

## Chapter VII

# INTERIM POLITICO-ADMINISTRATIVE AND CONSTITUTIONAL ARRANGEMENTS IN SRI LANKA'S PEACE PROCESS: SOME ISSUES AND SCENARIOS

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### Introduction

With the signing of the Ceasefire Agreement between the Government of Sri Lanka (GoSL) and the Liberation Tigers of Tamil Eelam (LTTE) which came into force on 24<sup>th</sup> February 2002, the Norwegian-assisted peace initiatives have reached a critical cross-road.

'Peace' at this current juncture has not moved far beyond the 'absence of war'. Death and destruction relating to the protracted war has ceased, although the human trauma continues. Problems relating to deprivation caused by the embargo are being addressed, but bottlenecks remain. While more and more goods are beginning to flow into the war-torn areas in the Vanni, they still remain outside the reach of those who have no access to regular employment and income. The displaced still remain displaced, although the mobility of persons between the metropolitan centres of Colombo, Jaffna, Trincomalee and Batticaloa has increased as well as mobility between cleared and uncleared areas.

On the whole, two months after the signing of the ceasefire agreement, the initial task of confidence-building and peace-making has been initiated; but, the task of peace-building and substantive talks on the causes that led to the conflict and their resolution remain largely unaddressed. To use the terminology of the government, we are presently in the stage of 'talks about talks'. The agenda of which

it is widely expected, would focus on the setting up of interim arrangements for the North-East. One concrete manifestation of this process could be the setting up of an Interim Administration for the North-East.

The United National Front (UNF) Government, in its election manifesto for the General Elections of 5<sup>th</sup> December 2001 indicated that 'An interim administration would be set up for the Northern and Eastern provinces.' At the time of writing this paper, reports indicate that the 'talks about talks' to be held in Thailand would concentrate on the setting-up of an interim administration for the North-East. This emerging scenario has been further reinforced by media reports quoting LTTE's Chief Negotiator and theoretician Anton Balasingham as saying that the setting-up of an interim administration for the North-East will comprise the core item on the agenda for the initial rounds of talks.

That the LTTE enjoys considerable power, prestige and hegemony in the North-East of Sri Lanka is beyond dispute. It is also axiomatic, given the present politico-military conjuncture, that any interim arrangement in Sri Lanka is most likely to approximate a system of delegation of power to an LTTE-controlled administration, either, directly or indirectly through its 'proxies'. It is also not entirely inconceivable that whatever interim arrangement that is envisaged and implemented through the instrument of an interim administration for the North-East may well evolve into a proto-model for any future outcome of a negotiated political settlement to the Tamil Question.

One immediate scenario is that any interim administration for the North-East would be based on the prevailing Thirteenth Amendment to the Constitution and we will return to this later in our paper when we discuss the constitutionality of the setting-up of an interim administration. Alternatively, we could well end up with a series of extra-constitutional measures based on an 'understanding' between the government and the LTTE. It is beyond the scope of this paper to discuss the latter; neither do we consider the latter to be a desirable scenario.

The objective of this paper, hence, is to flag some conceptual and empirical issues that have a direct bearing on the specific task of establishing an interim administration for the North-East as a continuum of the on-going Norwegian-assisted peace initiatives. The discussion would focus on the structure, powers and functions of an interim administration for the North-East and the tasks and challenges that it would be faced with.

### **On Interim and Transitional Arrangements: Some Conceptual Issues**

A conceptual issue that will necessarily have to be taken into consideration is the extent to which an interim administration would approximate a system of autonomy or power-sharing. While *autonomy* could be said to indicate a sub-system of governance within the State, which is controlled and administered by the 'authentic representative', *power-sharing*, on the other hand, could be said to relate to access to decision-making power at the centre.<sup>28</sup>

It is important, at the first instance, to take cognisance of the fact that there is a vital difference between interim arrangements *prior* to the reaching of a negotiated political settlement and transitional arrangements *following* a political settlement. In this context, the following observation from a recent study on implementing peace agreements may be of relevance for our purpose:

*"For the most part analysis of conflict resolution and civil war have paid scant attention to the short term implementation of peace agreements and have instead focused on mediation of agreements and/or long-term peace-building"*<sup>29</sup>

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<sup>28</sup> For a useful discussion see Background Paper for Workshop on "Self-determination Disputes and Complex Power Sharing Arrangements", Pembroke College, Cambridge University, February 9 & 10, 2001.

<sup>29</sup> See "Implementing Peace Agreements in Civil Wars: Lessons and Recommendations for Policymakers", International Peace Academy (IPA) Policy Paper Series on Peace Implementation, May 2001, New York.

On the other hand, there is also a distinct tendency for the 'interim' to get protracted and become permanent and thereby constituting a mechanism for redressing the symptoms of the conflict rather than the causes that led to the conflict.

