

Sri Lanka
Winning the Peace and Reaping the Dividends:
“One Country, One Nation, One Law”

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SRI LANKA: WINNING THE PEACE – SYNTHETIC OVERVIEW

Introduction

Sri Lanka is at a crossroads following a convincing electoral performance by the current government during the presidential election on January 26th, 2010 and parliamentary elections in early April 2010. The elections came on the heels of a decisive victory over the *Liberation Tigers of Tamil Eelam* (LTTE), ending a 26-year civil war. These two victories put the government in a position of strength and left it with two options: either it can maintain the status quo, by allowing the entrenchment of current institutions, policies and practices; or, the twin victories can be used as a base to implement much needed social, political and economic reforms. This report will demonstrate the unsustainability of the status quo and will argue for the government of Sri Lanka to implement the proposals recommended in this report. These proposals aim to remove the bases on which past cycles of violence and disregard for the rule of law have hindered Sri Lanka's progress socially, politically and economically and jeopardized its relations with trade partners, donor countries and Sri Lankan diaspora communities.

Sri Lanka's leaders would be wise to consolidate their victory on the battlefield and at the ballot box by "winning the peace" – that is, by pursuing reform from a position of strength. This agenda calls on the government to recognize that its recent successes can foster a sense of complacency, which will likely undermine the potential for transitioning from the current post-conflict period toward a socio-politically stable and economically progressive future. The danger is that complacency will serve to sustain the underlying bases of distrust, dissent, irredentism and conflict that have hindered Sri Lanka's progress and engendered instability and violence. The "winning the peace" agenda is about ensuring societal peace as a norm. The price of avoiding reform could be the recoupment of disaffected factions and disempowered peoples, both of whom have a history of using violence and avenues outside the political process as a means of achieving their variegated ends.

Sri Lanka's Political History: Cycles of Upheaval

Maintaining the status quo is understandably tempting, given the government's recent successes. What then are the incentives for exploring and implementing policy and institutional reforms? Sri Lanka's history since independence offers a firm and candid appraisal as to why a reform agenda of "winning the peace" is vital. Sri Lanka's first post-independence national election was held in 1952. The United National Party's (UNP) victory gave it majority control of 57 percent of the Parliament with 44 percent of the popular vote. The closest consolidated opposition party controlled just under 10 percent of the Parliament. In many ways, the 1952 election was a more decisive electoral mandate than the mandate that exists today for President Mahinda Rajapaksa's ruling Sri Lankan Freedom Party (SLFP).

However, within a year, Sri Lanka confronted its first national crisis with the mass strikes and protests of 1953, a response to the UNP's economic reform policies. In the predominantly Sinhalese western and south-western regions of the country, widespread violence necessitated the first national state of emergency. It also led to the resignation of Prime Minister Dudley Senanayake.¹ The UNP lost in the subsequent elections in 1956 to its rival SLFP, which took 39.5 percent of the popular vote and 53 percent of the seats in Parliament. The UNP only

¹ K.M. de Silva, *Sri Lanka: Problems of Governance* (Delhi: Konark Publishers PVT Ltd, 1993), 103-6. [de Silva, *Problems of Governance*]

managed to gain 28 percent of the popular vote, and 8 percent of the seats in Parliament. Yet the SLFP's programmes and agenda likewise produced communal riots in several parts of Sri Lanka. At the same time, hostility grew between the Sinhalese and Tamil populations, requiring the first SLFP government to issue another state of emergency.² Once again, decisive electoral victory meant little in terms of social dissent expressed outside of the political process.

Post-independence governments have been dominated by the predominantly Buddhist Sinhalese, who comprise more than 80 percent of the island's population.³ Seeking to address the British colonialists' past favouritism of the Tamil minority – who were disproportionately represented in the civil service and in the professional classes – the government designated Sinhala the country's official language and made Buddhism its official religion. The relative deprivation experienced by the largely Hindu Tamil population during the late 1950's and onward as a result of these exclusionary policies led to deepening disaffection within the Tamil community. Tamil demands for devolution of powers to the predominantly Tamil north and east of the island grew.

On September 26th 1959, three years after the *Official Language Act* (commonly known as the "Sinhala Only Act") made Sinhala the country's sole official language, SLFP founder and Sri Lankan Prime Minister, S.W.R.D. Bandaranaike was assassinated by a Sinhalese Buddhist monk. In this case, aiming extra-political violence at the head of state was the means by which political change was affected. The UNP was victorious in the elections following Bandaranaike's death.

The 1960s ushered in a period of government change and succession between the SLFP and UNP through to the end of the 1970s, without any major political upheaval. However, it is misleading to view this period as the ideal. Communal tensions between the Tamil and Sinhalese communities deepened, and the government only maintained order through the continuous use of emergency powers.⁴

It is against this backdrop that the government confronted a significant armed uprising, not from an increasingly alienated Tamil minority, but instead from the, "Sinhalese-Buddhist, ultra-nationalist Janatha Vimukti Peramuna (JVP) dominated by educated youths, unemployed and lower-class workers."⁵ The uprising resulted in over 10,000 deaths and governmental paralysis so severe that it traumatized the national economy.⁶ It is important to realise that the JVP uprising occurred in the face of a strong electoral mandate for the United Front government, a coalition of the SLFP and two Marxist parties, which together held 116 of 151 seats in Parliament. The conflict with the JVP simply confirms what had emerged as a pattern of organized, violent, debilitating dissent at moments when political victors felt most confident.

Those patterns of violence set the context for the introduction of the new Republican Constitution of 1972. Meant as a decisive political solution to the types of problems underpinning the JVP uprising and Sri Lanka's worsening inter-communal relations, the 1972 Constitution marks a period of attempted institutional reform for the purposes of resolving broad-based societal conflict.

Between 1970 and the adoption of the 1972 Constitution, the government dismissed calls by the Tamil-based Federal Party for a federal governance model for Sri Lanka. Given the JVP

² de Silva, *Problems of Governance*, 54.

³ According to the last census which was taken in 1981, Sinhalese comprise 74% of the population. No formal census has been conducted since. Based on the partial preliminary reports of the Sri Lankan Department of Census and Statistics Special Enumeration 2007 this percentage is probably above 80% today. <<http://www.statistics.gov.lk/PopHouSat/index.asp>>

⁴ *Ibid.*, 113-4.

⁵ *Ibid.*, 61.

⁶ *Ibid.*, 122.

uprising, it is unsurprising that the government felt unable to make concessions to minorities. In so doing, it asserted its clear, Sinhalese electoral mandate and that its brand of socialism would be sufficient to meet the needs of Sri Lanka's minority communities.⁷

Following the adoption of the 1972 Constitution, societal tensions persisted. This period saw the emergence of more concerted and organized opposition from the country's Tamil minority. The 1976 Resolution of the Tamil Liberation Front called for an independent, sovereign Tamil state. The 1976 Resolution used language that foreshadowed the violence to come, calling on, "the Tamil Nation in general and the Tamil youth in particular to come forward to throw themselves fully into the sacred fight for freedom and to flinch not till the goal of a sovereign socialist state of Tamil Eelam is reached."⁸

The UNP's return to power provided the justification for yet another new Constitution, passed in 1978. This Constitution altered the nature of governance in Sri Lanka. It replaced the previous Westminster parliamentary system of government with a new semi-presidential system, which added a powerful chief executive to share power with the legislature. Jayewardene became the first president under the new Constitution and assumed direct control of the government. The 1978 Constitution also included concessions to the Tamil community that sought to negotiate a settlement to ethnic problems. For instance, Jayewardene's UNP proposed an all-party conference, and abrogated the "standardization" policy of the United Front government, which was essentially an affirmative action policy to curtail the numbers of the overrepresented Tamil students in universities. However, while the Tamil United Liberation Front (TULF), in conjunction with the UNP, pressed for the all-party conference, progress was stymied by LTTE violence. This provoked a Sinhalese backlash against Tamils and blocked any successful accommodation.

Mass ethnic riots in July 1983 (known as "Black July") marked the start of the country's full-fledged civil war between the Sinhalese-dominated south, and the LTTE, fighting for Tamil independence from its base in the north. Compounding the civil war were additional uprisings, including the 1978-79 JVP insurgency in which tens of thousands were killed. These troubled decades witnessed extensive amendments to the 1978 Constitution, and numerous changes in government through elections. The *Public Security Ordinance (no. 25 of 1947)* proved to be the single most important legal document to governments since the 1970s, since more time has been spent under rights-curtailing emergency rule than outside of it.⁹ Even at the time of writing, Sri Lanka remains under emergency rule. But neither emergency rule, institutional nor governmental change was able to break the cycle of destructive civil war and escalating costs to the country's economy, social fabric and international reputation.

Historical Context for a Current Perspective

The sombre history laid out above is obviously not an exhaustive record of political turmoil in Sri Lanka. It simply illustrates that no Sri Lankan leadership, whatever its initial political success and electoral validation, has seen its policies, agenda and vision for Sri Lanka extend longer than a decade before collapse into violent upheaval. Of course, the government today could determine that the recent basis of its victories mark a break from politics in the past. However, this outlook may actually reflect a degree of hubris which only echoes the

⁷ Rohan Edrisinha et al, *Power-sharing in Sri Lanka: Constitutional and Political Documents 1926-2008* (Colombo: Centre for Policy Alternatives, 2008), 232-3, 235-6. [Edrisinha et al, *Power-sharing in Sri Lanka*]

⁸ Edrisinha et al., *Power-sharing in Sri Lanka*, 259.

⁹ de Silva, *Problems of Governance*, 144.

triumphalism of past victors in Sri Lanka's political arena. At each juncture described above, governments have felt justifiably validated in terms of relative power and electoral mandate in pursuing a governance programme designed to entrench their group's interests.

If Sri Lanka's history has been consistent in one respect, it is in its reminder to each of these governments over the decades that the dynamics fuelling social, economic and political violence are rooted in either the status quo or efforts to reinforce the status quo. In essence, past political victors are reminded that the strategies necessary for quelling widespread violence and marshalling the forces for far-reaching political control of Sri Lanka have never produced a sustained policy direction for a victorious political party, nor an enduring peace for the state.

The recent military defeat of the LTTE in May 2009 ruled out the possibility of a negotiated peace settlement that might address some of the grievances of the Tamil community that have been the impetus behind the protracted conflict. Although one year has passed since the government's military victory, there have been limited overtures by the government regarding its intent to generate a more humanitarian, equitable and inclusive power-sharing relationship with its Tamil minority population. At the same time, there are charges that the Tamil leadership has yet to acknowledge the extent of the suffering inflicted on the Sinhalese population during the course of the conflict. Rule of law remains weak and corruption is still rampant among government, bureaucracy, and law enforcement officials. Indeed, there are widespread allegations of corruption and nepotism under President Rajapaksa's current rule, including during the recent presidential election process itself.¹⁰ These observations suggest that the present 'peace' is fragile, fraught with suspicion and mistrust, and in need of immediate attention.

Political developments since the end of the conflict underscore analysis by interested international entities on the extent to which Sri Lanka is at risk of sliding deeper into corrupt and authoritarian rule, further alienating both domestic constituencies and the international community. Former army chief and opposition leader Sarath Fonseka is in prison facing court martial, charged with entering politics while in uniform. Critics see the detention as an example of the president's intolerance for dissent,¹¹ and Fonseka himself says it is part of a smear campaign to keep him out of politics.¹² While Fonseka won a seat in parliament in the April 8 polls, his party is no threat to Rajapaksa's ruling United People's Freedom Alliance coalition, which has taken 117 seats in the 225-member parliament – shy of two-thirds, but a decisive victory nonetheless. Opposition groups alleged fraud¹³ and the independent Centre for Monitoring Election Violence said 80 percent of the complaints of misconduct it received were levelled against President Rajapaksa's coalition.¹⁴

This potential for backsliding into violence and authoritarianism, and the resulting economic and political consequences, are among the reasons the government is urged to take on various policy and institutional reforms, as a break from past periods of opportunity that never realized their full potential. The current government faces a window of opportunity in which military resistance from the domestic Tamil community has been obliterated and is unlikely to

¹⁰ International Crisis Group, "Sri Lanka: Bitter Peace," Update Briefing/Asia Briefing No. 99 (Colombo/Brussels, 11 January 2010), United States Department of State, *2009 Country Reports on Human Rights Practices – Sri Lanka* (Washington, DC: US Department of State, 2010), available online at <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136093.htm>

¹¹ "Not in his stars: the president is master of his fate" *The Economist* (16 April 2010).

¹² "S.Lanka's Fonseka to be convicted next week: party" *Agence France-Presse* (16 April 2010)

¹³ Shihar Aneez and Ranga Sirilal, "Sri Lanka's ruling alliance wins parliamentary majority" *Reuters* (9 April 2010)

¹⁴ "Sri Lanka's first post-war parliamentary polls close" *BBC* (8 April 2010).

re-emerge in the near-term (despite the more conservative outlook of the Tamil Diaspora).¹⁵ At the same time, its electoral victory at 57 percent of the popular vote is substantial enough to allow it to explore a modest, feasible and meaningful policy agenda which includes some institutional reforms. It is our hope that such a reform agenda will be in the government's interest in terms of consolidating its rule and popularity while at the same time benefitting the entire nation by breaking the cycles of violence that have marked Sri Lanka's post-independence history, while potentially converting a "meddlesome" diaspora into a productive partner in domestic and international affairs.

Sri Lanka's government is certainly conscious that as its foreign relations turn increasingly towards closer ties with authoritarian regimes, its standing with Western foreign powers will come under increasing strain. At some stage the tide will turn and result in condemnation with real consequences from the West. Ultimately it is in the best interest of the current government of Sri Lanka to appreciate the benefits of maintaining a more centrist approach in its international relations. Furthermore, moral legitimacy as conferred by the international arena should be deemed desirable as this impacts on Sri Lanka's ability to engage in global economic trade, to contain diaspora opposition and to develop ties with moderate Tamils residing in the West. It will also keep Sri Lanka's options open vis-à-vis India, as that government seeks to regain political influence lost to China. The argument is that a politically pragmatic and non-aligned approach to foreign relations will yield, in the long run, stronger relations with India and the West, whereby the economic and political benefits will far outweigh any opportunities gained by Sri Lanka's neglect of the West and favour for authoritarian regime relationships.

Failures of Past Constitutional and Other Institutional Reforms

Institutional reforms are one modest element of the "winning the peace" agenda proposed here. Before any discussion of what these reforms and policies require, it is critical to reflect briefly on past institutional reforms that failed in either implementation or impact, thereby dramatically reducing confidence in such measures.

In 1957 and 1968 the government's negotiations, draft legislation and political agreements regarding decentralization and devolution raised hopes of meaningful powers being transferred to the Tamil community. The aborted *Regional Councils Bill* of 1957 remained a touchstone for subsequent federalism/devolution negotiations.¹⁶ The 1968 process under the UNP could not even reach the stage of draft legislation before dissolving. Thus, failures spanned more than two decades and implicated both major political parties.

The UNP government which swept to power in 1977 took important positions on issues of decentralization and devolution in specific policy terms. It endorsed a reference to minority rights within the framework of constitutional reform, decentralization of administration to the village level, and specified the administrative entities to be reformed or newly formed to bring these changes about. This commitment resulted in the *Development Councils Act* in 1979.

The creation of 24 district development councils approved by legislation in August 1980 was no small feat. Yet, it failed to address the needs of the Jaffna peninsula and the devolution of powers was slower than the creators of the legislation and the government intended it to be.¹⁷

¹⁵ The Tamil Diaspora, however, retains its capacity to impact on the resurgence of an irredentist insurgency within Sri Lanka, by virtue of the material support historically provided by these extra-territorial communities.

¹⁶ A. R. Tyagi, *The Working of Parliamentary Democracy in Ceylon* (Delhi; Sultan Chand & Sons, 1969), 7-8.

¹⁷ *Ibid.*, 7-8.

