not for any crime relating to the Stasi, but for his participation in the murders of two policemen carried out in 1931, more than two dictatorships earlier! There is evidence indicating that the Nazi police may have used torture to gather evidence in this case but Mielke was convicted anyway.

One of the trials I find most appropriate in Germany is that in which the defendant, East German dictator Erich Honecker, was not found guilty. He was released for health reasons and is now living in Chile. His indictment was for his participation in issuing orders to the border guards to use force without consideration in order to prevent people from fleeing over the Berlin Wall and the inter-German border. Because Honecker was not convicted on that charge, the people who have been convicted of these shootings are the border guards themselves. This is the most interesting set of trials in Germany and also illustrates many of the problems.

Border guards have been indicted in dozens of cases for shooting to kill at the Berlin Wall and at the border. The judges' rulings have been so varied that a higher court is trying to synchronise some of these decisions. The first case was that of four border guards who killed the last man to die at the Berlin Wall. Two of the guards were acquitted and two convicted. The case is now on appeal. The guards' argument was that they were following orders. This is a familiar argument in Germany; in fact it is the Germans who now allow us to put quotation marks around the phrase "following orders".

Such guards *were* following their orders; there is no question about that. They had been chosen for the job because they were the most unquestioning and indoctrinated of East German citizens. They had also been subjected to a course of incredible

indoctrination before deployment as border guards. In the first such trial, one that I attended, the judge ruled that even such people should have known that this kind of act was illegal. He said, "You cannot turn off you conscience in the last quarter of the 20th century."

My opinion is that it would be wrong to have a situation in which these 20-year-olds were convicted while their superiors went free. But I also feel that it would have been wrong not to try them with their superiors. The reason is as follows: One of the problems in eastern Germany is the tendency to look at Honecker's face on television and point to him saying, "It was all him! Me, I'm a little guy. What could I have done? I had no choice in the matter." This is the attitude that totalitarianism needs in order to function. Putting the border guards on trial has encouraged many people to question this belief and explore the reasons for their compliance.

But these trials are problematic because to the German public they seem unfair. They have brought ridicule to the justice system and reinforced the public notion of victimisation. People feel that they, the small people, are getting stepped on again. This focus on victimisation does not encourage people to question their own complicity with the dictatorship.

It is interesting to examine the question of power that arises in bringing trials. Civilian governments in Latin America suffer from a lack of political resources to try violators of human rights. On the other hand, the problem in eastern Europe is that there are too many political resources to bring about these trials. Adam Michnik has eloquently warned us about the potential of prosecutions to be used in a political way and I think this is happening in some countries.

In certain eastern European countries the old communist leaders are still in power and are now using the justice system to prosecute many of their political enemies. For example, they bring suits against journalists who criticise them. In doing so, these leaders are in some cases repeating the crimes of the old communists; they are abusing the justice system.

There is a danger in situations entailing real transition – as in Poland, Hungary and Czechoslovakia – that trials can themselves become instruments of human rights abuse if they do not strictly adhere to the due process of law. The sad experience of eastern Europe and elsewhere has shown that even those who have fought injustice can themselves commit injustice when they come to power. Unlimited power is always a danger, even in the hands of former dissidents.

ARYEH NEIER: I regard the concern for the victim and the need to uphold the rule of law as two sides of the same coin. The victim does not have the direct authority to take the law into his own hands by seeking revenge against the person who has harmed him. When the norms of society are transgressed and a person is harmed, the society as a whole must take action. Society, which is dedicated to the protection of the individual, must uphold the rule of law.

In the case of serious crimes such as murder or torture, in non-political instances the victim can ordinarily be assured that the prosecution will act. The prosecution may decide not to act in certain other kinds of cases which are less serious, but when a crime is of enormous significance such as murder, prosecutorial discretion is not exercised. However, in political cases, prosecutions may not take place because of a utilitarian calculus – that it is for the greatest good of the greatest number of people that prosecution is foregone in a particular case. The argument is that we may need to defer to the continuing power held by certain officials within the society; that we need to achieve reconciliation in the whole society.

I would argue that this approach of utilitarian calculus is illegitimate and would opt instead for an accounting approach to such a question. It seems to me that the concern for the victim is in fact the concern to uphold the rule of law. This demands that we do not sacrifice the victim on behalf of larger concerns.

I am troubled by the argument that deterrents are a reason for prosecution. It has already been mentioned in this conference

that predictions can be fallible. Another point can be made by examining the record with respect to prosecutions in the context of a set of transitions from dictatorship to democracy that took place in our lifetime. Some interesting comparisons emerge. Two decades ago transitions took place almost simultaneously in three countries of southern Europe – Spain, Portugal and Greece. The issue of prosecutions was handled in a completely different way in each case.

In Spain, the transition was negotiated over an extended period of time and no effort was made to achieve accountability. There were no disqualifications, the people who had been prominent in the Franco regime continued to be prominent in the democratic government that followed and there were no prosecutions. In Portugal there was a revolution which produced quite a different situation. It was somewhat chaotic and the main form of accountability was disqualification. A significant number of officials associated with the dictatorship were purged from office. However, prosecutions were not the means of accountability in Portugal. Greece, on the other hand, illustrates a case where systematic prosecutions took place. I would differ with Juan Mendez in his reference to the Argentine example as perhaps the most successful example of prosecutions. In my view the most successful example was Greece, which in 1974 had a transition for almost identical reasons as Argentina.

The Greek military launched its own adventure; whereas the Argentinians went into the Falklands, the Greeks went into Cyprus. Unlike the Argentinians the Greeks were humiliated; they were defeated militarily. Turkey entered Cyprus and the humiliating military defeat forced the collapse of the Greek military junta. That opened the way for prosecutions in the Greek context. Several score military officers were prosecuted for crimes such as murder and torture. Two former presidents of Greece were among those prosecuted and convicted. Georgios Papadopoulos was sentenced to death, not for human rights violations but for treason in launching the coup in the first instance. However, he also received a 25-year sentence for the deaths of demonstrating students at Athens Polytechnic University who were massacred by the police. Ioannidis was sentenced to life imprisonment for human rights violations and many other people were sentenced to more than 20 years in prison.

The trials were fair and proceeded with a variation on what had been practised in Greece. As in Latin American countries, Greece had no history of plea bargaining, but it was introduced into these trials which saw junior officers testifying against their superiors and helping to convict them. To my knowledge, some officers of the Greek colonels' regime are still in prison today, 20 years later, as a consequence of the trials that took place in Greece at that time.

With these very different examples of Spain, Portugal and Greece, what can one conclude about deterrents? Can we say there have been more or fewer violations of human rights in any one of these countries? It would seem not, which is why I believe that one cannot engage in trials on the basis of predicting a particular outcome. Jose Zalaquett believes that the path followed in Chile was less likely to lead to future abuse than a scenario in which the Chilean government would have sought to overturn the amnesty and attempted to prosecute. He may be right; he knows Chile better than I do and his prediction may well be more accurate in this case. I thus have no basis for arguing with him on a question of that sort. But I can argue with him on the basis of concern for the victims and the rule of law. As I have explained, I believe these to be the same concern because upholding the rule of law means that society as a whole will protect the victims.

Who should be prosecuted? My answer is those with the highest level of responsibility for the most outrageous crimes. The successful prosecutions are those which focus on the top officials. When German border guards are convicted while Erich Honecker is allowed to go free, an appearance of unfairness is created. It is more important to prosecute the Honeckers than the border guards, but I would not let the guards go unchallenged either.

The fact that Honecker went free actually raises a significant problem with respect to the border guards. In Nuremberg, those tried first were the top Nazi war criminals; in Tokyo those tried first were the top Japanese war criminals. Those tribunals established legitimacy. In Greece too those who were tried were the top officials of the military; the lower-level officers were let off in order that they testify against the higher-level officials. In

Argentina it was at the point when the generals were tried that the process had the greatest degree of legitimacy.

I differ with Mendez in his statement that one must demonstrate that the commander directly gave the orders or was in control in a very direct fashion. That contradicts Nuremberg and the Geneva Conventions. Protocol 1 of the Geneva Conventions, in dealing with war crimes, provides that a commander who has knowledge of grave breaches committed under his authority and does not take all feasible measures to prevent and suppress war crimes is himself guilty of war crimes. In a military context at least, I would argue, that accords with the concept of command responsibility, and that was also the principle followed at Nuremberg in the conviction of the top Nazi war criminals. Commanders must be under an obligation to prevent and suppress those crimes they know about. The main burden of proof is then to show that the crimes took place, that the top people knew about them and did not exercise their power to prevent and suppress the commission of those crimes.

I disagree strongly on another point with Mendez and Zalaquett who referred to democratic decision-making and democratic consensus. The victims of abuse are often minorities. In South Africa it is the majority that has been victimised. But take the case described by Dimitrina Petrova: When will there be a democratic consensus to rally to the defence of the gypsies? These are people who are despised by the rest of the population and are victims of abuse. Yet the rule of law means that those people must be protected as must those who commit grave crimes against them. Thus we cannot wait for a democratic consensus; the idea of the rule of law is that it does not depend on majority decision-making. The rule of law itself must determine our actions.

JOSE ZALAQUETT: I have been arguing for six years with Aryeh Neier on this last point. At issue are two distinctive philosophical views that stem from whether one subscribes to a preventive theory of criminal law or a retributionist theory. It is a testimony to the courage of Neier's ideas that although in recent decades the retributionists have been in the decided minority he has maintained his position. Democratic consensus does not mean that one community can impose something that is illegal on

another community. What I intended to put across was that according to the rule of law the victims cannot hold a veto power or decide on the general rules of society.

I would like to make some points on punishment in general, not only on prosecutions but different forms of punishment. We have been discussing truth and punishment, or truth and clemency, as possible tools. I have argued at this conference that truth is almost always an absolute value, particularly the overall truth when something is denied or concealed in society. Justice in the sense of criminal justice may be an option with certain limitations, or clemency may be an option, depending on the circumstances. The truth must be known because society cannot decide blindly one way or another. If you are going to prevent something, you must know what it is that you want to prevent. If you are going to repair, what is it that you are going to repair? Secondly, the process must be democratic in the sense that society must decide, not the perpetrators. The decision-making must be democratic; self-amnesties are not legitimate.

Thirdly, as regards crimes against humanity, we have a duty to prosecute these – but within parameters. The exact route followed is at the discretion, and according to the wisdom, of every nation. In virtually all instances punishment must be attempted for grievous crimes. What is at issue here is political limitations. History indicates that complete victors generally hand out a tremendous amount of punishment, but not necessarily justice. The results of Nuremberg are not disputed much, but this is certainly not true of the lynching in many European countries of collaborators as well as the Sandinistas' popular trials with thousands of Samozistas. Some of them might have been criminals, some not. There are also the cases of Cuban death squads against Baptista as well as Pinochet meting out justice on the Allendistas. In a situation of total victory, there is a paradox: You have all the power necessary to do justice yet you have a situation most prone to injustice.

The second type of situation is the one to which Neier referred – Greece and Argentina. In both cases one could go for the leadership, especially in Greece where there was a division within the military. There was also the European context with the Council of Europe and attendant political pressure. While they could have

gone further in both cases, the presence of the democratic forces did not produce total victory. The military was still a presence, albeit demoralised. In those circumstances one could go for a decision to prosecute the leadership.

The third type of case involves a situation in which there is a strong and cohesive military, and it is desirable to pursue prosecutions in most of the worst crimes. The difficulty here is that of whether prosecution is feasible or not.

With regard to punishment, I would like to quote from a chapter I wrote on responsibility in the Chilean report: "There are two types of responsibility – one that may be called 'legal' and that is always, with one exception, individual; and another type of responsibility that may be called 'political', 'moral' or 'historical'." That is a more rhetorical one but it is an important spiritual one. You may say, the Catholic Church failed against Galileo, or, the British government of Chamberlain did not stop Hitler at Munich. These statements reflect an historical, moral or political responsibility.

There are four legal responsibilities. Criminal responsibility means you are culpable for an act that is typically described in the law and sanctioned with a penalty after a fair trial. This is an individual responsibility, except for some technical exceptions. Secondly, there is civil responsibility to compensate either for crime or damages. Administrative responsibility is a third category: If you fail in your duties as a civil servant the sanction may be anything from a reprimand to being fired from the civil service. Finally there is political impeachment: You committed a mistake of such gravity that congress or another relevant body relieves you of your political position. Political responsibility is exerted in a different and more poetical way by the electorate when it decides not to return a candidate to office.

Every measure of punishment must be procedural if it is to be a legal responsibility, which is why I always oppose disqualification. Simply to disqualify sectors of people is not proper; a measure against someone must be an administrative, criminal or some other procedure. If not, the message is that you are not observant of the rule of law. It is better to be restricted than to undermine the rule of law and its basic legal concepts.

However, there is something I would like to quote in relation to those who have been culprits. In a paper distributed at this conference, Albie Sachs writes: "Why was it so difficult to be courageous? Why did I want to co-operate so much with the guards? Why was it so hard to resist?" These are the words of someone looked upon as a hero. Yet he is talking about the feebleness and the weaknesses of human nature.

Perhaps people attending this conference, though they may not be heroes, belong to a minority that tries to act in cases of injustice. On the other extreme there is a minority that commits injustices. But in the middle is the vast majority, the Salieris or mediocre people of this world. This is human nature and I am therefore bothered by any imperialism by those fortunate enough to be righteous about the rest. The law can only demand from the common citizen to be a law-abider, not to be a hero.

According to Nuremberg, the superior order is no excuse provided that a moral option was available. That is the law, and it means the following: When a soldier is ordered to shoot someone or live off a diet of bread and water for 60 days, he should disobey the order. But if he is ordered to shoot or else be shot and obeys the order he is excused because there is no other option available to him. The law considers human beings with all their weaknesses. The fact that some people are capable of better does not justify passing rules that would disqualify anyone who could not find an astute way of opposing an order.

On the question of who should be prosecuted, my answer would be those responsible for the worst crimes if possible and, if not, I agree fully with Mendez that we should not add to the impunity. We should accept or tolerate the inherited restrictions, but not add the legitimacy of a democratic president's signature to existing restrictions. I agree with Mendez that President Aylwin did that – he refused to add any further restrictions.