It appears from international experience that a respite from war and a hitherto rare confluence of intents between parties to the conflict is not in itself enough to set up the kind of interim arrangement that would ensure a successful settlement<sup>30</sup>. Those tasks of an interim administration such as channelling and mediating disputes, confidence building and normalising civilian life have a direct bearing on the shape and flavour of the negotiating process. Some of the worst mistakes in international experiences were reflected in Cambodia, Somalia, Haiti, Rwanda and the former Yugoslavia, where authoritarianism, corruption and lawlessness seriously hampered progress towards peace. Interim arrangements in Sri Lanka must have the institutional capacity and effective mechanisms to ensure those mistakes are not repeated here. As Mark Plunkett points out, "the lesson is that without justice there can be no prospect of lasting peace."<sup>31</sup>

Before we enter into a discussion on the empirical issues and scenarios relating to the composition, powers and functions of the proposed interim administration for the North-East province of Sri Lanka, it may be pertinent to look into the past negotiation processes where interim arrangements were contemplated.

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<sup>30</sup> For a useful discussion on the multiplicity of tasks in interim processes as well as peace maintenance see Jarat Chopra (Ed) (1998), *The Politics of Peace Maintenance*, Lynne Rienner Publishers.

<sup>31</sup> Mark Plunkett (1998) "Reestablishing Law and Order in Peace Maintenance" in Chopra, *op cit.* at p. 61.



## Interim Arrangements in Past Negotiations: An Overview

### **A. Indo-Lanka Accord of 1987 and Interim Administration**

The first excursion into interim arrangements in Sri Lanka, as a conflict resolution mechanism to the ethnic conflict, came in the wake of the signing of the Indo-Lanka Accord of July 29, 1987 which sought to ensure the following:<sup>32</sup>

- (i) The preservation of the unity, sovereignty and territorial integrity of Sri Lanka (*vide* Clause 1.1);
- (ii) The nurturing of the distinct cultural and linguistic identity of each ethnic group (*vide* Clause 1.3), within the framework of a multi-ethnic and a multi-lingual plural society (*vide* Clause 1.2), where all citizens can live in equality, safety and harmony and prosper and fulfil their aspirations (*vide* Clause 1.5); and
- (iii) The recognition of the Northern and Eastern Provinces as “areas of historical habitation of Sri Lankan Tamil-speaking peoples”.

The Government of India was designated to “underwrite and guarantee the resolutions, and co-operate in the implementation of these proposals” (*vide* Clause 2.14).

As a means of advancing the above, it was envisaged that there would be an ‘interim period’, from the date of elections to a merged North-East Province in December 1987 to the holding of a referendum, on or before 31<sup>st</sup> December 1988 (*vide* Clause 2.2). The referendum was to enable the people of the Eastern Province to decide whether they wished to remain linked to the Northern Province or constitute a separate administrative unit (*vide* Clause 2.3).

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<sup>32</sup> See Ketheshwaran Loganathan (1996) *Sri Lanka: Lost Opportunities*, CEPRA, University of Colombo.

Although the concept and the modalities of an 'interim administration' were not explicitly addressed in the Indo-Lanka Accord, it was communicated to the Tamil politico-military organisations by the Government of India on the eve of the signing of the Indo-Lanka Accord. The LTTE, having emerged as the dominant politico-military organisation, following its successful pursuit of hegemony through the force of arms against other Tamil politico-military organisations, sought for and obtained 'pride of place' in the proposed interim administration. The specific powers and functions of the proposed interim administration were not stipulated.

The priority then was to work out the composition of the interim administration. Accordingly, the LTTE was given seven seats in the twelve member interim administration, with two to the TULF and three nominees of the Sri Lankan Government. It was assumed that of the three Government nominees one would be Sinhala, one Tamil and one Muslim. Unfortunately, the initial task of setting-up the interim administration ran into snags with the LTTE and Colombo disagreeing on the appointment of the Chief Administrator. The military situation soon overtook the political environment and hostilities broke out between the LTTE and the IPKF, signalling the abortion of the proposed Interim Administration for the North-East.

#### **B. PA-LTTE Talks of 1994-95 and Interim Measures: With or without the LTTE?<sup>33</sup>**

A contentious issue that characterised the PA-LTTE Talks of 1994-95 was the various unilateral measures taken by the government in "easing the hardships of the Tamil People". This was seen by the LTTE as a covert means of isolating and alienating it from the Tamil populace. A case in point was the initiative taken by the government to unilaterally implement its reconstruction package.

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<sup>33</sup> See Ketheshwaran Loganathan (2001) *"An Analysis of the Thimpu Talks (1985) and the PA-LTTE Talks (1994-95) – Some Lessons on Processes of Negotiations in Armed Conflict"*, Background Paper presented at CPA / IFF Conference on *Exploring Possible Constitutional Arrangements for Meeting Tamil Aspirations Within a Unified Sri Lanka*, Locarno, Switzerland, 11<sup>th</sup> to 14<sup>th</sup> June 2001.