With funds not reaching District Ministers for the functions delegated to them, and the councils not having any funds under the planned funding mechanism to meet their tasks, the system held little meaning for the Tamil population. The unmet expectations compounded the problems leading to communal riots in 1983.¹⁸

While institutional change has disappointed, talks and negotiations have also failed to engender peace and stability. India-mediated talks throughout most of 1984 disintegrated by late that year. Those talks centred on devolution to regional bodies and concessions on language policy,¹⁹ but failure to commit on implementation set the tone for the coming decades of abortive negotiations. Renewed, more formal negotiations set the stage for the *Provincial Councils Act* of 1987, but these too failed to meet expectations of the Tamil community for whom meaningful decentralization became a key demand.²⁰

Constitutional Amendments Thirteen and *Sixteen*, made during the 1980s, were meant to be major concessions, one granting devolution and the other linguistic equality. The sixth amendment banned separatist movements, but in the process eliminated Tamil parliamentary opposition, making the Tamil militants the “spokespeople for the Tamil community at home and abroad.”²¹ This reflects both the potential and the danger of constitutional reform as a solution to Sri Lanka’s ills; amendments in the absence of a governmental and legal framework to support and implement them in good faith mean little.

Tamil militancy – and in particular the LTTE – are responsible for many important failures on policies, negotiated agreements and reform initiatives. Yet, the government also must bear responsibility, having taken advantage of the conflict to augment the powers of the police and security forces, suspend regular criminal procedure in favour of ongoing emergency rule and act outside the confines of the Constitution. Such actions have alienated Tamil moderates as well as some among the government’s natural support base in the south. This is a cycle that must be broken with a succession of policies, reforms and implementation strategies that are practicable, in order to slowly reverse the popular perception that government reforms are ineffective and ultimately deemed meaningless.

Policy Proposals and Analysis

The imperative for creative policy planning framed in the language and awareness of the “winning the peace” agenda is clear. However, for the reasons laid out above, massive institutional reform, federalism or further devolution are all largely discouraged. Instead, the policy map set forth below looks primarily to incremental non-institutional and non-constitutional reform. Some of the policy recommendations look to actuating existing institutional arrangements that have been allowed to languish. Where institutional and constitutional reform/design policies are recommended, it is within “soft” areas of governance. These are concessions and compromises which are justifiable for reasons of governmental efficacy and efficiency in areas of policy formulation and service delivery. The plan aims to rebuild confidence in Sri Lanka’s governing structures, increase the rule of law, and strengthen democracy.

¹⁸ *Ibid.*

¹⁹ de Silva, *Problems of Governance*, 44.

²⁰ *Ibid.*

²¹ *Ibid.*, 43.

Over the long-term, deeper institutional reform than what is envisaged in the proposals offered here will be required in Sri Lanka. Ideally, these will include a constitutional overhaul that devolves power to the north and east, limits the powers of the executive presidency and allows for more meaningful judicial review of legislation. It is no accident that these are not the kinds of initiatives that are being put forward here. Instead, our proposals focus broadly on strengthening governance and the rule of law. This is done by addressing, for example, issues of mitigating the risk of future civil conflict, regional poverty and inequality, transitioning Sri Lanka's legal infrastructure away from a wartime "state of emergency" mentality and toward greater respect for human rights, eliminating governmental corruption, moving away from "Sinhala-only" policies and services, and enabling and expanding checks and balances in parliament's revenue and budgetary system to allow for better policy implementation.

The reasons for the avoidance of broader institutional reforms at this time are two-fold. First, having just won a military victory over the Tamil Tigers as well as a decisive re-election, President Rajapaksa's government is unlikely to contemplate, let alone embrace, a set of reforms that will both curb his own power, and grant to the Tamil minority in peacetime elements of what the LTTE could not win at war. The political will is simply not there.

Second, there is no guarantee that institutional change would work. Even the best-designed institutions cannot be effective in a political and legal environment that does not respect them or have the capacity to support them. Indeed, past efforts at constitutional reform in Sri Lanka have betrayed a misplaced belief that the country's problems can be legislated away, while the consensus is that the Sri Lankans must devise a political solution as the means to conflict resolution and stability.²² One example was the devolution of power to eight provincial councils, which were meant to be a mechanism to grant the Tamil minority more political power. Due to the conflict, however, the provincial councils did not operate in the Tamil-majority north and east, becoming operational only in the Sinhalese-dominated parts of the country. The result was increased power for the Sinhalese majority at the local level but the maintenance of the status quo in Tamil areas that were meant to benefit from the reform.²³

At the same time, majoritarianism was exalted by the failure to provide a power-sharing arrangement at the centre. The unitary nature of the constitution remained intact, giving the centre the power to determine "national policy on all subjects and functions." The effect is that the centre was able to make legislative inroads into the sphere devolved to the provinces.²⁴ In short, past efforts at constitutional reform have elevated formal remedies to a strategy for reform, despite the fact that Sri Lanka has no deep tradition of turning to the courts or the law for resolution of its problems.²⁵ The fear is that another round of constitutional rewriting will only exacerbate tensions and become the latest in a long line of missed opportunities.

Keeping devolution or proposals for a federal arrangement largely off the table for the time being is also a way of deterring formation of conflicting positions in just those areas where potential for conflict is most acute. Far from being an oversight, maintaining gaps in constitutions can have positive and constructive purposes.²⁶ Sometimes the only way to defuse unresolved points of issue is to inhibit their development and "...to place them in an abeyance as

²² Lisa M. Kois, Dana Francis & Robert Rotberg, *Sri Lanka's Civil War and Prospects for Post-Conflict Resolution* (Cambridge, MA: World Peace Foundation, 1998), 13.

²³ *Ibid.*

²⁴ Neelan Tiruchelvam, "Devolution and the Elusive Quest for Peace" in Robert I. Rotberg, ed. *Creating Peace in Sri Lanka: Civil War and Reconciliation* (Washington, D.C.: Brookings Institution Press, 1999), 197.

²⁵ Kois et al, *Sri Lanka's Civil War and Prospects for Post-Conflict Resolution*, 14.

²⁶ Michael Foley, *The Silence of Constitutions: Gaps, 'abeyances' and political temperament in the maintenance of government* (New York: Routledge, 1989), xi.

a condoned anomaly.”²⁷ That is precisely the strategy at work here. The choice to avoid the divisive and emotive issue of devolution was not made in the hope it will go away, but rather in the hope that it can be put to one side for a period lest it become an impediment to smaller reform initiatives which, collectively, may be no less crucial for creating peace and stability.

Economic Imperatives for Policy Reform

Sri Lanka’s educated population and relatively high standard of living compared to its South Asian neighbours have given rise to the hope that it will be the “next Malaysia” or the “next Singapore,” as its leaders are fond of saying. The end of the conflict will create pressure on the government to make that elusive hope a reality.

The war in the north deprived Sri Lanka of an estimated three percentage points of economic growth each year in the 1990s.²⁸ Literacy rates have fallen, as have funds available for health and education. While Sri Lanka’s \$40 billion economy is forecast to grow more than 6 percent this year, protests following the presidential election in February dragged down the share market. The index has recovered, but foreign investors have been net sellers.²⁹ The country is also at risk of losing the latest tranche of a \$2.6 billion International Monetary Fund loan, a result of the 9.8 percent budget deficit it recorded for 2009 – well above the 7 percent target the IMF laid down. The Central Bank is indicating it will renegotiate the target, but with the government accustomed to using the bloated public sector as a patronage tool, it will be difficult to reign in spending.³⁰

Also, the importance of moving the current post-conflict period forward is further strengthened when one considers the fact that 50 percent of Sri Lanka’s GDP is attributed to diaspora remittances and loans from donor states. With a substantial portion of GDP being raised outside the country, improving economic productivity is crucial for capacity building for the government.

The pressure to make good on the peace dividend will also be compounded by the employment needs of poor Sinhala and Tamil youth, many of whom were formerly absorbed into the military service of their respective forces.³¹ Insufficient demobilization support for the army or economic opportunities for Sri Lankan youth is yet another risk factor. Concerns of unemployment or underemployment among youth, if left unheeded, are likely to give rise to the economic conditions that caused the simultaneous emergence of ambitious radical youth from both communities in the 1970s that marked the onset of political conflict.

A final economic imperative for reform is the international community’s concerns about human rights abuses committed on both sides through the end of the war and compounded by the government’s post-conflict internment of hundreds of thousands of Tamils in guarded camps. Continuing instability and the reputation of the government as an increasingly authoritarian and corrupt regime are impacting the government’s ability to move forward. Without reform, the feasibility of implementing poverty alleviation programmes, creating a climate for attracting foreign direct investment or developing diversified trading partnerships are all at risk.

²⁷ *Ibid*, 10.

²⁸ Kois *et al*, *Sri Lanka’s Civil War and Prospects for Post-Conflict Resolution*, 10.

²⁹ Ranga Sirilal, “Sri Lanka ex-general goes on trial; supporters protest” *Reuters* (16 March 2010).

³⁰ C. Bryson Hull and Shihar Aneez, “Whither Sri Lanka’s post-election economy?” *Reuters* (8 April 2010)

³¹ Kois *et al*, *Sri Lanka’s Civil War and Prospects for Post-Conflict Resolution*, 16.

Now that President Rajapaksa has succeeded in “winning the war” against the LTTE, his government must invest in ‘winning the peace’. In the process, it is hoped that Sri Lanka can reap the dividends of a stable and lasting peace.

With this historical and political context in mind, the following is an outline of our reform proposals, to be elaborated in the chapters that follow:

CHAPTER ONE: Transitional Justice and Rule of Law - *Prepared by: Allison Sephton*

During the entirety of the civil war, and especially towards its end in 2009, massive human rights atrocities were committed by all sides, including by the government. It is in President Rajapaksa’s best interest to confront this reality by pursuing a plan of transitional justice in order to address past rights violations and prevent future abuses. A policy for transitional justice will build the government’s accountability and legitimacy, strengthen economic development, help break the cycle of violence and achieve long-term peace, and improve Sri Lanka’s international reputation.

Several recommendations for a transitional justice plan are proposed. In the short-term, the government should address issues relating to detainees, reparations, freedom of speech, and resettlement of internally displaced people. In the mid-term, it must create a commission of inquiry (COI) to effectively investigate all abuses. In the long-term, it must strengthen human rights institutions and the rule of law, including tackling corruption and enacting reforms to policing.

CHAPTER TWO: De-politicising Appointments, Empowering Judges: Strengthening Sri Lanka’s Courts - *Prepared by: Lindsay Beck*

This chapter's focus is Sri Lanka's courts and appointments to both the Supreme Court and other oversight bodies such as the National Police Commission. While it deviates somewhat from our general scepticism with institutional changes at this time, it is felt that strengthening judicial oversight and independence is crucial for the success of the other reforms being put forward here. To break the cycles of violence and repression that have marked Sri Lanka's history, the country must have confidence in an independent judiciary. The courts must be empowered to pronounce on the validity of emergency rules that abrogate basic rights.

The courts must also be accessible linguistically and geographically, following decades of Sinhala-only rules that effectively excluded Tamil litigants and compounded the alienation of the Tamil community from the country's justice system. Initial steps to achieving these reforms – and ways to make them acceptable to the government – will be explored in this chapter.

CHAPTER THREE: The Electoral System - *Prepared by: Zsuzsanna Blanka Magyar*

Sri Lanka has a proud and long history of democracy. Periodically, experiments attempting to incorporate ethnic minorities into the political system resulted in further disenfranchisement stemming from recurrent struggles with the ethnic majority-dominated government. This is not surprising as the majority greatly outnumbers the ethnic minorities. As history has shown, disenfranchised groups were always looking for tools to demand their share of resources outside the political system. This had disastrous consequences in the past. To break

this cycle, even after a defeat of violent opposition groups, the majority should strive to include the ethnic minorities in the political system.

Currently, the incentives that the electoral system generates for ethnic accommodation and inter ethnic dialogue are weak. While there is an ongoing debate between the political elite and the public in Sri Lanka on what would be the most advantageous way to make major changes in the electoral system, the issue is highly contentious and the debate results in deadlocks. In the current situation and to prevent further instability, no major institutional changes are advisable in the short term. The desired outcome is to enable the current system to give greater opportunities for involvement to the minority groups, while at the same time assuring the majority that their interests will not be substantially compromised. As many have shown, electoral engineering in deeply divided societies can be challenging, and Sri Lanka in many respects exemplifies the most difficult case. In this context incremental changes in the electoral system and civic education may help to bring about learning, stability and improved accommodation.

CHAPTER FOUR: Economic and Social Policies to Mitigate Risk in the Post-Conflict Situation and Redress Grievances to Prevent Future Conflict - Prepared by: Anna-Maria Cappella

The risk of renewed conflict is a real threat to the Government of Sri Lanka. Although President Rajapaksa is expected to meet the development expectations of Sri Lankans, mitigating the risk for a return to conflict should be considered. This chapter evaluates the economic roots of political conflict and civil war in Sri Lanka.

The recommendations proposed in this report focus on two key areas of reform separately. First the report focuses on a policy agenda relevant for the immediate post-conflict situation to ensure that peace is maintained. Once the peace is more secure, Sri Lanka can move forward and transition to a conflict prevention policy framework to ensure that a long-term national social and economic development process does not contribute to future political conflict by redressing the subjective grievances of both the Sinhalese and the Tamils through an economic lens.

CHAPTER FIVE: Restructuring Legislatures: Improving Government Effectiveness, Rebalancing Relations with the Executive, and Removing the Basis for Violent Political Activity - Prepared by: Michael Youash

It is no surprise that as the government confronted each successive crisis with increasing application of emergency governing powers and states of emergency, the primary locus of power overwhelmingly shifted to the Executive and ultimately the Presidency. New constitutions, constitutional amendments, and other changes in Sri Lanka's Executive-Legislature relations show a consistent decline and marginalization of parliament in governing Sri Lanka. The sequencing of reforms bringing Parliament to this condition is most revealing; with the measures diminishing this institution's role often coming as a final step, or ratification, of what has already happened in practice as a result of greater power shifting to the Executive Branch in successive waves. Seen in this light, it is arguable that Parliament is popularly seen as a last consideration, of lesser consequence than other institutions – simply reflecting what is already existent in the broader body politic and not determinative of power relations in society.

Parliament's non-determinative role of fundamental power relations in society, and the fact that it is the last consideration for past governments in ratifying new power relations in society, make it the ideal entity for a programme of institutional reform. It is a 'soft' institution in that reform can be rolled-out in a highly controlled environment with the least ability to threaten the Executive's overarching prerogatives. At the same time, the Sri Lankan parliament possesses formal powers, such as ultimate responsibility for appropriations bills, which give it enormous potential to become far more consequential to opposition groups and disaffected populations seeking meaningful political space. Finally, with the creation of Provincial Councils and legislative organs for each province, enormous potential exists to develop institutional arrangements that can increase government capacity to meet increasing service delivery expectations by a restive population on the one hand, and meet some expectations for minority aspirations for some degree of substantive self-governance, on the other hand.

CHAPTER SIX: Sri Lanka: Foreign Policy and Diaspora Relations - *Prepared by: Iris Tal-Halbert*

The challenge faced by the government of Sri Lanka is how to best position and leverage its foreign policy and diaspora relations, so that it maximizes its capacity to generate goodwill and trust within the international community, while furthering the cause of short- to long-term economic development goals back home. It is incumbent upon the government of Sri Lanka to appreciate the axiomatic relationship that exists between a well thought out and balanced foreign policy agenda, positive engagement with diaspora communities and Sri Lanka's socio-economic stabilization and development. A return to a non-alignment position that reflects balance and political moderation to western observers, thereby stemming the flow of western alienation, while incorporating substantive efforts to address institutional deficiencies, human rights claims and intra-ethnic grievances, will signal Sri Lanka's commitment and capacity to engage with the global economy in earnest and legitimate ways.

