

# 'Toxic waste' of history

South Africa can learn a lot from other countries that have fought their own struggles against totalitarianism and brutality. At a recent Idasa conference Latin American and Eastern European speakers offered their 'pool of world experiences' in dealing with the past. MOIRA LEVY and JANET LEVY report.

**F**AILURE by South Africa's new government to deal with past human rights abuses would be akin to dumping political toxic waste for future generations to deal with, international experts warn.

This was the urgent message delivered at a recent Idasa conference by American commentators and veterans who have experienced the fallout of painful political transitions in South America and Eastern Europe.

Entitled "Justice in Transition: Dealing with the Past", the conference heard that issues such as the future of former torturers and assassins "will be boiling underground, waiting to erupt". Chilean lawyer Jose Zalaquett, who served on his country's National Commission for Truth and Reconciliation investigating the human rights abuses of the Pinochet regime, said "it would be political blindness to ignore the fact that examples of this abound worldwide".

The toxic fallout of maintaining short-term equilibrium at the expense of a country's long-term future was articulated by American journalist Tina Rosenberg: "It can damage your legal system. It can damage the rule of law and future civilian control of your 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."

She warned against "living with a dragon on the patio", in other words, hoping that the past would lie down quietly if it was not prodded or provoked. "To let bygones be bygones is tantamount to reconciliation at gunpoint and should not be confused with the real thing," said Rosenberg.

Pledging that world experiences would be taken to heart, legal academics Kader Asmal and Albie Sachs (both of whom serve on the ANC constitutional committee) said it was the task of a democratic government to set up an official commission to deal with past abuses.

"A new government of national unity must move swiftly towards building, reconciling, healing and reconstructing," said Sachs. "Mandela, speaking as the elected representative of the South African nation,

## AMNESTY LAWS

**THE INDEMNITY ACT OF 1990**, promulgated after the Groote Schuur Minute, gives South Africa's State President the power to indemnify people for "political offences".

**THE FURTHER INDEMNITY ACT OF 1992** indicated the government's eagerness at the time to indemnify state officials guilty of atrocities against the opponents of apartheid. When one of the houses of the tricameral parliament refused to assent to the bill, President FW de Klerk referred it to the President's Council.

The act gives the State President the power to grant indemnity for acts committed before noon on 8 October 1990 and to release people convicted for political offences if he believes this will "promote reconciliation and peace".

This act facilitates self-amnesty. It resulted in the freeing of the ANC's Robert McBride and "Wit Wolf" Barend Strydom, both of whom did not qualify for release under the 1990 act.

**THE TRANSITIONAL CONSTITUTION** will come into effect on 27 April 1994. The existing indemnity legislation will then become subject to constitutional review and to scrutiny in terms of the Chapter of Fundamental Rights in the new constitution.

According to Lourens du Plessis of the department of public law at Stellenbosch University, the issue of amnesty is also referred to in the new constitution by way of a postscript with the following theme: For the sake of reconciliation we must forgive, but for the sake of reconstruction we dare not forget.

Du Plessis told the Idasa conference the two indemnity laws were likely to be ruled invalid if brought before the new Constitutional Court. This was because they contradicted parts of the transitional constitution designed to ensure transparent and accountable administration.

Du Plessis said a new government of national unity should deal with the issue of indemnity as soon as it took office, before the matter came before the Constitutional Court.

will proclaim 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.

"A commission can expose all crimes on all sides, but it can do much more than that. It can find appropriate means of acknowl-

edging and honouring those who suffered."

The conference, held in Somerset West, was intended to serve as a comparative study and lay the ground for further forums on the subject of truth and reconciliation, with a focus on illegal activities such as dirty tricks, rogue policemen and death squads. A possible follow-up conference may be open to the public as well as to limited participants, observers, major organisations and the media.

The conference was timed to take place before the election because Idasa considers it critical that a government of national unity should have information at its disposal that would enable it to act swiftly in establishing a truth commission. The organisation's executive director, Alex Boraine, said the conferences could assist the new government with a mandate or "road map" to the complexities of the subject.

At the conference, themes such as acknowledgement, reconciliation and amnesty, reparations and prosecution were discussed during what Judge Richard Goldstone termed "an intellectually stimulating but emotionally draining" three days.

Some delegates expressed doubts about whether a new government would have the political will to deal with the past, while others warned that a truth commission could turn into a witch-hunt or be used as a political tool.

