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**TOWARDS A CONSTITUTIONAL  
SETTLEMENT  
OF  
THE ETHNIC CONFLICT IN SRI  
LANKA**

A Conference  
on

“Exploring Possible Constitutional Arrangements  
for  
Meeting Tamil Aspirations  
Within  
a Unified Sri Lanka”

Locarno, Switzerland  
11-14 June 2001

Organised by

Centre for Policy Alternatives, Colombo, Sri Lanka

and

Institute of Federalism, Fribourg, Switzerland

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## Introduction

The Centre for Policy Alternatives (CPA), Colombo, Sri Lanka, and the Institute of Federalism (IFF), Fribourg, Switzerland, organised a conference from the 11th to 13th June in Locarno, Switzerland, on “Exploring Possible Constitutional Arrangements for Meeting Tamil Aspirations Within A Unified Sri Lanka”.

In exploring ideas towards a constitutional settlement of the ethnic conflict in Sri Lanka, it was felt that there were two sets of issues that demand attention. Firstly, substantive issues of constitutional reform, political negotiations and institutional re-formulations. As ever, there is a huge hiatus in the positions of the parties to the conflict with regard to issues of substance, and therefore, the need was felt for a creative approach, a fortiori because, as the history of dialogue between the parties demonstrates, attempts at negotiations have never progressed to a stage where substantive issues could be discussed, and as such, the divergence of positions is all the more acute. The intention therefore was to find agreement on a constitutional structure that would accommodate and examine the aspirations, and the apprehensions, of the parties to the conflict.

The second set of issues pertain to procedure and the process of constitutional reform and conflict resolution. It was strongly felt that in the Sri Lankan context, these issues were not, and are not, being sufficiently addressed, given their paramount importance. Thus it was imperative that the Conference focus on the modalities of legitimisation, public support and acceptance. It was also felt that valuable lessons that could be learnt from the experiences of other countries, were being ignored. Accordingly, the second day of the Conference was devoted to the discussion of processes by which a negotiated settlement could be arrived at.

Participants were invited in their private capacities, with a view to finding representation among the various branches of stake-holder opinion in Sri Lanka's conflict. On account of the Chatham House rule under which the conference was conducted, participants have not been identified by name or affiliation. International Resource Persons were invited from Sri Lanka, Australia, Germany, Great Britain, Hong Kong, India, South Africa and Norway.

The major part of the first day's discussions were devoted to the Thimpu principles and their possible re-formulation, but there was a valuable exchange of ideas and viewpoints on many other salient issues as well. It was felt that a more comprehensible reportage would be possible by sifting through the various strands of the discussion with a view to categorising them according to identifiable themes. The several thematic categories that emerged were, the Thimpu Principles, Position of Groups other than the Sinhalese and Tamils, Nature and Extent of Devolution, Secession, and Other Constitutional Principles. The report of the discussions that follows, has attempted to include most what transpired, under those thematic categories. However, the extremely complex nature Sri Lanka's conflict defies any rigid or easy compartmentalisation. For example, a discussion on the Thimpu principles must invariably address the emotive issue of internal colonisation. Similarly, a discussion on the self-determination of the Tamil nation must also consider the Muslims of the Eastern Province and other communities. The best attempt has been made therefore to give appropriate attention to these areas of complexity and overlap, within, and sometimes without, the thematic boundaries.

The report on the sessions on procedural issues and process, by contrast, adopts a narrative style. The concerns that were discussed are presented on an issue-by-issue basis, and attempts to bring together the strands of what was an extremely fluid discussion under several broad subject areas. These include issues of legitimacy, an understanding of the working of Confidence Building Measures, and examination of the process by which negotiations should be approached and carried out.

Finally, an overarching consideration in the preparation of the report was a self-imposed constraint on length, so as to avoid the production of an unwieldy and recondite document.

11th July 2001

# Meeting Tamil Aspirations within a United Sri Lanka: Constitutional Options

## Presentation of Discussion Paper

The proceedings of the first day of the Conference began with the presentation of the first Discussion Paper dealing with issues of substance in a putative settlement. The paper was prepared and presented by Mr. Rohan Edrisinha of the CPA and was entitled "*Meeting Tamil Aspirations within a United Sri Lanka: Constitutional Options*". In his opening remarks, Mr. Edrisinha noted that the purpose of the paper was to provoke and facilitate discussion on some of the substantive issues that would arise if and when the parties met at the negotiating table. In this context, he pertinently noted the vast gulf existing between the parties on substantive issues; the legacy of deep mistrust and suspicion generated during years of conflict.

## Motivations for Constitutional Reform in Sri Lanka

Identifying two essential motivations for constitutional reform in Sri Lanka, Mr. Edrisinha said that, firstly, constitutional reform meant a response to authoritarianism and in this respect, was part of a wider agenda of democratisation. Secondly, he highlighted the importance of constitutional reform for conflict resolution and peace.

In assessing the recent constitutional reform process in Sri Lanka from these two perspectives, Mr. Edrisinha used the Draft Constitution document of August 2000 as representative of the government's position at present. It reflected, he said, a "Reality Check" for the purposes of the discussion paper, as to what the government was willing or able to do in relation to substantive constitution making and reform.

## Modified Thimpu Principles

Mr. Edrisinha stressed the importance of giving constitutional expression to the Thimpu Principles in any negotiated political and institutional settlement of Sri Lanka's conflict. He proposed a set of 11 principles as essential in a realistic future constitutional settlement. Mr. Edrisinha's set of principles included the four Thimpu principles in a re-formulated form, as well as supplementary additions.