The soundness of such an approach will also bear fruit as this translates into an improved and more trusting relationship with Sri Lankan diaspora communities who predominantly reside in western industrialized countries. The expected outcome of improving foreign relations with these various actors is an increased ability to capture loans and foreign direct investments from foreign donor institutions and private foreign enterprise. In turn, those monetary cash flows will be used to target various economic and infrastructure development and poverty alleviation programs in Sri Lanka. Furthermore, while the LTTE have now been defeated, the need for continued vigilance of disaffected irredentist diaspora groups behooves the Sri Lankan government to reinforce good relations and cooperation with security and law enforcement agencies in western countries where previously pro-LTTE diaspora communities thrive.

Finally, foreign direct investments by private foreign investors and Sri Lankan diaspora communities (many of whom had previously supported the LTTE insurgency in Sri Lanka) - are niche sectors in the FDI portfolio that have been relatively untapped until now. Therefore, given the axiomatic importance of FDI to the current economic development and ongoing security of Sri Lanka, the importance of poverty reduction programmes, the criticality of technology transfer to developing economies and the importance of stepping up the implementation of infrastructure development programs; the government's foreign policy agenda - in tandem with its domestic agenda, is critical to the stabilization of the island and the political and economic integration of its population. Ultimately, these dominant factors will contribute to the prospect of a stable and

lasting peace and to the legitimization of the Sri Lankan government internationally.

CHAPTER SEVEN: Concluding Remarks - Prepared by: Group

As has been shown, maintaining the status quo has not worked in the past, and is not sustainable in the future. Large-scale institutional reforms, while ambitious, have ultimately failed at breaking the cycle of violence and upheaval. Thus, incremental, modest reforms as recommended in this report will be better suited to “winning the peace” in Sri Lanka. Otherwise, both Sri Lanka and President Rajapaksa will fall victim to the turbulent past, for as has been famously observed during an extremely violent time in Europe:

"For the victors, at least for part of them, the war will have been politically profitable. And the responsibility for this rests on the behaviour of all that made resistance impossible. Now, as a result of the ethics of absolutism, when the period of exhaustion will have passed, the peace will be discredited, not the war."

- Max Weber, Essays in Sociology

Works Cited

- Agence France-Presse. "S.Lanka's Fonseka to be convicted next week: party." (16 April 2010). Available online from LexisNexis.
- Aneez, Shihar and Srilal, Ranga. "Sri Lanka's ruling alliance wins parliamentary majority." (Reuters: 9 April 2010). Available online from LexisNexis.
- BBC. "Sri Lanka's first post-war parliamentary polls close" (8 April 2010). Available online from LexisNexis.
- de Silva, K.M. *Sri Lanka: Problems of Governance*. Delhi: Konark Publishers PVT Ltd, 1993.
- The Economist. "Not in his stars: the president is master of his fate" (16 April 2010). Available online from LexisNexis.
- Edrisinha, Rohan, et al. *Power-sharing in Sri Lanka: Constitutional and Political Documents 1926-2008*. Colombo: Centre for Policy Alternatives, 2008.
- Foley, Michael. *The Silence of Constitutions: Gaps, 'abeyances' and political temperament in the maintenance of government*. New York: Routledge, 1989.
- Hull, Bryson C. and Aneez, Shihar, "Whither Sri Lanka's post-election economy?" (Reuters: 8 April 2010) Available online from LexisNexis.
- International Crisis Group. "Sri Lanka: Bitter Peace," Update Briefing/Asia Briefing No. 99. Colombo/Brussels, 11 January 2010.
- Kois, Lisa M., Francis, Dana, and Rotberg, Robert. *Sri Lanka's Civil War and Prospects for Post-Conflict Resolution*. Cambridge, MA: World Peace Foundation, 1998.
- Sirilal, Ranga. "Sri Lanka ex-general goes on trial; supporters protest" (Reuters: 16 March 2010). Available online from LexisNexis.
- Tiruchelvam, Neelam. "Devolution and the Elusive Quest for Peace." In Robert I. Rotberg, ed. *Creating Peace in Sri Lanka: Civil War and Reconciliation*. Washington, D.C.: Brookings Institution Press, 1999.
- Tyagi, A.R. *The Working of Parliamentary Democracy in Ceylon*. Delhi: Sultan Chand & Sons, 1969.
- United States Department of State. *2009 Country Reports on Human Rights Practices – Sri Lanka*. Washington, DC: US Department of State, 2010). Available online at <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136093.htm>.

CHAPTER ONE: BREAKING THE CYCLE OF VIOLENCE AND BUILDING THE RULE OF LAW: TRANSITIONAL JUSTICE IN POST-WAR SRI LANKA - ALLISON SEPHTON

Introduction

During Sri Lanka's 26-year civil war, many human rights abuses were perpetrated by both the government and the LTTE. Now that the war is over and the LTTE has been defeated, Sri Lanka is in transition from a state of emergency to one of peace. As a result, it might be tempting for the government to ignore past atrocities and to move forward with rebuilding the country. But this would be dangerous. Lasting peace and true reconciliation depends on the promotion and protection of human rights for all Sri Lankans.³² The past must be dealt with, and Sri Lankans' grievances addressed, otherwise the cycles of violence and political upheaval as described in the Synthetic Overview will continue. Furthermore, since it is alleged that some of the worst human rights atrocities were committed by the current government at the end of the war, the government must address these in order to build and maintain its legitimacy and accountability.

It is in President Rajapaksa's best interest to pursue a transitional justice plan to address the human rights abuses which were committed, to prevent future abuses, and to promote national unity and reconciliation. Transitional justice will promote the strengthening of human rights institutions, stability, accountability, and trust in the government and institutions.³³ We are making numerous proposals for the short-, mid-, and long-term, that implemented together over time, will achieve these goals and strengthen the rule of law and democracy in Sri Lanka.

Rationale for Proposals

There are four key reasons why Rajapaksa should pursue a plan for transitional justice:

1. Legitimacy and accountability

For Rajapaksa to maintain his mandate in the next election and beyond, he needs to "win the peace" in Sri Lanka by building his legitimacy and accountability in the eyes of Sri Lankans. He must address the many grievances held by Sri Lankans for the human rights abuses committed during the conflict, and he must also end the culture of impunity which has created backlash against the government in the past. Once Sri Lankans' rights are respected and protected by the government, this will build confidence in the government and strengthen democracy overall. The major opposition parties are calling for a commission of inquiry, and there is a perception that the present government is behaving in an authoritarian way and continuing to foster an environment of impunity and corruption. There is a risk that if an opposition party later comes into power and launches such an inquiry, it will further tarnish the reputation of the present government.

2. Breaking the cycle of violence and establishing lasting peace

³² United Kingdom Foreign and Commonwealth Office, *Annual Report on Human Rights 2009* (London: Foreign and Commonwealth Office, 2009), 148. [UKFO, *Annual Report on Human Rights 2009*]

³³ Jose Zalaquett, "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints," in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, ed. Neil J. Kritz (Washington, D.C.: United States Institute of Peace Press, 1995), 6.

Transitional justice will help break the cycle of conflict and instability described in the Synthetic Overview, and will create a basis for long-term peace. In the past, at each point of relative calm in the cycle, the government of the day would announce a plan to investigate and punish human rights abuses, but these always resulted in failure (as will be explored below). While the recurrent violence cannot be blamed directly on the failure of these investigations, it is not a stretch to surmise that addressing human rights grievances in a meaningful way will help reduce grievances both between groups and as against the state, and will help deter future violence. Transitional justice will also strengthen the rule of law among key institutional actors (such as the police, who have been some of the main perpetrators of brutality), so as to prevent abuses from occurring in the future.

3. Economic Development

Transitional justice will contribute to economic and human development³⁴, which will greatly help to “win the peace” and create a legacy for Rajapaksa. Transitional justice can lay the groundwork for development by alleviating marginalization, exclusion and vulnerability by addressing reparations, property restitution, rehabilitation, and reintegrating victims and perpetrators.³⁵ It can also create the key conditions for development – political and social stability; safety, security and access to justice; conflict prevention; and social and economic justice. To achieve all of these, not only are we recommending measures to address human rights abuses and institutional accountability, but also measures to deal with corruption and inequality, which are economic sources of the conflict (addressed in another chapter).³⁶

4. International Reputation

Finally, pursuing transitional justice will enhance Sri Lanka’s reputation in the international community, which will improve its foreign relations and economic opportunities. There are presently strong calls from the US, the UK, and the Tamil diaspora, among others, for Sri Lanka to address human rights violations during the war, as well as to address concerns such as the pre-election arrest of opposition candidate Gen. Sarath Fonseka on unspecified charges.³⁷ The recent suspension of Sri Lanka from the EU’s system of Generalized System of Preference Plus (GSP+) was in response to the human rights situation.³⁸ UN Secretary-General Ban Ki-Moon has recently announced that he will be convening a panel of experts to advise him on accountability and human rights issues in Sri Lanka.³⁹

Rajapaksa’s vehement opposition to this proposal in the name of sovereignty is only acting to tarnish his reputation and accountability both inside and outside Sri Lanka. It is a point

³⁴ Not only can achieving rights lead to economic development, but it might represent development in and of itself, as it can help people realize their full capabilities as human beings. See Roger Duthie, Introduction to *Transitional Justice and Development: Making Connections*, eds. Pablo de Greiff and Roger Duthie, International Center for Transitional Justice (New York: Social Science Research Council, 2009), 18, discussing Amartya Sen, *Development as Freedom* (New York: Knopf, 1999) and Peter Uvin, *Human Rights and Development* (Bloomfield, CT: Kumarian Press, 2004).

³⁵ Duthie, Introduction, 20.

³⁶ See Godfrey Musila, “Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions,” 3 *International Journal of Transitional Justice* 445 (2009).

³⁷ UKFCO, *Annual Report on Human Rights 2009*, 148-151; United States Department of State, *2009 Country Reports on Human Rights Practices – Sri Lanka* (Washington, DC: US Department of State, 2010), available online at <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136093.htm>. [USDS, *2009 Country Reports on Human Rights Practices – Sri Lanka*]

³⁸ UKFCO, *Annual Report on Human Rights 2009*, 148.

³⁹ United Nations Secretary-General, Department of Public Information, “Press Conference by Secretary-General Ban Ki-Moon at United Nations Headquarters” (UN Document SG/SM/12792, 16 March 2010)

well-taken that Sri Lanka has as its sovereign prerogative the ability to decide if and how to construct transitional justice policies. However, the Sri Lankan government's policies cannot violate international law, and must uphold its international human rights commitments.⁴⁰ Sri Lanka should be aware that by not addressing past atrocities or preventing new ones, it is failing to meet these obligations, and incentivizing the international community to take action.⁴¹ If Rajapaksa wants to rectify this and prevent further angering of the international community (as there might be a possibility of ICC indictments down the road), it would be in his best interests to launch an independent commission of inquiry as soon as possible.

Background of human rights abuses committed during wartime, and the present situation

During the conflict, democracy and the rule of law were severely eroded. Atrocities such as armed attacks against civilians, torture, disappearances, extra-judicial killings, and illegal expropriation and crimes to property occurred. Emergency rule was in effect throughout the majority of the conflict (under *The Prevention of Terrorism (Temporary Provisions) Act* No. 48 of 1979, or the "PTA"). Under this, basic legal safeguards for the protection of human rights, such as criminal procedures relating to arrest and detention as well as freedom of speech and association, were severely curtailed.⁴² It is estimated that (at least) between 16,000-60,000 disappearances occurred, and most violations occurred in the Tamil-dominated northern and eastern parts of the county.⁴³ Indeed, it is thought that the majority of civilian casualties have been Tamils.⁴⁴ A culture of impunity for atrocities committed endured on all sides (government, LTTE, and the many paramilitary groups linked with the government), but the government especially has been largely unaccountable for the crimes it committed.⁴⁵

It is thought that some of the worst atrocities occurred in the final months of the war in 2009.⁴⁶ The LTTE allegedly prevented civilians from leaving the territory and used them as "human shields," forcibly recruited civilians and children for combat, and shot civilians who attempted to leave LTTE-controlled areas.⁴⁷ The national army displaced about 280,000 civilians, made it difficult for international aid organizations to access the north to deliver supplies, and prevented journalists from reporting about the violence. There is also evidence of extrajudicial killings (and their concealment) and reports of persistent and heavy shelling of civilian areas in the north.⁴⁸

The situation is somewhat better now that the war is over, but concerns remain. Civilian abductions continued throughout 2009 and are allegedly still occurring on all sides.⁴⁹ Problems

⁴⁰ Sri Lanka has signed the *Universal Declaration of Human Rights*, and acceded to the *International Covenant on Civil and Political Rights*; the *International Covenant on Economic, Social and Cultural Rights*; and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

⁴¹ Zalaquett, "Confronting Human Rights Violations," 9.

⁴² Wasana Punyasena, "The Façade of Accountability: Disappearances in Sri Lanka," 23 *Boston College Third World Law Journal* 115 (2003), 130-132; Asanga Welikala, *A State of Permanent Crisis: Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka* (Colombo: Centre for Policy Alternatives, 2008), 187-190. Please see also Radhika Coomaraswamy and Charmaine de los Reyes, "Rule by emergency: Sri Lanka's postcolonial constitutional experience," 2 *International Journal of Constitutional Law* 2 (2004), 272-295.

⁴³ Punyasena, "The Façade of Accountability," 129.

⁴⁴ USDS, *2009 Country Reports on Human Rights Practices – Sri Lanka*.

⁴⁵ UKFCO, *Annual Report on Human Rights 2009*, 148; USDS, *2009 Country Reports on Human Rights Practices – Sri Lanka*; Punyasena, "The Façade of Accountability," 129-133.

⁴⁶ USDS, *2009 Country Reports on Human Rights – Sri Lanka*.

⁴⁷ UKFCO, *Annual Report on Human Rights 2009*, 148, 151.

⁴⁸ UKFCO, *Annual Report on Human Rights 2009*, 148: A high-profile example is Channel 4's airing of cell-phone footage of an army soldier carrying out several extrajudicial killings and this is thought to be genuine, but the government maintains that it's fake. This shows the importance of having a credible investigation.

⁴⁹ UKFCO, *Annual Report on Human Rights 2009*, 148, 151.

of human rights protection continue, as law enforcement and the legal system remain weak.⁵⁰ Corruption still runs rampant among the government, bureaucracy, judiciary, and law enforcement, thus preventing the effective protection of human rights at all levels.⁵¹ Unless they can afford a bribe or have political connections, civilians do not feel they can approach the police for protection or to investigate claims (nor do they trust them, as they were often the perpetrators of crimes.)⁵² Impunity is the norm, as official action against corruption is incredibly low (at one time, it was reported that punitive measures were only taken in 4% of all cases).⁵³ There have been allegations of corruption and nepotism under Rajapaksa's regime and during the recent elections, which do not bode well for his public legitimacy.⁵⁴

The situation of the internally displaced people (IDPs) was dire at the end of the war, as living conditions in IDP camps in the North did not meet international standards, and freedom of movement was severely restricted. The government has recently been speeding up the resettlement process and has begun rebuilding homes and conditions in camps have improved and freedom of movement eased.⁵⁵ However, full freedom of movement has not been achieved, the resettlement process is still failing to meet international standards, and there remain concerns for protection of both displaced and returning civilians.⁵⁶

Another major problem is the prisoners still detained in detention centres without charge, a result of emergency rule. There are still an estimated 11,500 ex-combatants to whom the International Committee of the Red Cross (ICRC) has no access, and the detainees have no access to due legal process.⁵⁷ The conditions in prisons are alleged to be deplorable and fail to meet international standards.⁵⁸

Freedom of expression and association also remain hindered. Since the war has ended there has been a crack-down on human rights defenders and journalists.⁵⁹ During the conflict, there was an intense atmosphere of intimidation; there were attacks on TV studios and a prominent newspaper editor was murdered in Colombo. There have been a reduction in high-profile attacks since June 2009, but serious and incessant threats to journalists (especially Tamils) continue.⁶⁰

The importance of transitional justice, and past (failed) attempts

⁵⁰ UKFCO, *Annual Report on Human Rights 2009*, 148.

