Human Rights Political Conflict & Compromise

Neelan Tiruchelvam
Memorial Lecture
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by
Ian Martin
Former Special Representative of the United Nations Secretary-General for East Timor and former Secretary-General of Amnesty International

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Neelan Tiruchelvam

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Human Rights, Political Conflict and Compromise

It was a great privilege for me although a very sad one, to be among the many human rights activists who gathered here in Colombo for the Neelan Tiruchelvam Commemoration Programme six months ago. It is an even greater privilege to have been invited to be again in Colombo on the saddest day of all, and to give a lecture in his memory. You and I would gain so much more if we were here to listen again to Neelan.

On that day last year I was in East Timor, working for the United Nations to try to ensure that the people of East Timor at last had the opportunity to exercise their internationally-recognised human right to self-determination, in a ballot which we were organising amid violence and intimidation - past violence, current violence, and violence threatened to come. A month later that ballot would take place, on a day more peaceful than we had dared to hope, only to be followed by an orgy of destruction in which hundreds of East Timorese were killed, an entire population displaced, and buildings razed on a scale which I think was truly without precedent.

Today one of the major issues facing East Timor, with tens of thousands of its people still across its border with Indonesia, in West Timor, is how to achieve justice for those who were the victims of these crimes, and at

the same time to reintegrate into a peaceful, independent East Timor those guilty of participation or complicity in them. One of the major issues facing Indonesia is how to bring to justice those Indonesian military personnel whose responsibility for these crimes was in many ways greater than that of the East Timorese militia they created, armed and directed; and that in turn is part of a larger question of establishing the truth and bringing a degree of justice for human rights violations perpetrated by its military across many Indonesian provinces and over several decades.

Before my first United Nations assignment, and when I first met Neelan, I was working for Amnesty International. Amnesty International took then, and takes now, the firm position that the perpetrators of human rights violations must be brought to justice, as a matter of principle and as an essential means of checking on-going human rights violations. It is one of the greatest achievements, not just of Amnesty International but of the non-governmental human rights movement as a whole, that this position of principle has become, increasingly, firmly enshrined in international law. Still more significantly, it is becoming increasingly likely that justice will in practice catch up one day with major human rights violators.

Until 1990, I used to sign letters from Amnesty International to the then President Pinochet of Chile, calling for justice for the killings, disappearances and torture carried out after he came to power: it would have been inconceivable to me then that in less than a decade

he would be arrested in my own country, and that the Chilean Supreme Court would today be considering whether to allow his prosecution. We now stand on the verge of the creation of an International Criminal Court to generalise the work begun in the ad hoc Tribunals on Former Yugoslavia and Rwanda. When last September the Indonesian Government agreed to allow an international force to check the violence in East Timor, one factor among the many pressures which overcame their strong initial resistance was, I believe, the reminder by the United Nations Secretary-General and High Commissioner for Human Rights that if the violations continued they would not be able to escape responsibility for crimes against humanity.

These are great advances. But the claims of justice in the cause of human rights are not without serious dilemmas when it comes to the practicalities of negotiating and sustaining an end to political conflict. Addressing human rights violations can contribute to the negotiation of peace: as you know all too well in Sri Lanka, a cycle of gross abuses on one or both sides of a political conflict deepens and perpetuates its bitterness. But human rights violations are rarely entirely gratuitous: they are the symptoms of the struggle over political power or control of economic resources. Campaigning against human rights violations on its own can limit them, but it is only the resolution of the underlying conflicts that will altogether end them. Those of us whose perspective on conflicts is that of human rights activists must therefore have great respect

for the role of those whose task is to seek to resolve them.

I find this reflected in the writings of Dr Neelan Tiruchelvam, in a paper he wrote in 1994, following the 1993 World Conference on Human Rights in Vienna, entitled "Human Rights: a Post-Vienna Agenda for Policy and Research". He identifies as a challenge for further analysis: "the accountability of the perpetrators of human rights violations of the recent past". The problem, he wrote,

> is a moral and legal one; the need for truth and justice; the need to repair the damage caused and to prevent such atrocities from happening again. But the problem is also political and practical: the need to bring the country together as a functioning unit. Widely diverse countries have had experiences of dealing with the problem of past human rights abuses, which experiences need to be distilled and made available to others.