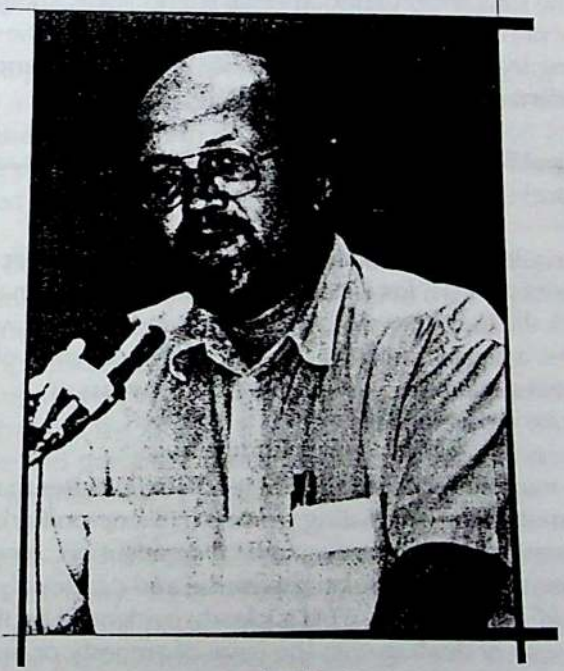
Whether some crimes must always be prosecuted or not is a complex legal question that has not been settled fully. Mendez advances a very plausible solution to this problem. Certainly the answer is clear when it comes to a grave breach of the Geneva Conventions such as genocide. But Protocol 2 in Article 6 states

that when hostilities cease, the party in charge should attempt to give as broad an amnesty as possible, or both parties should reciprocally give as broad an amnesty as possible. This applies to El Salvador because when you have peace after a truce and no one has been defeated, the law and the Geneva Conventions accept that the two sides are unlikely to prosecute each other. That means a broad amnesty is required, but this does not cover grave breaches which should be pursued. The possibility of an amnesty is envisaged in war legislation because it is part of the political reality. The topic is one that deserves much more legal study because it is so complex. Clearly, we have a duty always to prosecute certain crimes.

In some cases there are political reasons for making exceptions, or legal constraints exist. When then can we make exceptions as regards prosecutions within a certain category of crime? There is a distinction between exemplary prosecutions and scapegoats which needs to be developed further. Ideally one should use a pyramid of gravity and identify the worst crimes and culprits for prosecution. The reality is not so clear cut, unfortunately. Sometimes one can pin down some of the culprits but they may be in the lower ranks. It is difficult to distinguish a situation in which impunity does not prevail completely from one in which scapegoats are found. By scapegoats I mean that you prosecute whoever it is easy or politically safe to prosecute although the cases may not be of the gravity that you would have chosen. I believe one should avoid scapegoatism, but exemplary prosecutions are, indeed, possible and necessary, even if they cannot be consistent across the board because of political restrictions or legal impediments. ■

CHAPTER SEVEN

AMNESTY & TRANSITION IN SOUTH AFRICA



Lourens du Plessis

LEGAL ANALYSIS

'It is highly unlikely that the existing indemnity acts will survive constitutional review.'

LOURENS DU PLESSIS: South Africa's transitional constitution, which will come into effect on 27 April 1994, impacts on the issue of amnesty and/or indemnity for acts associated with political objectives in two ways. The issue is referred to in explicit terms and with legal authority in a rather extraordinary postscript. In addition, the third chapter of the constitution, which is the Chapter on Fundamental Rights, fixes standards for the review of both existing and future legislation on the issue. The existing legislation is the Indemnity Act of 1990 and the Further Indemnity Act of 1992.

I will deal first with the explicit reference to the issue in the constitution.

The transitional constitution is innovative in a number of respects. Section 4 (1), for instance, proclaims its supremacy and provides for the invalidity of any law or act inconsistent with it. This denotes a clear break with the past. A dispensation of constitutional supremacy is substituted for 83 years of parliamentary sovereignty.

But the transitional constitution itself also illustrates that – and why – the multiparty negotiating process in Kempton Park was not the appropriate forum to produce a final constitution. A negotiated transition requires substantial compromise and can hardly be a "clean break" with the past. This is clearly evidenced by the non-conclusive way of dealing with the issue of amnesty or indemnity for acts associated with political objectives.

The negotiating parties were engaged constructively in this crucial controversy only during the final stages of the negotiating process. It came up as an issue in bilateral talks between mainly the South African government/National Party and the ANC alliance. All the parties agreed, albeit for different reasons, that the issue had to be addressed in the constitution. But they could not initially agree on the nature, content and status of possible provisions to this effect.

When they eventually agreed on what had to be written into the constitution, they were compelled by time constraints to bypass the technical committee responsible for drafting the text and to include the formula they had agreed on as a postscript without couching it in technical language. The central theme of the postscript appears to be this: *For the sake of reconciliation we must forgive, but for the sake of reconstruction we dare not forget.*

The postscript is equal in status to other provisions of the constitution and is therefore also supreme law. But can it be invoked as a standard of review to test existing indemnity legislation or does it solely fix standards for the future?

The multiparty negotiators did not deal with the issue of amnesty in a comprehensive and conclusive way, but they expressed their intention to do so by way of legislation after 27 April in the postscript. From this perspective the postscript was not intended as a standard for testing existing legislation.

On the other hand, should the inaction of future legislators delay the enactment of the law envisaged in the postscript, it is hardly conceivable that the negotiators responsible for drafting the postscript contemplated the continuation of laws contradicting its very aims and objectives. Thus understood, the postscript backed by Section 4 (1) of the constitution is an appropriate and purposeful standard against which existing legislation on indemnity can be tested.

The existing legislation can be explained as follows. Section 2.1 of the Indemnity Act of 1990 vests the State President with apparently gratuitous powers to grant "indemnity to any person or category of persons in respect of any event or category of events". Section 2.2 precludes the institution of both criminal

and civil proceedings against any person to whom indemnity has thus been granted. Section 1 of the same act provides for the granting of temporary immunity.

This act, promulgated in the wake of the Groote Schuur Minute, envisages (without explicitly saying so) indemnity or immunity for mainly "the liberators" who committed offences in the course of the struggle against apartheid. But its extensive wording makes it applicable to the indemnification of state officials as well.

The South African government and the ANC reached agreement on a broad definition of "political offences" and published guidelines in the *Government Gazette*. The guidelines, which do not have the force of law, take into account the intention and objectives of the perpetrator as well as the circumstances, nature and effects of the offence in determining whether an act constitutes a political offence. In other words, both subjective and objective factors are looked at. The procedure established under the Indemnity Act has worked reasonably well, but difficulties and differences of opinion between the main role players involved have also occurred from time to time.

Late in 1992 the government, expressing the view that the Indemnity Act does not make sufficient provision for the indemnification of all those who "advised, directed, commanded, ordered or performed acts with a political object which resulted in criminal charges", enacted the Further Indemnity Act.

The contents of the latter act, as well as the manner and circumstances in which it was passed, demonstrate the government's keenness at the time to indemnify state officials who perpetrated atrocities against adversaries of apartheid. The government acted unilaterally and did not consult any of its major negotiating partners. This was in marked contrast to the culture of negotiation and consultation which characterised the adoption and implementation of the 1990 Indemnity Act.

When one of the houses of the tricameral parliament refused to assent to the Further Indemnity Bill, F W de Klerk, for the first and

only time during his term of office as State President, used his powers to refer the bill to the President's Council in order to secure its adoption. There was thus a keenness, almost an anxiety, to get this act on the statute books.

In terms of the Further Indemnity Act, it is the State President who finally decides on indemnity for the perpetrators of acts "with a political object advised, directed, commanded, ordered or performed ... before 12:00 on 8 October 1990".

Indemnity thus granted has the effect of preventing or suspending both civil and criminal proceedings. The State President can also release prisoners convicted and sentenced for committing offences with a political object if he is of the opinion that "such release may promote reconciliation and peaceful solutions". The offence in question had to be committed before 8 October 1990.

Note that political motivation is the sole criterion for establishing someone's entitlement to indemnity or release. This purely subjective approach represents a break not only with the guidelines laid down to implement the 1990 Indemnity Act, but also with the trend in other jurisdictions. The promulgation of the 1992 act, for instance, resulted in the release of ANC member Robert McBride and "Wit Wolf" Barend Strydom, both of whom did not qualify for indemnity in terms of the 1990 guidelines.

The State President exercises most of his key functions provided for in the Further Indemnity Act *after consultation* with a National Council on Indemnity, the composition of which is entirely at his discretion. The State President is thus under no obligation to follow the advice of this council. The council hears and considers applications for indemnity and release and then advises the State President. Applications are heard in camera and those involved in the proceedings are sworn to secrecy in order "to encourage prospective applicants to submit their applications with confidence". A court of law may also refer any criminal or civil case to the council for its consideration and finding.

The Further Indemnity Act clearly facilitates self-amnesty. One of its side-effects has also been to benefit offenders who, in

terms of the 1990 guidelines, could not qualify for indemnity or release.

Next I will look at the existing legislation in the light of the Chapter on Fundamental Rights and of the postscript to the constitution.

With the commencement of South Africa's transitional constitution on 27 April 1994, both the Indemnity Act and the Further Indemnity Act will become susceptible to constitutional review and, in particular, to scrutiny in terms of the Chapter on Fundamental Rights.

A recent judgment of the Supreme Court of Ciskei (*Buzelwa Eunice Matinkinca and Petrus Vantyu v The Council of State of the Government of the Republic of Ciskei and The Chairman of the Council of State*, Case No 442/93) provides a good example of how sweeping indemnity provisions can be tested against standards laid down in a Bill of Rights.

In this case the court had to consider the constitutionality of a Special Indemnity Decree of 1993, adopted in the wake of the notorious Bisho shootings, which granted "unconditional indemnity to all persons from criminal prosecution in respect of any offence committed or alleged to have been committed by them at or near Bisho on 7 September 1992". The court's main findings as to whether indemnity of this nature impinges on fundamental rights were the following:

- Blanket indemnity violates the majority of citizens' right to equality before the law and equal protection of the law because certain citizens are not called to account for criminal misdemeanor. (This right is also protected in Section 8 (1) of South Africa's transitional constitution.) Judge Heath, who handed down the court's judgment, suggests this is the case even if equality is understood not merely as an equilibrium in a formal sense, but also as substantive equality accounting for differences among people and the dissimilarity of their situations and circumstances.
- Unqualified indemnity interferes with citizens' rights to life and to freedom and security of the person, including the right to be free from torture or cruel, inhuman or degrading treatment or punishment. These rights are also entrenched in

South Africa's transitional constitution in Chapter 3, Sections 9 and 11 respectively. The rights themselves are violated, so the court argues, if a state indiscriminately exculpates the perpetrators of their violation.

- Indiscriminate indemnity invades victims' right to have their judicial disputes settled by a court of law. This right is also entrenched in Section 22 of South Africa's transitional constitution. This right is invaded even if indemnity does not preclude victims' recourse to civil remedies: An aggrieved citizen can *as of right* insist that where applicable, criminal proceedings be instituted against those who have wronged him or her. The Ciskeian Special Indemnity Decree, unlike South Africa's indemnity legislation, does not preclude recourse to civil remedies.

Chapter 3 of South Africa's transitional constitution contains two provisions designed to help ensure transparent and accountable administration. Section 23 entrenches a right of access to information held by the state and Section 24 entrenches the citizen's right to administrative justice. Similar provisions are not in the Ciskeian Bill of Rights. Indemnity proceedings under the Further Indemnity Act are veiled in secrecy. This in itself constitutes an encroachment on the right to access to state-held information by those who need such information in order to exercise or protect their rights. This method of secrecy is also inconsistent with the right to written reasons for administrative action entrenched in Section 24 (c) of our constitution.

It has been held by a court before, the Transvaal Provincial Division, that under the 1990 Indemnity Act someone whose application for indemnity is being considered is not entitled to the advantages of natural justice or procedural fairness. If the court's finding on this is correct, then the act clearly interferes with the citizen's right to procedurally fair administrative action which is entrenched in Section 24 (b) of our constitution. So on the face of it our existing legislation is in conflict with what is entrenched in the Bill of Rights.

A finding that indemnity legislation infringes fundamental rights entrenched in the constitution does not conclude the process of constitutional review. The court is also called

upon to consider whether the said infringements do not constitute the permissible limitations to the right in question. In the Ciskeian case referred above, the court concluded that the infringements resulting from the Special Indemnity Decree were not permissible limitations: The Bill of Rights permits limitations by a decree with general application only, while the Indemnity Decree was promulgated to cater for one particular event.

South Africa's transitional constitution also provides for the limitation of rights "by law of general application", but both indemnity acts seem to be of sufficient generality to pass this test. However, both acts vest the State President with such an unfettered discretion to grant indemnity that if the exercise of his discretion has the effect of limiting entrenched rights, it could be argued that the limitation is actually effected not by law of general application but by the discretion of the State President, and that it is therefore not permissible.

Permissible limitations of the rights entrenched in Chapter 3 are required to be reasonable, "justifiable in an open and democratic society based on freedom and equality", and not to negate the essential content of the right in question. Should the court thus find that existing indemnity legislation constitutes law of sufficiently general application for the purpose of limiting rights, the limitation it effects will still have to pass these latter tests.

I expressed the view previously that the postscript to the constitution is an appropriate and purposeful standard against which existing legislation on indemnity can be tested. A court, for instance, has resort to the postscript in order to determine which values prevail in respect of indemnity for acts associated with political objectives in an open, democratic, reconciled and reconstructed "new" South Africa based on the principles of freedom and equality. Should the postscript be allowed thus to infuse the arsenal of values enshrined in the limitation clause, the limitations effected by the existing indemnity acts will in all probability fail the permissibility test.

In sum then, it is highly unlikely that the existing indemnity acts will survive constitutional review.

I conclude with reference to a few strategic considerations which will have to be taken into account if the laws are going to be struck down.

If the constitutional court is going to strike down the existing indemnity acts, statutory provision for amnesty and/or indemnity will fall away. The order of the constitutional court will, as a rule, have effect only from the moment it is made and will therefore not undo indemnity already granted under the discredited legislation. The court, however, has a discretion to order otherwise should "the interests of justice and good government so require".

The constitutional court could well conclude that, given the proven disadvantages of self-amnesty, the interests of justice and good government require it to undo indemnity granted under especially the 1992 act. To uphold the self-amnesty of an illegitimate regime, so it can be argued, will undermine citizens' respect for the law and could perpetuate a culture of abuse and intolerance.

It would be wiser for the incoming government of national unity, especially the legislature, to deal with the issue of amnesty and/or indemnity before the matter is taken to court and to do so in a spirit of the broadly phrased value statements embodied in the postscript to the constitution. The objectives thus spelt out certainly allow for legislation calling into existence a "commission of truth and reconciliation". The commission will have to be put in a position where it can facilitate striking a balance between the revelation of the truth and the shielding of the perpetrators of abuse from the vengeance which in a moral sense they actually deserve.