On 13<sup>th</sup> February 1995, the government announced the appointment of a Presidential Task Force on Rehabilitation of the North-East province. The Task Force was given a period of three months to implement its programme that included the electrification of Jaffna, the repair of major roadways leading to Jaffna, the reconstruction of the Jaffna Public Library and repairs to the Jaffna General Hospital. The reconstruction package was very much Jaffna-centric.

The unilateral decision was communicated to the LTTE in a letter dated 16<sup>th</sup> January by President Chandrika Kumaratunga. In that letter she "informed" the LTTE leader V. Pirabhakaran that the Government would be commencing work on the main areas of reconstruction mentioned earlier and requested the LTTE to "make arrangements" to receive the technical officers and to "facilitate their work". **The LTTE was not directly represented in the Task Force.**

The LTTE was not impressed. The LTTE leader in his a letter of 25<sup>th</sup> February 1995 addressed to President Chandrika Kumaratunga wrote,

*"...we call upon the Government to seek a negotiated settlement to these critical matters with the LTTE so that it would facilitate the practical implementation of major reconstruction projects in the war-affected areas. In this context, we wish to point out to you that our delegation, at the last round of talks, had suggested the formation of an appropriate authority comprising Government representatives and the LTTE be constituted with adequate authority to plan and implement all reconstruction projects. This suggestion was accepted by the Government delegates".*

Although the LTTE was subsequently requested to participate in the Presidential Task Force, it was more as an after-thought. And, by that time the damage had been done. **The apparent confidence building measure had become a source of suspicion.** In any event,

what the LTTE had proposed was its participation in the Authority for Reconstruction and Rehabilitation as the authentic representative of the Tamil people. It may also be noted that the notion of separating 'Tamil interests' from 'Tiger interests' and the 'weaning' of the Tamil populace from the Tiger 'influence' figured prominently in the broad strategy of the Kumaratunga government. The LTTE on the other hand was firm that they constituted the sole legitimate representative and mediator of Tamil interests. This, as we shall see later, has a direct bearing on the on-going peace process.

In sum, although the PA-LTTE Talks of 1994-95 did not progress to the stage of even pre-settlement interim measures, the setting up of a Presidential Task Force on Rehabilitation by the Government and the LTTE's own proposals for an appropriate 'Authority' to oversee the task of reconstruction that would include representation from the Government and the LTTE, came closest to some form of an interim administration.

**C. PA Constitutional Reform Proposals of October 1997, PA-UNP Consensus on October 1997 Proposals, and Draft Constitution Bill of August 2000 relating to Interim Administration:**

***PA Constitutional Reform Proposals of October 1997***

The October 1997 proposals did not deal with any interim arrangements but some measures were added following the discussions with the UNP later, as described below.

***PA-UNP Consensus on Amendments to October 1997 Proposals***

The discussions between the PA and the UNP envisaged an interim council set up to administer the North and East which was to function until a referendum is held. If a referendum for the Eastern Province was not held during the stipulated period (5 years), the North and the East would thereafter be administered separately by two Interim Councils until such time a referendum was possible.



In effect, while under the prevailing situation, stemming from the Indo-Lanka Accord and the 13<sup>th</sup> Amendment, the North-East will remain merged till such time as a referendum in the Eastern Province votes otherwise, under the PA-UNP agreement, if a referendum was not held at the end of five years, the presently merged North-East would de-merge into two distinct administrative units. There was provision to extend this period to ten years.

***Draft Constitution Bill of August 2000***

The August 2000 Draft Constitution Bill replaced the multiple referenda contained in October 1997 Proposals<sup>34</sup>, with a single referendum in the Eastern Province (i.e. Districts of Trincomalee, Batticaloa and Ampara), not earlier than the expiration of nine years and not later than three months prior to the expiration of a period of ten years, "to enable the electors of such Districts to decide on the question whether or not such Districts and the Administrative Districts of Jaffna, Killinochchi, Vavuniya, Mannar and Mullaitivu should form one Region to be designated the North-Eastern Region." There was no provision for a South-Eastern Regional Council as envisaged in the October 1997 Proposals.

The Draft Constitution provided for an interim period of ten years. The duration of the said ten year interim-period was to comprise of five years under an Interim Council appointed by the President (*vide* Article 243) and the remaining period under an elected Interim Regional Council (*vide* Article 253).

There was to be one Governor, one Chief Minister and one Board of Ministers for the two Northern and Eastern Regions. This amounted to a single Regional administration for the two Regions (Northern and Eastern), as per Part C of the First Schedule of the Bill, and not a single Regional administration for a unified North-Eastern region, as per Part B of the First Schedule.

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<sup>34</sup> See Section 4.1 B of this paper, *infra*.