## Devolution and Other Constitutional Principles

Although Mr. Edrisinha's principal focus was on devolution and concepts of autonomy, he also drew attention to the observations in the paper on other central issues of reform. These included provision for judicial review, allocation and division of subjects, arrangements for power sharing and dispute resolution at the centre and the entrenchment of human rights norms and constitutionalism. In a related context, Mr. Edrisinha stated that the Sinhala nationalist and anti-devolutionist viewpoint found no representation in the discussion paper.

## Presentation Responding to Discussion Paper

Prof. Yash Ghai, Sir Y. K. Pao Professor of Public Law at the University of Hong Kong, and currently Chairperson of Kenya's Constitutional Review Commission, then made a presentation responding to Mr. Edrisinha's paper.

### Preliminary Considerations

At the very outset, Prof. Ghai emphasised that a proper appreciation of the Tamil's sense of betrayal and injustice must inform attempts at conflict resolution and constitutional reform. Viewed in this context, Prof. Ghai felt that the government's proposals of August 2000 were grossly inadequate for the purposes they were intended to achieve. He was of the opinion that the August 2000 proposals were 1980s solutions to problems of the 1960s and 1970s and as such, had no serious chances of success.

*“The government’s proposals of August 2000 were grossly inadequate for the purposes they were intended to achieve”*

In this regard Prof. Ghai noted the rushed nature of the process that produced the August 2000 Draft Constitution, and identified this as a serious flaw in Sri Lanka's constitution making attempts. The non-inclusive nature of the process and the conspicuous lack of transparency were identified as corollary flaws. The resultant document thus contained little or no reflection, exploration, or understanding of the fundamental reasons and causes of the conflict.

Drawing attention to the highly legalistic language and extremely complex nature of the government's constitutional documents, Prof. Ghai thought that reform attempts would be more successful and agreements more durable if the constitutional reform negotiations started with agreements on broad general principles and ultimate objectives.

The process must then proceed on a stage by-stage-basis with maximum possible consensus and compromise built along the way. In the light of these considerations, Prof. Ghai stated it was no surprise that the August 2000 attempt was doomed to failure. He emphasised the exigency of making peace the “Big Theme” of the political discourse, and that there must be no judgementalism regarding “winners” or “losers”.

Commenting on the two motivations identified in the discussion paper for constitutional reform in Sri Lanka, Prof. Ghai stressed the inherent links between them. While devolution is fundamental to conflict resolution, he advanced the principle of devolution as a countering device against authoritarianism and over-centralisation. He said that in the Kenyan constitutional reform process, devolution was primarily used in the latter context.

Questioning the need to re-interpret or reformulate the Thimpu principles too closely, Prof. Ghai stated that the general nature and susceptibility to flexible re-definition were the overwhelming strengths of the Thimpu principles.

Prof. Ghai noted the emphasis given to devolution in the discussion paper, in terms of its emotionally divisive potential in Sri Lankan politics. However, he felt that in the Sri Lankan debate, too much attention had been devoted to this issue to the exclusion of many salient others. While regional autonomy is important, indeed imperative, such arrangements had to be coupled with other mechanisms to ensure greater responsiveness at the centre. In other words, there was a need to “federalise” the culture of governance at the centre.

*“Make peace the ‘Big Theme’ of the political discourse”*

It was pointed out that not only federalism, but also self-determination at a general conceptual level involved a successful blend of “self-rule” and “shared-rule”. Prof. Ghai enumerated various existing mechanisms for fostering shared-rule, among them bicameral legislatures, appropriate bureaucratic structures and proportional representation.

### **Standard Concerns Against Devolution**

Continuing on the subject of devolution, Prof. Ghai listed a range of standard concerns in other conflict situations similar to Sri Lanka. Most of these apprehensions have at one time or another affected consensus in Sri Lanka. Some of these concerns as listed by Prof. Ghai were as follows:

- That devolution may lead to the disintegration of the existing state.
- That devolution may encourage other groups (in Sri Lanka, other groups such as the Eastern Province Muslims and Up Country Tamils) to also demand territorial autonomy.
- That devolution of economic power is inefficient.
- That devolution entrenches and / or encourages divisions between ethnic groups.
- That regions may lack adequate administrative capacity.
- That group rights are not always compatible with individual rights.
- That bi-national federations historically have been problematic.

### **Lessons from Comparative Experience**

Prof. Ghai outlined some ways to address many of these concerns and adverted to the wealth of other political and legal options that could be extracted from comparative experiences of constitution building. For example, comparative experiences suggest that legal / constitutional prohibition or force may not be the best mechanisms for avoiding secession. Pointing to Sri Lanka’s experience, he stated that the preoccupation with constitutional safeguards against secession were patently irrelevant where state actions continue to provoke and engender secessionist political forces. Similarly, Prof. Ghai alluded to comparative experiences where the devolution of economic power has been demonstrably more efficient than centralisation. He mooted the devising of asymmetrical state structures to overcome problems of bi-national federalism.