In this spirit, I wish tonight to illustrate three of the dilemmas which have been or are still being played out in practice in countries where I have worked in recent years. First: to what extent may it be necessary and justifiable to compromise human rights principles of accountability in order to negotiate a peaceful solution to a conflict? Second: once conflict has been

halted, how far may it be necessary to compromise those principles to bring about reconciliation? Does the pursuit of justice threaten or sustain the peace? Third: what is to be done if the aftermath of conflict leaves human rights principles of equal validity in conflict with each other?

But let me first make clear that in two crucial respects, the positive relationship between the respect for human rights and the negotiation and sustainability of peace is unambiguous, and should pose no dilemmas. A commitment by all parties to a conflict to respect fully humanitarian and human rights principles can greatly enhance the climate for successful negotiations leading to an end to a conflict. This is not just a theoretical proposition: it is one which has been proved in practice. In both El Salvador and Guatemala, the first major step towards the end of long and bitter civil wars was the commitment that both government and rebel forces would fully respect humanitarian and human rights principles: not just rhetorical commitments, but a mutual signing of detailed undertakings, and an invitation to international verification of the respect of these undertakings in practice. The presence of human rights observers then helped to ensure that the undertakings were increasingly respected, and reduced the suffering of civilians, while enhancing the confidence of each side to the conflict that they were being sustained by the other. It should be noted, too, that the role of civil society in demanding such undertakings, and in helping to shape the human rights aspects of the agreements and

to insist upon their implementation was a crucial one. It was in this increasingly positive context that negotiations progressed, in each of these two cases, towards a ceasefire and an eventual comprehensive peace settlement.

The second unambiguous relationship is that the sustainability of peace will be enhanced by - indeed it depends on - the respect for the human rights of all sectors of the population after armed conflict has come to an end. It is for this reason that it is now well recognised - certainly by the United Nations Secretary-General, in his guidance to his Special Representatives - that human rights guarantees and the institutional arrangements necessary to sustain them should be an explicit part of peace agreements. It is correspondingly recognised that one of the highest priorities in post-conflict peace-building is the restoration or creation of the institutions essential to the rule of law: an impartial judiciary; a civilian police force drawn from the local population whom it is to police, trained in the respect for human rights and able to maintain order while the military remain in their barracks; decent detention facilities in which the human rights of inmates are respected.

So in these two respects the positive synergy between promoting human rights and promoting peace is clear. Let me now, however, illustrate from situations in which I have had some personal involvement what I believe are real dilemmas.

The first of these - to what extent may it be necessary and justifiable to compromise human rights principles of accountability in order to negotiate a peaceful solution to a conflict? - was a feature of the international efforts to reverse the military coup in Haiti, which had ousted democratically-elected President Aristide in 1991. A combination of sticks and carrots were deployed to seek to persuade the military leaders to agree to the restoration of the President and of constitutional order. At first the sticks were weak ones: regional sanctions, which did something to impoverish the majority of poor Haitians who had voted for Aristide, and little to touch the military and their allies. And from the beginning the carrots included the promise of an amnesty from prosecution .

The nature of the amnesty to be offered was, however, a matter of contention. Aristide was deeply reluctant to agree to amnesty for the killings of thousands of his supporters in the aftermath of the coup, and cited the relevant provision of the Haitian Constitution, which constrained the President to grant amnesty only in "political matters". He was willing to concede amnesty for the act of rebellion itself, but not for crimes against humanity.

As negotiations failed to progress and the military remained obdurate, the sticks became heavier, with stronger sanctions universally applied under the authority of the UN Security Council. But the United States Government, which was of course the key actor, continued to exclude any possibility of military

intervention to oust the Haitian military leaders. The pressure intensified on Aristide to agree to a broader amnesty. Since he could hardly be asked to violate the provisions of his own Constitution, the constraint on a Presidential amnesty was to be evaded by a general amnesty bill to be passed by the Parliament, which the President was required to commit himself in advance to promulgate.