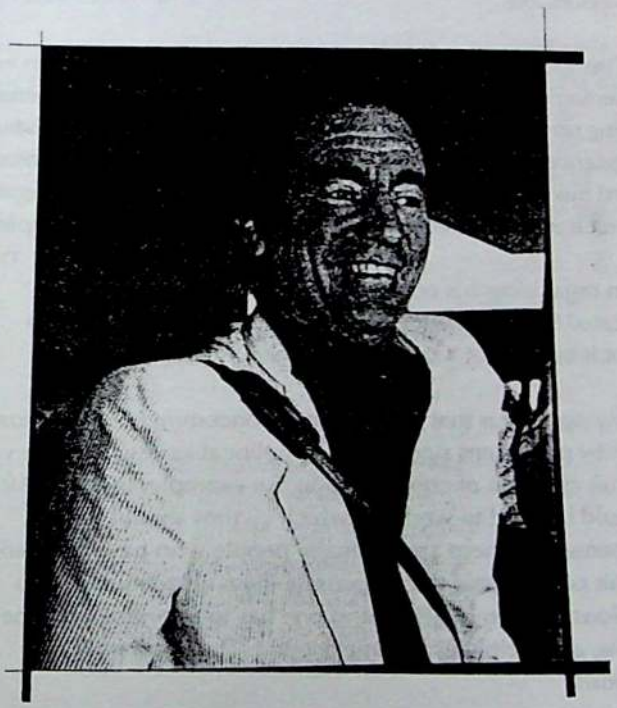
It is true that there will be perpetrators of atrocities on "both sides" who will go unpunished. This is perhaps an outcome of the logic of history, on which Max Horkheimer once remarked: "As long as world history follows its logical course, it fails to fulfil its human destiny."

But there is also a less cynical way of looking at the matter. Both the experiences of confessing guilt and of forgiving those responsible for untold suffering are liberating precisely because

they are eminently humane. Lawyers therefore have to acknowledge that whatever they can offer in terms of dealing with the past will at best facilitate to but a modest extent the vital interaction between confession and forgiveness – an enigmatic process which ultimately escapes explanation and regulation by way of legal formulas. Appropriate legislation can, however, help prevent legalised amnesty from becoming institutionalised amnesia. ■

CHAPTER EIGHT

SOUTH AFRICAN RESPONSE



Albie Sachs

JUDGE RICHARD GOLDSTONE (MODERATOR): This conference has been an intellectually stimulating but emotionally draining experience for the South Africans attending. To look at the problems of justice in transition simply from a moral point of view is difficult in itself. To do so from a jurisprudential or a theological perspective would be similarly difficult. Add to that the political dimension and the task of finding a solution that will satisfy most of those who need to be satisfied seems almost insurmountable.

The attendance here of South Africans who are all but consumed with the present constitutional and political events leading up to the April election is a proper indication of the importance with which South Africans do regard and need to regard this topic. If a new government shies away from the subject it will do so at its own peril and that of all our people.

In organising this conference at this time, Idasa has indicated the importance it attaches to the issue. I have no doubt it comes not a moment too soon.

My opinion is that the decisions concerning the past must be taken by politicians since they are political issues. Take the very difficult question of compensation, for example. In South Africa it would be hard to work out which victims should be compensated. There are too many people who have suffered as a result of apartheid to compensate them all adequately. So decisions have to be taken and one has to prioritise even the victims, as horrible as that may sound. Those are political decisions.

I do not believe a truth commission should take political decisions. If that is the intention, it is doomed to lack credibility from the start. I do not believe that any court, be it a truth commission, court of law, any judicial or quasi-judicial proceedings, can define its own terms of reference. These have to be determined by the politicians, who may find it easy, perhaps tempting, not to take difficult and unpopular decisions. However, these are decisions that have to be taken even before a truth commission or any other process can get under way.

The reaction from the South Africans at this conference is the main purpose of the exercise. We have been privileged and fortunate in having foreign experts here, and Idasa and its supporters have done a magnificent job on our behalf in bringing to South Africa a really extraordinary collection of people who have every right and competence to address this subject.

FIVE VIEWS

'I am ready to forgive, but I need to know whom to forgive and for what.'

MARY BURTON: My response to this conference has been three-fold. Firstly, I feel alarmed at the magnitude of the task ahead and the depth of understanding required. I knew before this conference about some of the Latin American experience, but I have been shaken by the detailed and personalised accounts of the different experiences of dealing, for example, with state security files in eastern Europe. Dimitrina Petrova from Bulgaria gave us some feeling of the conflicting demands placed on would-be reformers, the inability to attend simultaneously to all the issues at hand and the complexity, for example, of the issue of disqualification or lustration.

I was mesmerised by the visible evidence in a panel discussion of the long-running and sophisticated debate between Jose Zalaquett and Aryeh Neier. We, meanwhile, are grappling to cope with the beginning of some of the processes concerning when to prosecute, whom, for what reason and what offences. The complexity is frightening.

But that leads to my second response, an enormous thankfulness for the richness of that international experience, of that history of the search for truth and justice, and of our universal commitment. This was uplifting and it reminded me of a thread looping around the world, putting in stitches here and there, building the fabric of this quest for justice.

To me both of these responses echoed a conference convened by Human Rights Watch in December 1988 to celebrate the 40th

anniversary of the signing of the Universal Declaration of Human Rights. Neier was responsible for organising a symposium addressing precisely this subject. The things said then have been for me an undercurrent to the years that followed.

At that symposium there was a Cuban poet who advocated unconditional and total forgiveness. He said there was no point in digging up the past, no matter what one had been through. It was best to wipe the slate clean and start afresh. On the other hand, there was a priest who spoke about his experiences in Uruguay and about the need for healing. He told of a woman he had counselled after the disappearance of her child. She had said to him: "Father, I am ready to forgive, but I need to know whom to forgive and for what." The priest, who had been tortured himself, also concluded that the power of the victim to forgive was what rendered him or her more powerful than the torturer. These are transcendent points that we in South Africa have to work towards.

My third response is addressed mainly to the foreign visitors, some of whom know us well and our experiences. I have wanted to call out during the conference: "Yes, but you don't quite know what it's like for us. You don't understand the complexity of the things in which we are involved."

I felt that some of our voices had been missing in this discourse. There is the story of the Afrikaner people, their experience in concentration camps and the effect of this on subsequent generations.

There is the story of the more recent years, of trying to build a new and non-racial society. The funeral of the assassinated Cradock activists in 1985 became for many a touchstone of what the new South Africa might be and of the things that still needed to be done. The funeral was held at the dusty stadium of Lingelihle township and thousands of people had come from all over the country. A small number of white mourners were made welcome and their presence celebrated. Police watched from hillsides while in the white town residents were fearful behind barred and shuttered windows, self-excluded from the process of coming together, growing together and learning to know one another. Those are the sort of barriers we need to overcome, by telling such stories.

The struggle we have already embarked on in opposing our own indemnity acts is another of the stories. We need to talk about what the Indemnity Act of 1990 does and does not achieve. We know the Further Indemnity Act is not the way and we need to find appropriate mechanisms and resources.

Tina Rosenberg mentioned "dragons on the patio", but in our case the dragons will be right inside the living room with other wild creatures. The obstacles we will face are many. There are deep divisions, mistrust and misunderstandings.

We need to remind ourselves of Zalaquett's injunction to know and understand the adversary. But we also have to note the effect of the negotiating process on the negotiators, the ability of people to change and learn to understand one another. We need to spread that process more deeply throughout our society.

Another obstacle is the desire of the perpetrators of violence to gloss over the past. We keep hearing from government representatives about forgiving and forgetting, about wiping the slate clean. The trouble is that we have not even written on the slate yet.

Another difficulty is the compulsion in this pre-election period for the competing parties to put forward candidates for politically expedient reasons, despite the fact that their hands are not clean. After the election there will be constraints upon a new government of national unity.

There will also be pressure from many quarters, including victims, to deal quickly with the past, or to ignore it in order to respond to economic needs. We all hope for development, growth and an opportunity to address economic disadvantages. But there is a sense in which people are waiting to grasp the fruits of the new society and, possibly to their own detriment, say, "Let's put the past behind us quickly and seize the new opportunities." I think we need to deal with that too.

Faced with all these problems, I am reminded by Lawrence Weschler to "hone the blade", the instruments for dealing with the past. We need to have a commission of truth that can establish the facts and we need to give it teeth. It

must gather in the stories to reach that truth which is, in a way, already widely known and accepted. But we need to make it legitimate through that process. We need to tell and record and validate that truth. We need to acknowledge the wrongs, not only in terms of injustice and hurt, but also the terrible loss.

There are so many people lost to our society whom we really need at this stage: Matthew Goniwe, David Webster, Steve Biko, Chris Hani, people whose loss is inestimable to the process we must go through. We need to say that we will do the best we can without them.

We need to acknowledge equal worth. Part of that is the constitutional process, the provision for equal rights, the vote, use of the land and enjoyment of the fruits of the common society. We need to build and strengthen the Bill of Rights and respect for the rule of law, and to build a culture of rights.

We need to dismantle the security apparatus and deal with whatever files may be left, possibly with gas masks, though I have grave doubts about disqualification or lustration without some other process. I do not think a commission report can lead to that. We need to prosecute the guilty. We need to stop the hit squads and assassinations that still continue. We need mechanisms to find those people and to bring them to court.

We need to seek international instruments, the United Nations conventions and also perhaps the African Charter. We need to build the charter's ability to strengthen not only our democratic society but also that of neighbouring countries.

We need to give attention to reparation and redress, specifically to the restoration of the land, but also to compensation and special opportunities.

We need to build a society and uphold the vision because what the government of national unity may not be able to do, organisations that have worked for a long time for human rights can continue to insist upon. We probably need that dual balance of what is possible by a government and what is desirable and for which we must continue to ask.

Finally, though we dwell on the difficulties and are right to do so, the immediate future is the election, the first step towards the process of making these changes. Although we recognise the difficulties, we are hugely excited and optimistic about the process of the election itself and its outcome.

DUMISA NTSEBEZA: Even victims face dilemmas when confronting the problem of dealing with justice in a time of transition. My experiences in these situations may be revealing. In some cases time is a great healer because it enables you to forget some of the worst things that have happened, not only to other people but to yourself as well.

I recently met a man who served in the security services in 1967. He is now a member of the Democratic Party and a respected member of the community. But the circumstances of our meeting in 1968 were quite different. I was about 19 years old then and his view of me was that I was a cheeky little – and he used the offensive word – kaffir. He did not desist from third degree methods in trying to get what he wanted.

I had always harboured the view that when we had a just society it would deal with him. But one day I was confronted with a situation in which I had to ask for his assistance. My brother was doing some research on the ANC Youth League in the East London area. This man was prominent in the security services there and was very knowledgeable on the subject.

When we met again, I felt very uncomfortable. I wondered whether he had forgotten who I was since, after all, he had met so many people. In fact he did remember me and I found that much of my anger was no longer there. I found myself in the strange position of shaking hands with him.

In the 1960s it was clear that the people we were dealing with were white security policemen representing a white establishment. But in 1977 we suffered at the hands of a so-called black government, which in the view of hard-core nationalists should have been better than a white government. After Transkeian independence I was arrested with others, convicted and spent considerable time in solitary confinement.

On the day of our jailing, the Commissioner of Prisons, who is now high up in Transkei's military government, took it upon himself to be present when we were taken from court and to make sure we were taken to the death cells where we were kept for two years. We knew about all the people on death row and heard all the jokes the police made about those destined to be hanged. It was traumatic just to be in that place.

During our imprisonment, this commissioner was himself detained by the Matanzima government for petty differences. He was an inmate of his own prison. About the time I was admitted as an attorney he was the first person to come into our offices for legal advice. He sued the government for wrongful arrest and was represented by a lawyer in the partnership. I must confess that up until this day I have refused to deal with that man. In our offices I was never able to deal with him. I believe many people who have suffered such bad treatment would react that way when confronting the perpetrator.

If this man could be considered to be a pawn of the system, Chief Kaiser Matanzima certainly could not. In 1985 my cousin was taken from his home by Transkeian security policemen and shot dead in cold blood in front of witnesses. My brother and I were arrested for making a public stand against this. As a result we were detained. Matanzima told one of our relatives that the aim had been to eliminate all of us. Though my cousin never had the chance to defend himself in court, Matanzima said publicly that he had been killed because he was responsible for a certain fire.

In later years Matanzima himself had political problems and at one stage his brother denounced him. Then one day I saw him in a junior advocate's chambers where he had come to seek legal opinion about the constitutionality of his removal from his party and the Transkei National Assembly. He was introducing himself to all and sundry and suddenly he was standing in front of me saying, "Look, I'm sorry. I didn't know who you were. This is the first time I have met you face to face."

I do not really know how one deals with a man who has been responsible for large-scale atrocities in the Transkei. Richard Goldstone suggests the issue is a political one, but I think the

problem is to deal with the ideological divide. The government has not hesitated to point to the abuses attributed to liberation movements. I think that will consistently be the government's response to liberation movements' attempts to grapple with this issue. The main point is that while we seem to have skeletons in our own cupboards that we are not dealing with effectively, the establishment will use this as an excuse not to deal with its own situation.

One must also remember that the government is not a vanquished enemy. It is in power and still has armed forces in place.

This conference must do more than grapple with the government's purpose in raising the issue of atrocities in the ANC camps in Angola. One also has to deal with the perceptions of a general public that remembers that although the ANC admitted to abuses in some camps and apologised, there have been recommendations that have never been implemented.

If missing people cannot be found there must be a way of dealing with that. People find it difficult to accept talk of amnesty when there has still been no acknowledgment of say, the way Steve Biko died. This will have to be dealt with, even if it means more inquiries. The healing process can never begin unless this is taken into account.

Other issues that need to be looked at include the future of the security forces. Will the ANC have their loyalty? What has happened to 32 Battalion and the Selous Scouts? Who is involved in some of the private security firms? Then there is the matter of how one deals with a group that is not a vanquished enemy. And finally, the judiciary: Is it representative?

ALBIE SACHS: I am going to use a phrase I have never used before, "our government". It doesn't come easily. Until now it has been "the regime", "the enemy", "the *boere*" – at very best, "the government". Now it is going to be "our government" and it is hard to accept. It will be our government not only in the sense that we will have elected it, but in that it will consist of our people, South Africans with our scars and hopes, our diversity.

So many of us are used to being in opposition and being the critics that we have secured something like a comfortable cocoon, mentally and emotionally. We have almost discharged ourselves of responsibility for what happens in this country because of "the government" or "their government".

Only we can take responsibility for our government and our country. This theme of being a country, of national unity, of truly becoming South Africans and of South-Africanising the country, is going to rest on our shoulders. To be effective we must face up to all the problems and acknowledge all the contradictions and deficiencies involved. Unless we do that we do not stand a chance.

To wallow in the impossibilities is to disclaim responsibility for what is the historic task of our generation. We cannot say to history: "Stop. We are going to deal with the question of amnesty and treating all the rascals and criminals of the old regime. When we have done that history starts up again."