⁵¹ Colombo Times, "Bribery probe on ex-CJ begins" (Colombo: 25 October 2009), accessed online from LexisNexis; Hindustan Times, "Sri Lanka: Bribery complaints top 3200 mark last year" (3 February 2010), accessed online from LexisNexis.

⁵² USDS, *2009 Country Reports on Human Rights – Sri Lanka*.

⁵³ Naved Ahmad and Oscar T. Brookins, "On Corruption and Countervailing Actions in Three South Asian Nations," *7 Policy Reform* 1 (March 2004), 29.

⁵⁴ Reuters, "UPDATE 6 – Sri Lanka ruling alliance wins parliamentary majority," (Colombo: 9 April 2010), available online at <http://www.reuters.com/article/idUSSGE63804S20100409>; Right Vision News, "Understanding nepotism in Sri Lankan context" (Colombo, 24 February 2010), accessed online from LexisNexis.

⁵⁵ UKFCO, *Annual Report on Human Rights 2009*, 149-150; Government of Sri Lanka, "Sri Lanka: Post-War housing boom with army support begins in Jaffna" (2 April 2010), available on ReliefWeb, <http://www.reliefweb.int/rw/rwb.nsf/db900SID/MINE-845N54?OpenDocument&rc=3&emid=ACOS-635PHK>; Government of Sri Lanka, "Sri Lanka: Government Expedites Resettlement of IDPs" (15 March 2010), available on ReliefWeb, <http://www.reliefweb.int/rw/rwb.nsf/db900sid/AZHU-83KMF2?OpenDocument&rc=3&emid=ACOS-635PHK>

⁵⁶ International Crisis Group, "Sri Lanka: A Bitter Peace," Update Briefing, Asia Briefing No. 99 (Colombo/Brussels: International Crisis Group, 11 January 2010).

⁵⁷ UKFCO, *Annual Report on Human Rights 2009*, 149.

⁵⁸ USDS, *2009 Country Reports on Human Rights – Sri Lanka*.

⁵⁹ Human Rights Watch, "Sri Lanka: End Witch Hunt Against the Media and NGOs" (New York: Human Rights Watch, 11 March 2010), available online from ReliefWeb, <http://www.reliefweb.int/rw/rwb.nsf/db900sid/KHII-83F3K6?OpenDocument&rc=3&emid=ACOS-635PHK>; UKFCO, *Annual Report on Human Rights 2009*, 148.

⁶⁰ UKFCO, *Annual Report on Human Rights 2009*, 150.

Transitional justice, put simply, means addressing violations of human rights that have occurred, and preventing new ones.⁶¹ It seeks to strengthen the rule of law and achieve national unity and reconciliation, without retribution or revenge, largely by exposing to the public the full truth of events which occurred on all sides.⁶² Public acknowledgement by the government of wrongs committed is important to ensure that there is a fair, unbiased and authoritative historical account of the events, and to promote healing, reconciliation, and reparative justice.⁶³ Hiding the truth will lead to further resentment and distrust of the government. A culture of impunity and a “victor takes all” mentality (of which the current Rajapaksa government may fall victim) will weaken efforts to prevent future abuses and strengthen the rule of law.⁶⁴

For whatever transitional justice plan the government adopts, it would be wise to communicate the details of the plan and its rationale to the Sri Lankan population.⁶⁵ This will achieve transparency, trust, and accountability, and can be a way of achieving public support for the project and the government’s platform. Related to this, the policy must represent the will of the people and must go through a democratic process where appropriate.⁶⁶

As mentioned, a culture of impunity predominated on all sides during the civil war, and continues today. Beginning in the 1990s, there have been several iterations of official investigations into human rights abuses, but all have resulted in failure to produce either public results or punishments, due to political pressures.⁶⁷ Many, such as the 1996 Defence Ministry’s Board of Investigation (BOI), suffered from a lack of independence.⁶⁸ Several of the early commissions were a result of civil society pressure, and not of the government’s own willingness (which was reflected by their poor results and a lack of public faith in the process).⁶⁹ The most recent Presidential Commission of Inquiry presented the results of its investigations in July 2009 into 16 high-profile cases of human rights abuse, but the report has not been made public, only one case was recommended for further investigation, and there has been no follow-up since.⁷⁰

At present, little is being done. The Attorney General’s office remains weak in being able to launch investigations and prosecutions, and has been virtually unable to indict high-profile perpetrators.⁷¹ There has been no progress on investigations into many high-profile cases, including the assassination of newspaper editor Lasantha Wickrematunga in 2009.⁷² There have been little investigations into military and police brutality, which continued after the war while emergency rule was still enacted.⁷³ In October 2009, Rajapaksa announced that he would form a committee to look into the US State Department report on possible human rights violations. However, the committee’s deadline to report has been extended until April 2010, and there are rumours that it has been tasked simply to rebuff allegations, rather than investigate them.⁷⁴

⁶¹ Duthie, Introduction, 18.

⁶² Zalaquett, “Confronting Human Rights Violations,” 5. He says that all of the major international human rights instruments (*UNDHR*, *ICCPR*, *ICESCR*, and the *Genocide Convention*), have preventive purposes.

⁶³ Zalaquett, “Confronting Human Rights Violations,” 6-7; Priscilla Hayner, *Unspeakable Truths: Confronting State terror and Atrocity* (New York: Routledge, 2001), cited in Lyn Graybill and Kimberly Lanegran, “Truth, Justice, and Reconciliation in Africa,” 8 *African Studies Quarterly* 1 (Fall 2004), 3-4.

⁶⁴ Zalaquett, “Confronting Human Rights Violations,” 6-7.

⁶⁵ Zalaquett, “Confronting Human Rights Violations,” 6.

⁶⁶ Zalaquett, “Confronting Human Rights Violations,” 9.

⁶⁷ Please see Punyasena, “The Façade of Accountability” for a thorough account of COIs up until 2003. Please also see Chandra Lekha Sriram, “Dilemmas of Accountability: Politics, the military and commissions of inquiry during an ongoing civil war the Sri Lankan case,” 5 *Civil Wars* 2 (2002), 96-121.

⁶⁸ Punyasena, “The Façade of Accountability,” 139.

⁶⁹ Punyasena, “The Façade of Accountability.”

⁷⁰ UKFCO, *Annual Report on Human Rights 2009* 151; USDS, *2009 Country Reports on Human Rights – Sri Lanka*.

⁷¹ Punyasena, “The Façade of Accountability,” 144-148.

⁷² UKFCO, *Annual Report on Human Rights 2009*, 151.

⁷³ UKFCO, *Annual Report on Human Rights 2009*, 151.

⁷⁴ USDS, *2009 Country Reports on Human Rights – Sri Lanka*

Short-term recommendations

Sri Lanka should do the following immediately:

Detainees: The government should immediately provide all remaining detainees held without charge with proper criminal procedure and fair trials, and should release those for whom there is little to no evidence.⁷⁵ Emergency rule should no longer be a hindrance to the full implementation of basic legal standards. Lists of all detainees should be furnished and made public.

IDPs: The government should continue with the process of resettling IDPs. It must strive to ensure that this process meets international standards, and must continue to provide access to housing, food, water, health care, and education. Full freedom of movement must be restored to all, and effective, un-biased police protection in the language of the IDPs must be provided (addressed further in the long-term recommendations).⁷⁶

Freedom of expression: The Sri Lankan government should undertake all means possible to end the atmosphere of silence, which greatly threatens democracy and perpetuates an image of authoritarianism. Freedom of speech and association (guaranteed under s. 14 of the Constitution) must be allowed. Threats to media outlets, journalists, and human rights defenders must end, and the government must protect their lives and the expression of their rights. Investigations must be pursued into high-profile cases (discussed below).

End emergency rule: If it has not already done so, the government must lift emergency rule. This will ensure that all rights guaranteed under the Constitution receive full protection (as many are unfortunately derogable under emergency rule), and will prevent government officials from committing future atrocities that may have been allowed under emergency rule. This will also begin the process of strengthening the rule of law and increasing accountability.

Reparations: The government must ensure that adequate reparations are given in a timely manner for damaged property and loss of land which occurred during the civil war, especially in military-seized areas in the north. The government must also provide reparations for victims of abuses or families of victims who were killed, to assist with treatment of physical and psychological consequences.⁷⁷

Mid-term recommendations

The most important thing that the Sri Lankan government must do in order to achieve reconciliation is to establish some form of Commission of Inquiry (COI) to investigate human rights abuses and expose the truth. The parameters of this recommendation will be discussed below. At the outset, it is recognized that the government may be resistant to launching a COI, as exposure of past bad acts risks undermining the government and opens it to calls for punishment

⁷⁵ Amnesty International, “Sri Lanka: Time for a new start, an appeal to Sri Lanka’s presidential candidates,” ASA 37/002/2010 (18 January 2010), 2-3, available online from www.amnesty.org.

⁷⁶ See Amnesty International, “Sri Lanka: Time for a new start,” for further recommendations.

⁷⁷ Zalaquett, “Confronting Human Rights Violations,” 10; USDS, 2009 *Country Reports on Human Rights – Sri Lanka*; see also H. J. F. Silva, “‘Reparations’ from a Sri Lankan Perspective,” *Windsor Yearbook of Access to Justice* 22(2003), 179-188.

and acts of vengeance.⁷⁸ The government may not want to leave its own members open to persecution. However, there is an equally large risk of revolt and political upheaval if the government does not pursue a COI. If the government wants to maintain accountability and legitimacy, and seeks to break the cycle of violence and revolt, then it must begin a meaningful, thorough investigation into past atrocities committed on all sides.

There are several considerations involved in formulating a COI:

1. Independence and thoroughness

The commission must be independent, impartial, use internationally-recognized methods, and have sufficient resources to do its job properly.⁷⁹ It must be run separately from other government institutions, such as the military (the 1996 BOI, discussed above demonstrated how a lack of independence from the military hindered investigations). It is not recommended that a COI be spearheaded by the judicial system because it is presently weak and is not fully independent (as will be discussed in another chapter), and given its limited resources may not be efficient or effective.⁸⁰ Given that corruption and a lack of respect for the rule of law unfortunately still pervade Sri Lanka's police force and civil service, it would be extremely wise if Sri Lanka accept assistance from international actors and independent local civil society groups to create and carry out this commission. These actors can provide resources and expertise, as well as satisfy the current demands for international involvement of Sri Lanka's investigative process. With time, the commission can train and work with local authorities in carrying out its work, with a view to reforming the law enforcement and judicial systems to be capable of carrying out fair, independent processes on their own. These are long-term rule-of-law reforms which are discussed in greater detail in the "long-term recommendations" section of this report. This COI could eventually resemble the model of the Historical Enquiries Teams used in Northern Ireland.⁸¹

It is important that the COI produce a thorough report complete with detailed recommendations for future human rights protection. It must be able to provide a full account of events in order to prevent a revisionist history, and to prevent being a source for conflict in the future.⁸² This is why independence is so critical. The COI should also thoroughly investigate the inadequacies of the present criminal justice system in terms of protecting rights, and provide recommendations for improvement, so that it can assist in strengthening institutions and moving Sri Lanka out of the cycle of conflict.⁸³

Because atrocities were committed by both sides, it is important that both be exposed – even if the other side effectively no longer exists. The government must also not give the impression that its atrocities were justified by violence from the other side, or that there is some measure of compensation of guilt.⁸⁴ This will be seen as illegitimate and will not address the grievances of victimized groups or prevent future uprisings. The government must take full

⁷⁸ Zalaquett, "Confronting Human Rights Violations," 7.

⁷⁹ Jamal Benomar, "Justice After Transitions," in *Transitional Justice: How emerging democracies reckon with former regimes*, ed. Neil J. Kritz (Washington, DC: United States Institute of Peace Press, 1995), 34.

⁸⁰ Zalaquett, "Confronting Human Rights Violations," 7.

⁸¹ Paige Arthur, International Center for Transitional Justice, "Identities in Transition: Developing Better Transitional Justice Initiatives in Divided Societies" (International Center for Transitional Justice, 2009), 12.

⁸² Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace* (New York: Human Rights Watch, 2009).

⁸³ Amnesty International, "Sri Lanka: Time for a new start," 5-6.

⁸⁴ Zalaquett, "Confronting Human Rights Violations," 9.

responsibility for abuses it committed by using its power to violate the law rather than to uphold it.”⁸⁵

2. Temporal Mandate

The government should not limit the commission’s investigations to a short period of time, or one that will be most exculpatory for its own members. Ideally, an effective investigation needs to be pursued into all atrocities which have been committed since the outbreak of war in 1983. But given that this might not be feasible, some organizations have suggested that a current mandate extend back to August 2005, when abuses committed by the current government became prominent.⁸⁶ The temporal mandate, and indeed the transitional justice plan itself, should ultimately be decided through an extensive consultation process with the opposition and civil society.

3. Amnesty and Judicial mandate

This is an important consideration. On the one hand, a COI could have a judicial mandate and be able to prosecute perpetrators itself. Or, the evidence gathered from its investigations could be used by the judicial system to launch prosecutions. Another option would be to avoid prosecutions and instead provide amnesty to all those willing to testify; the aim of the COI could be to obtain a complete account of events for both families and all Sri Lankans. There are pros and cons to each of these. What matters most is what is being demanded by Sri Lankans; consultation with the population must be sought in a democratic way before the parameters of a COI are formed.⁸⁷

The main benefit of providing amnesties in return for information is that more perpetrators will come forward, and the most complete historical account will be achieved. This is why COIs in other countries, such as Argentina, have failed – they did not provide protection to those who came forward, and perpetrators refused to speak for fear of punishment.⁸⁸ Besides full amnesty, partial amnesties such as sentence reduction or non-penal sanctions such as public apologies could also be tools used.

Ultimately, if victims and their families are seeking the truth, an amnesty is perhaps the best way to achieve it. This will best lead to reconciliation and may be best for stability and strengthening institutions in the long-term. It may also be more peaceful, as COIs with punishments may lead to backlash. This was the case in Argentina, where the initial transitional justice policy of indicting military officials led to dangerous rebellions that jeopardized the democratization process.⁸⁹ However, an amnesty runs the same risk in that it may actually reinforce a culture of impunity, and may provoke backlash from communities or individuals who do not feel that justice is being served (such as the victimized communities).⁹⁰ Indeed, it is argued by some that Sri Lanka’s past amnesty-based investigations did not serve justice but rather merely served the interests of the ruling party.⁹¹

⁸⁵ Zalaquett, “Confronting Human Rights Violations,” 9.

⁸⁶ Amnesty International, “Sri Lanka: Time for a new start,” 5-6.

⁸⁷ Rama Mani discusses the importance of public opinion and sentiment in determining which path of transitional justice to pursue, and when to pursue it. See Rama Mani, “Does power trump morality? Reconciliation or transitional justice?” in *Atrocities and International Accountability*, eds. Edel Hughes, William A. Schabas and Ramesh Thakur (New York: United Nations University Press, 2009), 23-41, at 26-27.

⁸⁸ Benomar, “Justice After Transitions,” 37-39; Zalaquett, “Confronting Human Rights Violations,” 20-27.

⁸⁹ Benomar, “Justice After Transitions,” 33.

⁹⁰ For a lengthier discussion of the compromises to formal justice entailed by amnesty-based transitional justice, please see Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), cited in Graybill and Lanegran, “Truth, Justice and Reconciliation in Africa,” 3.

⁹¹ Punyasena, “The Façade of Accountability,” 117-118.