The new combination of sticks and carrots - which also included an element of power-sharing and guarantees for the future of the army - still proved insufficient to induce the military leaders to stand down. International efforts collapsed when a bunch of thugs were employed to precipitate the humiliating turnaround of US troops, sent under UN auspices to "professionalise" - but also in fact to neutralise - the Haitian army. Yet this lack of international determination only led to pressures for further compromise by Aristide and his supporters. The Office of the UN Special Envoy for Haiti obtained amnesty laws from other countries as possible models - including laws criticised, and eventually formally condemned, as contrary to international law - and drafted amnesty bills for the Parliament. International pressure to adopt this legislation was applied at a time when constitutionalist legislators were subject to military intimidation, some had fled the country, others felt unable to participate for reasons of personal security, and supporters of the military elected illegitimately had resumed their participation in the senate. The most

shameful moment came when a draft bill which would have covered all crimes stemming from the coup right up to the date the law would be promulgated was presented at a ceremony attended by diplomats and welcomed by the UN spokesperson - this at a time when egregious human rights violations were still being committed, and would thus be exempt from prosecution.

The surrender by the Haitian military of the power they had seized, and the return of the legitimate President, came only when the US threatened military intervention, with the support of the constitutional government of Haiti and the authority of the UN Security Council. The resort to force was probably unavoidable: the most attractive carrots, including the most sweeping amnesty assurances, were not going to succeed as long as the sticks stopped short of the willingness to use force. Some opponents of an amnesty, however, tended to understate its significance as a potential stumbling block in the negotiations. There is no avoiding the dilemma for negotiators: maintaining the principle of accountability may well raise the hurdle to a peaceful transition. Yet however uncomfortable this conclusion, an amnesty in breach of international human rights principles should never be the outcome of pressure through the very organisations which are the guardians of international law - in the case of Haiti, the United Nations and the Organisation of American States - at a time when genuine national choice is impossible.

I am pleased to say that since the Haiti experience it has come to be recognised by the United Nations that

the UN cannot condone amnesties regarding war crimes, crimes against humanity and genocide, or foster those which violate relevant treaty obligations. During the course of 1999, Secretary-General Kofi Annan issued guidelines to his envoys and representatives involved in peace negotiations, to assist them in tackling human rights issues that may arise during their efforts. These guidelines, he said, addressed the tensions between the urgency of stopping fighting, on the one hand, and the need to address punishable human rights violations on the other: they represented a tool with which the UN can assist in brokering agreements in conformity with the law and in a manner which may provide the basis for lasting peace.

The dilemma remains a highly topical one. In recent months, there has been strong criticism of United Nations peacekeeping in Sierra Leone, and of the peace agreement signed in Lome in July 1999. Under this agreement, Foday Sankoh's Revolutionary United Front agreed to lay down its arms in exchange for a promise of amnesty for past acts, together with their inclusion in a new coalition government in which Sankoh's control over the country's diamond mines was formalised. That agreement was brokered not by the UN, but by governments which did not want to commit their troops to fight to restore the control of the elected government: the UN in witnessing the agreement disassociated itself from the granting of amnesty. In Sierra Leone today, it seems that a different choice is being made between military intervention and amnesty for human rights

violations: Foday Sankoh is in custody and the government intends that he will be put on trial, while UN forces play a more robust role. But let us be clear. This is an unwelcome dilemma for those of us who would wish to endorse military interventions or solutions only as a last resort, and prefer the path of negotiated peace. Nonetheless, a determination to uphold to the fullest the principle of accountability may imply a greater dependence on military action; conversely, a desire to seek only a peaceful solution may imply being unable to assert the accountability of those who have no such scruples.

This brings me to the second dilemma: once conflict has been halted, how far may it be necessary to compromise human rights principles to bring about reconciliation? - does the pursuit of justice threaten or sustain the peace? This is the dilemma which I have already indicated faces East Timor today.

The conflict in East Timor was presented by Indonesia over the decades, and still last year, as essentially a conflict among East Timorese, which Indonesian forces were compelled to attempt to pacify. This is far from the truth. From the moment when the "Carnation Revolution" in Portugal opened up the prospect of the decolonisation of East Timor, elements in Indonesia encouraged and exploited conflicts among Timorese in the interests of the eventual annexation of the territory. But conflicts among the political groups which formed in the 1970s were real, and were expressed in and intensified by a brief but bloody civil

war, in which the killing of prisoners and other human rights violations were committed. Those divisions are not without their resonance today; but to them are now added the consequences of nearly 24 years of Indonesian occupation: divisions between those who supported integration into Indonesia and served it, as government officials and in other ways, and those who actively or passively resisted it.