**D. Advisory Council for the Northern and Eastern Provinces  
Regulations No. 01 of 1999**

In November 1999, the President acting on her powers to make Emergency Regulations under s.5 (1) of the Public Security Ordinance, issued a *Gazette* notification stating, in view of the North-Eastern Provincial Council standing dissolved by operation of s.5A of the Provincial Councils Act as amended, that:

*"[It was] necessary for the preservation of public order and for the maintenance of supplies and services essential to the life of the community to establish an Advisory Council for the Northern and Eastern Provinces for the due discharge of the executive and administrative functions by the appropriate authorities within the said Provinces."*

Accordingly, the regulations went on to establish an Advisory Council consisting of eleven to seventeen members appointed by the President giving representation to every administrative district of the two Provinces. The renewable term of office was one year or less. The President would also assign one or more members to each administrative district, whose duty it was to bring to the attention of the Council, the Governor and other appropriate authorities, the needs and requirements of such district, and to co-ordinate the executive and administrative functions thereof.

Regulation 5 provided that "[It] shall be lawful for the Governor to consult the Council in the exercise and discharge of his powers and functions under the Constitution or other written law." The Council could advise the Governor with regard to the restoration of civil administration and the maintenance of law and order. It could submit and prioritise proposals for development activities and advise on the allocation of resources for same. The Council could also advise on ways and means of raising revenue within the Northern and Eastern Provinces (*vide* Regulation 6).

The Council could make a recommendation, under Regulation 7, to the President for the appointment of a five member Board of Management to assist the Governor on the following groups of subjects:

1. Law and order, public administration and local government;
2. Finance, industry, infrastructure development, transport and highways;
3. Education, culture, youth affairs and sports;
4. Environment, agriculture and lands, fisheries and co-operatives; and
5. Health, housing, women's affairs, social services and rural development.

The Council had the power to add further subjects to a group.

**This arrangement, while substantial in its scope of application, was essentially an interim bureaucratic response towards restoring civil administration in the North-East, whilst accommodating the EPDP, which was then the largest Tamil parliamentary party and an ally of the PA government. The President used her powers ingeniously in respect of essential services under the Public Security Ordinance to buttress the Governor's powers under the 13<sup>th</sup> Amendment in establishing an interim administration, thereby foreclosing questions as to its validity.**

This legal scheme remained in force till July 2001, when the State of Emergency lapsed, but the appointments to the Advisory Council or Board of Management were never made. While promulgating fresh regulations remains an option, it is to be noted that that would involve the declaration of a state of emergency with all the other associated problems.

## **Contours of an Interim Administration for the North-East**

### **On the Constitutionality of an Interim Administration**

A most critical question on an interim administration at this stage of the peace process is as to the constitutional implications in respect of its legal validity and political legitimacy. The concerns are different this time round, in that two of the last three attempts at establishing an interim administration have been as part of a wider constitutional reform attempt, and in any event, without any participatory input from the LTTE. Thus, the following questions are re-incarnated with fresh significance: Would an interim administration in whatever form be unconstitutional?

**On the other hand, is it at all necessary to consider the constitutional validity of an interim, as opposed to transitional institution, since constitutional reform and eventual structure of the administration in the North and the East would be the subject of substantive negotiations between the parties?**

The point is to establish institutional arrangements for efficient and effective public service delivery for an *interim* period, during which the principal stakeholders will be negotiating the substantive questions of a settlement that would in turn find constitutional expression. The UNP has a mandate from the people to negotiate peace with the LTTE, who in turn through the TNA has an indirect mandate from the Tamil people of the North and the East to negotiate on their behalf.

Presumably, an interim administration for an agreed period would be set up by an agreement between the government and a de-proscribed LTTE, following the 'talks about talks' in Thailand this year. What would be the constitutional authority of the government to enter into such an agreement with the LTTE? The answer must take into consideration the fact of co-habitation, and the questions which have been raised against the validity of the Ceasefire Agreement, because the same basis of authority would underlie any subsequent agreement between the same parties.



Another problem is as to what should constitute the interim period. The desired period should be one which would give the LTTE-controlled interim administration sufficient time to realise for the people the dividends of peace, but it also should not be so protracted as to give rise to a situation where the substantive issues remain unaddressed. There is a danger of the interim measures becoming comfortable working arrangements which give no incentive for the parties to begin the harder task of negotiating a settlement. This is not acceptable, least of all due to the fact that such an administration has no electoral mandate from the people of the North-East. A non-elected permanent administration would be wholly unjustifiable because it would rob the process of legitimacy and thereby jeopardise a final settlement.

*A. Using the Thirteenth Amendment*

Would it be possible to set up an interim administration, that has some constitutional validity, but which at the same time accommodates the political participation of the LTTE without direct elections? One way of doing this is to use the provisions of the 13<sup>th</sup> Amendment relating to the powers of Provincial Governors coupled with an agreement between the parties setting out the modalities of an advisory political council.

Article 154C of the Constitution vests executive powers in relation to the matters contained in the Provincial Councils List with the Governor. The Governor may exercise these powers directly, through the Board of Ministers, or through officers subordinate to him. Therefore it would be possible to set up an interim administration under a Governor directly exercising executive powers, and which would have a constitutional basis under the 13<sup>th</sup> Amendment. In the present circumstances, there shall clearly be no provincial council elections at the outset, and therefore there will be no elected Provincial Council or Board of Ministers. However, the provincial civil service including the North-Eastern Provincial Secretariat would exist and be available to the interim administration.