*“Constitutional prohibition or force may not be the best mechanisms for avoiding secession”*

### **Interim Arrangements**

Regarding an issue which was relevant to the Workshop sessions on “Process” as well, Prof. Ghai proposed the option of postponing the resolution of particularly intractable questions by as much as a generation in time by putting in place interim arrangements. In this context he did not share Mr. Edrisinha’s hostility to the Executive Committee system of administration proposed in the August 2000 document for the regions / provinces. He argued that this system might engender a culture of power sharing and non-confrontational decision making.

### Check List for Federal Constitution-making

Continuing his observations on sound constitution making, Prof. Ghai delineated to the participants a check-list of issues to consider in designing federal type arrangements:

1. Entrenchment of the supremacy of the constitution. The constitution must give appropriate the interests of all jurisdictions, central and peripheral, as well as to “culture” and “identity” in a way that strikes a balance between them.
2. Division of power. As the Sri Lankan experience shows, a list of concurrent powers was not necessarily a mechanism of co-operation between centre and periphery. What is more, its existence availed itself to invidious centralisation and usurpation of regional / provincial functions. If a concurrent list is used, paramountcy in cases of inconsistency should be given to the regions. This was stressed as particularly important in cases of devolutionary federalism, where, by placing pressure on the centre to create consensus in order to achieve more uniform action, it would be an incentive to co-operation.
3. The centrality of comprehensive provisions for judicial review. Prof. Ghai returned to the two motivations for Sri Lankan constitutional reform, viz., especially to judicial review as a countervailing device against centralisation and authoritarianism. Similarly, the necessity of a suitable forum for the mediation / resolution of disputes between centre and periphery.
4. Provision for the autonomy of institutions at the regional level. Prof. Ghai underscored the importance of appointments being made locally so as to enhance accountability.
5. The exploration of symmetrical or asymmetrical options. Prof. Ghai reiterated the observations on asymmetrical options contained in the discussion paper.

### Sovereignty

Prof. Ghai also drew attention to the central importance of conceptions of sovereignty in cases of devolutionary federalism. In his opinion, modern international law makes a critical distinction between internal and external sovereignty. The two are often confused, although in fact only the former is affected by federalism. Prof. Ghai pointed out the sovereignty arrangements between the Special Administrative Region of Hong Kong and the People’s Republic of China, and de-centralisation attempts in Papua New Guinea and Bougainville, as illustrations of creative approaches to a difficult question.

*Modern international law makes a critical distinction between internal and external sovereignty*

Furthermore it was argued that old notions of sovereignty were changing at present with the expanding forces of internationalisation. In any event, he believed sovereignty to emerge from the current process of evolution as a less important concept than it was hitherto considered. In relation to Sri Lanka, he advocated “fudging” the sovereignty issue where it becomes particularly contentious.

### Secession

On the question of secession, Prof. Ghai considered it to be more complex and diverse than the two conceptual categories (i.e., Choice and Just Cause theories) dealt with in the discussion paper would appear to suggest. His primary concern here was to stress the moral and practical responsibilities of seceding units to areas left behind. In particular, he was concerned with rights protection of minorities living within the

seceding entity (e.g., the Muslims of the Eastern Province). On a self-determination based right to secession, Prof. Ghai's interpretation of modern international law and United Nations instruments was that they identify self-determination in the sense of an internal concept. He referred thus to the emerging principle of self-determination as effectively meaning self-government.

### **"Social Solutions"**

In concluding his expert contribution to the workshop, Prof. Ghai touched upon some modern trends in modern constitution making. In particular he recognised the need felt to downsize the state in redesigning state structures for the future. Finally, he urged the participants to move away from ethnicity based solutions towards "social solutions" for Sri Lanka's protracted conflict.

During the course of Prof. Ghai's presentation, he drew empirical lessons from comparative constitution-making and conflict resolution. These included Papua New Guinea and Bougainville, East Timor, Fiji, Hong Kong, Kenya and Canada.

### **Discussion**

Following Prof. Ghai's presentation, the discussion was opened to the participants and the deliberations that followed directly related to both presentations of the morning. Initially, participants were encouraged to pursue the extent to which comparative experience could provide assistance with issues currently confronting Sri Lanka. In the afternoon, the discussion was focussed around the Thimpu principles and their modification. The essence of the discussion, which is related below, is organised according to the major themes that emerged.

### **Thimpu Principles**

Opinion was divided as to whether the text of the principles should be left intact or explicitly modified, as in the morning's discussion paper. There was broad agreement however that there was room for different views about what they meant in practice. There was also agreement that this susceptibility to flexible interpretation was one of their strengths.

One view, which seemed to attract at least tacit agreement, was that the Thimpu principles essentially required, firstly, that both communities must live as equals politically and economically. Secondly, the physical security of both communities must be guaranteed.

In ensuring equality between the Sinhala and Tamil communities, one participant identified three key areas where changes are imperative. Firstly, he laid out the necessity of re-designing the national flag. At present a crucial political concern was that the flag symbolises Sinhala majoritarianism. Secondly, the participant argued for the creation of at least two linguistic states along Indian lines. Further questions raised in this regard as to what was involved in the conceptualisation of such states were not pursued. Thirdly, it was argued that there can be no realistic equality between Sri Lanka's communities where the state was constitutionally obliged to promote one religion. Accordingly it was strongly felt that the special "foremost" status accorded to the Buddhist religion must be removed from the constitution.

*Thimpu principles form an integral components of a broader right to development*

Another participant advanced a corollary argument to the concerns raised above. According to this view, the Thimpu principles form integral components, such as land, without which a general right to development cannot be meaningfully realised. While this observation was directly concerning the Tamil community in Sri Lanka's North and East, the merits of the argument as generally applicable to all of Sri Lanka's communities were not pursued.

