Introduction

Political theorists like to establish simple oppositions. The idea that liberal democratic ideals can be contrasted with those of consociational arrangements as a means of resolving ethnic conflict is a case in point. In most cases, however, a complex combination of both is likely to be required. The idea that there are some fundamental human rights principles that should underpin any settlement and that help to create the pressure for change is equally attractive. In the real world of ethnic and political conflict the principles of human rights must in practice be thought of as correspondingly flexible.

The unsatisfactory nature of any simple oppositions in this area can be illustrated in one of the most important and controversial issues in the resolution of serious ethnic and political conflict, that of dealing with past or continuing human rights violations that inevitably occur during conflicts of this kind. There is a stark difference between human rights lawyers and politicians in their approach to issues of prosecution, punishment and amnesties in the aftermath of wars and conflicts. Human rights lawyers and activists usually insist that those responsible for serious human rights violations or war crimes should be prosecuted and punished.¹ ‘No impunity’ is their current slogan. The universal implementation of the statute of the International Criminal Court is their longer-term objective. Politicians, particularly those closest to negotiations on peace settlements or their implementation, more often support or acquiesce in settlements which involve formal or informal amnesties for crimes committed during the conflict.² In their view it is
'the big picture' – achieving lasting peace – which takes precedence and anything which interferes with that objective is to be avoided or sidelined.

Recent examples of these differing approaches

It is easy to illustrate these differing approaches. In the aftermath of almost all recent major conflicts the human rights community has campaigned for the immediate arrest, trial and punishment of those responsible for war crimes or serious human rights abuses, while politicians have usually found some way of avoiding or at least postponing all or most prosecutions.

In Argentina the new democratic government which replaced the military junta following the 'dirty war' from 1976 to 1983 and the Falklands war in 1983 put the leading generals on trial. But mounting pressure from the army for an end to prosecutions led to the enactment in 1986 of an effective amnesty for many alleged violations: the 'full stop' (punto finale) law (No. 23.492) set a 60 day deadline for the termination of all criminal proceedings arising out of the 'dirty war' and the 'due obedience' law (No. 23.521) provided for an irrefutable presumption that military personnel were acting in the course of duty. This was followed in 1989 by a Presidential Decree of Pardon (No. 1002/89) for all those not benefiting from the amnesty laws. The validity of these laws has repeatedly been challenged in lower courts and a ruling by the Supreme Court is pending.

In Chile, General Pinochet insisted on the enactment of a general amnesty and personal protection from prosecution in advance of his agreement to co-operate in the restoration of civilian government in 1990. Following his arrest in 1999 in the United Kingdom on charges by a Spanish prosecutor of torture and other human rights violations, the House of Lords decided that there was no immunity for heads of state in respect of international crimes. But the British government, apparently with the support of the Chilean government, eventually decided not to extradite him to Spain on the ground of ill-health. Following his voluntary return to Chile, his immunity from prosecution as life senator was removed by the Chilean Supreme Court in August 2000. However, the Court subsequently held that he was unfit to face trial on the grounds of mental incapacity.

In South Africa an effective amnesty for both government and opposition forces was negotiated as an essential part of the agreed transfer of power from the White minority to the Black majority. In formal