However, a COI with the ability to impose penal sanctions, or whose evidence can be used for punishment, also risks backlash from groups supporting the government, and from within the government itself, as its members will likely be the target of many investigations. While there may be strong support among the victimized populations for criminal sanctions, the majority supporting Rajapaksa's government may not support such action. Implementing punishments runs a great risk of more instability, violence and social divisiveness in the short-term. In countries where the military is still a prominent force (as was the case in Chile), past experience shows it is harder to indict members of the military and government; successful prosecutions of past violators have occurred only in countries where the governing agents have experienced defeat and lost most or all of their power.⁹² Furthermore, since the past violence in Sri Lanka has largely been the result of systemic corruption and lack of rule of law, imposing individual guilt through trials may not be the best way in assisting with overall institutional reform in order to prevent abuses in the future.⁹³

If the government does decide to include punishment as a strategy, then it must be sure to apply this equally to both sides to avoid accusations of unaccountability and to avoid further infuriating the victimized populations. It must also uphold international standards relating to trials, treatment of offenders and penalties.⁹⁴ It must absolutely not pursue this policy under the emergency rules of the PTA. It must also be recognized that while pursuing penal sanctions may help to strengthen the criminal justice system, there is perhaps a larger risk that given the current weakness of the judicial system, it does not have the capacity to carry out these investigations and prosecutions fairly or efficiently. Conducting criminal trials and imposing punishments using corrupt and lawless institutions could indeed result in more harm and violence than peace and justice.⁹⁵

4. Final recommendation, and what is not being recommended

On balance, it is recommended that the government of Sri Lanka pursue a COI with a policy of either a partial or full amnesty. At this time, the legal system does not have the capacity to conduct extensive and fair criminal prosecutions, and given that most perpetrators will likely be public officials, this will not be in the government's interest and may lead to further instability and conflict at this fragile time. It is also unclear if the general population supports a strategy of legal sanctions.⁹⁶ If the government does choose to pursue a judicial mandate with criminal sanctions, it is recommended that these be reserved for the most serious and high-profile abuses, with a policy of full investigation and disclosure for lesser crimes (for the benefit of victims and families) coupled with amnesty for low-level offenders. There should be a requirement of full and public apologies made to victims and their families.

Ideally, we recommend that the scope of the inquiry be broad, so that all individuals, families and communities are able to discover the truth about abuses they have suffered. This will also better promote national reconciliation and unity, and will instil the most confidence in

⁹² Benomar, "Justice After Transitions," 33.

⁹³ See Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), and Michael Humphrey, "From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transition and Individual Healing," 14 *The Australian Journal of Anthropology* 2 (2003), 171-187. Both referred to in Graybill and Lanegran, "Truth, Justice and Reconciliation in Africa," 4.

⁹⁴ Zalaquett, "Confronting Human Rights Violations," 9.

⁹⁵ For arguments in support of using local justice mechanisms, please see Human Rights Watch, *Selling Justice Short*. For arguments against, please see Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," 28 *International Security* 3 (Winter 2003/04), 5-44. For the dangers of carrying out trials in weak institutional settings, please see Rama Mani, "Does Power Trump Morality?," 31-33.

⁹⁶ Comments from David Cameron, Toronto, ON, 29 March 2010.

government institutions. However, for the same reasons that wide-scale trials are not being recommended, there is not at present the institutional capacity or impartiality to carry out widespread inquiries (even with amnesty) for every single crime committed. It is recommended that initially, investigations be carried out into the high-profile cases already identified, as well as other cases brought forward by NGOs, civil society actors, and civilians with sufficient evidence. It is our hope that with a policy of amnesty, the truth will be more easily revealed. As institutional capacity builds over time through our other recommendations, more widespread investigations can be conducted.

The strength of this recommendation lies in the fact that it is coupled with other policies (elsewhere in this report) of providing reparations for victims, and improving the rule of law and access to justice. These, combined with an amnesty-driven COI with a wider potential to unveil the “truth” to victims, creates a model of “reparative justice” that is best suited to helping Sri Lankans move forward, and to bridge the gap between justice and peace.⁹⁷ When the COI is part of the overall strategy of improving institutional capacity as recommended throughout this report, it has the best chance of breaking the cycle of grievances in Sri Lanka.

We are not recommending a traditional truth and reconciliation commission with extensive opportunities for the public sharing of experiences. This is because these are better suited for grievances between community members, and in the Sri Lankan case, most of the abuses appear to have been perpetrated by either LTTE or government officials, and not fellow Sri Lankans. Also, the different communities are generally geographically isolated, and there does not seem to be a lot of support among the population for a truth commission.⁹⁸ There are also dangers in conducting truth commissions without strong political backing and resources, and “a poorly executed truth commission may be worse than no truth commission at all as the opportunity for justice will be lost and is unlikely to be repeated.”⁹⁹ However, our amnesty-driven COI has elements of a truth commission, in that we hope it will lead to more officials (of all levels) coming forward and revealing the “truth” to victims and their families – even if these cannot always lead to more in-depth investigations, it will still provide a sense of reparative justice for victims. Our recommendation that the COI investigate institutional failures and make recommendations for the future is also an element commonly found among truth commissions.¹⁰⁰

While there is fear that an amnesty-based policy could reproduce a culture of impunity and renewed cycles of violence,¹⁰¹ the difference with Sri Lanka’s present situation is that the conflict is over, and the LTTE effectively quashed. The chances of high-level conflict reoccurring are not strong at this point. This situation provides a unique opportunity for the government to adopt a new strategy moving forward – to respect the rule of law and human rights in peacetime. An amnesty-based COI is the best way to address abuses while maintaining the present peace so that space can be created for institutional reform. If respect for the rule of law is established moving forward, human rights abuses are less likely to be committed in the future if conflict is to re-occur, and at that time perhaps there will be more support for criminal sanctions.

⁹⁷ Mani, “Does Power Trump Morality?,” 37-39.

⁹⁸ Comments from David Cameron, Toronto, ON, 29 March 2010; Comments from Lindsay Beck, Toronto, ON, 9 March 2010.

⁹⁹ Mani, “Does Power Trump Morality?,” 34, discussing Patricia Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (London: Routledge, 2002).

¹⁰⁰ Priscilla Hayner, “Fifteen truth commissions: 1974-1994: A comparative study,” 16 *Human Rights Quarterly* 4 (1994): 629-32, cited in Graybill and Lanegran, “Truth, Justice and Reconciliation in Africa,” 3.

¹⁰¹ Human Rights Watch, *Selling Justice Short*.

Long-term recommendations

It is hoped that the short- and mid-term transitional justice strategies will lay the groundwork for the strengthening of human rights institutions and respect for the rule of law in the long run. However, these must be coupled with other reforms to ensure that human rights protection remains strong and the cycle of violence truly ended. While the following reforms are long-term in nature, their implementation must begin immediately (especially the measures to strengthen rule of law, eliminate corruption, and reform policing). We recommend the following:

Rule of Law: This needs to be strengthened in order to effectively protect human rights. Reforms to the judiciary need to be made (as discussed in another chapter), and access to justice needs to be widened. The criminal system must be strengthened and its independence assured so that it is equipped to uphold rights and properly punish human rights abuses in the future.¹⁰² Closely linked with this are addressing policing and corruption, discussed below.

Corruption: This needs to be eliminated at all levels, especially at the level of the police, if citizens are expected to turn to them (discussed below).¹⁰³ It also needs to be eradicated among the government and bureaucracy, if transparency, legitimacy and accountability are to be fostered. Besides Rajapaksa's reputation, there are even more instrumental reasons for eliminating corruption. Corruption, along with weak legislation and law enforcement, non-transparent financial institutions and lack of respect for the rule of law have all been found to breed criminal activity and terrorism.¹⁰⁴ Government corruption has been shown to increase the likelihood that foreign investors will terminate international joint ventures in Sri Lanka.¹⁰⁵ Corruption is, quite simply, a "destructive force that hinders progress and development whenever it is present in a society."¹⁰⁶

At an institutional level, transparency and checks and balances need to be implemented, as well as a more democratic and accountable form of governance, in order to strengthen the rule of law and build trust in the government.¹⁰⁷ At the level of individual actors (police, civil servants), the key to effectively tackling corruption is to prevent actors' dependence on it, and to limit the realization of potential gains from it.¹⁰⁸ Examples of such measures include implementing legislation requiring all members of Parliament and their families to declare their assets each year and imposing sanctions if anomalies arise, and ensuring all public servants earn decent salaries.¹⁰⁹ The Commission to Investigate Allegations of Bribery or Corruption needs to be drastically strengthened and de-politicized so that it can effectively investigate and punish instances of corruption.¹¹⁰ While Sri Lanka has in recent years enacted many pieces of

¹⁰² Human Rights Watch, *Selling Justice Short*.

¹⁰³ USDS, *2009 Country Reports on Human Rights – Sri Lanka*.

¹⁰⁴ United States Federal Research Division, Library of Congress, *Nations hospitable to organized crime and terrorism* (Washington, DC: Federal Research Division, Library of Congress, 2003).

¹⁰⁵ Pierre-Xavier Meschi, "Government corruption and foreign stakes in international joint ventures in emerging economies," *Asia Pacific Journal of Management* 26 (2009): 241-261.

¹⁰⁶ Ahmad and Brookins, "On Corruption and Countervailing Actions in Three South Asian Nations," 21.

¹⁰⁷ United Nations Development Program, "Project Document: Support Efforts and Action Against Corruption in Sri Lanka – SEAC Project," (UNDP: January 2009) Available online at <http://www.undp.lk/SubProjects/Pages/detail.aspx?itemid=18>, accessed 15 April 2010. [UNDP, "SEAC Project Document"]

¹⁰⁸ Ahmad and Brookins, "On Corruption and Countervailing Actions in Three South Asian Nations," 22.

¹⁰⁹ BBC Worldwide Monitoring, "Text of Sri Lankan presidential candidate's manifesto," Colombo, 8 January 2010; Rights Vision News, "Ranil to make it compulsory for MPS to declare assets every year," Colombo, 3 April 2010. For more concrete and numerous recommendations, please see UNDP report.

¹¹⁰ UNDP, "SEAC Project Document."

legislation aimed at improving transparency and battling corruption, these need to be better actuated, and the *United Nations Convention Against Corruption* needs to be formally implemented and its compliance monitored.¹¹¹

Policing: The police force needs to be professionalized and de-politicized, and the “routine lawlessness” and abuse of power among them needs to be quashed.¹¹² Measures need to be implemented to end corruption among the ranks, which runs higher than among any other public sector.¹¹³ They need to be better trained in proper legal process, impartiality, and human rights protection. They also need to be held more accountable, and the atmosphere of impunity needs to end, as this has facilitated their incapacity to investigate and prosecute cases effectively, not to mention the violence they regularly inflict on civilians.¹¹⁴ The police force needs to be distanced from direct government control (as it is under direct control of the Ministry of Defence and has all too often been a political tool), and institutions like the National Police Commission need to be strengthened, and their independence maintained so that effective oversight and investigations into police action may be carried out.¹¹⁵ There is also a huge need for Tamil-speaking police officers in Tamil-speaking areas, and sensitivity to minorities needs to be vastly improved.¹¹⁶ Indeed, there were reports that even in the last parliamentary election, police meted out violence towards Tamils to prevent them from voting.¹¹⁷

Bill of Rights: Sri Lanka presently has a limited bill of rights within Chapter III of its Constitution – it notably does not include the right to life, and social and economic rights are merely non-justiciable “Directive Principles of State Policy.”¹¹⁸ Furthermore, many rights (including ordinary procedures for arrests and detention under Article 13, and the right to freedom of speech and association under Article 14) are subject to restrictions in the name of national emergency and public order.¹¹⁹ Pre-trial detention processes are not protected at all under Article 13.¹²⁰ The right to life and socioeconomic rights need to be included, and derogations of rights removed, to ensure that Sri Lanka is a strong protector of human rights and is living up to its international human rights obligations.¹²¹

Human Rights Commission: This body needs to be made politically and financially independent so that it can be effective in protecting human rights.¹²² The Commission has a wide mandate to investigate complaints of rights violations and to grant relief, as well as to advise the government on its compliance with human rights standards and to even monitor detention centres.¹²³

¹¹¹ UNDP, “SEAC Project Document,” 3-4.

¹¹² ICG, “Bitter peace,” 19.

¹¹³ Hindustan Times, “Sri Lanka: Bribery complaints top 3200 mark last year” (2 February 2010), available online from LexisNexis; Ahmad and Brookins, “On Corruption and Countervailing Actions in Three South Asian Nations,” 26.

¹¹⁴ USDS, *2009 Country Reports on Human Rights – Sri Lanka*.

¹¹⁵ Amnesty International, “Sri Lanka: Time for a new start,” 8; USDS, *2009 Country Reports on Human Rights – Sri Lanka*.

¹¹⁶ Comments from The Hon. Bob Rae, Toronto, ON, 9 April 2010; USDS, *2009 Country Reports on Human Rights – Sri Lanka*.

¹¹⁷ This was reported by The Center for Monitoring Election Violence, an independent poll monitoring group in Sri Lanka. In Carleton Place, “Sri Lanka’s leader seeks to consolidate control in parliamentary elections” (Colombo, 8 April 2010), available online from LexisNexis.

¹¹⁸ Welikala, *A State of Permanent Crisis*, 209.

¹¹⁹ Welikala, *A State of Permanent Crisis*, 210.

¹²⁰ Welikala, *A State of Permanent Crisis*, 210.

¹²¹ Sri Lanka acceded to the *International Covenant on Civil and Political Rights (ICCPR)* in 1980, however it has still not been incorporated into domestic law. See Welikala, *A State of Permanent Crisis*, 209.

¹²² UKFCO, *Annual Report on Human Rights 2009*, 148; Punyasena, “The Façade of Accountability,” 140-143; Amnesty International, “Sri Lanka: Time for a new start,” 8-9; see Mario Gomez, “Sri Lanka’s New Human Rights Commission,” 20 *Human Rights Quarterly* 2 (May 1998), 281-302.

¹²³ Punyasena, “The Façade of Accountability,” 149.

However, it has not produced effective programs and has not been a strong authority to the government. During the war, it was not able to function effectively due to understaffing and lack of resources.¹²⁴ This body needs to be turned into a strong tool for rights protection and promotion, available to all Sri Lankans.

Emergency Rule: As discussed in further detail in another chapter, Sri Lanka needs to end emergency rule,¹²⁵ and needs to ensure emergency rule is not used in the future (unless absolutely necessary) as a tool to curtail rights. The culture of “the ends justify the means” needs to be abolished within the judicial and law enforcement systems and among the administration so that rights do not continue to be infringed unnecessarily.

Conclusion

While there may be peace now in Sri Lanka, it will not last if the institutional atmosphere of lawlessness, authoritarianism, and corruption is not destroyed. If President Rajapaksa wishes to prevent future conflict, pursue economic development, and maintain political power, he must immediately enact measures to address human rights grievances, and to strengthen the rule of law, as recommended in this report. Not only will transitional justice improve Rajapaksa’s image and accountability, but it will break the cycle of violence and political instability which has plagued Sri Lanka for far too long.

¹²⁴ USDS, *2009 Country Reports on Human Rights – Sri Lanka*.

¹²⁵ Besides the PTA, there were successive pieces of legislation enacted in 2005 and 2006 respectively which broaden emergency rule powers. The Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2005 and the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 of 2006 further restrict rights and criminal procedure. They threaten to tip the balance between appropriately addressing legitimate national security concerns, and upholding the rule of law and principles of legality and fundamental justice on the other. See Welikala, *A State of Permanent Crisis*, 181-186.