It is in the course of an historical process that we deal with the process of cleaning and cleansing, and opening our society and ourselves and our memories and expectations. Against this background we deal with the process of destroying institutions and creating new ones, of establishing a regime of constitutionality, of repairing the terrible material injuries inflicted upon people in terms of how they live and are educated. In this context we deal also with the great humiliations most South Africans have been subjected to by colonialism, racism and domination. We do this together, simultaneously, in one major process.

What has come through to me so strongly in this marvellous conference, rich in ideas and international experience, lived and not just thought about, is that this new government of national unity must move swiftly towards building, reconciling, healing and reconstructing in one rapid forward sweep. The government must take responsibility for the whole process, and for what happened in the past.

This will not be done as individuals. Mandela will proclaim, speaking as the elected representative of the South African nation, that we assume responsibility historically for all the evil

and injustice of the past. We see it as our task to remedy the hurt and to ensure it never happens again. We have to do that collectively as a government of national unity. It is not just the task of the ANC, National Party, Democratic Party or Pan Africanist Congress. It is the task of our nation, and we as the nation must start speaking and thinking in those terms.

The government speaks first as a commitment to the South African people, but we must also speak to all our neighbours. The damage, terror, destruction and loss of life in the southern African region can be directly associated with the crimes in this country. The same kind of mindless violence that was exported to Mozambique and Angola is revisiting us in a terrible way.

We have to acknowledge that we, as a country and as South Africans, assume an historic responsibility for what happened. Many of us fought against it, all of us are going to give the guarantee that it will not happen again. Future relationships will be based on principles of dignity, equality and mutual respect.

It may seem impossible. There are "miracle miracles" and "hard work miracles". We are in an age in South Africa of hard work miracles for which you need faith and conviction. Cynicism is our biggest enemy because it says: "They are all the same. There is an inevitability of crime, violence and irresponsibility." But scepticism is our best friend. It says: "Trust nobody and have belief, have faith." So without cynicism but with scepticism, we assume this kind of major responsibility.

There will be an amnesty. We are constitutionally committed to an amnesty. One can lament and criticise it and argue about its terms. But the amnesty is balanced out with the concept of reconciliation and reconstruction. It is not a reconciliation to bury and forget the past, which means to continue with the past; it is to assume responsibility for the past and correct the imbalances and injustices.

That means the government then makes a moral pronouncement to our people and to our neighbours. This is followed by mechanisms for dealing with the reparation that is necessary, and this can only come with disclosure and exposure, truth and honesty.

I personally find the phrase "commission of truth" slightly discomfiting; perhaps it echoes the "Ministry of Truth". We can create a new terminology that is more acceptable, maybe "commission of truth and repair", then truth cannot be categorised or limited.

There is a vast amount of human reconstruction and reconciliation to be done that goes well beyond the old "us and them", the freedom fighters and the *boere*. I think of those in our own ranks – the askaris, the betrayers and counter-betrayers – terrified, threatening, still murderous. What will happen to them? What will happen in Natal? We can speak about reconciliation and reintegration where whole communities have been involved in bitter feuds and killings passed down for almost a generation now.

What happens to the collaborators working in the bantustans, many of them corrupt and wealthy. How do we relate to them as neighbours and as South Africans?

There has to be a comprehensive approach to all these questions. No one is left out of truth or of the broad South African reconciliation. We should not hope to make everybody who has been a killer, an assassin, into a wonderful new human being. As far as I am concerned it is enough to simply stop them from killing.

If, in the course of the current historical process, we have agreed to a broad amnesty, we cannot have a deal for the sake of sharing spoils of office. Our country can be torn apart. If those who have so many weapons and so much information at this stage align themselves with the forces threatening to destroy this country, we will all suffer. The poor and oppressed will be the biggest victims.

It is not a question of saying "emotion is on this side and thought is on that side". Reconciliation is about emotion and feelings – pride, dignity and a sense of right. We are not putting a brake on a certain emotion. If we want to save more people from being killed, if we want peace for reconstruction, we cannot say to those in the security forces: "Allow the elections to go ahead. As soon as they are over

we are going to lock you up." It just won't work. There will be more deaths and suffering.

What we can say to them is: "When we have the new constitution, if you side with those fighting democracy with arms and assassinations, you will forfeit any claim to amnesty."

To me that is moral. The non-moral stance is to step outside of the field, and say "there the villains go, simply doing each other favours". True morality forces you to look at these realities, to take responsibility for the historical process and to choose the option that will best serve the interests of the poor and oppressed, that will give us stability and enable us to manage the transition and to achieve reconstruction.

At the same time, we must find ways of truly honouring those who fought for democracy and suffered as a result. A commission can expose all crimes on all sides but it can do much more than that. It can find appropriate means of acknowledging and honouring those who suffered – families, survivors, neighbours and whole communities. Some of it has to be very personal and individual, not statistics. What we heard from Chile was very beautiful, a report with the name of every person – our family, our father, our daughter, someone known and recognised as an individual.

We will also need living memorials. One thinks of the reconstruction of District Six carried out in an open, transparent way involving those victimised. One thinks of Robben Island too. Every part of our country has areas where we can have living memorials of reconstruction.

The final aspect will be the true honouring of everybody. It will be street lights, education, the health system, the sense of dignity, participation and true equality. That will be the greatest healer. We must focus on the healing side and let the rascals be swept away by history to be lashed by their own consciences.

ANDRE DU TOIT: Listening to this conference with South African ears has been a rich but also confusing, even contradictory, experience. There has been an overload of

relevance. I have been struck by the need to address a range of issues and to do so urgently, as a matter of priority.

A commission of truth and reconciliation, or whatever name is chosen, should take place soon after the April 1994 election or we risk a situation in which nothing is done. I have also been struck by the obvious difficulties, the many complications and obstacles, even the impossibility of really taking on those issues. That leaves me with the sense that facing the issues of justice in transition and dealing with the past in the South African context is so huge, so complex and so varied that it is almost disempowering. One hardly knows where to begin.

Our main task is to disaggregate the problem and to prioritise. We should start by thinking about where to begin. We must identify clearly the core issues, the specific, manageable tasks. We must focus on those and for now leave aside other aspects that are also worthwhile but can come later. Unless we do that I fear we will not do anything. I had a strong sense that there was a slippery slope in our discussions, a temptation to slip from the essential minimal core. But even in beginning to start on these core issues, people begin to raise other issues which, though relevant, are not central. Then we find ourselves on the slippery slope to more Utopian ideas. There is a danger here because we cannot do everything at this stage of our history.

Our challenge is to demarcate the core issues to be confronted in the South African case and particularly those which are politically feasible. The Chilean case is a good comparative example: Its Commission of Truth and Reconciliation focused on the specific topic of disappearances. Against the political and historical background of Chile this was a core issue yet one that could be carefully delimited. This meant the commission could deal with the task in a limited period of time and with acceptable results.

South Africa is obviously different from Chile and we cannot simply duplicate what has been done elsewhere. The issue of disappearances is not so central here as it was in Chile. I would suggest that we need to focus on the so-called third force and its activities which have been denied. We must look at the complicity of state functionaries in death squads and deaths in detention.

We must meet the challenge from Jose Zalaquett who said that, firstly, one must be clear about the overall objective of what one is trying to do. Secondly, one must exercise political judgment, taking into account the available resources and constraints. The objective must be sustainable. Do not take on more than is possible, he said.

Bearing this in mind I come to a second general conclusion. In South Africa we must be realistic about the fact that we are dealing not with only a question of morality but also of politics. However, we must watch out for what I would call a loaded realism. The problem should not be posed in a question-begging way and I am afraid that many of the so-called realist arguments do so. This would mean, for example, speaking about the project of a commission of truth and reconciliation but pointing out all the political pre-conditions and costs involved, the need to secure stability and the potential threats to stability and to consolidation of the transition. The problems are thus built into the question so one is going to arrive at the conclusion that the project is not feasible because the costs are too great.

One should also look at the problem the other way round. You must also ask the question: What will happen if we do not have a commission? The costs and risks will be even greater if we do not take on the task. From a moral and political point of view the omissions are as important as the acts, and the consequences of omissions are as important as those of the acts.

Anyone who has ever tried to learn how to ride a bicycle knows that the secret of staying on top is to keep on moving. If one applies this mechanical metaphor to the context of a transition, the idea would be that if you worry too much about maintaining your stability, you freeze the transition and go backwards. We are in a transition that in some ways was made possible by the moral and political breakthrough of 2 February 1990. We must sustain it but not freeze it. Although there is a balance of forces one must maintain momentum by going on to new levels of the transition.

If we take this task seriously, perhaps as some form of truth commission, then it seems critical that this must be an official project of the state. The reasons for this have been laid out in other examples presented here. It is a question of available resources and of the moral way.

In the South African case it is immediately clear how difficult this will be because of the political pre-conditions that must exist for an official commission to be launched soon after the election by the new government of national unity.

It would mean that the major actors, Nelson Mandela and perhaps F W de Klerk, must adopt this project as their own as must the ANC and perhaps the National Party, or nothing will happen. Such a commission must be an official action owned by central actors. I agree that it cannot be imposed by the white liberal conscience of some fringe and marginalised political actors who sit on the sidelines wanting to intervene without any political base.

But what are the chances for such an official action? I am rather pessimistic about this and believe we have a problem that must be addressed as a matter of urgency. If the commission cannot be official, one must think about the alternatives. Can it be done some other way, by non-governmental organisations, by organs of civil society, along the lines of El Salvador? I believe we need to look specifically at the possibilities of an international and foreign tribunal.

Finally, I believe there is a real danger, not of nothing happening when the new government of national unity and reconciliation comes into power, but that only some things will happen. There is a danger that we will have indemnities and amnesties and much talk about reconciliation and reparation and so on but that this will largely be a spurious exercise. All we have said here can be given serious content, can be given teeth, or it can be trivialised and used in spurious ways. Lawrence Weschler commented that South Africa is a society steeped in false consciousness – and we certainly have a long track record of trivialising important political concepts. We must use words such as reconciliation, amnesty and amnesia in their serious senses or not at all.

WILMOT JAMES: Andre du Toit has spoken about making distinctions between what is desirable and what is possible. What is desirable is rooted in a larger democratic project that would want to insist that the best kind of citizenry and electorate, the best kind of population is informed, educated,

literate, knows about its own history and can digest its own history. It is thus important that the gathering of truth and information about the past proceeds on a variety of levels. The proposal to have a commission that gathers information about atrocities, the consequences of state violence and so on is part of a democratic process to do with education and information.

It has another function and that is to establish new values, to announce a sharp break between the past and the future. South Africa's forthcoming election means different things to different people. To me it marks a moral shift between a past and a future. It is desirable to introduce a range of values, procedures and mechanisms in a wide variety of areas of society that make the announcement of this break with the past a democratic one. The idea of having a commission of truth and of looking at questions of corrective justice is part of that.

My second point recognises the importance and difficulties of looking at the consequences of state violence. I do not dispute that this is a large and complicated area that deserves top priority. But at the same time I would not like to see other forms of dispossession and expropriation pushed off the agenda in South Africa.

At this conference people have mentioned the consequences of colonialism. When you refer to such consequences you are also speaking, among other things, about a pattern of land distribution that is the result of the use of state colonial power in order to dispossess people of access to land. I suppose one can speak about the appropriation mechanism of colonialism. It has created forms of inequality between people as a result of a history of dispossession and expropriation.

In my work I have looked at the consequences of the administration of the Group Areas Act on property loss in South Africa as a whole. What is important is not simply the one-off character of that process, i.e. properties seized and people losing something in the process. They lose money, dignity and community, but they also lose a series of opportunities in terms of wealth acquisition in the future. The accumulation of wealth is an inter-generational process so if

you take away someone's house you set back that process a couple of generations. There is something in that story around land and wealth that has generated a pattern of inequality between whites and blacks in particular. That would need looking at as well. I would hate to see it being pushed off the agenda.

There is a variety of ways in which it can stay on the agenda. It will be kept there, not by academics, but by demands from the population. How you deal with what could be an administrative nightmare I am not sure. One could consider setting up a trust or special fund to take care of low-income housing needs in South African cities. This could also be a symbolic acknowledgement of the harm caused by dispossession and expropriation under the Group Areas and Land acts.

My third point is to voice my concern that the idea of dealing with South Africa's past may not be feasible. What is feasible has to do with how different forces play out in the new state. It seems from discussions here that objectively the least propitious circumstances for looking at the past effectively involve a transition where the old order does not collapse, the old state institutions do not fall apart, the police and military are intact and the bureaucracy is its normal inefficient self but has not collapsed. With this scenario one gets a negotiated settlement and power sharing for a period of time.

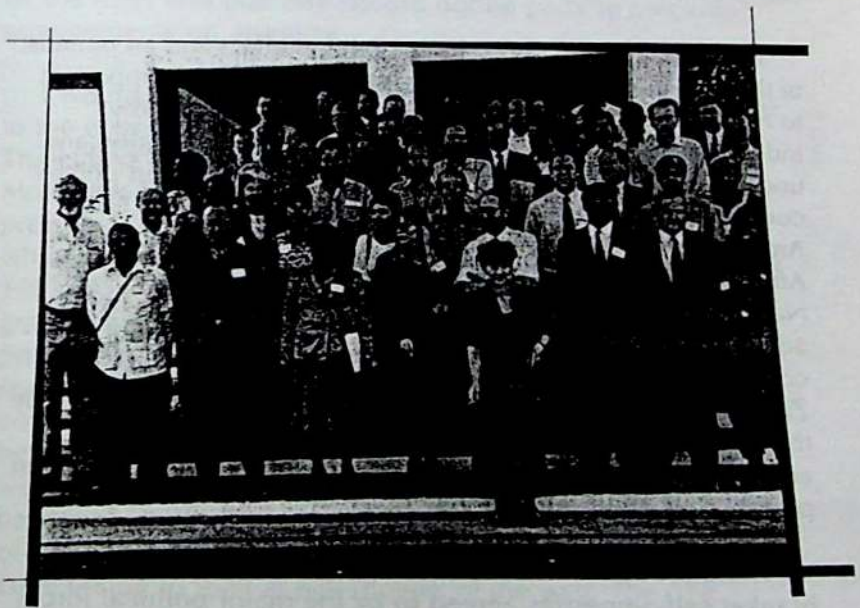
Some people have dwelt, I think correctly, on the point that a new government may not have the political will to look at the issues we have been discussing. It may be too divided on the subject and may have interests to protect that would not be served by opening up a can of worms. I do not know what the configuration of politics will look like after 27 April and thus I do not want to say it is impossible. But I do think there are good arguments for thinking it will be a major uphill struggle.