A putative agreement between the government and the LTTE could establish an advisory political council that gives 'pride of place' in representation to the LTTE. The *modalities* of the interim measures (not the *procedure* by which they came into existence) adopted by regulations under the Public Security Ordinance in 1999 may be usefully replicated for this purpose. The Governor would in effect exercise his constitutional powers according to the advice of this council. While provision for such an advisory council does not find explicit expression in the Constitution, it is also difficult, and for the same reason of constitutional silence, to find such an arrangement contra-constitutional.

In this way, the actions of the interim administration would not be unconstitutional while at the same time those actions would be the result of decision-making that has LTTE participation. This constitutional-*cum*-political scenario would fit with the conceptual requirements of interim arrangements, especially as regards complex power-sharing mechanisms in conflict transformation.

However, in view of the tensions of co-habitation at the Centre, there are certain other provisions of the 13<sup>th</sup> Amendment impinging on the operation of Article 154C that must be taken into consideration when pursuing the option suggested here. Quite apart from the convoluted drafting of these provisions, they also have a strong centralising predisposition towards the office of the President. At the same time, it must be noted that in the present scheme of things, the appointment to the Governor's office would be a person who enjoys the confidence of the LTTE. If therefore the Governor in practice exercises his executive powers on the advice of an advisory political council, Advisory Council or Board of Management as discussed above, with the significant acquiescence of the government in Colombo, then the centralising propensities of the law are mitigated.

By Article 154F, the Governor is given a wide power to ignore the advice of the Board of Ministers where he is under the Constitution, required to exercise his functions in his discretion. However, the Governor's discretionary powers under Article 154F

were challenged in *Premachandra v. Jayawickrema* (1994), where the Supreme Court restrictively interpreted the provisions stating, *inter alia*, that “[It] is a cardinal maxim that every power has legal limits, however wide the language of the empowering Act. If the court finds that the power has been exercised oppressively or unreasonably, or if there has been some procedural failing, such as not allowing a person affected to put forward his case, the act may be condemned as unlawful.”<sup>35</sup>

Under Article 154K, where the Governor fails to comply with any directions given to him, it shall be lawful for the President to hold that a situation has arisen in which the administration of the Province cannot be carried on in accordance with the provisions of the Constitution. Consequently, Article 154L empowers the President to arrogate to himself by Proclamation, the functions of administration exercisable by the Governor.

Article 154J provides for the President’s powers in respect of public security in relation to the Provinces. Upon making a Proclamation under the PSO on the grounds of Sri Lanka’s security being threatened, *inter alia*, by armed rebellion, the President may give directions to a Governor as to the manner in which the executive power of the latter is to be exercised. The explanation to Article 154J states that a Presidential Proclamation may be made before the actual occurrence, *inter alia*, of armed rebellion, if the President is satisfied that there is an imminent danger of such an eventuality. A Proclamation under the PSO cannot be questioned in any court on any ground. However, Ch. XVIII of the Constitution, which pertains to public security, contains some parliamentary checks on the President’s power.

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<sup>35</sup> *Premachandra v. Major Montague Jayawickrema and Another* (1994) 2 SLR 90. [The Provincial Governor’s Case]

### ***B. The Territorial Unit of the Interim Administration and Minority Safeguards***

The territorial unit of the interim administration would be the merged North-Eastern Province. Provision was made by s.37 (1) of the Provincial Councils Act No. 42 of 1987 for the President by Proclamation to amalgamate two or three adjoining Provinces into one administrative unit. Accordingly, by *Gazette Extraordinary* No. 522/9 of 8<sup>th</sup> September 1988, the Northern and Eastern Provinces were merged. In the event of the Northern and Eastern Provinces being merged, the Act also requires a poll to be held in the Eastern Province only, to enable the electors of that province to decide whether they wish to continue to be administered as one unit with the Northern Province (*vide* s. 37 (2) (a) read with the proviso to s. 37 (3) of the Provincial Councils Act). Although the Act required the poll to be taken by 31<sup>st</sup> December 1988, s. 37 (2) (b) empowers the President to postpone the date of such poll from time to time. It has since been the practice to annually postpone the poll, by Presidential order published in the *Gazette*. Given the legal basis of the merger flowing from the office of the President, it need not be reiterated that management of the tensions of co-habitation at the centre would assume considerable importance.

The territorial unit of an administration in the North and East has long been the subject of violent controversy<sup>36</sup>. In the October 1997 constitutional reform proposals of the PA called for the de-merger and/or re-demarcation of the temporarily merged North-East province. The following options were to be worked out through multiple referenda (*vide* Article 127):

- The linking of the eastern districts of Trincomalee and Batticaloa to the Northern districts of Jaffna, Killinochchi, Vavuniya, Mannar and Mullaitivu i.e. merger of the present North-East minus the Ampara district.