Works Cited

- Ahmad, Naved and Brookins, Oscar T. "On Corruption and Countervailing Actions in Three South Asian Nations." 7 *Policy Reform* 1(March 2004): 21-30.
- Amnesty International. "Sri Lanka: Time for a new start, an appeal to Sri Lanka's presidential candidates." ASA 37/002/2010 (18 January 2010). Available online from www.amnesty.org.
- Arthur, Paige, International Center for Transitional Justice. "Identities in Transition: Developing Better Transitional Justice Initiatives in Divided Societies." International Center for Transitional Justice, 2009.
- Bass, Gary. *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*. Princeton: Princeton University Press, 2000.
- BBC Worldwide Monitoring. "Text of Sri Lankan presidential candidate's manifesto." (Colombo, 8 January 2010). Available online from LexisNexis.
- Benomar, Jamal. "Justice After Transitions." In *Transitional Justice: How emerging democracies reckon with former regimes*, ed. Neil J. Kritz. Washington, DC: United States Institute of Peace Press, 1995: 32-41.
- Carleton Place. "Sri Lanka's leader seeks to consolidate control in parliamentary elections." (Colombo, 8 April 2010). Available online from LexisNexis.
- Colombo Times. "Bribery probe on ex-CJ begins" (Colombo: 25 October 2009). Available online from LexisNexis.
- Coomaraswamy, Radhika and Charmaine de los Reyes. "Rule by emergency: Sri Lanka's postcolonial constitutional experience." 2 *International Journal of Constitutional Law* 2 (2004): 272-295.
- Duthie, Roger. Introduction to *Transitional Justice and Development: Making Connections*, eds. Pablo de Greiff and Roger Duthie, International Center for Transitional Justice. New York: Social Science Research Council, 2009): 18.
- Gomez, Mario. "Sri Lanka's New Human Rights Commission." 20 *Human Rights Quarterly* 2 (May 1998): 281-302.
- Government of Sri Lanka. "Sri Lanka: Government Expedites Resettlement of IDPs." (15 March 2010). Available on ReliefWeb, <http://www.reliefweb.int/rw/rwb.nsf/db900sid/AZHU-83KMF2?OpenDocument&rc=3&emid=ACOS-635PHK>.
- Government of Sri Lanka. "Sri Lanka: Post-War housing boom with army support begins in Jaffna." (2 April 2010). Available on ReliefWeb, <http://www.reliefweb.int/rw/rwb.nsf/db900SID/MINE-845N54?OpenDocument&rc=3&emid=ACOS-635PHK>.
- Graybill, Lyn and Lanegran, Kimberly. "Truth, Justice, and Reconciliation in Africa." 8 *African Studies Quarterly* 1 (Fall 2004): 1-18.
- Hayner, Patricia. "Fifteen truth commissions: 1974-1994: A comparative study." 16 *Human Rights Quarterly* 4 (1994): 629-32.
- Hayner, Priscilla. *Unspeakable Truths: Confronting State terror and Atrocity*. New York: Routledge, 2001.
- Hayner, Patricia. *Unspeakable Truths: Facing the Challenge of Truth Commissions*. London: Routledge, 2002.
- Hindustan Times. "Sri Lanka: Bribery complaints top 3200 mark last year" (3 February

- 2010). Available online from LexisNexis.
- Human Rights Watch. *Selling Justice Short: Why Accountability Matters for Peace*. New York: Human Rights Watch, 2009.
- Human Rights Watch. "Sri Lanka: End Witch Hunt Against the Media and NGOs." New York: Human Rights Watch, 11 March 2010. Available online from ReliefWeb, <http://www.reliefweb.int/rw/rwb.nsf/db900sid/KHII-83F3K6?OpenDocument&rc=3&emid=ACOS-635PHK>.
- Humphrey, Michael. "From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transition and Individual Healing." 14 *The Australian Journal of Anthropology* 2 (2003): 171-187.
- International Crisis Group. "Sri Lanka: A Bitter Peace," Update Briefing, Asia Briefing No. 99. Colombo/Brussels: International Crisis Group, 11 January 2010.
- Mani, Rama. "Does power trump morality? Reconciliation or transitional justice?" In *Atrocities and International Accountability*, eds. Edel Hughes, William A. Schabas and Ramesh Thakur. New York: United Nations University Press, 2009): 23-41.
- Meschi, Pierre-Xavier. "Government corruption and foreign stakes in international joint ventures in emerging economies." *Asia Pacific Journal of Management* 26 (2009): 241-261.
- Musila, Godfrey. "Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions." 3 *International Journal of Transitional Justice* 445(2009).
- Punyasena, Wasana. "The Façade of Accountability: Disappearances in Sri Lanka." 23 *Boston College Third World Law Journal* 115 (2003).
- Reuters. "UPDATE 6 – Sri Lanka ruling alliance wins parliamentary majority." (Colombo: 9 April 2010). Available online at <http://www.reuters.com/article/idUSSGE63804S20100409>;
- Rights Vision News. "Ranil to make it compulsory for MPS to declare assets every year." (Colombo, 3 April 2010). Available online from LexisNexis.
- Right Vision News. "Understanding nepotism in Sri Lankan context" (Colombo, 24 February 2010). Available online from LexisNexis.
- Sen, Amartya. *Development as Freedom*. New York: Knopf, 1999.
- Silva, H.J.F. "'Reparations' from a Sri Lankan Perspective." *Windsor Yearbook of Access to Justice* 22(2003): 179-188.
- Sriram, Chandra Lekha. "Dilemmas of Accountability: Politics, the military and commissions of inquiry during an ongoing civil war the Sri Lankan case." 5 *Civil Wars* 2 (2002): 96-121.
- Snyder, Jack and Leslie Vinjamuri, Leslie. "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," 28 *International Security* 3 (Winter 2003/04): 5-44.
- Teitel, Ruti. *Transitional Justice*. Oxford: Oxford University Press, 2000.
- United Kingdom Foreign and Commonwealth Office. *Annual Report on Human Rights * 2009. London: Foreign and Commonwealth Office, 2009: 148-152.
- United Nations Development Program. "Project Document: Support Efforts and Action Against Corruption in Sri Lanka – SEAC Project." UNDP: January 2009. Available online at <http://www.undp.lk/SubProjects/Pages/detail.aspx?itemid=18>.

United Nations Secretary-General, Department of Public Information. “Press Conference by Secretary-General Ban Ki-Moon at United Nations Headquarters.” UN Document SG/SM/12792, 16 March 2010.

United States Department of State. *2009 Country Reports on Human Rights Practices – Sri Lanka*. Washington, DC: US Department of State, 2010. Available online at <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136093.htm>.

United States Federal Research Division, Library of Congress. *Nations hospitable to organized crime and terrorism*. Washington, DC: Federal Research Division, Library of Congress, 2003.

Uvin, Peter. *Human Rights and Development*. Bloomfield, CT: Kumarian Press, 2004.

Welikala, Asanga. *A State of Permanent Crisis: Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka*. Colombo: Centre for Policy Alternatives, 2008.

Zalaquett, Jose. “Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints.” In *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, ed. Neil J. Kritz (Washington, D.C.: United States Institute of Peace Press, 1995): 3-31.

CHAPTER TWO: DE-POLITICISING APPOINTMENTS, EMPOWERING JUDGES: STRENGTHENING SRI LANKA'S COURTS – LINDSAY BECK

Political interference with Sri Lanka's courts long pre-dates the ethnic conflict.¹²⁶ The country has spent more years under emergency rule than under democratic governance since its independence in 1948 – an incursion on human rights that did little to halt recurrent and violent uprisings in both the Tamil-majority north and Sinhalese south of the island. With the end of the war, however, and with the appointment of a new chief justice last year, Sri Lanka faces a window of opportunity to strengthen the rule of law and reassert a role for a strong and independence judiciary. Doing so will contribute to breaking the cycles of violence that have marked the country's post-independence history while at the same time reassuring investors and aid donors at a time the country is under pressure to realize a post-war peace dividend.

While the reforms proposed in this package as a whole have largely shied away from counselling constitutional change or institutional restructuring for Sri Lanka, this chapter is, to an extent, the exception. Strengthening the judiciary's role and independence, making the government accountable to the courts and allowing for effective judicial oversight of emergency regulations are crucial to setting the stage for deeper institutional reform that may be required over the long-term. So too is developing a judiciary that the country's citizens – Sinhalese, Tamil and Muslim – view as fair, impartial and responsive, especially in the area of human rights.

The focus in this chapter is on three areas of reform related to the judiciary that it is hoped will lay the groundwork for stronger courts, rule of law and respect for fundamental rights.

(i) The 17th Amendment and the Constitutional Council

The 17th amendment to Sri Lanka's 1978 Constitution was passed in 2001 to depoliticise appointments to key oversight bodies. It does so by requiring that nominations be approved by a Constitutional Council comprised of members from across the political spectrum. Its mandate, however, was allowed to lapse less than five years after its creation, and Rajapaksa has circumvented it to make his own direct appointments. A proposal to revitalize a non-partisan mechanism for making appointments to the judiciary and to institutions overseeing the police and human rights will be explored.

(ii) The Supreme Court

While Sri Lanka's entire courts system is in need of reform, the focus here will be on the Supreme Court since it has sole jurisdiction to hear fundamental rights cases, as well as the (limited) power to judicially review legislation. This section will look at the court's past record as a basis for proposals on strengthening its powers. It will also briefly examine the question of access, both linguistic and geographic. Further, this section will aim to justify the rationale for avoiding a more sweeping reform agenda, which might have included the establishment of a Constitutional Court or constitutionalizing ethnic minority representation on the court.

(iii) The Prevention of Terrorism Act and Emergency Rule

Decades of emergency rule in Sri Lanka have institutionalized state violence and allowed for a culture of impunity with regard to rights to infiltrate the armed services and police. Constant reliance on the PTA and emergency regulations have rendered

¹²⁶ International Crisis Group, "Sri Lanka's Judiciary: Politicised Courts, Compromised Rights," Asia Report No. 172 (Colombo/Brussels: International Crisis Group, June 30, 2009).

Sri Lanka's criminal procedure laws virtually irrelevant. Proposals will be made here with regard to strengthening judicial and parliamentary oversight of the use of emergency powers and the content of emergency regulations, with the aim of limiting recourse to such powers and diminishing their scope.

These proposals are a starting point; they do not set out the ideal. They aim to find a balancing point in being strong enough to form the basis for meaningful change, but narrow enough that they might be acceptable to the president and thus have a realistic chance of being acted upon.

Rationale for Proposals

At first glance, it seems unlikely that President Mahinda Rajapaksa would embrace reforms that curb his power to control appointments, raise the prospect of a more confrontational judiciary and scale back mechanisms of emergency rule that became the country's reflexive response to security challenges. However, there are two primary reasons that should convince the president to embrace these reforms. First, they will strengthen stability in a country which, despite the recent military victory, remains vulnerable to unrest and future armed conflict. Second, these reforms are crucial to building a base for attracting much-needed investment and foreign aid. Each of these will be addressed in turn.

While the end of the war has seen the demise of the Liberation Tigers of Tamil Eelam as a fighting force, there remain flashpoints for unrest in the north and east. Some 11,700 former LTTE members remain in custody with no procedures in place to address their legal status.¹²⁷ Within the Tamil community, their detention is an ongoing reminder of the fact that after 30 years of violence they emerged on the losing side. Nearly a year after the end of hostilities an estimated 84,000 are still housed at Menik Farm, a huge, guarded internment camp whose residents are reliant on aid for food and water.¹²⁸ Tens of thousands more are confined to camps for internally displaced persons across the north and east.

The power vacuum in the north and east following the defeat of the Tigers combined with dire living conditions and insecurity of the camps, mean the government faces both conditions conducive to unrest as well as an opportunity to win hearts and minds. A continuing state of emergency allows security forces to enter homes without warrants and imprison suspects without trial for lengthy periods, even though historically such regulations have had the counterproductive effect of fuelling the Tamil secessionist movement.¹²⁹ Sri Lanka's police service and paramilitary Special Task Force together comprise more than 85,000 people, less than 2,000 of whom are Tamil speakers,¹³⁰ reinforcing the idea that the police are an arm of a government that does not represent the Tamil community. Gestures of goodwill and shows of sincerity in areas of policing and judicial reform could help win over a population which, while sympathetic to the Tigers' political goals were often dismayed by their own brutality.¹³¹

¹²⁷ United States Department of State, *2009 Country Reports on Human Rights Practices – Sri Lanka* (Washington, DC: US Department of State, 2010), available online at www.state.gov/g/drl/rls/hrrpt/2009/sca/136093.htm.

¹²⁸ "Imperfect peace: The government spars with aid agencies; the displaced still suffer," *The Economist*, March 31, 2010.

¹²⁹ Radhika Coomaraswamy and Charmaine de los Reyes, "Rule by emergency: Sri Lanka's postcolonial constitutional experience," 2 *International Journal of Constitutional Law* 2 (2004): 276.

¹³⁰ USDS, *2009 Country Reports on Human Rights Practices – Sri Lanka*.

¹³¹ Comments from The Hon. Bob Rae, Toronto, ON, April 9, 2010.

For the average person, the symbol of the government is the police, who have a visible and powerful presence.¹³² And yet despite accusations of torture and forced confessions,¹³³ the Attorney General's powers have so far not been used to prosecute any officer above the rank of Inspector of Police.¹³⁴ Non-partisan appointments to the police watchdog body and to the Supreme Court – the arbiter of fundamental rights complaints – and a Supreme Court that was seen to take on rights abusers in the security forces could have important symbolic and practical effects. This in turn would build confidence in Rajapaksa's government and defuse sources of instability.

The stability that has for so long evaded Sri Lanka is crucial for attracting aid and investment. Functioning courts send a message to investors that Sri Lanka is a secure environment in which to do business; emergency rule has the opposite effect. Investors must be assured that disputes will be settled through the courts in a predictable way, free of political interference. They must also be assured that the courts will police government corruption. Two recent cases – *Waters Edge* and *Lanka Marine Services* – are instructive.¹³⁵ The former concerned the sale of state land to private developers to develop a golf course, without proper process or valuation. The latter involved irregularities in the privatisation of a state-owned fuel bunkering firm.¹³⁶ In both cases the Supreme Court went some way toward holding the government accountable, fining officials involved and, in the *Lanka Marine Services* case, voiding the transaction. But the action taken had little structural effect, as the Court shied away from challenging the core of presidential power.¹³⁷ The judiciary needs a strengthened mandate if it is to assure foreign business that Sri Lanka is a stable, accountable place in which to invest.

Donor aid also remains vital for Sri Lanka, especially for the hundreds of thousands still in camps. Yet international agencies are running out of funds to meet their needs, after the government's rejection of a United Nations-led mechanism for channelling humanitarian assistance to the country. Only 4 percent of the estimated total required for humanitarian aid in the camps has been promised.¹³⁸ Assurances – and real actions – on human rights will allow for more aid to flow, with fewer strings, contributing to a virtuous cycle of stability, aid and investment. Stability will also allow for a census in the north and east for the first time in decades, meaning a proper assessment of needs that could spur more and better targeted aid.¹³⁹

The Seventeenth Amendment and Judicial Appointments

If Sri Lanka's 1972 Constitution subordinated the judiciary, the current Constitution, promulgated in 1978, entrenched the concept of an all-powerful Executive President whose actions were virtually above the law.¹⁴⁰ Power was centralized in the hands of the presidency just as the country's security situation reached crisis levels, with the Tamil insurgency in the north and east beginning in earnest in 1983. Under the 1978 Constitution, appointment of judges was by the President "by warrant under his hand" and was imbued with a "spirit of authoritarian

¹³² Jasmine Joseph, ed. *Sri Lanka's Dysfunctional Criminal Justice System* (Hong Kong: Asian Human Rights Commission, 2007), 8.

¹³³ Basil Fernando, "A Study About the Processes and Strategies of Prevention of Torture in Sri Lanka," in Joseph, ed. *Sri Lanka's Dysfunctional Criminal Justice System*, 46.

¹³⁴ *Ibid.* 22.

¹³⁵ International Crisis Group, "Sri Lanka's Judiciary," 27.

¹³⁶ "S.Lanka's Keells says ruling to cost up to \$12 mln," *Reuters*, April 22, 2008.

¹³⁷ International Crisis Group, "Sri Lanka's Judiciary," 27.

¹³⁸ "Imperfect peace: The government spares with aid agencies; the displaced still suffer," *The Economist*, March 31, 2010.

¹³⁹ Comments from The Hon. Bob Rae, April 9, 2010.