There appeared to be a broad acceptance of the Thimpu principles as a basis for negotiations between the participants. One participant argued that Thimpu principles 1 and 4 are already given recognition in the August 2000 Draft Constitution. He further stated that Thimpu principle no. 3 was acceptable within the framework of a united Sri Lanka, but was emphatic in his rejection of this right to self-determination as including a right to unilateral secession. He added that Thimpu principle no. 2 is more problematic, to the extent that it leaves unresolved the position of the Muslims in the North and Eastern Provinces. He was however of the view that the permanent merger of the North and East (that is, the areas identified as territory contiguous to the Tamil nation, or, in other words, the Tamil traditional homeland) was acceptable if it was achieved through the democratic means of a referendum.<sup>1</sup>

The last observation was sharply contested by another participant who questioned its realism. He stated that radical demographic alterations have been imposed by state sponsored, systematic, internal colonisation of Sinhala people in the contiguous areas claimed by the Tamil nation. He questioned on this basis the validity of a referendum result.

Returning to the first Thimpu principle, one participant offered the viewpoint that from a theoretical perspective, a distinction was possible between two concepts of nationhood. One concept was of the nation in the sense of a political community, and the other, the "cultural nation". He further reiterated that there was no question about the Tamils' claim to nationality, and that the conflict cannot be viewed from a Sinhala majority vs. Tamil minority perspective. In a similar vein, another participant emphasised that a community's subjective choice or consciousness that they are a nation is adequate to make them a nation. In this context, self-determination flowed as a fundamental right to a nation.

*A community's subjective choice or consciousness that they are a nation is adequate to make them a nation*

An alternative viewpoint that was expressed contained a strong hostility to all forms of nationalism as being obsolete. In this view, constitutional reform takes place in the realm of politics – the art of the possible. Compromises and reconciliatory attitudes are vital, and the operative theme in conflict resolution should concentrate on the costs of non-resolution. It was also thus argued that while a reformulation of the Thimpu principles was necessary, any such reformulation must avoid nationalist underpinnings.

In another divergent view to most participants, an argument was advanced from the basis that the Thimpu principles were clearly located in international law. Thus any future constitutional settlement must be in the nature of a compact between two sovereign people. The reformulation of the principles in the discussion paper is through the prism of constitutional, and thus domestic, law. In this participant's opinion, this aspect of

*Any future constitutional settlement must be in the nature of a compact between two sovereign people*

the discussion paper gives a different, and not altogether accurate, complexion to the approach that must be taken in resolving the conflict.

In response to the last observation, another participant pointed out the existence of alternative reformulations available from comparative constitutions that have addressed similar problems to Sri Lanka's. In particular he adverted to Article 2 of the Spanish constitution which, while speaking of the "Spanish nation", simultaneously accommodates the existence of other "nationalities". He also drew attention to the provisions of the Swiss constitution in relation to the territorial integrity of cantons.

The course of the discussion on the Thimpu principles led one participant to summarise the result as follows: That there was a reasonable commonality of view about the Thimpu principles, which suggested that they might be used as guiding principles. This was however, subject to four sets of reservations:

1. Paradigmatic reservations – Some participants were concerned about the nationalistic paradigm that Thimpu reflects.
2. Reductionist reservations – The implications for secession, in turn drawing on differences of view over the application of international law and in any event its meaning (the Choice or Just Cause debate).
3. Communication – Given the potential for misunderstanding, there was a need to communicate and explain the meaning of the principles to the majority community. In this regard he was of the opinion that the discussion on whether or not to modify the principles was important.
4. Lack of operationalisation – The need to further explore the meaning of the Thimpu principles in practice.

### **Position of Groups other than the Sinhalese & Tamils**

A major issue in discussing the implications of the Thimpu principles in practice was uncertainty about their meaning for other communities. The most obvious question, the position of Muslims in the Eastern Province, was pointed out and it was conceded that the discussion paper did not deal with this issue. Reference was also made to Up Country Tamils (Tamils of Recent Indian Origin), Malays, and marginally to Sinhalese living in the North and East.

The discussion cannot be said to have yielded any concrete answers for the resolution of this question. Nevertheless several non-territorial options were discussed, including constitutional guarantees of language and religious rights, encouragement of multiculturalism, and provisions for the general protection of minority rights. An apparent conceptual incompatibility as between group rights and individual rights, as well as the protection of personal laws of the country were two issues that were peripherally canvassed. As a territorial solution, the re-demarcation of the boundaries of especially the Eastern Province to include a Muslim majority administrative district and to amalgamate the Sinhala majority area with the Uva Province was suggested by one participant, but there was no constructive engagement on this important and live issue.

The issue of other communities arose also in the context of the manner in which decisions about self-determination based devolution might be made, particularly in the North and East. The issue was further complicated by what was described by one participant as planned settlement and Sinhala colonisation in the East in recent times. While there was no general consensus on this most sensitive of issues, it was a widely held opinion among the participants that this was a particularly pernicious problem that had to be immediately addressed.

One viewpoint was advanced that consideration of the human rights of other communities must not detract from giving due recognition to the right to self-determination of the Tamil nation of the North and East. This was rebutted with the salient observation that universal human rights cannot by definition detract from the realisation of self-determination, being in itself, such a right, and that furthermore, such exercise must always be subject to human rights norms.