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<sup>36</sup> See Loganathan, *op cit.*, fns 5 & 6.



- In the event of the above being constituted, then the setting up of a Muslim unit to be called the South-East Regional Council comprising the Polling Divisions of Kalmunai, Sammanthurai and Pottuvil.
- In the event, of Trincomalee and Batticaloa deciding not to link with the North, then two separate Regional Councils to be established and a referendum in the polling division of Ampara to enable the electors to decide whether they should form a separate Region of Ampara, or form part of the Uva region.

As this paper points out elsewhere, the disagreements are based largely on the position of minorities (i.e., Muslims and Sinhalese) living in the two Provinces. As with most ethno-political conflicts, the positional debate between the parties reflect a set of attitudinal dichotomies. The concerns of the Sinhala people correspond to the emotive issue of internal colonisation from the Tamil viewpoint. Muslim apprehensions correspond to whether the North and the East constitute a linguistic region, or whether the ethno-religious dimensions warrant separate arrangements *vis-à-vis* the Muslims of the East. These are all elements of conflict formation in Sri Lanka, and as such, will have to be the subject of intensive substantive negotiations in the future. For the present, basic minimum standards have to be built into either the Interim Administration Agreement or a Human Rights Agreement, whereby the physical security, essential goods and services and equal access to justice are ensured for Sinhalese and Muslims living in the North-East.

In this context, the scheme of representation in the interim advisory political council assumes great importance. In Section 3 of our paper, we briefly described how this question was dealt with in various previous attempts at setting up an interim administration. One scheme has been to appoint representatives to each administrative district in the two Provinces, thereby allowing the actual demographic profile to ordain the composition of the interim body. This principle of representation could be coupled with a mutually agreed number of seats to be nominated by the LTTE and

government respectively. The LTTE would, as before, expect 'pride of place'.

Another mechanism of safeguarding minority interests was envisaged in the Draft Constitution Bill of August 2000 (Ch. XXVIII). This was the Equality Commission appointed by, and reporting to the President, consisting of three members representing the "three major communities of the Northern and Eastern Regions" (*vide* Article 252). The function of the Equality Commission was to monitor the measures taken by the Interim Council and Board of Ministers to promote equality of opportunity for all communities in respect of matters such as employment and access to public services, and "to promote parity of esteem amongst all communities". The Commission was also able to inquire into complaints against public bodies. It would be perhaps unfair to question the effectiveness and utility of the Commission given that it never existed, but it would still be difficult to expect much from a relatively powerless body.

## **Tasks and Challenges before an Interim Administration**

### ***A. Reconstruction and Resettlement:***<sup>37</sup>

The prevailing environment is conducive to address the challenge of rebuilding the North-East Province (NEP) with a focus on the dynamic relationship between development and peace-building in a war-torn society. It appears that the so-called peace-dividend, which has been so elusive for so long, may now have some chance of materialising.

However, it is important to be reminded that historically the relationship between development and peace has invariably hinged on uncertain premises in Sri Lanka as well as the rest of the world. The permanent ceasefire provides some opportunities for investment and growth although it does not serve as a sufficient incentive for long-term investment. These opportunities are largely to be found in

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<sup>37</sup> This section is based on a discussion with Dr. N. Shanmugaratnam on 24<sup>th</sup> March 2002.

the construction (infrastructure, resettlement and relocation), agricultural, fisheries, communication and trade sectors. Local and international tourism has potential too. A key question at this juncture is how these opportunities could be used to promote development so as to strengthen the peace process.

**The development of the NEP would positively serve peace-building if it can enable the people to achieve greater socio-economic security and regain their dignity and self-esteem through more rapid human development. In other words, the rebuilding of the war-torn NEP ought to have a strong element of intentional socio-economic advancement through the widest possible participation of the people. Such an inclusive process of development could make a lasting contribution to confidence building at the community level and thereby strengthen the peace process. However, the odds against such an approach are formidable in view of the variety of political, economic, demographic and environmental issues, human and organisational capacity gaps, and the imperatives of the ruling paradigm of development. These challenges have to be seriously addressed by those concerned about peace and development in Sri Lanka.**

**The task of resettlement of the internally displaced clearly should rank high on the agenda of the proposed interim administration. In this context the on-going census on the internally displaced being carried out by the Government with the assistance of the UNHCR is timely. It is pertinent here to refer to the following section on Confidence-Building Measures from the Rambouillet Accords (Interim Agreement for Peace and Self-Government in Kosovo) which has a direct relevance to the Sri Lankan situation:**

*"The parties recognise that all persons have the right to return to their homes. Appropriate authorities shall take all measures necessary to facilitate the safe return of persons, including issuing necessary documents. All persons shall have the right to reoccupy their real property, assert their occupancy rights in state-owned property, and recover their other property and personal possessions" (vide Article 2, Clause 3).*

## ***B. On Financial Powers***

The nature of relations between the Centre and the Region in any scheme of fiscal devolution will necessarily hinge on the following sets of relationships: (1) The division of subjects between the Centre and the Region; (2) The division of financial power between the Centre and the Region; and (3) The role of the Centre and the Region in Economic Planning.