¹⁴⁰ Kishali Pinto Jayawardena, "A 'Praxis' Perspective on Subverted Justice and the Breakdown of Rule of Law in Sri Lanka," in Joseph, ed., *Sri Lanka's Dysfunctional Criminal Justice System*, 36.

disregard for the independence of the judiciary”.¹⁴¹ Members of the Supreme Court and Court of Appeal were appointed by the President and could only be removed on proven grounds of misbehaviour or incapacity, and after a majority of Parliament had supported the move.¹⁴²

Successive governments through the 1980s made attempts at undermining judicial independence. Judges of superior courts were once locked out of their chambers and homes of Supreme Court judges were attacked following fundamental rights judgements.¹⁴³ In the 1970s, then-president J.R. Jayawardene stacked the bench with allies¹⁴⁴ and former chief justice Sarath Silva (who retired last year) was thought to be hand-picked by then-president Chandrika Kumaratunga when he took office in 1999.¹⁴⁵ The government was known to *promote* police officers who the Supreme Court had found responsible for fundamental rights violations, as a way of undermining the Court’s authority.¹⁴⁶ The cumulative result is a justice system that is “extremely susceptible to political pressure”.¹⁴⁷

It was against this backdrop that the 17th amendment was enacted in 2001, after passing unanimously in parliament. The provision stipulates that a Constitutional Council “shall” be formed, to nominate members of several bodies, including the higher judiciary, the Human Rights Commission, National Police Commission and the Attorney General. On receiving recommendations from the Council, the president is mandated to make the appointments. The Council was comprised of 10 members as follows:

- The prime minister, opposition leader and speaker;
- One member chosen by the president;
- Five members chosen jointly by the prime minister and the opposition leader;
- One member chosen by a majority vote of parliamentarians from the small parties in parliament.

However, the Council has been inoperative since March 2005, when the three-year terms of six of its 10 members expired, depriving the body of a quorum.¹⁴⁸ In November that year, Rajapaksa was elected president.

After months of haggling, the prime minister and opposition leader decided on five names to recommend to the President. But Rajapaksa did not immediately appoint them. He also decided that the Council could not run without its 10th member – the one chosen by minority parties – leaving it inoperative. During this period the terms of the members of the Human Rights Commission expired and Rajapaksa appointed replacements directly. He took the same course with the National Police Commission.¹⁴⁹ The President has also made direct appointments to the Attorney General’s office, increasing its vulnerability to political pressure “exponentially”.¹⁵⁰

¹⁴¹ *Ibid.* 42.

¹⁴² Deepika Udagama, “Taming the Beast: Judicial Responses to State Violence in Sri Lanka,” *Harvard Human Rights Journal* 11, (1999): 269.

¹⁴³ *Ibid.* 283.

¹⁴⁴ International Crisis Group, “Sri Lanka’s Judiciary,” 4.

¹⁴⁵ *Ibid.* 11.

¹⁴⁶ Udagama, “Taming the Beast,” 272.

¹⁴⁷ Amnesty International “Sri Lanka: Time for a New Start, an appeal to Sri Lanka’s presidential candidates.” ASA 37/002/2010 (January 18, 2010). Available online at www.amnesty.org.

¹⁴⁸ International Crisis Group, “Sri Lanka’s Human Rights Crisis,” Asia Report No. 135 (Colombo/Brussels: International Crisis Group, June 14, 2007), 25.

¹⁴⁹ *Ibid.* 25.

¹⁵⁰ Amnesty International, “Twenty Years of Make-Believe: Sri Lanka’s Commissions of Inquiry.” ASA 37/005/2009 (June 11, 2009), 38. Available online at www.amnesty.org.

Proposed Reforms

The 17th amendment marked one of the first efforts to impose constitutional constraints on the misuse of executive power. But its effectiveness has been hampered by bad faith on the part of Rajapaksa and by the fact that in Sri Lanka's system, checks on executive powers are in the hands of parliament, a notoriously weak and fractious body.¹⁵¹ The make-up of the Constitutional Council has also been criticized for its failure to include members of the judiciary or civil society.

Drawing on these criticisms and on a 1994 proposal made by a civil society initiative called the Movement for Constitutional Reform,¹⁵² it is proposed that to change the make-up of the Council to include eight members, as follows:

- The prime minister and opposition leader;
- The chief justice;
- Two regional chief ministers;
- Three civil society members, one each from the Sinhalese, Tamil and Muslim communities.

The regional chief ministers would be selected from among the chief ministers of the regions and approved by two-thirds of them. Regional governance is notoriously weak in Sri Lanka, and largely inoperative in the north and east. The rationale for including representation from regional ministers is thus aimed at strengthening the roles for those bodies and building their capacity by bringing regional leaders into decision-making processes in the central government. If Sri Lanka is to consider further institutional reform in the long-term that involves a devolution of powers, such reforms will only be successful if there is the regional capacity to support them. The inclusion of regional ministers on the Constitutional Council is a small step toward that aim. Requiring the approval of two-thirds of those ministers is designed to try to encourage the appointments of moderates by making their appointment contingent on at least some measure of support from the northern and eastern provinces.

The civil society members would be nominated by any of the other members of the Council, and their appointments approved by a double majority in parliament, of Sinhalese parties and minority (Tamil and Muslim) parties. The aim of the double majority rule is to prompt the sitting members of the Council to select civil society delegates who are moderate and respected in order to ensure their approval by all ethnic groups in parliament. Mandating the inclusion of minorities would increase respect for the Council – and in turn for the institutions whose appointments it oversees – among minority communities.

To avoid the current scenario of the president by-passing the Council to make his own appointments, parliament must have the power to reject any appointments made outside of the Constitutional Council. Failing that, the Supreme Court must be empowered to declare *ultra vires* appointments constitutionally invalid.

Of course there is no way to guarantee the Council's functioning – it is contingent on the good faith of its members and recent experience illustrates the tremendous resistance from the political establishment to attempts to depoliticize the governance process. However, it is hoped that under the arrangement proposed here, the kind of stalemate faced currently will be avoided. First, by changing the scenario from one in which opposing parties are forced to collectively

¹⁵¹ International Crisis Group, "Sri Lanka's Judiciary," 25.

¹⁵² Rohan Edrisinha, et al. eds., *Power-Sharing in Sri Lanka: Constitutional and Political Documents (1926-2008)*. (Colombo: Centre for Policy Alternatives, 2008), 446.

choose members to one which moves decision-making outside of parliament, the aim is to avoid the inter-party battles that have hindered the appointments process. Second, by giving the regions and members of civil society a stake, it is hoped that the public outcry over a scenario in which the Council ceases to function would be too great to make this a politically palatable option.

The Supreme Court

Under the terms of the 1978 Constitution, Sri Lanka's judiciary consists of a Supreme Court comprising a chief justice and six to 10 judges, a Court of Appeal, and provincial high courts. At the base of the judicial hierarchy, the Judicature Act of 1978 creates district courts, which hear largely civil matters, and magistrate courts, which hear mostly criminal cases.¹⁵³ The Supreme Court has original, appellate and advisory jurisdiction, and is empowered to exercise jurisdiction with respect to constitutional matters and the protection of fundamental rights. It may also hear petitions related to the election of the President and the validity of a referendum.

Early post-independence attempts to fetter the independence of the judiciary were met with resistance by judges.¹⁵⁴ But the institution was systematically weakened through a combination of government interference, resort to emergency rule that the courts were unwilling or unable to challenge, and constitutional changes in 1972 and 1978 that effectively abolished judicial review of legislation. Currently, if a bill is not challenged within one week of its introduction in Parliament, it can be enacted as legislation and thereby become immune from constitutional challenge, a system that creates perverse incentives for the legislature.¹⁵⁵ "The constitutional law-making scheme encourages legislative chicanery and a lottery-style system of checks and balances – in short, jackpot constitutionalism."¹⁵⁶ The 'one-week' rule made it impossible, for example, for Sri Lankans to challenge the Prevention of Terrorism Act after its enactment.¹⁵⁷ No draft of the Act was made available for public comments, and many Sri Lankans did not question the law when it was passed, believing it applied only to Tamil separatists. They learned otherwise when the government began using it against its political opponents in the south.¹⁵⁸ As noted above, the 1978 Constitution also compounded the institutional subordination of the judiciary by entrenching the Executive Presidency, whose actions were above the law.

Even earlier, the Tamil community was alienated from the judicial system by the *Language of the Courts Act*, passed in November 1960. An extension of the *Sinhala Only Act* that was passed four years earlier, the Act was designed to promote and expand the use of Sinhala in all courthouses. The bill did not even mention Tamil. "For Tamils, the notion that the Northern Province, where nearly 98 percent of the population was Tamil-speaking, now had to gear itself up to litigate in Sinhala was considered ludicrous and tyrannical."¹⁵⁹

In the face of political interference and constitutional restrictions, the record of the courts has been mixed. The Supreme Court has been traditionally deferential in fundamental rights cases, especially during emergency rule, even though those were the times when the threat to

¹⁵³ International Crisis Group, "Sri Lanka's Judiciary," 4.

¹⁵⁴ Jayawardena, "A 'Praxis' Perspective," 41.

¹⁵⁵ Rohan Edrisinha, "Constitutionalism, Pluralism, and Ethnic Conflict: The Need for a New Initiative," in Robert I. Rotberg, ed. *Creating Peace in Sri Lanka: Civil War and Reconciliation* (Washington, D.C.: Brookings Institution Press, 1999), 172.

¹⁵⁶ *Ibid.* 172.

¹⁵⁷ Coomaraswamy and de los Reyes, "Rule by Emergency," 276.

¹⁵⁸ Udagama, "Taming the Beast," 277.

¹⁵⁹ Neil DeVotta, *Blowback: Linguistic Nationalism, Institutional Decay and Ethnic Conflict in Sri Lanka* (Stanford: Stanford University Press, 2004), 125.

individual liberties was the greatest.¹⁶⁰ The Court held in the 1980s, for example, that it could not question the President's decision to declare a state of emergency or promulgate emergency regulations in the absence of bad faith – and the onus was on the injured party to prove bad faith.¹⁶¹ However, in the late 1980s the Court made a series of bold decisions. The most notable was the 1987 case of *Joseph Perera v. Attorney General*, in which it invalidated an emergency regulation for the first time in the history of Sri Lanka.¹⁶² The case was a constitutional challenge to a regulation that prohibited the distribution of any poster, handbill or leaflet without police permission, regardless of its impact on national security or public order. The Court held the regulation was overbroad and violated freedom of expression. In addition, because it permitted the “arbitrary and capricious exercise of power”, it violated equality rights.¹⁶³

The government responded with a constitutional amendment that sought to restrict the judicial review of regulations made under the Public Security Ordinance, a move the court had some success in circumventing through creative interpretation.¹⁶⁴ During this period the courts also began requiring the Secretary of Defence to disclose the factual basis for preventive detention orders and using a reasonableness test to determine the legality of the Secretary's decisions. Still, the Court stopped short of declaring preventive detention itself unconstitutional.

Despite a handful of notable judgements, the judiciary's politicization has worsened in recent years to the detriment of human rights protection. Under Sarath Silva, benches were constituted without any consideration for seniority, instead ‘packed’ with favourites who would be amenable to coming to a decision favoured by the political establishment.¹⁶⁵ The court under Silva also intervened at crucial moments in the political process to strike down negotiated agreements that were designed to address Tamil concerns.¹⁶⁶

The most notable example was its 2005 issuance of an interim stay order invalidating the Post-Tsunami Operational Management Structure (PTOMS) between the government and LTTE, designed to coordinate the delivery of aid following the Indian Ocean tsunami. Sinhalese nationalists turned to 39 MPs from the JVP to bring a constitutional challenge to PTOMS. The mechanism envisaged a set of regional committees in the north and east whose chairs would be appointed by the LTTE.¹⁶⁷ While the Court rejected the argument that, since they were not an entity recognized by law, agreements could not be entered into with the Tigers,¹⁶⁸ it found that the expenditure mechanism created in PTOMS did not comply with public finance and accounting provisions of the constitution.¹⁶⁹ Facing the prospect of PTOMS being struck down as unconstitutional, the government backed away from the project. The Chief Justice would have been aware that the part of the scheme the Court found unconstitutional could not have been rectified given the LTTE's position and the delicate balancing involved in the negotiations.¹⁷⁰

The politicization of the Supreme Court has also had consequences that have permeated the lower courts. The criminal justice system is subject to political pressure, lacks effective witness protection and “the system is so degraded that the vast majority of human rights

¹⁶⁰ Udagama, “Taming the Beast,” 285.

¹⁶¹ *Ibid.* 285.

¹⁶² Coomaraswamy and de los Reyes, “Rule by Emergency,” 287.

¹⁶³ Udagama, “Taming the Beast,” 286. The full case is reported at *Joseph Perera v. Attorney General*, [1992] 1 Sri L.R. 199.

¹⁶⁴ Coomaraswamy and de los Reyes, “Rule by Emergency,” 287.

¹⁶⁵ Jayawardena, “A Praxis Perspective,” 43.

¹⁶⁶ International Crisis Group, “Sri Lanka's Judiciary,” 24.

¹⁶⁷ Sujit Choudhry, “Constitutional Politics and Constitutional Reform in Sri Lanka: Process Before Substance?” in J. Bertrand & A. Laliberte, *Multination States: East and West* (Cambridge: Cambridge University Press, forthcoming), 14.

¹⁶⁸ Edrisinha, *et al. Power-Sharing in Sri Lanka*, 717.

¹⁶⁹ Choudhry, “Constitutional Politics and Constitutional Reform in Sri Lanka,” 14.

¹⁷⁰ Edrisinha, *et al. Power-Sharing in Sri Lanka*, 717.

violations over the past 20 years have never been investigated, let alone heard in court”.¹⁷¹ Political pressure, combined with violence and harassment of judges for politically unpopular decisions, has decreased efforts overall by the judiciary to protect rights. The result is a loss of public confidence in the ability of judges to act as a measure against government authoritarianism.¹⁷²

Following the retirement of Sarath Silva as chief justice, President Rajapaksa appointed Asoka de Silva in 2009. The appointment was made without the involvement of the Constitutional Council, in violation of the 17th amendment. However, de Silva was the most senior justice on the court, and is known as a capable and fair jurist, without his predecessor’s highly political profile,¹⁷³ raising hopes that the reforms proposed below could find success.

Proposed Reforms

The aims here are to begin to strengthen the legitimacy and independence of the judiciary. This is so that the court will first, not stand as an impediment to any future constitutional arrangements with minority communities; and second, so that the judiciary will be willing and empowered to make decisions respecting human rights – even in the face of a powerful police service, army and executive.

However, sweeping institutional changes are not recommended here, largely for the reasons outlined in our Synthetic Overview – the spectre of an unwilling government and scepticism that institutional change in the face of an undemocratic political culture can be effective. A Constitutional Court, for example, whose main function would be to interpret the constitution and review legislation, is not recommended at this time. Although the enactment of unconstitutional legislation has been a problem in Sri Lanka, such an institution is not a viable response.

In the current political climate, such a proposal would be unpalatable to Rajapaksa’s government. Constitutional Courts have also been viewed with scepticism by some minorities, who see them as serving to consolidate the privileged position of the majority society within the state, empowering courts to reinforce the dominant narrative.¹⁷⁴ The Braithwaite proposals, for example, developed by a British law firm in 1995, recommended a Constitutional Court with an equal number of judges from each state.¹⁷⁵ In so doing, the scheme guarantees that minorities will always be outnumbered, given that Tamils comprise less than 20 percent of the population and are heavily concentrated in the north and east.

Further, constitutional courts by definition are confrontational. Yet the political environment may be so charged that it is impossible for such a court to speak out by overturning legislation at an early stage. “It is risky for a young court to have to deal with the political hot potatoes constantly tossed to it by government officials.”¹⁷⁶

Instead, the proposals here are aimed at creating the foundation for potential bolder changes in future by strengthening judicial independence and thereby increasing public

¹⁷¹ Amnesty International, “Twenty Years of Make-Believe,” 2.

¹⁷² Jayawardena, “A Praxis Perspective,” 43.

¹⁷³ International Crisis Group, “Sri Lanka’s Judiciary,” 12.

¹⁷⁴ Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2004), 247.

¹⁷⁵ These were known as the Braithwaite Proposals for the British law firm Bates Wells & Braithwaite that designed them. See Edrisinha, *et al.* *Power Sharing in Sri Lanka*.