Speakers such as Idasa's director of policy and planning, Frederick Van Zyl Slabbert, and Barney Pityana of the Department of Religious Studies at the University of Cape Town (UCT), pointed to the dilemmas involved in trying to balance various factors: How does one proceed with a truth commission if some of the very people who need to be indicted are in the government of national unity? How can one draw the right wing into negotiations if they face the threat of prosecution?

UCT sociology professor Wilmot James added: "What is feasible has to do with how different forces play out in the new state. The least propitious circumstances for looking effectively at the past seem to 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



MAIMED: Father Michael Lapsley.



WIDOWS: Nomonde Calata and Mbuyi Mhlauli.

**N**OMONDE Calata did not cry when Cradock police banged at her door at midnight to take her from her children for questioning. She did not flinch when police warned her that one day they would get her husband, United Democratic Front activist Fort Calata.

But eight years later she faces the questions of the child she was carrying the day her husband's body was found, the alleged victim of a hit squad killing. When she speaks of her child's desperation for any flimsy piece of information about her father, Calata cannot hold back the tears any longer.

Nomonde Calata, like the countless victims of the gross abuses under apartheid, is a symbol of her land – she needs to forgive, to heal and to experience reconciliation.

At Idasa's conference on Justice in Transition, the worth and dignity of victims was high on the list of reasons for holding a truth commission in South Africa. Few victims ask for revenge, but many ask for the truth to be told and for past wrongs to be acknowledged.

Chilean lawyer Jose Zalaquett said that "at a societal level the process of moral

## Victims want truth not revenge

construction is in the hands of the society. Thus victims cannot hold veto powers in this regard."

Speaking with Calata and others on a panel entitled "Experiences Under Repression", legal academic Albie Sachs said: "What I seek is acknowledgement that the values we stood for were fundamentally right and human. Our generation got into trouble for being good, not for being bad."

Sachs, who lived in exile for 23 years and who was severely injured in a car-bombing, said: "The greatest healer will be the final honouring of everybody. It will be street lights, education, the health system, a sense of dignity, participation and true equality."

Father Michael Lapsley said it was ironic that the parcel bomb explosion which

caused him to lose both hands and an eye in Zimbabwe "took place after 2 February 1990; it was part of the 'new' South Africa, as have been the deaths of thousands of people. We are dealing with a regime that has not repented. This would involve an amendment of life, not a glib and cheap way of speaking about a 'new' South Africa as one would of putting on a clean shirt."

Lapsley said he did not see the matter as a simple choice between revenge and forgiveness. "I do not want revenge, but that doesn't mean I don't believe in the simple processes of justice.

"At a personal level I believe that those who committed the crime of apartheid should be punished. Yet I also know it may be in the interests of the nation as a whole that they are not."

Judge Richard Goldstone warned that decisions regarding victims would be complex: "There are too many people who have suffered as a result of apartheid to compensate them all adequately. As a result decisions have to be taken and one has to prioritise even the victims, as horrible as that may sound. Those will have to be political decisions."

a negotiated settlement and power sharing for a period of time."

Responding to reservations, UCT political science professor André du Toit said that instead of focusing on the difficulties of dealing with the past, one should rather consider the huge costs of *not* having a commission. Sachs added that "to wallow in the impossibilities is to disclaim responsibility for what is our historic task". Asmal pointed to the encouraging fact that South Africa was the

first African country to enter its transition without a general amnesty law.

Explaining the need for a truth commission, Black Sash vice-president Mary Burton said that only if victims knew "whom to forgive and for what" could real healing take place.

The conference heard that perpetrators needed to acknowledge their past crimes in a meaningful way in order to recognise the dignity of the victims, to reconstruct a

morally just order and to enable healing to take place.

Delegates spoke out against "blanket amnesties", adding that truth telling should go hand-in-hand with immunity from prosecution. Sachs assured delegates that although South Africa was constitutionally committed to an amnesty, "it is balanced out with the concept of reconciliation and reconstruction".

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Umtata lawyer and former detainee Dumisa Ntsebeza said the liberation movements should deal effectively with the "skeletons in our own cupboards" and heed recommendations made during an internal inquiry into the ANC camps. If the ANC failed to do this, the National Party government could opt out of dealing with its past, and public unease over the camps would not be laid to rest, he said.