This is not an issue that will go away. It will be put on the agenda again and again by different sections of our population. That means we could be looking at a situation resembling Bulgaria. In other words, there is a real chance the issues will be trivialised, or not dealt with, or that somehow in the fray and confusion of our new political arrangements this particular

question will become another political football. If that is the case, then it will be the task of organisations within civil society to maintain the pressure to keep the issue on the agenda. ■

CHAPTER NINE

SOUTH AFRICAN AGENDA



Delegates at the conference on Justice in Transition

DISCUSSION ON PRIORITIES & OPTIONS

KADER ASMAL: It is important for overseas visitors at this conference, and for history, that the nature of the debate in South Africa be recognised. My explanation is in part a response to a comment by Andre du Toit, who expressed doubt as to whether a new government of national unity would deal decisively with past violations of human rights. He feels that South Africans tend to have a false consciousness about issues and to trivialise them. But visitors should not go away with the impression that the ineptitude of politicians here will result in further shoddy compromises when a new government is in place.

I am like Gramsci, a pessimist of the intellect and an optimist of the will. In the context of optimism of the will it is important to recognise that there are structures, institutions and key individuals who embrace the notion of true reconciliation and understanding of the past and that this has become part of their consciousness. These groups have taken the lessons of Latin America and Africa to heart. We will be the first country in Africa to enter a transition without a general amnesty law. In Namibia the administrator general exculpated all sides by administrative order. There are South Africans who are concerned about the legacy of that decision for Namibia. In Zimbabwe the British passed a law pardoning acts committed by those in favour of the Unilateral Declaration of Independence and by those opposed to it. Such granting of amnesties has taken place elsewhere in Africa too.

There are those in South Africa who understand that blanket self-amnesties agreed to by the major political forces are a hostage for the future. When the Further Indemnity Act was passed in 1992, the National Executive Committee of the

ANC said it would not be bound by this law. The ANC used the experience of Latin America to say that the truth must be known, that it must be complete, and that it must be officially proclaimed and publicly exposed. The organisation went on to say that this truth-telling could not be facilitated by a body appointed in 1992 and that only a democratic government undertaking policies representing the will of the people could do so. Further, the policy must not violate human rights enshrined in international law, thus no government was entitled to issue amnesties for egregious human rights violations. Reparations for victims and their families were also a requirement. This was a clear policy statement, openly adopted for the first time, as far as I am aware, by any resistance movement. It was also in this context that the ANC reported on our acts [of abuse committed in its camps in Angola]. As a report by Americas Watch has shown, it is unparalleled for a liberation movement to look at its own pathology in this way (without equating acts of the resistance with those of the oppressor). Clearly, there is a conviction in this country that elites cannot fix the rules and that one should not be party to precluded arrangements on amnesty.

I would like to explain the background to the final clause to the interim constitution discussed by Lourens du Plessis. The clause may not be legalistic in tone and Dikgang Moseneke may not like it, but it was necessary because of pressures in the practical world of negotiations, pressures to which some in Latin America have succumbed. From August 1993, government demands for a general amnesty were so great that failure on the part of the ANC to shift may have prevented adoption of the constitution by November. For this reason ANC negotiators offered a clause in the constitution concerning reconciliation. The reply was an 18-page bill to be passed by the tricameral parliament by November which would give total amnesty for events of the past. This would have included indemnity from civilian procedure in a court of law and an absence of inquests. There was also to be no commission to look at pathologies of the past. The ANC resisted these pressures on the grounds that the ANC was not entitled to expunge the past, particularly in relation to people who were not members of the ANC, and nor was it morally

entitled to be party to an agreement that would violate the rights and the extraordinary yearning of people to know about the past.

In South Africa's case, a democratically elected government will be able to look at the terms of the amnesty in the context of the constitution. This will be done in the context of a firm moral and political commitment not to simply abolish the past in order to build the future.

LOURENS DU PLESSIS: I have been asked by a foreign delegate to speak about the link between the postscript to the constitution and the negotiation process. Negotiations took place at the World Trade Centre in Kempton Park. There were various negotiating structures, the most active of which was a Negotiating Council consisting of two representatives from each party. At the start of the process there were 26 parties, representing every political party in South Africa of any significance including Inkatha and the other parties which later formed the Freedom Alliance.

The process was facilitated by technical committees. Seven areas were identified for negotiation. Two of these revolved around the constitution – the drawing up of a constitution and the drafting of a Bill of Rights or Chapter on Fundamental Rights in the constitution. The parties were advised by technical committees. In these two particular technical committees the drafting was done by the committee and then submitted to the Negotiating Council. It was discussed and referred back to the committee. It is curious that the final clause was never examined by the technical committee in question. I tried to find out from the chairperson of that committee what was meant by this clause and he replied: "It was during the final stages of the negotiation and we just never saw that."

At a certain stage of the negotiations the parties on the right realised their demands were not going to be met and they started withdrawing. The Inkatha Freedom Party and the white right withdrew at an early stage and were later followed by Bophuthatswana. When the final clause – and other important

issues – were agreed on, those parties had already withdrawn from the negotiating process.

The constitution leaves many important issues to the next legislature. The aim seems to be to protect future legislation in that area from constitutional scrutiny to some extent. For instance, it is said that affirmative action is not a right in the constitution, yet it is also said that measures can be taken to implement affirmative action and that these cannot be challenged in terms of the equality clause. The clause regarding amnesty is to some extent similar, but it is also stated that amnesty *shall* be granted. Thus if this has the force of law, there will have to be provisions on amnesty. We will face a dilemma if a new legislature does not act swiftly in this regard because, as I pointed out in my paper, I believe the existing legislation runs the risk of being struck down.

An interesting constitutional question is that of who will take parliament to court for not going through with the amnesty. A statement of this nature is problematic because it is couched in "declaration of intent" language, yet there is a provision in the constitution stating that it is law. This makes technicians uncomfortable: The term "parliament shall" constitutes strong legal language signifying that something is mandatory. If parliament does not want to make law in this regard, I suppose it will have to be taken to the constitutional court.

ALEX BORAINE: There are such things as whips and party discipline whereby people are told "you shall, and if you don't like it you can get out". That is how practical politics works. If there has been an agreement between major parties then those parties will have to stick to it.

JOHN DE GRUCHY: I would like to put on record the fact that a major part of the work of the church has involved the struggle against apartheid. It is primarily a church of the victims in that the vast majority of its membership consists of dispossessed people. Many churches have paid a heavy price for their opposition to apartheid. A small denomination that I know well had 432 of its church buildings expropriated by the government.

Against this background I would like to say that there have been four forms of discourse to our discussion – not just the moral and the political, but also the legal and the theological. Albie Sachs has used the words "forgiveness", "reconciliation" and "healing", which are in fact theological terms. We tend to confuse our usage of language and as a result we talk past each other. Part of the importance of theological discourse is to keep alive what Karl Mannheim called the "concrete Utopian vision". That means not allowing the debate to avoid the greater issues in terms of transformation in the process of transition. We must achieve transition and there is a realism demanded of all of us. But there is another dimension to this. There is an ongoing pressure that is not only moral but also theological. The theological goes beyond the moral. The moral says there must be justice; the theological concurs, but adds that justice must lead to reconciliation and that reconciliation must acknowledge the need for justice. There is more at stake than morality.

What are the agents that can enable this process to happen? In the long term academics cannot do this; they can only play a Gramscian role. The question then is: How do we engage communities of moral and theological discourse in the process, whatever their denomination or religious faith? It seems Nelson Mandela recognised this when he referred to the church as the "midwife" of the democratic transition process when he addressed the Ethiopian churches. We need communities that will exercise critical solidarity with those engaged in the difficult political tasks of transition and reconstruction. What is required is solidarity and an awareness of the difficulties, rather than a practice of injecting Utopian theological language into discussions and thereby obfuscating the issues. But this solidarity must be a critical solidarity in that important questions are continuously raised. This supportive community will be critical in the sense that it will keep a check on politicians and lawyers.

If there is any community in this country that is going to enable the peace structures to work it will be the church. There is no way that the victims of apartheid are going to be helped by groups comparable to Alcoholics Anonymous. Such organisations may be helpful in the case of isolated individuals but we are talking here about massive numbers of people who have to be in some way enabled through communities to

overcome their past and to learn how to be fully human again in terms of the processes of forgiveness and reconciliation. That may be a pastoral task. As regards the oppressors, it is only through the Dutch Reformed Church that these people can be touched in terms of the moral issues we have been discussing. Though I have been critical of the DRC in the past I believe it is crucial that they form part of this process.

HERIBERT ADAM: My opinion is that it is dangerous to mix theologians and politics. That does not mean politics should not be moral, but I am on the side of the Pope when he declares that priests should stay out of politics!

On a different subject, I would like to draw some comparative academic analytical conclusions that have come out of discussions here. Tina Rosenberg made the useful distinction between "regimes of criminals" in Latin America and "criminal regimes" in eastern Europe. In South Africa we resemble the criminal regimes of eastern Europe with regard to bureaucratic and institutionalised domination and violence. That relates to the legitimacy of the system. Rulers in eastern Europe had a degree of legitimacy in comparison to those in Latin America. They could speak in the name of the people. The South African Communist Party supported the eastern European regimes and communists here were bound by that legitimacy. The apartheid regime was clearly illegitimate and a crime against humanity in the eyes of the world, yet its supporters perceived a certain legitimacy in that system. In eastern Europe the violence was perpetrated against a minority, against dissidence. In South Africa the violence was perpetrated against the majority, yet it was restrained by the fact that the minority depended on the labour of that majority.

The regimes in eastern Europe were defeated; in South Africa the old regime will be very much part of the new order, much like Bulgaria perhaps. That relates to comments at this conference by Andre du Toit and Albie Sachs. I agree with Sachs that we have to distinguish between what is politically feasible and what is morally desirable. Du Toit urged us to take into account the costs of realism as opposed to the costs of omission. I would, however, have liked him to spell out the costs of

omission. My opinion is that one can be fairly sure that a truth commission or a witch-hunt would lead to more human rights violations, more violence and more confrontation. If that assumption is correct, unless the issue is handled carefully the whole purpose of the exercise will be counter-productive and will bring about the very opposite of what it is supposed to achieve. I fear that a truth commission, even one along the lines of the Chilean model, will be seen to be undermining the amnesty and will drive the perceived victims of the commission into the right-wing camp and into further confrontation.

In South Africa what we have is not only a criminal regime; we have a criminal society. How do you apply that to Natal where the past has impacted on the present in such a way that an entire society has been brutalised by the low-grade civil war there? That is quite a different situation from Latin America. In that part of the world it was both necessary and possible to have individual compensation, and what Wilmot James has said regarding compensation for land expropriation can be done on an individual basis. But in South Africa the major reparation has to be collective and symbolic, in the form, for example, of an apartheid museum.

ALEX BORAINE: I do not believe that amnesty and/or indemnity and a commission of truth and reconciliation are mutually exclusive. Heribert Adam gives the game away when he talks about his fear of a commission of truth and/or a witch-hunt, although he qualifies that in terms of perception. Many inside and outside of some political parties would argue that when talking about a truth commission the last thing they have in mind is a type of witch-hunt or tribunal that issues a judgment of hellfire and brimstone. It is true that there may be problems: We live in an imperfect world and an imperfect society. But I hope we will not reach a point at which we rule out certain options because we are locked into amnesty and indemnity. This is not the way it has to be and I do not see that as the result of the Chilean example either. Though the Chilean commission was not perfect, it is important to stress that it did not disclose the names of culprits. I understand that the names were given to the courts.

...

Du Toit was trying to make the point that a commission of truth and reconciliation could take into account the political realities of our time. As he has said, we are going to have to raise the question: What if we do nothing? Another important question is: How do we proceed? This conference was perceived as a first step, a comparative study enabling us to look at and learn from experiences elsewhere. We do not have to impose on this country the solutions, successes and mistakes of others. We can write our own agenda against the background of hard political reality. But we would be foolish beyond words if we did not take into account the warning of Adam and others.

ALBIE SACHS: I agree with Heribert Adam that if the issue of opening up the past is badly handled it could be extremely divisive; it could destroy our attempts to create a country called South Africa. The process must be handled very carefully. But I do believe it is absolutely vital to have a commission of reconciliation and truth, perhaps as the very first act of the new government. It has to ring a bell of morality.

There is a reason for the peculiar form of the strange clause in the transitional constitution, a clause I would call a "postamble" rather than a "postscript". There had to be a commitment to all those villains and rascals who caused so much damage. They had to be reassured that it was in their interests to give up the criminality of their conduct and to go along with the process of having a new constitution and elections. Without that there was the risk that they would have caused immense damage. We could have ended up without an election, without a constitution and without a country. The focus was on them and their demands. At the same time, we could not agree as a Negotiating Council to a blanket amnesty in constitutional terms in that document. A balance was struck, and that was to say the issue would be left to the future parliament on the understanding that it would be committed in broad terms to granting an indemnity. Why leave it to a future parliament? We wanted the issue to be publicly debated. We wanted the rationale, the themes and the issues to be put on the table in a transparent and open way. Parliament was the body to do that. At the same time, the clauses in the constitution make it clear that

reconciliation must take place in the context of reconstruction and that the past should not be forgotten and buried.

I would like to pay tribute to Kader Asmal who raised the issue of dealing with the past in his inaugural lecture 18 months ago. He put it on the table in South Africa and has been relentlessly pursuing it inside and outside the ANC and in public. That is the one reason why we are even having this conference at all. The moral commitment and attention to detail has been profound. It is something that reaches our souls. It is not just a question of political trade-offs. It is who we are and what South Africa is going to be. We want to get it right and we want to handle it in a way that will make everyone feel a little nobler, a little better, a little prouder to be part of a nation that is beginning to sort out all its problems.

Speaking in my personal capacity as someone who has been involved in internal ANC debates, I must say that there is a powerful thrust inside our organisation in favour of a commission of truth and reconciliation. We want it; our people want it. We will almost certainly be the leading force in government and we envisage a government of national unity as being a government that tackles national tasks, not one that goes in for compromises and trade-offs. It is what we have spent our whole lives fighting for. It is the meaning of the 28 years that Mandela spent in jail. It is the meaning of everything. It is the creation of a nation.

We can tell De Klerk, presuming that he is a vice-president, that he cannot stop a commission from being established because the nation needs it. But he can influence the way in which it functions, its style, and ensure that there is no humiliation, harassment or bitter reaction from those who dominated others in the past. He can thus influence us to ensure that the commission functions in the best possible way. If we have managed to achieve the drafting of the constitution, which seemed impossible, we can achieve a form of national reconciliation by exposing and disclosing the truth and dealing with the past. Anything that caused severe pain on the basis of racial domination must be part of the mandate. This means the pain caused by the Group Areas Act will be included, even if the format is different. I agree with Judge Goldstone that it should

not be the function of the commission to attribute compensation in individual cases. Rather, it must establish norms and principles, acknowledgement and recognition. Other bodies can handle the concrete workings of these cases. I believe it will be possible to get a binding agreement on the setting up of a commission. Part of that agreement will include assurances that there will be no harassment, no witch-hunts. The aim is not to lash out and punish those who caused pain in the past, but rather to bind us together and produce the kinds of things that brought this conference into being.