In the Sri Lankan context, the above relations are delineated in the 13<sup>th</sup> Amendment to the Constitution which has been found to be woefully inadequate as a basis for meaningful autonomy. **The main drawback in the 13<sup>th</sup> Amendment is not only the limited scope for resource mobilisation by the Provinces, but the excessive dependence of the Province on the Centre for grants and resource allocation. It is this dependency that has enabled the Centre to encroach into the affairs of the Provinces.**

Coming to the specific situation of the North-East, the nature of relations between the Centre and the Province in relation to financial powers is obviously more complex and contentious. While the 'cleared areas' came under the total control of the Centre and depended entirely on the magnanimity of the Centre, the areas under the control of the LTTE were the subject of miserly treatment, aggravated by the economic embargo. In addition, the LTTE has evolved its own parallel financial administration, based on 'taxation' that further imposed severe disabilities on an already burdened populace.

The on-going peace initiative, which has led to the blurring of the 'cleared' and 'uncleared' areas and is fast heading towards a situation where the LTTE is likely to emerge as the dominant factor under a system of an interim administration, has contributed to reducing some of the above complexities. **The task then is how to bridge the gap between resource requirement and resource mobilisation, in a manner that would not go contrary to the principles of fiscal devolution.**



A reading of Budget 2002 that was recently tabled in parliament clearly indicates that the financial burden of the task of rehabilitation and reconstruction in the North-East is to be passed on to the international donor community. That the international donor community is prepared to take on that burden is also manifest in the recent visit to Jaffna by the Heads of Foreign Missions as well as donor agencies. This raises further questions as regards the foreign borrowing powers of the interim administration.

**Further, the tremendous challenges of rebuilding the North-East economy is clearly beyond the capacity of resource mobilisation within the region or resource allocation from the Centre to the North-East region by way of grant. The 13<sup>th</sup> Amendment to the Constitution that spells out the system of fiscal devolution is also inadequate for the purposes of financing the task of resettlement, rehabilitation and reconstruction that faces the North-East for the next several years.**

**An added problem is the 'parallel' financial administration of the LTTE based on 'taxation'. There are speculations that the external sources of funding for the LTTE may be declining in the context of the on-going global campaign aimed at the suppressing of the financing of terrorism. Further, the terms of the ceasefire agreement makes extortion a ceasefire violation. In this context, financial powers may have to be devolved to the North-East in creative manner that involves an LTTE-controlled interim administration as a key stakeholder as well as the key distributor of benefits to the populace. But, any further expansion of fiscal devolution can be brought about only under conditions of 'taxation, with representation'. In the final analysis, devolution of financial powers should be for a region and its people. This would involve an effective system of transparency and accountability. In this context, the LTTE will need to undergo a transformative process.**

### *C. On Pluralism*

Establishing a political order in the North-East based on pluralism and democracy is a formidable challenge, but an imperative exigency, not least because the people in those areas have been long deprived of at least a semblance of a free political life. **International experience demonstrates that entrenching plural democratic values from the outset is important also because the normative basis of the final settlement is invariably and decisively influenced by them.** In this regard, a party that does not make long-term commitments to full realisation, and short-term efforts to operationalise human rights and democratic norms must not be held to be justified in doing so.

This brings us to the question of the composition and decision-making processes in the interim administration. The most contentious issue facing the setting-up of an interim administration is the insecurity faced by the Muslim populace who had faced expulsion and extortion at the hands of the LTTE for more than a decade. At the time of writing this paper, the LTTE has made a self-criticism of sorts when Anton Balasingham stated at a public meeting in Pudhukudiruppu in the Vanni that the LTTE's decision to expel the Muslims from Jaffna in 1990 was a "political blunder". This has now been followed by a meeting between the leadership of the LTTE and the SLMC.

Another vexed issue would be the role of non-LTTE organisations in the interim administration. This problem may be largely resolved by the LTTE allowing the Tamil National Alliance (TNA) a prominent role in the interim administration. However, the LTTE-TNA relationship is one based on total subservience. The *modus operandi* of the LTTE in the North-East further indicates that it seeks to impose its absolute hegemony *vis-à-vis* polity and civil society. This does not augur well for pluralism and the democratisation of the decision-making processes in the interim administration.

#### ***D. On the Rule of Law and Human Rights***

In setting up interim arrangements for the pre-settlement stage, during which time substantive political negotiations would take place, steps must be taken from the very outset to ensure that the rule of law would underpin administration. This principle must be a cornerstone of the agreement that sets up the interim administration, and would also entail that the applicable rules must be those of Sri Lankan law including constitutionally enshrined fundamental rights. The Ceasefire Agreement takes a step in the correct direction wherein the government pledged to conduct arrests and prosecutions under the ordinary criminal law and not the PTA, which is widely perceived as arbitrary and oppressive by the people at large and not just the LTTE. As such, it would appear that the LTTE's *de facto* system of judicial administration needs to be discontinued, which in any event suffers from a lack of credibility due to its inconsistent nature and disproportionate penalties.