Flowing from this, one participant referred to the need to “determine who the people are”. In this context, there was discussion on the Tamil nation, the Tamil traditional homeland, Tamil-speaking peoples of the North and East, the Muslims of the Eastern Province, and the Merger of the Northern and Eastern Provinces, albeit with no real thematic focus to the discussion.

### **Nature and Extent of Devolution**

As mentioned earlier, there was the reference to “states”, without any more detailed examination as to what this should mean in practice. The progression toward any degree of detail was the suggestion of the establishment of “linguistic states” based on the Indian model.

There were a few references to “confederation” as opposed to “federation”, again without a detailed examination of the expected differences between the two. In one case, references to “confederation” flowed from the view that self-determination would take place in accordance with international law principles, presumably creating two states (or “two sovereign peoples”) that would come together in a “confederation”. In another, “confederation” was envisaged as a more de-centralised version of federation: a “hard solution” made necessary by historical experience.

*Balance of power on the ground” at the time of negotiations should be reflected in the future state structure*

Further to this context, one participant posed the question as to whether a distinction between internal and external self-determination was available in international law. He raised concerns about a principle of external self-determination in relation to secessionism and advanced the opinion that the threat of secession was hanging indeterminately even in the more successful comparative experience of Canada. Responses to his question were mixed and contradictory.

There was also oblique reference to a view that the “balance of power on the ground” at the time of negotiations should be reflected in the future state structure as established by a negotiated constitution. Discussion on this was dilatory as perhaps it was felt to be a matter more appropriate to the sessions on “Process”.

## Secession

Given the theme of the workshop, there was relatively little direct and detailed exploration of the issue of secession. While both presentations dealt with it at some depth, it generally was not a major issue in the discussion of the modified Thimpu principles. It was raised principally in the context of whether self-determination should take place externally or within a unified / united Sri Lanka.

*An ethnicity based right to self-determination is neither desirable nor in conformity with modern trends in international law*

One participant stated that an ethnicity based right to self-determination is neither desirable nor in conformity with modern trends in international law. Critically citing the Yugoslav example and the Batinder Commission, it was further stated that secessionist solutions, even where unavoidable, cannot be allowed to repeat or recreate the problems that led to secession in the first place.

An underlying issue here, which remained largely unexplored, is the “architectonic illusion” in constitutional reform for conflict resolution. Is the re-designing of the grand architecture of the state sufficient or adequate in resolving long drawn out conflicts?

The question here was whether constitutional law offers sufficient variety and flexibility to deliver an appropriate level of autonomy. One participant raised this issue and added that the matter was compounded by the Sri Lankan experience where Colombo usually offers a constitutional “blueprint”, where no real negotiation or engagement with stake-holder opinion has occurred in the actual making of the document.

In response to the morning's discussion paper, just as much to the atmosphere of controversy surrounding the Supreme Court of Sri Lanka during the time of the workshop, one participant made the point that the judiciary is not necessarily trustworthy and independent in Sri Lanka. This was adduced as another problem for an essentially “constitutional” settlement.

## Other Constitutional Principles

There appeared to a general acceptance that the way forward required prior agreement on a set of constitutional principles. Some of the South African principles were distributed to the participants as an example.

One participant gave his viewpoint from experience in the making of South Africa's constitution. He stated that constitutional principles inform and guide constitutional negotiations. In South Africa, devolution was agreed upon as a guiding principle in the drafting process from an early stage of the negotiations. He also advised against getting mired in definitional difficulties, stating that broadest possible agreement must be built up around identified general principles. Precise meanings as to what the principles mean in practice, he said, could be articulated and agreed upon at the later stages of negotiations.

*Constitutional principles inform and guide constitutional negotiations*

There was some discussion of other constitutional principles, as important in their own right and as underpinning devolutionary arrangements. These included power-sharing at the centre and constitutional

protection of human rights. It was assumed that these would be included in any set of principles. Due to time constraints, unfortunately, the discussion could not be as wide-ranging as this issue deserved.

### Recapitulation of Discussion

Responding to some of the issues raised during the course of the discussion, Prof. Yash Ghai made a number of points in conclusion to the sessions of the first day. He concluded that the discussion suggested a common conclusion that there was a need to formulate generally acceptable constitutional principles with which to build the framework of a unified Sri Lanka. In this, he said, Sri Lanka might benefit from the way in which the Canadians widened their constitutional debate.<sup>2</sup> In Sri Lanka's case, he was happy with a re-formulation of the Thimpu principles, but he emphasised that any meaningful set of principles must include those other values as well.

Prof. Ghai went on to state that it was an undeniable truth that in 21st century society, people have multiple identities. In this context, constitutions must not only perform their traditional function as a map of power, but must also provide the framework for the governance of multi-ethnic polities on the basis of co-operation. Thus the principal role of constitutions in the 21st century is to provide the framework for the governance of multi-ethnic communities on the basis of co-operation. In Prof. Ghai's opinion, Sri Lanka's past constitutional reform proposals do not resonate with these contemporary international developments.

*It is an undeniable truth that in 21st century society, people have multiple identities*

Speaking in relation to the constitution-making process itself, Prof. Ghai argued that there might be value in the establishment of two panels responsible for the process. One panel would consist of resource persons, that is, political / community leaders, academics / intellectuals, civil society groups / NGOs, etc. Technical advice would be obtained from this panel. Friendly, acceptable governments, who would facilitate or mediate during the negotiation process, would constitute the other panel.