These divisions intensifed after the fall of President Suharto in 1998 opened up new possibilities for East Timor. A climate of greater political freedom gave rise to open campaigning for independence, including excesses which intimidated the integrationists. In response pro-integration militia groups were formed, not only with the encouragement of the local government, but with the active involvement of the Indonesian army in the territory. After President Habibie announced that if the East Timorese rejected his offer of special autonomy within Indonesia he would recommend immediate independence, the militia went on the rampage, killing pro-independence leaders and supporters. From January to April 1999, serious human rights violations were committed.

The presence of the United Nations Mission in East Timor (UNAMET), which I had the privilege to head, and of the international media and others, inhibited such human rights violations from May to August, even though it did not end violence, and still less the threats of violence if the majority opted for independence. Despite predictions that the poll would be disrupted, a

remarkably peaceful polling day saw 98.6% of those registered coming to vote, despite the intimidation to which they had been subjected. But the announcement that 78.5% of them had opted for independence was followed by the intense but methodical wave of violence and destruction to which I referred in my opening remarks.

It now appears that the scale of the killing, evil as it was, was considerably less than was feared at the time: the latest estimate by the United Nations in East Timor is that between 1000 and 1200 people were killed. But the scale of the destruction of buildings and facilities was extreme, and virtually the entire population was displaced. Those who fled to the hills have long since returned to begin the reconstruction of their homes, but a substantial minority were displaced across the border into Indonesian West Timor. Over 165,000 of them have gradually returned to East Timor, but some 125,000 are thought by the United High Commissioner for Refugees to remain in West Timor. Some of these are former militia members and their families, who may or may not wish to return; but many are people who were forcibly removed and have no reason not to return, other than the intimidation and false information directed at them by the militia who remain active in their camps.

There is on the part of the East Timorese political leadership, beginning with Xanana Gusmao, and on the part of the Church, beginning with Bishop Belo, a great willingness to seek reconciliation with those Timorese guilty of participation or complicity in the violence.

This appears to be shared by the majority of the population, who have already received many of them back into their communities with only occasional attempted reprisals. There is also a great practical need to overcome resistance to return on the part of militia members in West Timor, for short term and long term reasons: in the short term, to release their constraints on those among the displaced who already want to return; and in the long term, to remove the basis for efforts to destabilise East Timor from across its land border. Yet the demands of justice are equally real and keenly felt among the population. The more guilty among the perpetrators have not yet returned, and communities may have allowed perpetrators back with the expectation that they will be brought to justice in the future. If justice is not done, the less forgiving within those communities may take it into their own hands.

East Timor has yet to decide upon its own resolution of this dilemma. The broad coalition of independence parties, the CNRT, has announced its intention to help develop with the UN a Commission for Reception and National Reconciliation. It has been suggested that different strategies be employed with respect to four different categories of persons in West Timor: first in order of culpability, those who were responsible for the most serious crimes, such as murder and rape, or who led or organised the violence; second, those responsible for less serious crimes, such as burning, looting and assault; third, those not known to

have committed any crimes but who benefited from a close relationship with the Indonesian security forces in the past; fourth, those who were forcibly removed to West Timor or fled due to intimidation or fear. Category One cases would be referred to the justice system. For those in the other categories, the Commission would help to facilitate a community-brokered arrangement for their return. In the cases of those in Category Two who committed less serious crimes, they would be required to admit to their wrongs, apologise for their acts, and agree to some form of community service, payment or symbolic act as a demonstration of their remorse and their desire to be reintegrated into the community. These agreements would be brokered by traditional leaders or other respected members of the community, assisted by the Commission, and ratified by a local court, so that the perpetrators would no longer be liable for the acts disclosed. The immediate task of facilitating return would be linked to the larger purpose of establishing the truth of the human rights violations perpetrated since the 1970s, and recommending measures to provide assistance to victims and prevent future abuses.

The current thinking in East Timor thus reflects conclusions that have been reached elsewhere. It is certainly not possible, and it may not in any case be desirable, to pursue justice against all those who have committed crimes in the course of a major conflict. Local communities must be involved in the process by which lesser sanctions and reparations may substitute for the full rigour of the law.