MARY BURTON: During this conference we have focused on the constitutional and legal aspects of amnesty and a commission. Another aspect to be recognised is the fact that against the background of a long-running negotiations process there remained a need to deal with pressing demands for land restoration, housing and economic development. Thus, hand in hand with negotiations on constitutional matters, there has been a gradual establishment of a National Housing Forum, regional housing forums, and now regional housing boards with powers to act. Members of the past government and people who represent the future government have been working together on these forums. They are already dealing with some of the issues discussed here. Some communities dispossessed of their land have already enjoyed victories as regards land restoration. The relationships between people on these forums have been difficult and conflictual at many stages of the process. One reason for this is precisely because of the pain of dispossession of some of those involved. At the same time there are civil servants who feel anxious about their jobs and futures. There is a sense in which the new government of national unity, simply by taking on board the responsibility for dealing with some of those issues through a commission, will remove that task and thus the conflict from the working processes that must meet people's demands. One of the imperatives of dealing with and acknowledging the past is that it will simultaneously facilitate other efforts in process.

ANDRE DU TOIT: In response to Heribert Adam, I must point to the general conclusion that issues about the past will not go away and must be confronted. The question is not whether or not

we should put the issue of a truth commission on the agenda depending on the cost. It *is* on the agenda, and it will remain there. If you try to ignore the issue and keep it off the political agenda it will come back in other ways, ways that are perverted and uncontrolled. The choices we face involve confronting the issue in a well-structured, focused way, thinking about the right kinds of context, agencies and instrumentalities in which the issues can be raised.

We should remember Jose Zalaquett's distinction between societies which have suffered a lapse from a long-existent and fairly resilient tradition of democracy as opposed to those that have never had a just system. In the case of the former, the risks of backtracking are perhaps not as great because the historical institutions and memories of those societies may guard against that. But this is South Africa's first transition to democracy. For the first time in our history we are trying to establish a rule of law and a society in which the principle of the dignity of each individual is recognised. We are also trying to establish a society in which people cannot with impunity get away with atrocities. This must be established in a clear way or we will revert to a situation in which certain forces in society can act with impunity. Measures of amnesty can be used in the new society, but if we are serious about the transition, if we want to establish the rule of law and have a society in which the dignity of the victims is recognised, then we must take on the task of dealing with the past. There is no way in which it can be kept off the agenda.

WIKTOR OSIATYNSKI: As a constitutional lawyer I understand that South Africa's new constitution does not preclude condemnation, a break with the past and an announcement of new values. It is also clear that the new parliament can create a commission of truth and reconciliation and that it has an obligation to pass the amnesty laws. I am concerned that there is limited time in which to act. In addition, a commission, though created by parliament, must be independent.

I am also very worried that South Africa may not be able to fulfil the expectations of its people. Your gross national

product may only be two or three percent a year, possibly five percent if one considers that this country has more resources than eastern Europe. If expectations are not met, a political shift is possible. Support for the parties outside the government of national unity may increase and as a result politicians within the government may be tempted to trade the principles of justice for social support.

What is the position of the Pan Africanist Congress and other groups on the question of amnesty? This to me is another crucial question and there is a lesson to be learned from Poland in this regard. These groups may promise economic development and the government may find itself under pressure to find scapegoats.

ALEX BORAINE: I refer you to the tough statement by PAC leader Barney Desai that has been distributed here. It is a demand for truth but also, as Desai puts it, justice. That means prosecutions and accountability in terms of past acts. His is a much tougher voice than we have heard at this conference, but it represents the views of others and it would be foolish for us to ignore that.

I also want to make it clear that I believe it would be wrong for a truth commission to be a political or parliamentary commission. It should be an independent commission made possible by the action of the state.

KAREL SCHWARZENBERG: In spite of the fact that South Africa has a parliament (albeit elected by a minority) and courts, grave violations of human rights occurred here. In the interests of the future it is important to pinpoint the legal and psychological mechanics of how, despite the existence of such institutions, abuses could have taken place. The reason for doing this is because there is always a temptation to misuse power. Another reason for dealing with the past by way of a commission is that it is a way of building a common history in a deeply divided society. How this is done is important because a commission must have credibility in all communities and its findings must be accepted by all. The

example of Czechoslovakia proves that the proper care must be taken in this regard or the exercise will miss its mark.

ARYEH NEIER: If there is general agreement that a truth commission is necessary in South Africa, then there is work to do before parliament acts in defining the mandate of the commission. In some countries this mandate has been self-evident: In Argentina it had to deal with disappearances; in Chile with disappearances and assassinations; and in El Salvador it was only possible to focus on a number of incidents that took place during 12 years of armed conflict.

The South African case seems to be infinitely more complicated. Tina Rosenberg's distinction between a "criminal regime" and a "regime of criminals" strikes me as useful in the South Africa context in the sense that in a way you had both. You had a criminal regime that administered the apartheid system as well as a regime of criminals that committed crimes in order to maintain apartheid. So do you deal with the acts of the criminal regime, that is, the apartheid system? My inclination is to say that you should not. The main role of a commission is to deal with deception and to respond with truth. Apartheid was practised openly. Still, the question is not a simple one and it deserves debate.

In honing the mandate of a South African commission there are many other questions to consider. For example, should the commission be concerned with criminal acts committed by homeland governments? To what degree was the state implicated in violence committed by non-governmental bodies? Does a commission have to concern itself with crimes facilitated by covert assistance provided by private groups? The commissions in Argentina, Chile and El Salvador derived a certain amount of effectiveness and legitimacy from the relative speed with which they were able to consider the issues. Be aware that if the mandate is too broad one may eliminate the possibility of being able to act expeditiously.

ALEX BORAINE: As John de Gruchy and others have said, awareness of political and economic realities is not necessarily mutually exclusive with a commitment to transformation. It is a

question of knowing how to go about the process. Further, the commission must be appointed by a government of national unity or we will be seriously weakened in our attempts to deal with the past. But I must emphasise that the commission must not be seen to be political in character. Though politicians have a crucial role to play, the commission should be independent and impartial, and should be seen as such. The responsibility of the state to take action is not merely responsibility of the politicians. I accept the good faith of those in the majority party in the new government who are committed to truth, justice and reconciliation. But I am aware of what happens when politicians are forced to confront massive problems immediately after taking office. For this reason I think there should be a synergy between those destined for parliament who will fight for a commission, and those of us in civil society who can back up the demand. There can be solidarity in the form of regular contact. The issue is too important to be left to one group only. Pressure is required from inside and outside the government.

There are, of course, important voices not heard at this conference – not because they were excluded but because they were unable to attend. These could include the voices of the children, of widows and voices on the extreme left or right. These voices need to be heard and so the debate must be extended. The publication of a book by Idasa on the subject is part of this. As Aryeh Neier has said, it is critical to assist the government in producing the mandate for a commission, a road map, the directions, a start. There are those of us who have spoken about this preparatory conference with a view to a much larger public conference. Lawrence Weschler has mentioned to me the concept of a conference featuring an immediate circle of participants, then a wider circle of observers, followed by the press, the diplomatic corps and the public.

Finally, I want to echo De Gruchy's view that the questions we have been debating are more than legal, moral and political – as this conference has proved. Guilt and forgiveness are major human themes which resonate in literature and history down the ages. But there is a difference between cheap and costly grace. Du Toit referred to this when he pointed to the danger of trivialising great themes and great issues. For South Africa to do that would be a tragedy. ■

CONCLUSION

Looking back at the work, the energy, the challenges faced so far by South Africa's Truth and Reconciliation Commission, it is almost easy to forget that at the time of the conference on which this book is based it was still unclear whether the political will existed to put such a commission in place at all. Not only is our commission now a reality, but unlike some other commissions its work is being conducted in full public view, both as regards the testimony of victims if they so choose, and that of perpetrators applying for amnesty. For some victims, the fact of simply having told their story to the commission and in the gaze of the public media is, they say, a major step towards catharsis and healing.

We are operating within the tricky framework of a negotiated political settlement which has entailed compromises. From some victims' perspective, amnesty is understandably a particularly bitter pill to swallow. But at least we have not shied away from grappling with the past by issuing blanket amnesties, as was done in some other parts of the world.

At a 1995 conference in Guatemala, I was struck by the feeling of revulsion among South American delegates during a discussion on amnesty. It is clear that, for most people in South America, the only experience of amnesty was a general or blanket amnesty which, in most cases, was devised and imposed by the very regime which was responsible for the violations of human rights. It is thus understandable that general amnesty is looked upon by human rights organisations and lawyers as a betrayal of those who suffered and is something to be avoided at all costs.

But in South Africa's case it was in order to avoid an amnesty which amounted to little more than impunity that we attempted to introduce an amnesty programme which included accountability

and disclosure. To get amnesty, an individual must make full disclosure for his or her acts, and these acts must meet a number of criteria:

- The act must have been committed in good faith as a part of the struggle against the state or against any publicly known political organisation or liberation movement engaged in the struggle against the state.
- The act must have been committed within the scope of the person's authority and duties, or a person must have believed they were.

When deciding whether the objective was a political one committed in the course of a conflict of the past, the Amnesty Committee will take into account the following matters:

- The motive of the person involved.
- The context in which the act occurred.
- The legal and factual nature of the act.
- The object of the act.
- Whether or not the perpetrator was obeying orders.
- The proportionality of the act in relation to the objective: In other words, was it necessary to take the action to achieve the particular objective?

Dealing with the Past remains for me not only a valuable historical document but also a rich source of ideas from some of the world's most prominent commentators in an area of great complexity and magnitude. On page 8 of this volume, Jose Zalaquett explains how "a pool of world experiences is contributing to an understanding of the lessons to be learned about justice in times of transition. For those grappling with these problems, such an understanding can point to possible solutions. More importantly, it can help shape the correct attitude, both ethically and politically, among all participants."

It is our hope that South Africans' attempt to grapple with their history will contribute to that international pool of knowledge. The unique nature of our commission has already elicited widespread international interest from human rights groups as well as countries such as the Republic of Ireland, Bosnia and Rwanda. A delegation from the South African commission has visited Rwanda to help its cabinet and legal team draft a reparations bill and to share ideas on issues of transitional justice.

As to the question of why deal with the past at all, the commentaries in this book by Aryeh Neier and Tina Rosenberg remain as powerful as ever. It was generally accepted at the conference that ignoring the past could compound the problem and merely delay the necessity of addressing the same set of problems in the months and years ahead. This was illustrated graphically by Neier's reference to the present conflict in Serbia and Croatia. The tragedy unfolding there has its roots in World War II, in a concentration camp called Jasenovac, where between 250 000 and 300 000 people were exterminated in ovens by the Croatians. No attempt was made to deal with the past in that country with the result that Serbs and Croats still relive it over and over today. The past cannot simply be brushed aside. Reconciliation begins when people deal with the past rather than simply ignoring it or trying to conceal it. It should never be assumed that an apparent lack of political pressure to deal with past abuses implies that such pressure is not fermenting underground and constantly in danger of erupting. As Rosenberg reminded the conference: "If people do not feel that justice will ever be done, then the door is opened to private acts of vengeance and retribution."

The search for truth is much more a matter of caring for the victims than even the pursuit of justice. To ignore what happened to thousands of people who were victims of abuse under apartheid is to deny them their basic dignity. Finally, when the truth about the past is known, it can help to deter future abuse.

In answer to the question of *how* the truth is to be arrived at, the insights provided by Dimitrina Petrova, Joachim Gauck and Karel Schwarzenberg in the chapter entitled "State security files and disqualification" remain invaluable in pointing out the potential pitfalls of scrutinising security files to discover the extent of the human rights violations and to identify the perpetrators. More recently, Rosenberg has written a fascinating, and disturbing, book entitled *The Haunted Land: Facing Europe's Ghosts After Communism* in which she documents, among other things, the way state security files were used in the new Europe to disqualify people from public office.

Unlike South Africa, however, the countries she describes did not have truth commissions. For example, people whose only

"crime" was to be approached by the security police at some time in their lives found themselves publicly named as informers on the basis of suspect information in state security files. They were disqualified without an opportunity to defend themselves. The South African commission can only make recommendations to the president as regards disqualification. Furthermore, we believe that our commitment to due process cannot be compromised.

It is true that in Germany a staff of 3 000 with a budget of R500 million a year has been diligently examining 180 kilometres of files. But there are many others from the Czech Republic, Hungary, Poland and Bulgaria who point to the unreliability of security files. They are, by definition, incomplete and full of deceit. Provided this warning is borne in mind, access to security files and the files relating to decisions made by high-ranking policemen, the military command and politicians could shed light on past dark deeds. In the face of allegations that many of South African's state security files have been destroyed, the truth commission intends holding a hearing to determine the condition of the files and who ordered their destruction.

The final word on dealing with the past, and about the whole search for truth and reconciliation, is left to Nomonde Calata, who addressed the conference in February 1994 and whose harrowing appearance at the truth commission's Human Rights Violation Committee in April 1996 will remain imprinted in the memories of many South Africans of this era. As Antjie Krog put it: "[Her] cry of distress and uncontained grief ushered in an experience which changed my life."

At the conference, after describing the brutal assassination of her husband, Fort, his widow's thoughts turned to the unborn child she was carrying at the time and who is now 11 years old. "She keeps on asking questions: 'Who was my father?' It is hard to explain to her. At times she comes and says, 'Can't you draw a picture for me? Can't you say something that he said?' That is very, very hard."

Alex Boraine
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NOTES ON CONTRIBUTORS

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Nomonde Calata is the widow of murdered United Democratic Front activist Fort Calata. She lives with her three children in Cradock in the Eastern Cape.

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Joachim Gauck was appointed after the reunification of Germany as Federal Commissioner of the Stasi files. He has served as pastor in the Evangelisch-Lutherische Landeskirche of Mecklenburg since 1965. He was one of the initiators of the church and public resistance movement against the Sozialistische Einheitspartei Deutschlands (SED) government in Rostock in 1989. He became a member of the Volkskammer in 1990.

Paizoah Gcina is the daughter of Daniel Gcina, who was a political detainee on Robben Island for 15 years. She runs an entrepreneurial development consultancy in Port Elizabeth.

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Juan Mendez is a lawyer now living in the United States. He was detained in Argentina for two and a half years for defending political prisoners. He has been a director of Americas Watch and is currently general counsel of Human Rights Watch. He is the author of *Truth and Partial Justice in Argentina* and also an adjunct professor at Georgetown University in Washington.

Adam Michnik is the co-editor of *Gazetta*, the Warsaw-based successor to Solidarity's underground journal which is now the foremost newspaper in eastern Europe. He is recognised internationally as a key philosopher and theorist of Poland's Solidarity movement and has written many essays on the theory and practice of settling accounts with those guilty of past abuses.