### Notes

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1. The Thimpu Principles as placed before the Sri Lanka government delegation in July 1985, in Thimpu, Bhutan, by the six Tamil organisations represented at the talks (the TULF, LTTE, EPRLF, EROS, PLOTE, and TELO) were as follows:
  - Recognition of the Tamils of Sri Lanka as a distinct nationality
  - Recognition of an identified Tamil homeland and the guarantee of its territorial integrity
  - Recognition of the inalienable right to self-determination of the Tamil nation
  - Recognition of the right to full citizenship and other fundamental democratic rights of all Tamils, who look upon the island as their country
2. This would then include principles such as federalism, democracy, constitutionalism and the rule of law, respect for minorities, and the duty to engage in principled negotiations in the event of constitutional dispute. Per the Supreme Court of Canada in Reference regarding Secession of Quebec (1998) 2 SCR 217.

## **An Analysis of the Thimpu Talks (1985) and the PA-LTTE Talks (1994-1995) - Some Lessons on Processes of Negotiations in Armed Conflict**

On 13th June 2001, the second day of the Conference devoted to issues of process, Prof. Nicholas Haysom of Cape Town University made a presentation responding to the discussion paper by Ketheshwaran Loganathan, "An Analysis of the Thimpu Talks (1985) and the PA-LTTE Talks (1994-1995) - Some Lessons on Processes of Negotiations in Armed Conflict".

By way of introduction, Prof. Haysom stated that it is important to realise that constitutional reform processes are inextricably entwined with other procedural issues of peace building, in that it was important to be cognisant of new and emerging constitutional theories and trends when creating a new constitution. Sri Lankans had a comparative advantage in being able to employ the latest constitutional 'technologies'. He emphasised the importance of preparation for negotiations. It was mooted that the negotiations should not be entered into only because of military exigencies. On the contrary, it was argued that the *raison d'etre* of negotiations should be to move the peace process forward, and thus be an initiative that incorporates the full commitment of all parties involved. Prof. Haysom said that by definition, negotiations never give what each party exactly wants, and that compromise was an inherent part of the process. Furthermore, advance preparation allows one to utilise moments of rapid change of circumstance. Recent examples in SE Asia demonstrate how apparently immutable circumstances can change overnight. To this end, he underlined the importance of building trust and respect between the negotiating parties. If trust and respect for another's point of view was not present, he said that there was very little chance of a consensual agreement at the end of negotiations, and that the process of negotiation itself was bound to be severely undermined. This mutual trust building engenders the feeling of being a part of a negotiation process and helps to enhance the commitment of the parties to process and to 'ownership' of the product of the negotiations. The importance of the parties being in touch with the pulse of their constituencies was highlighted, since the implementation and long-term success of any agreement hinges upon the appeal of the same to the people at large.

*It is important to build trust and respect between negotiating parties*

Prof. Haysom said that successful negotiations must necessarily incorporate sophisticated forms of communication - both within and between the negotiating partners, and to constituencies other than one's own. He also said that there can be no ambiguity or vagueness on the core issues of a cease-fire agreement - a high degree of accuracy is needed when laying out the terms and conditions for a cease-fire.

Prof. Haysom stated that momentum - the ability and necessity to keep moving forward - was the most important quality of negotiations. Comparing it to an escalator going down, he said that the upward path was difficult, but that inactivity only led to a deterioration of positions and a regression of the entire process.

To this end, the importance of dealing with issues as packages, and not as single issues, was highlighted. It was stated that when contentious issues are dealt with in packages, there could be more space for give and take between the parties. When dealt with as single issues, the perception of there being only one winner was seen as possibly detrimental to process of negotiations. Particularly contentious issues must not be allowed to bog down the entire process, and creative solutions like the Sun-Rise and Sun-Set techniques of the South African peace process should be looked at as a possible way forward.

The fine line between confidentiality and transparency is one that has to be negotiated carefully, said Prof. Haysom. Too much secrecy could enshroud the process of negotiation and engender suspicion, while too much transparency, brings with it the danger of each party posturing only to its own constituency, and thus undermining the wide-based appeal of the process of negotiations.

The importance of the process of negotiations being as inclusive as possible was a point that was strongly underlined, to avoid some parties feeling left out or alienated, including those parties and groups who are not major players in the conflict but are nevertheless an integral part of it. Prof. Haysom also said that there was a need to examine the interests that lie behind the Thimpu Principles, in order to better understand the position of the parties that endorse it. It was important to distinguish 'positions' from interests so as not to confuse the two.

Indeed, it was argued that protracted ethno-political conflicts cannot be resolved through looking at constitutional reform alone, but that emphasis should also be placed on improving the level of relations and understanding between those parties who are directly involved. Time, it was argued, was a precious resource, one that could be used creatively to expand options, or destructively, to close avenues open for the resolution of the conflict.

Regarding the issue of the legitimisation of the LTTE and the parity of status between parties in a process of negotiation, it was argued that the attempt of the government to de-legitimise the LTTE by proscribing it in various countries, with the effect of undermining the legitimacy of its major negotiating party, is inimical to the progress of negotiations. Prof. Haysom was of the opinion that it was important not to look down upon the LTTE within the fold of a negotiation process. The recognition of the LTTE as a legitimate representative of the Tamil peoples was important. It was noted that it was difficult for the LTTE to come to the negotiating table, given its past history, and that a government that is insensitive to the concerns of the LTTE would not make it very easy to engage the LTTE in a peace process. Therefore it was incumbent upon the government of Sri Lanka to create the necessary framework and atmosphere within which the LTTE could be cajoled into a peace process.