My third dilemma - what is to be done if the aftermath of conflict leaves human rights principles of equal validity in conflict with each other? - I encountered in its most acute form in Rwanda. The extreme nature of the Rwandan dilemma stems from the enormity of the Rwandan genocide. This enormity consists in the number of its victims - over half a million, slaughtered by primitive methods in a short space of time: one commentator calculates a daily killing rate at least five times that of the Nazi death camps over six weeks in April/May 1994. But its enormity lies also in the numbers of its perpetrators: tens of thousands, possibly hundreds of thousands of ordinary Hutu peasants participated in the murder of their Tutsi neighbours with their own hands. There followed an exodus of Hutu refugees also unparalleled in its scale and speed, an evacuation ordered by the political leaders who had ordered the genocide, who remained in control of the refugee population in the camps. These camps became the base for a genocidal insurgency back into Rwanda, and Rwandan troops became the perpetrators of massacres as they fought to combat it. Ultimately they took the war across their border into Zaire, now the Democratic Republic of Congo, breaking up the refugee camps and committing further violations as they pursued those who did not return to Rwanda deep into Zaire. Meanwhile tens of thousands of persons denounced as perpetrators of genocide were packed into prisons and local lock-ups, suffering conditions of detention in which many died,

the inhumanity of which it is almost impossible for those of us who saw them to describe.

The Rwandan Government was criticised for the arrest of alleged perpetrators outside the procedures of a criminal justice system that had ceased to exist, and for their prolonged detention without trial in unacceptable conditions of detention; then when trials did eventually began in a newly-created justice system, for their failure to meet standards for fair trial. The UN High Commissioner for Refugees was criticised by some for feeding those guilty of genocide in the camps, and by others for participating in the return of refugees to conditions in Rwanda where they were at risk. Humanitarian NGOs agonised, some deciding to abandon the camps, others to stay.

The uncomfortable fact is that once the genocide had been allowed to occur, the full application of human rights principles to the resulting situation became literally impossible. Human rights standards required that the perpetrators of genocide be brought to justice, but that they be investigated and arrested by due process of law, held in decent conditions of detention, and given a fair and prompt trial. They required that refugees with a well-founded fear of persecution be given protection, able to make voluntary decisions to repatriate without being compelled or intimidated into either returning or remaining. They required that those guilty of crimes against humanity be arrested and brought to justice and that those waging armed conflict be excluded from

refugee protection. They required that insurgents still engaged in genocidal murder be combated by security forces fully respecting the principles of humanitarian and human rights law. Such principles are often hard to reconcile in practice: in the context of post-genocide Rwanda, reconciling them fully was beyond possibility.

In such a situation, we are not entitled, I suggest to take either of two easy options. We cannot focus on any one of these absolute requirements and criticise the failure to fulfil it, without acknowledging the impossibility of the dilemmas. But neither can we justify the abandonment of the principles at stake. We have to share in the responsibility of determining the courses of action which represent the least unacceptable compromises of principles which are simultaneously unachievable.

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I have not chosen or set out these dilemmas in order to suggest parallels with the situation Sri Lanka faces today: each of the three situations from which I have illustrated them is very different from the others, and all are very different from Sri Lanka. I do believe that the two unambiguously positive relationships between the respect for human rights and the negotiation and sustainability of peace are universally applicable, including to Sri Lanka: that a commitment by all parties to a conflict to respect fully humanitarian and human rights principles can greatly enhance the climate for

successful negotiations leading to an end to the conflict; and that the sustainability of peace will be enhanced by - indeed it depends on - the respect for the human rights of all sectors of the population after armed conflict has come to an end.

As for the dilemmas, all I can be certain of is that the situation in Sri Lanka will continue to pose terrible dilemmas of its own. The cause for which Neelan gave his life was that of justice and peace in Sri Lanka, just as he sought to promote those throughout the world. As a lawyer and human rights activist, he was utterly committed to the principles of human rights, but he did not stop at the declaration of principles, only then to criticise others for the failure to realise them in practice: as a political activist and parliamentarian he engaged in the practical task of working and reconciling, for peace and justice. It is in his memory that we must confront any dilemma: we must strive to minimise, when we cannot altogether avoid, the sacrifice of justice to peace, or of peace to justice.

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