Nthato Motlana is chairperson of New Africa Investments Ltd, chairperson of the Get Ahead Foundation which was established to promote black entrepreneurship, and a member of Idasa's board of trustees. He has practised as a medical doctor in Soweto and has an extensive record as a political and business activist. Motlana has been banned and detained under South African security legislation. He was president of the Soweto Civic Foundation.

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Dimitrina Petrova was the founder of Ecoglasnost, the most active dissident organisation in Bulgaria. She represented the organisation in Bulgaria's first post-communist parliament in 1990 and 1991. She heads the Institute for Social and Environmental Research in Sofia which works in the fields of human rights, civil society empowerment and environmental policy.

Tim Phillips has served as an adviser and consultant on democratisation, human rights and conflict resolution in central America and eastern Europe. He is founder and co-chairperson of the Project on Justice in Times of Transition which is based at the Foundation for a Civil Society in New York.

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Albie Sachs, a legal academic who spent 23 years in exile, is a judge on South Africa's Constitutional Court. He has served on the national executive of the ANC and was part of the ANC team which worked on the foundation for a new constitution for South Africa. He is an honorary professor in the department of public law at the University of Cape Town. In 1966 Sachs went into exile after spending long periods in detention. In 1983 he lost his left arm in a car-bomb attack in Maputo, Mozambique. He has documented his experiences under apartheid in *The Jail Diary of Albie Sachs* and *Soft Vengeance of a Freedom Fighter.*

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Van Zyl Slabbert is a member of Idasa's board, visiting professor at the Wits Graduate School of Business and chairperson of Khula Investments. He was chairperson of the Central Witwatersrand Metropolitan Chamber and co-chairperson of the Task Force for Local Government Elections. A Progressive Party MP and Leader of the Opposition, Slabbert quit the whites-only parliament in 1986 to form Idasa with Boraine.

Lawrence Weschler is a writer, art critic and New York columnist. He has written extensively on repression and human rights abuse in eastern Europe and South America. In *A Miracle, A Universe: Settling Accounts with Torturers,* he tells how activists and survivors of torture in Brazil and Uruguay tried to redeem their societies from decades of brutality.

Jose Zalaquett is professor of law at the University of Chile. A former activist, he served as a commissioner on the National Commission for Truth and Reconciliation in Chile. He has served as a member of the International Commission of Jurists. In 1976 he was first jailed and then expelled from Chile for his work as head of the human rights department in the Ecumenical Committee for Peace in Chile. During his 10 years in exile, he served on the governing board of Amnesty International.

- **Those listed above were panellists or moderators at the conference.**

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Prof Dr Sergio Vieira
Mr Lawrence Weschler
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APPENDIX 1
BY BREYTEN BREYTENBACH

Just a few words by way of expressing my regret for not being with you for your important conference. I feel the need to withdraw into my shell for a while and there to lick my own words as it were. South Africa is like Commando brandy – even with moderate consumption the hangover eventually overshadows the euphoria. In a few days the lady and I are about to retreat from here to Berlin, a city of dead angels, where I hope to sift through the accumulated dust of my thoughts.

The fascinating theme you intend to circumscribe may well go to the heart of our shared human condition: the obligation to live together in full knowledge of the past with at least a semblance of decency and tolerance and order, when the foulness of the crimes committed by some of us against the others is still propagating its stench. And the questions you will track are lamentably only too immediate still for too many of us in the Nether world. What should or could even be done about the horrors perpetrated by man against man, about the secretion of evil which stained whole communities – justified, we were told, by consideration of national security or reasons of state? How did it happen, when we had the means of flashing back history on our screens of illusion or perusing it at leisure in libraries with the soft smell of time, that our century turned out to be so much more totalitarian than any comparable period of mankind's itinerary? And when a rotten system with its polluted ideology is brought down, or when it flounders in its lues of corruption and cruelty, how is a repetition of the same abuses to be prevented? Can arbitrary force only be checked by counter-force? Can the vicious circle within which we live like snarling dogs be breached? Do we have the capacity to learn from our own vagaries or the mistakes of others? Is full memory a mantra of public protection? Or just the mouthing of self-indulgence? May it not be argued that the more fulsome the memory the less scope we have for pain and inventive recollection? Isn't our collective lunacy a method for keeping in touch with ourselves? How can the waft of society's moral constraints curtail the power

lust of our rulers? And how will total recall and denunciation of festering injustices shape the syntax of reconciliation? Will a national healing be promoted by lancing the boils? To quote Bertold Brecht: How can we construct a new house without clearing out the cellars of the old ruin? (To be fair, I expect he equated "reconciliation" with "revolution".)

I am sure you will hear as many opinions, coloured in many instances by the rancid aftertaste of deprivation and torture, as you have participants. I'd have loved to fit my voice to those of your guests, to compare scars, to test our reciprocal deafness. The struggle goes on, the looting continues, as also the soul-searching and the quest for effective strategies of resistance to barbarism. In our struggle for rehabilitation it is imperative not to trade in tomorrow for today, nor to excuse today's bloodshed in the light of yesterday's darkness. A beginning, I'd imagine, would be to keep active our sense of topography and our understandin of the human desire to belong somewhere.

Had I been present, I should most likely be thinking aloud along the tentative and confused outlines and inlines and lining of my own insights. For example, what juice could be squeezed from the experience of a prolonged sojourn in prison? Apart from an enhanced taste for the grain of contrasts, probably nothing momentous, and let me assure you that one need not have eaten time in prison to have one's emotions and reactions scrambled! Humiliation, degradation and ultimately death can be encountered easily enough. They are old fellow travellers faithfully cooling their heels in taverns along many a road. Similarly, the grace of a deeper breath can as fortuitously be learned under other circumstances. One could have your tonsils removed, or go wait for the dog of God in the rounded silence of some monastery! I'm not even sure about the advantages of being exposed to a knowledge of the misery and the desolation of the human heart – or whether it serves any purpose to hear, ear against the earth, the rattle of bones down the centuries.

To my mind, our humanity is defined by being lost and incomplete. The gnawing sense of being unfinished must be due to the fact that our consciousness (as also our expectations) extend beyond death. We just cannot leave eternity alone; why, we even dawdle and diddle with infinitude! The fiddling! We are

lost because we reckon ourselves to be civilised members of societies which – shall I say by their very nature? – are revealed to be in discrepancy with the moral precepts we have all been taught to adhere to. Maybe the anguish of repression is caused precisely by those among us who refuse to accept that we're lost, by our guides who are blindly in love with illusions.

In prison I found that man, like other animals, is a product and a spinner of habits. We live by smells, by the return to known places and patterns of reassurance if not of knowing, and we need to repeat the doodles. Our habits are obsessive, like mating and picking the nose and clinging to superstitions (and our morality is also whistling in the dark while crossing the fingers); even our madness is but the need for *situating* and recognising where we belong (and being recognised, and our supplication for consolation) gone haywire, where obsessional habit-repetition can no longer hold the essential desolation flowing from our awareness of being.

There is security in patterns, in repeating the known. Much killing is done out of a need for security. The killing, as in Bosnia and Angola, creates its own looping of the familiar. I kill therefore I am. I kill therefore I was. I am killed, therefore I am.

We share a scab-picking curiosity, a proxy titillation when piercing the experiences of others, perhaps in the longed-for paroxysmal experience of the Other. The ex-prisoner gets nauseous and tired of explaining what cannot be conveyed (boredom is a cure for the trauma!); he no longer knows what his memory is really like, except for sometimes in a dream; he gives what is expected of him, shaded by areas of assumed reference and coded comprehension; he re-invents himself retrospectively because shaping through telling is a transformation, a creation, a making other; he may become an enigma to himself, a secret endlessly slithering out of grasp, but sticking in his own gullet because dunked in the pain and the inadequacy of his own telling; and he obsessively re-visits in his own underground the agonizing sequences of failure – "Where did I make the wrong decisions? How and why did I blind myself? What is the relationship between the intelligent hero I imagined and the cowardly fool peering at me from the mirror?" Words, words like veils. Words – teased and then cut from emotions – constitute the

clothing of thoughts. Well, even synthetic cloth will go the way of all flesh, and a change in seasons will bring new fashions.

For the onlooker there is the urge to *understand*, thus the better to exorcise and keep bad luck at arm's length, but as well the need (which we label "cruel") to *see* discomfort in action, to experience what is imagined as a heightened sense of being.

Experiencing being has no moral connotation and teaches no lessons. Besides, survival knows no justice. Even though a simulacrum of justice is often considered the vehicle of survival. The classical example must be how all the suffering of the Jews could not restrain the Israeli state from persecuting and killing the Palestinians. All the blood spilt during the Spanish civil war did not stop a victorious Franco from continuing to blacken the soil with execution blood. Where leftist regimes came to power, propelled by the strength of their humanist convictions, often only monkey respect was shown for elementary human rights.

Man, the two-legged and two-faced conqueror, can apparently be neither changed nor bettered. "Crimes" (as we stigmatise certain expressions of social behaviour, unless indulged in by the powerful) can only be contained by patterning society in habits of inhibition.

Our *understanding* of events, conceivably also of ourselves, is a process of bringing the disparate into a same frame of reference. It is like taking a photo: The unassimilable, the strange, the foreign and the menacing all become domesticable because artificially focused in a frame of fixed and isolated "seeing". The technique of snapping images stops wayward possibilities, causes relationships, suggests sense ... and prevents knowledge or even only seeing from leaking all over us!

This too you may learn in prison: We all feel the need for ritual and thus for acting. Religion, after all, was originally a matter of theatre. A good voice even today counts for more than true faith. Or will the proximity of the One (the original Other) be measured exactly by the quality of the supplicant voice calling forth? Isn't that why we activists have such sonorous timbre, why our vowels will swell to orotund whining? Is that

why we sometimes have South African priests shaking and stomping and prancing with the onanist fury of self-transport?

There is first of all the attempt to placate or to intoxicate, not to *know*. (What we really want to know is the dance of death; to be partner, not prey.) The tragedy in the works of Kafka springs from the tension between the ritualistic – which purports neither to know nor to mean – and the trust for significance. Maybe ultimate sense lies ensnared in a movement of patterns which lulls understanding to mediate being. We must find the breath for mumbling rhythmically in order to pick our way through the killing fields. This is why, I think, Genet's plays (compare Le Balcon) are so essential as articulations of ritual.

One may consider ritual as replacing understanding because it allays the pain of being confronted by the naked image, or as a continuous form of apprehension because it allows illusion to enter the dance with the real. Is understanding not a son of a whore of power? And power the bitch in heat of possession? And possession the mother of truth? And truth the mother of all wars? Is this not finally the purpose and the use of political trials? Is this not why we love birds and must kill them? But ritual is also a shape of power. In fact, power is the ritualistic mating with the void.

I'm deliberately steering away from larger, more formal extrapolations. We are in a mess, peering in the dark whilst conditioned to believe there must be light, yet obliged to go on licking ourselves and our social environment into shape – and inventing a purpose to our efforts. For instance, in South Africa now, people are living on the edge where darkness cuts the light. On many edges: oblivion, freedom, justice, change ... and trapped in the quicksand of forward movement.

I sometimes think the pattern of rituals also discloses our deep urge for humiliation, for abasement, for the chance of suspending the rules by sliding beyond the limits. The same force is at work in any act of creation. Not to be confused though with the enforced dehumanisation of prison life where you will be exposed to instances of degradation and sequences of power abuse *to which you cannot react*, thereby inducing a self-loathing in the witness made impotent.

Poor human cattle that we are! A word of caution nevertheless: Let's not equate the ritual of exposure and confession only with power or with self-pity; we'll be in even darker valleys of death unless we steer clear of victimology, meaning indulging the humble pride and the vanity of the victim, the soul-corruption of suffering. It is vital to keep intact the capacity for rage!

The minimal guideline growing from the minimalist convictions of the sceptic: *It is wrong to kill*, because the rub-out doesn't solve the riddle of being born alone to die alone. By extension, that it is self-defeating to smother freedom or dreams of decency. Let the riddles multiply! The way forward can never be to commit crimes against the stories of history and culture, nor to stand by when these misdeeds are done.

A Russian proverb apparently states – remarking upon injustice is like having an eye gouged out, looking away is losing both eyes. Heiner Müller, the German playwright, points out that the level of culture is fixed by the way in which society interacts with its dead. We must continue talking to the deceased if only to explain to them why their dreams were groundless and how their sacrifices turned to dust.

The way forward is to keep moving!

APPENDIX 2
BY LAWRENCE WESCHLER

During the months of its initial upsurge, Polish theorists used to characterise Solidarity as an expression of the *subjectivity* of the Polish nation, by which, they'd explain, they meant its rediscovered capacity for acting as the subject rather than the object of history. As with the lines from Zbigniew Herbert, this was a formulation that kept recurring to me during my recent trips to Latin America. For such a transformation – at root grammatical, in which an entity which had been content to receive the action of other people's sentences now suddenly demands to initiate such actions as its own – is typical of any revolutionary situation. And conversely, I began to realise, the very essence of repression is likewise grammatical: the authorities scrambling to find some way of recapturing individuals (or polities) who had suddenly taken to behaving like subjects, so as to turn them back once again into mere objects. History, in this conception, is a battle over who gets to say "I" (or at the state level, who gets to say "we" – "we, the regime ..." or "we, the people"), and that, after all, is what torture is all about as well. If, as Elaine Scarry has demonstrated in her book *The Body in Pain*, torture is in its essence a discourse, a teaching, what is being taught is the futility of acting like a subject, of aspiring to anything beyond abject objecthood.

Torture attempts to accomplish this fundamental transformation by situating its discourse at the intersection of two of the most primordial mysteries of human being: incarnation and solitude. To people who have been attempting to behave in a lofty, selfless manner, it elaborates the incarnation of lofty ideals (of the soul) in a body. It subverts the soul through the vulnerability of the body in which it inheres, teaching that one *can* be reduced to one's own body and nothing else – the horizon of the wide, wide world with all its wide, wide hopes can become constricted to the point that it becomes entirely effaced. Likewise, torture impresses on the individual – and again, particularly individuals who've been living with others, among others – the fact of the absolute solitude of human

existence, which is finally, in its most extreme expression, solitude before death. That sort of knowledge, which ordinary people can ordinarily sustain for at most a few moments at a time, once in a long, long while, torture forces its victim to withstand for hours, days, weeks at a time. It is harrowing knowledge, and is intended to harrow. The scream that comes welling out of the torture chamber is thus double – the body calling out to the soul, the self calling out to others – and in both cases, it goes unanswered. Torture's stark lesson is precisely that enveloping silence: It aims to take that silence and introject it back into its victim, to replace the flame of subjectivity with an abject, hollow void.