*There was a consensus that there should be an equality of status between the government of Sri Lanka and the LTTE during the process of negotiations*

It was pointed out that there must be a great effort from the parties in a process of negotiation to treat each other with respect – since a cogent, comprehensive and lasting final agreement cannot be arrived at without the acquiescence of all those involved in the process.

It was deemed important to include, in addition to the government of Sri Lanka and the LTTE, the peoples in the south of Sri Lanka (the domain of Sinhala Buddhist nationalism), Muslim groups and indeed, even the United National Party (the main opposition party) and other groups and parties in the process of negotiations, since without such inclusion, there could be no national consensus on peace processes.

In light of the above, it was argued that the broadening out of the process of negotiations could happen only after the LTTE and government of Sri Lanka have met. While it was accepted that the discussions between the government of Sri Lanka and the LTTE would be political in nature, the inclusivity of the process of negotiations should ensure that the greater agenda does not gloss over other salient issues.

Some participants said that it was difficult for the LTTE to engage in a process of negotiations since the LTTE leadership had the responsibility of not undermining the sacrifice of its cadres. It was also felt by some that the government of Sri Lanka was not yet mature enough to start a serious negotiation process, which was why the LTTE has tried to mould a comprehensive cease-fire agreement with the government as an incentive for entering into a process of negotiation.

*...many participants supported the idea of the LTTE as a legitimate representative of the Tamil peoples*

It was generally agreed that the war had dragged on for too long, and that a military victory for either side was elusive. It was also mooted that the best possible settlement to the ethnic conflict can be arrived at only when the LTTE is part of the process of negotiation. Furthermore, it was argued that without the acceptance of a peace agreement by the LTTE, the implementation and long-term effectiveness of the same would be seriously undermined. As such, many participants supported the idea of the LTTE as a legitimate representative of the Tamil peoples.

There were however, some concerns over the negotiation of issues like fundamental rights with the LTTE. Ways to incorporate responsibility for one's actions in the past, and ways to come to terms with and redress the transgressions of fundamental rights need to be explored further. To this end, the establishment of a body like the Truth and Reconciliation Committee (TRC) in South Africa, was mooted.

The issue of Confidence Building Measures (CBM) was also discussed. Interestingly, it was argued that confidence-building measures could themselves engender disharmony. Confidence-building measures, it was said, can be based on certain assumptions that may not be necessarily shared by the parties in conflict. It was said that a CBM must always be towards a win-win and non-zero sum goal.

The danger of unilateral confidence-building measures was also discussed. It was agreed that a confidence-building measure such as a cease-fire agreement, could be seriously weakened if proclaimed unilaterally.

Furthermore, it was stated that confidence-building measures outside the context of negotiations (called loss of face negotiations) are useless, since they are not perceived to be a constituent part of the negotiations and are not postured as such. 'Loss of face negotiations' are bound to fail.

Legitimation was said to have two dimensions – one horizontal, about the widening out of the process and the inclusion of as many parties to the conflict as possible, and the other vertical, about the increase in confidence and mutual trust between negotiating parties when issues like de-proscription et al have been addressed.

The issue of proscription and de-proscription was also one that was discussed at length. It was generally agreed that the proscription of the LTTE in the UK was erroneous. Some participants also said that at the present moment, the legitimacy of the LTTE was hinged upon its de-proscription in Sri Lanka.

It was stated that objective conditions for entering into a process of negotiation could have a positive impact on subjective conditions, which might be against entering into such a process. As an example, it was said that the ANC armed struggle created a condition that made the subjective contentions of the major players more amenable to a peaceable end to violence, and thus proved to be the genesis of the process of negotiations.

There were questions asked on the nature of the LTTE's representation – on whether they were the sole, authentic or predominant representatives of the Tamil peoples. It was asked whether it was not possible for the LTTE to engage in discussions with other Tamil parties, and whether, in the post-peace agreement period, it will be the only party in control. These are questions that the participants decided to think about in the future.

It was also argued that ways of enhancing the legitimacy of the LTTE should be looked at in the future in order to bring it into a peace process. However, too many questions about the future were also thought to be detrimental, since they could serve to undermine the efforts of the present and also demonise certain groups in the process of negotiations.

When discussing issues on facilitation and mediation, Prof. Haysom said there are two instances when foreign facilitation is necessary. One, when the extent of the distrust between the parties in the conflict is so great that face-to-face negotiation is impossible. Two, when there is a clear imbalance of power or imbalance in the perception of legitimacy between the parties, the foreign facilitator plays a role in addressing this imbalance. On the other hand, direct talks can better promote joint ownership of the process.

It was pointed out that the countries chosen by the protagonists as facilitators or mediators obviously have their own geo-political interests, and that we should be acutely cognisant of these interests. And yet, some participants felt that the internationalisation of the problem in Sri Lanka makes the peace process more responsible, and thus, were in favour of even more international participation in the process of negotiations.

This was however countered by others in the group, who said that in the Sri Lankan context, internationalisation places one party to the conflict, the LTTE, at a disadvantage, since it does not have access to foreign facilitation and mediation resources in the same fashion as the government of Sri Lanka. A point was made, however, that the biggest problem of any international actor in the conflict was one of accountability.