Needless to say a massive reconstruction programme is needed to operationalise what is envisaged as an acceptable interim judicial administration. Physical infrastructure in terms of courts, police stations and humane detention centres, related administrative offices, provision of adequate legal resources including law libraries, procedures for storage, retrieval and replication of records and information held by the system need to be put in place or reconstructed. Legal training for a competent Bar and Bench and training of a police force for non-military duties of community policing would also need to be addressed.

The law and order machinery in any interim arrangement where there is no de-commissioning creates its own complexities and asymmetry. It is clear that any interim administration should have its own police force that functions independently of both the security forces and the LTTE's armed forces. The provisions of the 13<sup>th</sup> Amendment relating to police, which is a provincial subject, have not been effected. But giving effect to the 13<sup>th</sup> Amendment on independent policing and law and order so that those subjects

become the responsibility of an LTTE-controlled interim administration throws up some difficult questions with regard to the existence and location of the LTTE's armed forces.

In other areas, there may be more specific measures that would need to be built into the agreement such as safeguards for the independence and physical security of justice personnel, and anti-corruption measures. **Accountability mechanisms built in to the agreement setting up the interim bodies may extend to include international monitoring.** The imperative of financing such large-scale reconstruction in turn raises questions of transparency and accountability of the interim administration, **which would be responsible for the conduct of the programmes and the disbursing of funds.** *A fortiori* due to its inherently non-democratic political nature, it is important that procedures and mechanisms are in place that can be used to hold the administration accountable at least to some limited legal extent.

**There is scope for a separate Human Rights Agreement between the parties that would establish minimum standards of acceptable behaviour, and which could supplement administration according to law during the interim period.** Such an agreement must give expression to minimum substantive rights such as equality before the law and protection of minorities, but should ideally also contain rights that are the basis of plural democracy. As a starting point, the agreement could at least reiterate the commitment of the parties to the fundamental rights enshrined in the present Constitution.

The Human Rights Agreement, in respect to the interim judicial system and procedural rights, must draw from the UDHR, the ICCPR and the UN Basic Principles on the Independence of the Judiciary. Such a commitment to the rule of law assumes overwhelming salience in the context of the mooted interim administration having no democratic mandate at the outset.

Based on this, the agreement must set up institutions that are able to win the confidence of the people, and would include an independent



and accessible judiciary, independent and effective civilian law enforcement and prosecution authorities, and the sanctity of contractual obligations and property rights actively enforced *via* the ordinary courts of law.

### Some Concluding Remarks

We have attempted to identify strands of a complex set of issues that would need to be addressed in setting up an interim framework of administration within which substantive political negotiations may successfully take place. In doing so we have delineated some elements of a possible conceptual model drawn from international experience, and described Sri Lanka's own past attempts in a comparative perspective.

We have drawn attention to some political issues, in so far as they are relevant to the interim period. These would need to be firmly understood and accepted by both parties (and their constituencies) if they are to engage successfully.

We felt that the constitutional implications of setting up interim arrangements were particularly important, in that, whilst solely legalistic approaches are clearly inappropriate in dealing with conflict resolution in protracted ethno-political problems, conflict resolution based on contra-constitutional realpolitik is also, and perhaps more dangerous. We are committed to the principles of constitutionalism that, among other things, define the constitution as a living document of contractarian relations between the various groups of a multiple identity polity. As such we believe that constitutional reform is a dynamic instrument of conflict resolution, of managing socio-political tensions, and of democratic government, which should be used imaginatively by both parties in Sri Lanka's peace process in negotiating towards a just and equitable settlement. However, negotiations of such a nature may not be possible if the interim framework does not provide the conducive space. Indeed, the possibility of a settlement might become fraught if the interim arrangements themselves became a problem.

The overwhelming concern at this point in the process must be the development of the socio-economic security of all the people of the North and East. Their lives have been marred by years of military conflict and restoring their livelihoods, 'normal' life and dignity must take centre-stage. Accordingly, we devoted considerable attention to identifying possible ways to move the debate (and thereby action) forward. It is in this regard, i.e., re-settlement and reconstruction, that the need for an interim administration is most felt. It follows then that a future interim administration responsible for reconstruction would be the conduit through which massive disbursement of funds would take place, raising in turn, material questions regarding mechanisms for holding it accountable.

In flagging these issues for further discussion, we have not tried to urge solutions. We have instead restricted ourselves to identifying pertinent issues and making tentative suggestions on some ways of moving forward on what are the preliminary steps of a long and arduous journey towards peace in Sri Lanka.

**However, we must be aware of the fact that any interim arrangements relating to the resolution of the ethnic conflict should be located within a broad framework of principles and objectives delineating the contours of a final settlement.**