I first began considering many of the issues raised in this book several years ago when I spent a few weeks surveying the daunting and inspiring work taking place at the Rehabilitation and Research Centre for Torture Victims, the RCT, in Copenhagen, Denmark. The clinic that served as the embryo fo that centre was launched in 1979 by Dr Inge Kemp Genefke, a passionately intense neurologist who, for many years, had been active on the board of Amnesty International. As she explained to me, much of the work at Amnesty International had been – and indeed still is – devoted to securing the release of particular individual political prisoners suffering various forms of torture in countries all around the world. It is arduous, mind-dulling, seemingly endless work – this constant collating of information and bringing pressure to bear on repressive regimes – but every once in a while it works: A prisoner does get released. At such moments, Genefke recalled, she and her co-activists would experience an understandable feeling of triumph, of success, of completion, as if the task, at least in that one instance, had been achieved, and they could now go on to other similar cases.

However, once in a while one of those liberated former prisoners would make his or her way to Copenhagen, or else she might encounter such a onetime victim on her travels abroad – one of her success stories, one of her "closed" cases – and over and over again she'd be struck by how still devastated and hollowed-out these liberated individuals remained, often years after they'd attained freedom. She began to realise that liberation might constitute only the beginning, rather than the culmination, of the work that needed to be done for these tormented

individuals. Furthermore, as some of the victims began to settle in Copenhagen (Denmark has a fairly enlightened policy regarding refuge for victims of political persecution the world over), she was able to observe their progress – or rather lack of progress – at close range. The Danish government provided the torture victims, like all its other refugees, with liberal stipends for housing, general health coverage, language assistance, and so forth. But unlike many of the other refugees, the former torture victims repeatedly failed to thrive in their new environment. They remained listless and dazed; they suffered excruciating sieges of dread, recurrent nightmares both waking and asleep. They (and their families) had been mangled in a profound way, and Dr Genefke came to feel that their reintegration would require a special, highly particularised, and as yet uninvented, form of therapy.

That is precisely what she and her remarkable colleagues – physicians, psychologists, physiotherapists, social workers, occupational therapists, paediatricians, family therapists, social scientists, statisticians, and others – have been attempting to fashion over the past decade in Copenhagen. They have been working with torture victims from throughout the world, slowly and systematically evolving a coherent regime of therapy, one that ought in principle to prove equally effective whether the victim comes from Asia or the Middle East, eastern Europe or Latin America, the Soviet Union or Africa – and they have been eagerly sharing the results of their research with similar centres that have begun forming in such places as Toronto, Minneapolis, and Los Angeles. They are all obviously doing important and valuable work.

So I was somewhat surprised, in the years after my first visit to Copenhagen, to find that the RCT and the other centres had become the object of a certain amount of resentment on the part of some activists and therapists in the Third World, particularly in the Southern Cone. (Such resentments were by no means universal, and the various centres definitely had their share of Third World admirers.) Some of the resentment seemed parochial, a matter of turf and the woefully limited funding available for such efforts worldwide. Some of the resentment was directed at the notion of First World specialists casting themselves as the authorities, the arbiters of correct therapeutic

practice, on this principally Third World phenomenon. "The First World has already taken everything else from the Third", one Uruguayan therapist complained to me. "Now they want to own our suffering too, the last thing we have left." This critique derived perhaps from the global pretensions of the Danish team – their ambition to cast themselves as the world authorities on the subject. I sometimes imagined that if the Danes had more modestly cast their project as "the Centre for the Assistance of Torture Victims who Happen Temporarily to Be in Exile in Denmark", much of the resentment might have abated.

A more trenchant and substantive critique, however, has to do with the medical model underlying the work of those centres – the notion of torture victims as a group being analogous, in a way, to cancer or hypertension (or even incest) victims; the notion that they suffer from a certain definable "syndrome", so that a treatment could be developed that would be equally efficacious for victims from Sri Lanka, South Africa, the Soviet Union, or Santiago, and indeed that one element of such treatment should consist of group therapy sessions in which victims from all over the world share their common experiences. "But torture is not a medical problem," one Uruguayan therapist insisted to me. "It is in its very essence political, social – and rehabilitation from torture can occur only in a political and social context. The original point of the torture was to take various individuals who had been politically or socially active, on behalf of their various causes, in a particular location at a particular moment, and to gouge out their capacity for such activism: to leave them as if dead, unable any longer to aspire, let alone to act. The only true therapy for torture ought therefore to be revolution – overthrowing the system that tried to expunge that capacity for activism on behalf of those ideals. Short of that, however, therapy must consist in helping the torture victim to reintegrate himself into the ongoing struggle – nurturing his capacity for idealism once again, for activity as part of the larger group in which he was once a member. To focus exclusively on the former torture victim's status as a former torture victim only serves to perpetuate the legacy of isolation and separation that was the regime's intention in torturing the individual in the first place. My point is that a Uruguayan torture victim has more in common with other Uruguayans than he or she does with torture victims from other places, and he or she will be rehabilitated to

the extent that he or she can be reintegrated into his or her own society. That involves a political or social model rather than a medical one."

It is certainly true that the vision that animates a Jaime Wright in Brazil or a Luis Perez Aguirre in Uruguay is not simply one of rehabilitating the individual victims of a prior dictatorship, but also involves the rehabilitation of the entire surrounding society. And indeed, as I listened to these various First and Third World therapists lay out their positions (often, as I say, simply their misunderstandings of one another), I began to realise that there are societies – entire polities – which might themselves be considered torture victims, in every bit as great a need of rehabilitation as the individuals persisting in their midst. Indeed, torture itself, during repressive regimes, has a dual role: the expunging of the capacity for subjective aspiration in specific individuals, and through their example (the whiff of terror their fate spreads), the expunging of that capacity in the wider society as well. When individuals are being tortured and everyone knows about it and no one seems able to do a thing to help, primordial mysteries at the root of human community come under fundamental assault as well. Inter-subjectivity is laid waste. So that it becomes possible to recast Dr Genefke's observation and to note that the rehabilitation of torture societies does not culminate with free elections – that on the contrary, the true work of social rehabilitation only begins with the reintroduction of such democratic conventions.

How is the rehabilitation to proceed? Again, one has to return to the scream welling out of the torture chamber. An old man, a teenage boy, a young woman five months pregnant, is screaming in agony. And what is the torturer saying? As Marcelo Vignar has pointed out, he is saying, "Go ahead, scream, scream all you like, scream your lungs out – nobody can hear you, nobody would care to hear you, nobody cares about you, no one will ever know." That is the primordial moment which has desperately to be addressed – and as desperately by the torture society as by the torture victim: Who was there? Who was screaming? Who were those people standing by the screamer's side? Who, even now, will dare to hear? Who will care to know? Who will be held accountable? And who will hold them to account?

Now, good people will disagree on how that holding to account ought to proceed in the context of real-life, often exceptionally precarious political situations. In her magisterial study, *The Origins of Totalitarianism*, Hannah Arendt held that "the first step on the road to total domination is to kill the juridical person in man" – that is, to make the attainment of justice appear hopeless and its pursuit pointless. David Remnick, the *Washington Post's* Moscow correspondent, recently cited this passage and went on to observe, "Likewise, the first essential step toward liberty is the revival of the legal impulse in man." Arendt, no doubt, would have agreed – and yet, paradoxically, she seemed to favour forgiveness. In her book *The Human Condition* (published in 1958, barely a decade after the defeat of the Nazis), she wrote: "Without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we could never recover; we would remain the victim of its consequences forever." Forgiveness, for Arendt, was essential to freedom, to our capacity for free agency; the regeneration of subjectivity, and intersubjectivity, required forgiveness. "Only through this constant mutual release from what they do can men remain free agents, only by constant willingness to change their minds and start again can they be trusted with so great a power as that to begin something new. In this respect," she went on to say, "forgiveness is the exact opposite of vengeance, which acts in the form of re-acting against an original trespassing, whereby far from putting an end to the consequences of the first misdeed, everybody remains bound to the process, permitting the chain reaction contained in every action to take its unhindered course ..."

"The alternative to forgiveness," Arendt continues, "but by no means its opposite, is punishment, and both have in common that they attempt to put an end to something that without interference could go on endlessly." If Arendt clearly favoured the one over the other she nevertheless found it "quite significant, a structural element in the realm of human affairs, that men are unable to forgive what they cannot punish". (Thus is the apparent paradox in Arendt's thinking resolved.) Earlier, anticipating even more directly the situation occasioned by the various military-imposed amnesties which have proliferated throughout Latin America in recent years, Arendt commented that "No one can forgive himself (just as) no

one can feel bound by a promise made only to himself; forgiving and promising enacted in solitude or isolation remain without reality and can signify no more than a role played before one's self." Arendt might well have objected to the Brazilian and Uruguayan amnesties precisely because they foreclosed the possibility of forgiveness.

The question of clemency, however, remains controversial. At the Aspen Institute's fall 1988 conference at the Wye Woods Centre in Maryland on the subject of state crimes, Jose (Pepe) Zalaquett, a Chilean activist long associated with Amnesty International, tried to frame a general theory on the appropriate uses of amnesty and punishment, a framework of rules – "a policy to deal with a legacy", as he phrased it. Zalaquett noted that any policy regarding past abuses would have two central objectives – first, with regard to the past, reparation, repairing the damage wrought by the earlier abuses; and second, with regard to the future, prevention, promotion of a stable democratic future in which such abuses wouldn't recur. He argued that any such policy would have to meet certain minimum requirements to be considered legitimate. Firstly, the truth would have to be known, complete, officially sanctioned and publicly exposed ("put in the record of the nation's memory"). Second, the policy would have to represent the will of the people. This might admittedly prove difficult to achieve, but a self-amnesty on its face would always be illegitimate both because it violated this principle and because nobody ought ever to profit from his own bad faith. Third, the policy would have to be such that it did not violate standards of international law, either by exacting punishments that were too severe or lavishing clemencies that were too broad. (Thus, for example, genocide and disappearance require punishment no matter what, in line with various international codes, whereas torture and extended incarceration are not as closely regulated.) "But if those three conditions are met," Zalaquett continued, "whether a policy leans more toward clemency or severity should be up to the nation in question" – that is, not subject to absolute, outside standards. "And clemency can be just as valuable a preventive as severity," Zalaquett concluded. "I insist on that."

However, he got an argument on that from Aryeh Neier, the executive director of Human Rights Watch in New York. To begin with, Neier demurred from the notion that "the will of the

people" has anything to do with the proper application of justice. "If Pepe hits me," Neier proposed, "I have a right to forgive him, but does everybody else in this room have the right to forgive him in my stead?" Neier then went on to an ever more fundamental disagreement. "I want to quarrel," he said, "with the assumption that a principal reason for seeking justice, or criterion for evaluating its efficacy, should be the future stability of the reconstituted democracy. Such predictions are highly speculative. Who's to say that clemency won't simply further embolden the torturers, thereby inviting rather than preventing future abuses? And who is it precisely who is to be authorised to make determinations regarding such larger considerations? El Salvador's Duarte and Guatemala's Cerezo both have insisted that the larger good required their staying in office and completing their terms – that was the foremost priority, and certain sacrifices in the human rights field hence could well prove necessary. But who are they to say that? The human capacity to look backward is frail enough. The human capacity to look forward is frailer yet. Rather, punishment is the absolute duty of society to honour and redeem the suffering of the individual victim. In a society of law, we say it is not up to individual victims to exercise vengeance, but rather up to society to demonstrate respect for the victim, for the one who suffered, by rendering the victimiser accountable. As a matter of law we simply have to say we are not going to grant clemency to the most grotesque criminals. We may be forced to do so on the basis of force majeure, but we should never do so as a matter of law."

Repeatedly on my trips to South America, I was told that it's easy for outsiders to pontificate on the correct line to take with regard to the human rights abuses of past dictatorships, but much, much more difficult to sustain any sort of line there on the ground, in those countries themselves, in the years after such a period of repression. I think everyone at Wye Woods realised as much, as we sat in that elegant conference room, surrounded by the lovely fall foliage, on the placid shores of that inlet off Chesapeake Bay.

Certainly, the two cases I've studied in these pages – Brazil's and Uruguay's – afford no ideal outcome. (For that matter, no country exists where anything remotely approaching the ideal

has yet been achieved.) The transition in both countries has been mired in the muck of forced compromise, bad faith, self-delusion, betrayed hopes and abandoned responsibilities. In both of these instances, the little success that was achieved was at best provisional (there were no trials in either country, no expressions of justice; torturers whose prior conduct was thoroughly documented in *Brasil: Nunca Mais* didn't even necessarily lose their jobs; in Uruguay, the referendum finally lost and the issue was largely set aside). Still, in both cases, thanks to the herculean efforts of relatively small sectors of the population (in the case of Brazil, of an infinitesimally small sector); the interests of truth were served. Facts were established, and the actual history was inscribed in the common memory.

And as Zalaquett noted in his presentation, "The truth in itself is both reparation and prevention." Retrospectively, the broadcasting of truth to a certain extent redeems the suffering of the former victims. At least to a degree, it answers and honours the scream after all, it upends the torturer's boastful claim that no one will ever know. Prospectively, the broadcasting of truth has an effect that is at once more subtle and perhaps more momentous. For, as we have seen, it is essential to the structure of torture that it take place in secret, in the dark, beyond considerations of shame and account. When the torturer assures his victim "No one will ever know", he is at once trying to break the victim's spirit and to bolster his own. He needs to be certain that no one will ever know; otherwise the entire premise of his own participation in the encounter would quickly come into question. By the time that Uruguayan general was warning how, if the referendum passed, no one could ever be sure that subordinates in the Uruguayan military would ever again unquestioningly obey the orders of their superiors in any future war against subversion, it was already too late. That doubt has now taken on a life of its own, despite the outcome of the referendum. After all, that referendum could have ended up otherwise – and the next one might. Torturers can never again feel so self-assured – nor their victims so utterly forlorn. The same applies to larger institutions. After the recent examples of Argentina, Uruguay and Brazil, flawed though they may be, none of the institutions that might in the future try to impose another torture regime will ever again be able to do so with such a blithe assurance of impunity. To date, the militaries in all three

countries have remained, for the most part, in barracks: One reason is that they want no part of the financial debacle that remains the legacy of their last period of domination; but it is also, I suspect, because of the chastening effects of the various truth-tellings. Their strut has become more brittle, more anxiously self-conscious.

One of the things that is remarkable about the stories of both Brazil and Uruguay is the way in which, to a large degree, the rehabilitation of the torture societies, to the extent it has occurred, was accomplished by the torture victims themselves. These victims – hollowed-out, burnt-out shells – came alive once again by testifying to the truth of their own experiences. And that truth, to a degree, has set both themselves and their societies free.

This chapter is an extract from Lawrence Weschler's book *A Miracle, A Universe: Settling Accounts with Torturers.*

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