*The biggest problem of any international actor....is one of accountability*

As such, the exact role of a facilitator and mediator in the context of Sri Lanka was clearly an issue that needs further exploration. However, one point brought out was that the international community can only provide the facilitative framework and nothing more, and that it was the responsibility of the parties in the conflict to move ahead with an agenda for peace within this framework.

There was a cautious note expressed when accepting the solutions a foreign party brings to the conflict in Sri Lanka, since the solutions offered might be within paradigms that the foreign party is more comfortable with but inapplicable to the state of affairs in Sri Lanka.

*... the Sri Lanka government and the LTTE have both recognised that negotiations are necessary to bring peace and that war cannot achieve anything*

Some participants questioned whether it was the correct time to begin negotiations for peace. They based their argument on the fact that while on the one hand, the government of Sri Lanka wants to negotiate, it was on the other hand trying to undermine its efforts at home by proscribing the LTTE abroad. It was thus brought out that the government of Sri Lanka is perhaps not ready for negotiated end to the ethnic conflict and that there was no substantive basis upon which the commitment of the Sri Lankan government for peace could be based.

In reply, other participants said that the current phase was the pre-negotiation phase, and that the distinction between the pre-negotiation and negotiation phases was one to take cognisance of. Furthermore, it was said that even if the time for negotiations is not right, it does not follow on from there that the parties in the conflict sit back and let events turn for the worse. Like Haysom before, there was an emphasis on moving forward and proactivity, as opposed to a passive hands-off approach.

Some participants were of the opinion that the war was confined to the North-East and was not felt anywhere else, and also said that the South of the country had benefited from the war. Many however disagreed with this stance, and said that the war in the NE had in economic terms sent clear signals to the business community of Sri Lanka that there is a grave problem in Sri Lanka. It was also argued that it is precisely because there is a tangible change in the south constituency that there is a perceivable shift in the change of the attitude towards the peace process in recent years. Some went even further and said that there is a significant constituency on each side in favour of peace, especially since both the Sri Lanka government and the LTTE have both recognised that negotiations are necessary to bring peace and that war cannot achieve anything.

It was also said that that it was incumbent upon civil society to follow the process of conflict resolution and engender its progress.

There was much said on the structure and process of negotiations. It was brought out that the Sri Lankan government and the LTTE never had talked about a constitutional solution to the conflict, and that this was because the LTTE was unwilling to get down to the process of constitution making.

In reply, it was said that the LTTE did not engage with the government of Sri Lanka because the latter had on many occasions undermined the entire process of negotiations.

It was said that in bringing together a Constitution package, there has to be a constructive symbiosis between the Sri Lankan government and the LTTE and also, to involve other parties and groups in the process. As an example of this, the experience of South Africa was highlighted, in which the peace process was extremely inclusive. An inclusive peace process, it was felt, made people feel part of the peace process and thus engendered a sense of responsibility towards the progression of the same.

The importance of not over using experts in the process of a constitution making and the peace process was also highlighted. A rigid and unimaginative constitution and peace agreement were mooted as the possible fall-out of the over use of experts.

There was discussion about a Truth and Reconciliation Committee, and its part in the peace process in Sri Lanka. Some participants said that truth and reconciliation must be an integral part of the peace process to allow the process of healing, and that it should be implemented after a peace agreement. In the end, the TRC was something that was put on the agenda with some reservations about its structure and the timing of its entry into the peace process, and as such, is ripe for discussion in the future.

The participants generally agreed that issues like weapons decommissioning were to be dealt during the process of negotiations and not after the settlement of the conflict. However, it was also pointed out that the LTTE will not decommission its weapons easily – and that a cogent and lasting peace agreement needs to be arrived at first.

Attention brought to the issue of arms procurement during the process of negotiations. Exploring avenues to address this issue is a point for discussion in the future.

Some participants felt that the cease-fire by the LTTE in December 2000 was premature, and thought that a de-escalation in the fighting would have been a more viable measure to bolster the peace process. It was generally agreed, as mentioned earlier, that confidence-building measures should be bi-laterally agreed upon and should not be done unilaterally. The importance of a monitoring process to oversee any ceasefire was also discussed, since it is upon an effective monitoring process that the long-term success of a cease-fire depends on. Furthermore, it was deemed important to have some system of law and order in war torn areas once there was a cessation of hostilities.

How to deal with a confidence-building measure that was taken unilaterally, and yet intended as a catalyst to move the peace process forward was a question that was asked of the participants. To this end, it was agreed that confidence-building measures are dependent upon the people recognising the true intent and governing motives of any such measure.

A point that was underscored was the importance of having trained, disciplined and competent negotiators. The preparedness of leaders of the main parties in the ethno-political conflict in Sri Lanka to engage in a constructive process of negotiations to bring about a peace agreement was questioned, and was flagged for future discussion.

Looking towards the future, there was a strong call for a more balanced gender representation at all levels of the peace process. While it was acknowledged that substantive and procedural issues are inextricably entwined, questions and discussion on procedural issues is always more difficult to come by in Sri Lanka.

The need in the future for further constructive discussion on procedural issues was agreed by all present. Also expressed was a desire to broaden the scope of the peace process - to go beyond the idea of a constitutional settlement, to link other processes like development on to the peace agenda, and to include the country as a whole in the pursuit of a just and lasting peace.