A commission could also look at the feasibility of reparations, compensation and land restoration. However, Zalaquett cautioned, in a country such as South Africa where the majority of the population was aggrieved by apartheid, "once you start pulling a thread of the knot of reparation you may continue without an end in sight. 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."

On the issue of whom to prosecute and for what, Open Society Fund president Aryeh Neier said: "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. And in dealing with the past, abuses must not be compounded. One's methods must be beyond reproach and must adhere to considerations of fairness and due process."

Rosenberg said that in highly bureaucratized systems – as was apartheid – it could be difficult to pin crimes to individual authors. However, even a small number of prosecutions could have important symbolic value.

According to some delegates, under international law there is an obligation to prosecute crimes against humanity. Yet delegates also warned that although South Africa fell into this category – with grievous violations such as murder, disappearances and torture bloodying many hands – it did not mean the political realities of South Africa would allow this to be accomplished.

Commenting on the conference, Borraine said the consequences of doing nothing were horrendous. But to "trivialise" the great themes of guilt and forgiveness by not dealing with South Africa's history in a satisfactory manner would also be a tragedy.

"If there is going to be healing you cannot draw a veil over the past. To deal with the past is to deal with the future," he said.

● *Conference proceedings are soon to be published as a book with a foreword by convenor Alex Borraine.*

# 'Amnesty' can mean 'amnesia'

THE experiences people of different countries suffered at the hands of totalitarian governments were very varied, the conference on Justice in Transition heard. So were modes of resistance – and the styles of the oppressors themselves.

But all agreed on the need to confront the perpetrators of these crimes – sooner or later. From Poland came the message: be wary of the term "amnesty", for under certain circumstances it can come to mean amnesia. From Latin America the warning was: "reconciliation" can easily be confused with recurrence.

Speaking on a panel entitled "Reconciliation/Amnesty: Past and Present Experiences", American journalist Tina Rosenberg drew a distinction between Latin America and Eastern Europe. In Eastern Europe, the state sought to mobilise the entire society along socialist lines. Silence and non-participation were unacceptable, even punishable, and everyone was expected to be an active, practising communist. In Latin America, however, the state set

itself up in opposition to the people and sought non-participation, preferring a passive and docile – even apolitical – citizenry.

Consequently, those who challenged the regimes in Latin America were more easily identified and criminalised. By contrast, in Eastern Europe protest often took the form of small, informal acts of defiance and of "working the system".

The conference heard, for instance, of an East German woman who, approached to act as an informer, resolved her dilemma by feigning naivety and proudly talking openly of the approach, thereby displaying what was taken to be unreliability by her would-be spy masters and effectively disqualifying herself from their service.

Opposition included "all kinds of shades of greyness", according to Poland's Wiktor Osiatynski. "People worked out a strategy to live a relatively decent life without being part of either the opposition or the system. This was for the greater part what most people were doing. They were trying to live a full life without being compromised."

In Eastern Europe after the 1950s Stalinist period of brutality and terror, repression largely took the form of economic control. Osiatynski said the main instruments of control over society "switched to control over benefits and rights; rights were treated as benefits. To get a passport or something from abroad or a coupon to get a car or scarce goods you could be easily controlled. The state controlled everything which was a key to a better life."

By contrast, control in Latin America was punitive, direct and explicit, and offenders were usually punished with uncompromising brutality. This meant that state and military crimes against humanity in Latin America were committed by identifiable individuals, whereas the crimes of Eastern European states were the crimes of a criminal system. They were bureaucratized. "They

*'In Eastern Europe they were criminal regimes, whereas in Latin America they were more likely to be the regimes of criminals'*

were crimes that could only be committed by organisations as organisations," in Rosenberg's words.

This has huge implications for future retribution; an individual can be prosecuted and taken to court, a system can't.

"In Eastern Europe they were criminal regimes, whereas in Latin America they were more likely to be the regimes of criminals," Rosenberg said.

In Argentina, for example, this meant the individuals who had led the military junta could be successfully prosecuted in court and served sentences of seven to eight years in prison.

Juan Mendez, an Argentine lawyer who spent more than two years in prison for defending political prisoners, told the conference that Argentina had probably gone the furthest in establishing accountability and bringing out into the open details of the crimes committed during the eight years of totalitarian rule.

He said the new democratic government of Argentina had identified three levels of accountability: those who gave the orders, those who committed excesses in carrying them out, and those who simply followed orders. The law made only the first two categories punishable.

He described the five-month trial of the