¹⁷⁶ Victor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (New Haven: Yale University Press, 2009), 76.

confidence in the Supreme Court as a rights-protecting institution. The following is suggested as a means of safeguarding the independence of the bench:

- The chief justice is to be appointed by the Constitutional Council from among the sitting Supreme Court justices, with a strong presumption in favour of the most senior justice on the bench.
- Each of the other justices is to be nominated by the Constitutional Council from among sitting judges and senior members of the bar. Once nominated, their appointments must be ratified by a double majority of Sinhalese parties and minority parties in Parliament.
- Those appointed from the Attorney General's office must number no more than three, assuming a full Court of 10 sitting justices.

The rationale here is similar to that proposed with regard to the composition of the Constitutional Council – an attempt to force the minds of those making appointments to consideration of moderate, respected lawyers and judges whose nominations would be broadly palatable across ethnicities. The proposals do not recommend ethnic quotas on the bench for the simple reason that in the climate of just having won a decisive military victory, this is almost certain to be rejected by the government.

The restriction regarding appointments from the Attorney General's office speaks to the habit developed of stacking the courts with its lawyers – who tend to sympathize with the government's positions – as a way of influencing judicial outcomes.¹⁷⁷ The practice not only creates a bias on the bench, it acts as a disincentive for ambitious and talented lawyers to work their way up through the judiciary, since there is a perception that they will be overlooked for peers within the government.¹⁷⁸

Further changes are proposed as follows:

- The full bench must sit to hear fundamental rights claims and constitutional cases to avoid situations in which the chief justice “stacks” panels to influence the outcome in sensitive cases. Should that prove impractical, the best alternative is a reversion to the former system in which the most junior member of the Court places judges randomly on cases.¹⁷⁹
- The court must be properly staffed with interpreters so that cases may be brought in Tamil or English, as well as Sinhala. As noted above, while a fixed quota for Tamil representation may be ideal, it seems unlikely to be accepted at the present time. At the very least, however, the highest court must be linguistically accessible.
- A prosecutor's office separate from the Attorney General's office must be established. It is a conflict of interest to have the body that provides legal advice to all arms of the Sri Lankan government, including the police and armed forces, also initiate and prosecute criminal proceedings against members of those forces.¹⁸⁰

Civil society groups in Sri Lanka have also vetted proposals to allow Courts of Appeal to hear fundamental rights claims.¹⁸¹ While this would alleviate some of the Supreme Court's backlog, it is not recommended at this time. Again, the reason is institutional competence. The priority here is to have one court – the country's highest court – functioning properly. The hope

¹⁷⁷ International Crisis Group, “Sri Lanka's Judiciary,” 9.

¹⁷⁸ *Ibid.* 9.

¹⁷⁹ *Ibid.* 11.

¹⁸⁰ Amnesty International, “Twenty Years of Make-Believe”.

¹⁸¹ Edrisinha, *et al.* *Power-Sharing in Sri Lanka*, 772.

is that this will first, have a demonstration effect on lower courts, and second, that as the reforms proposed in this entire package take hold, the political climate 10 years on might allow for greater clarity as to the types of changes that may be desirable in the rest of the justice system. Given the access to justice trade-off inherent in this limitation, it is also advised that the Supreme Court consider hearing cases not just in Colombo, but in the regions, on the request of the parties. The idea is to make the court both more physically accessible and again, to have a demonstration effect for both the lower courts in the regions and for the public.

Although it would be ideal, broader powers to review legislation are not recommended here, for the reasons explored above regarding institutional capacity and political environment. The power to review regulations made pursuant to a state of emergency, however, is crucial and will be addressed in the following section.

The Prevention of Terrorism Act and Emergency Rule

Since Sri Lanka's independence, emergency rule has been more the norm than the exception. Dozens of emergency regulations have been passed pursuant to the Public Security Ordinance of 1947. Along with the Prevention of Terrorism Act – passed in 1979 and made permanent in 1982 – they have had the cumulative effect of granting extensive powers to the police and armed services and making the country's criminal procedure laws a virtual irrelevance.¹⁸² Sri Lanka's recent history is itself evidence of the ineffectiveness of emergency powers as a means of curbing violence. The restoration of proper criminal procedures in dealing with the thousands of Tamils currently detained without charge could also go a long way toward building a measure of confidence in the government in the north and east. There is also a need to strengthen oversight over the imposition of emergency rule by making it more difficult to enact and by allowing for greater judicial review of resulting emergency regulations.

Since 1971, Sri Lanka has been under a nearly continuous state of emergency. During a declaration of emergency, the president is able to enact regulations that give special powers of search, arrest and detention to the national security forces. Such regulations may override any inconsistent legislation and certain fundamental rights guaranteed in the 1978 Constitution.¹⁸³ They also empower the defence minister to order an individual's detention for up to 18 months without judicial supervision where he "has reason to believe of suspect that any person is connected with or concerned in any unlawful activity".¹⁸⁴ In the period following the 2006 collapse of the Norwegian-brokered ceasefire agreement alone, the government promulgated more than 20 new emergency regulations.¹⁸⁵ There is no systematic publication of such regulations, compounding the rights implications.¹⁸⁶

As noted above, under the 1978 Constitution's 'one-week' rule makes it virtually impossible to judicially review legislative and executive measures in the courts. Art. 15(7) of the constitution also declares that fundamental rights are subject to restrictions "as may be prescribed by law in the interests of national security, public order and the protection of public health or morality...". "Law" includes regulations made under the law relating to public security. The framers of the 1978 Constitution perceived the declaration of a state of emergency and the

¹⁸² See Asanga Welikala, *A State of Permanent Crisis: Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka* (Colombo: Centre for Policy Alternatives, 2008), 181-187 and Udagama, "Taming the Beast," 275-281.

¹⁸³ Coomaraswamy and de los Reyes, "Rule by Emergency," 277.

¹⁸⁴ Udagama, "Taming the Beast," 276.

¹⁸⁵ Human Rights Watch, *Legal Limbo: The Uncertain Fate of Detained LTTE Suspects in Sri Lanka* (New York: Human Rights Watch, February 2, 2010).

¹⁸⁶ International Crisis Group, "Sri Lanka's Judiciary," 6.

conduct of the government during emergency rule to be purely political and administrative matters – the prerogative or right of the executive. The exclusive discretion in respect of an emergency proclamation is vested in the President, who is entitled to exercise it according to the dictates of his personal opinion.¹⁸⁷ In South Africa by contrast, the constitution requires the declaration of a state of emergency to be an act of last resort, once normal measures are exhausted or inadequate, and then only where it is necessary to restore peace and order.¹⁸⁸ The Sri Lankan constitution (Art. 155(5)) also provides for extensions of states of emergency for a period of up to one month at a time, subject to the approval of a simple majority in Parliament. To the extent that any oversight was contemplated, Parliament, not the courts, was vested with that responsibility.¹⁸⁹

There are several reasons the government should limit emergency rule and allow stronger judicial oversight of emergency regulations. First, many of them are in violation of Sri Lanka's commitments under international law,¹⁹⁰ making them a focal point for international criticism and a potential impediment to the disbursement of aid. Second, in light of the JVP uprisings, there is a long legacy of using the emergency regulations against not only Tamil militants in the north, but also against Sinhalese. Their repeal would thus be welcomed by the President's own power base – the south. Finally, there is no evidence that such regulations served the purpose for which they were intended. In the south, emergency regulations were often promulgated *in response to* attacks, rather than as a preventive measure.¹⁹¹ In the north, emergency rule served largely to reinforce the LTTE's message that the government in Colombo was anti-Tamil and could not be trusted. Recourse to emergency rule took its toll on the country's political culture without securing the objectives of security and law and order.¹⁹²

Proposed Reforms

Some proposals have been put forward for scaling back emergency rule in Sri Lanka, but they are not sufficiently protective. One proposal, for example, suggests that declarations of emergency must be approved by a simple majority in Parliament within 14 days, and every 30 days thereafter. Where a declaration of emergency has been in force for a period of six months during a single calendar year, then two-thirds approval from Parliament would be required.¹⁹³ However, the two-thirds rule has not historically offered protection to the Tamil minority,¹⁹⁴ since the Tamil community comprises far less than one-third of the population and Tamil parties generally hold less than one-third of the seats in Parliament. It is for that reason that double majority rules have been proposed in this paper as an alternative.

The following is suggested as a means of strengthening parliamentary oversight over the imposition of emergency rule:

- Declarations of emergency must be approved by a simple majority in Parliament within 7 days. In the absence of such approval, the proclamation lapses and another may not be invoked for a period of 30 days.

¹⁸⁷ Welikala, *A State of Permanent Crisis*, 202.

¹⁸⁸ *Ibid.* 202.

¹⁸⁹ *Ibid.* 175.

¹⁹⁰ Human Rights Watch, *Legal Limbo*.

¹⁹¹ Welikala, *A State of Permanent Crisis*, 182.

¹⁹² *Ibid.* 8.

¹⁹³ This was a 1994 proposal from the Movement for Constitutional Reform. See Edrisinha, *et al.* *Power-Sharing in Sri Lanka* at 448.

¹⁹⁴ Choudhry, "Constitutional Politics and Constitutional Reform in Sri Lanka," 10.

- To extend a state of emergency beyond seven days, a double majority of the Sinhalese parties and Tamil/Muslim parties is required and must be renewed every 30 days thereafter.
- When a declaration of emergency has been in force for a period of more than six months in a single calendar year, two-thirds approval from each of the Sinhalese and Tamil/Muslim parties would be required for its continuance.

The Supreme Court must also become more active in hearing constitutional challenges to emergency orders. The 2000 case of *Abeysekara v. Ariya Rubesinghe* provides a promising starting point. In a unanimous decision, Amerasinghe J. set out a three-part test to assess the constitutionality of emergency regulations that seek to restrict fundamental rights, explicitly basing it on that established by the European Convention of Human Rights.¹⁹⁵ According to that test, the court would inquire into

- a) Whether the restrictions are prescribed by law;
- b) Whether they have a legitimate aim; and
- c) Whether they are necessary in a democratic society.

This test shows the Supreme Court adding to the bare requirements of legality established by the constitution with public law concepts such as necessity, reasonableness and proportionality¹⁹⁶ – a welcome shift in a context where the language of the constitution itself has not been sufficiently protective.

Abeysekera and *Joseph Perera* show that an active judiciary, coupled with pressure from the international community, can go some way toward containing the arbitrary use of emergency power and protecting the fundamental rights jeopardized by its use. It is hoped that the proposals made here to strengthen judicial independence, and the proposals made in the previous chapter regarding mechanisms for transitional justice, will result in greater efforts by the Court to take a stance that is protective of human rights, even in the face of strong executive power. This is especially important given that a fundamental rights petition on the Supreme Court may be the sole avenue of relief open to someone detained without charge.¹⁹⁷ At the local level magistrates are often reluctant to act, since they rely on police for protection and are therefore unlikely to jeopardize their own security by taking an aggressive stance against police detention and treatment in police custody.¹⁹⁸ The “one-month rule”, in which petitioners must bring their claim within one month of the alleged rights infringement, the practical problem of finding a lawyer who will take such cases and the cost and inconvenience of travelling to Colombo to bring a case are additional impediments to the effectiveness of judicial protections, putting pressure on the Supreme Court to become more protective of fundamental rights.

Conclusions: Looking Ahead

The reforms proposed in this chapter are aimed at re-asserting the independence of the judiciary in Sri Lanka and curbing the state-of-emergency mentality that has eroded respect for human rights. They are not meant to be comprehensive; they offer a starting point that will hopefully be palatable to the government and go some way toward keeping Sri Lanka from sliding into yet another downward spiral of violence. In the coming years, however, there are several related areas of reform that might be considered.

¹⁹⁵ Welikala, *A State of Permanent Crisis*, 198.

¹⁹⁶ *Ibid.* 198.

¹⁹⁷ International Crisis Group, “Sri Lanka’s Judiciary,” 21.

¹⁹⁸ *Ibid.* 17.

First, while the importance of strengthening judicial review of emergency rule is crucial to curbing police powers and attendant human rights abuses, over the long-term the Supreme Court should be empowered more broadly to review legislation for its constitutionality. Currently, the ‘one-week’ provision in the constitution means that there is effectively no means of judicial review. It is no accident that the repeal of that provision was not proposed here – not because that would not be desirable, but because of the risk that in emergent systems, judicial efforts to assert constitutional supremacy can result in political crises, leading to the counter-intuitive result of curtailing the development of judicial independence.¹⁹⁹ The reforms put forward in this paper are necessarily cautious in light of Sri Lanka’s political environment.

Second, the development of a legal aid system would make the courts more accessible, both for fundamental rights cases and otherwise. Access to the courts is valuable in and of itself, but in a developing environment legal aid can contribute to the rule of law by bringing more disputes into the legal framework and making law a more dominant force in the institutional order.²⁰⁰ It can also act as a pressure valve, calming angry parties who might otherwise be more active in resisting the government.²⁰¹

Finally, the police and security forces need to be radically changed. Their composition must eventually reflect the demographics of the country, with at the very least Tamil speakers in the north and east. Police powers, which expanded through decades of emergency rule, must be scaled back. Police would ideally be properly trained and given tools to investigate effectively so that torture is no longer turned to as a means of extracting confessions. In the near-term, however, Sri Lanka must begin with the basics: strengthening the role of the courts, their respect and visibility among all ethnic groups in the country, and ending the human rights abuses that are undermining the prospects for post-war peace.

¹⁹⁹ Stephanie Balme and Michael W. Dowdle, “Exploring Constitutionalism in 21st Century China” in Stephanie Balme and Michael W. Dowdle, eds. *Building Constitutionalism in China* (New York: Palgrave Macmillan, 2009), 3.

²⁰⁰ Fu Hualing, “Access to Justice and Constitutionalism in China,” in Balme and Dowdle, eds., 170.

²⁰¹ *Ibid.* 171.

Works Cited

- Amnesty International. "Sri Lanka: Time for a New Start, an appeal to Sri Lanka's presidential candidates." ASA 37/002/2010, January 18, 2010.
- Amnesty International. "Twenty Years of Make-Believe: Sri Lanka's Commissions of Inquiry." ASA 37/005/2009, June 11, 2009.
- Balme, Stephanie, and Michael W. Dowdle, eds. *Building Constitutionalism in China*. New York: Palgrave Macmillan, 2009.
- Bertrand, J. and A. Laliberte, eds. *Multination States: East and West*. Cambridge: Cambridge University Press, forthcoming.
- Comella, Victor Ferreres. *Constitutional Courts and Democratic Values: A European Perspective*. New Haven: Yale University Press, 2009.
- Coomaraswamy, Radhika and Charmaine de los Reyes. "Rule by emergency: Sri Lanka's postcolonial constitutional experience." 2 *International Journal of Constitutional Law* 2 (2004): 272-295.
- DeVotta, Neil. *Blowback: Linguistic Nationalism, Institutional Decay and Ethnic Conflict in Sri Lanka*. Stanford: Stanford University Press, 2004.
- Edrisinha, Rohan et al., eds. *Power-sharing in Sri Lanka: Constitutional and Political Documents 1926-2008*. Colombo: Centre for Policy Alternatives, 2008.
- Human Rights Watch. *Legal Limbo: The Uncertain Fate of Detained LTTE Suspects in Sri Lanka*. New York: Human Rights Watch, February 2, 2010.
- Human Rights Watch. *Selling Justice Short: Why Accountability Matters for Peace*. New York: Human Rights Watch, 2009.
- International Crisis Group, "Sri Lanka's Judiciary: Politicised Courts, Compromised Rights," Asia Report No. 172 Colombo/Brussels: International Crisis Group, June 30, 2009.
- International Crisis Group, "Sri Lanka's Human Rights Crisis," Asia Report No. 135 Colombo/Brussels: International Crisis Group, June 14, 2007.
- Joseph, Jasmine ed. *Sri Lanka's Dysfunctional Criminal Justice System*. Hong Kong: Asian Human Rights Commission, 2007.
- Malleson, Kate and Peter H. Russell, eds. *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World*. Toronto: University of Toronto Press, 2006.
- Reuters. "S.Lanka's Keells says ruling to cost up to \$12 mln. April 22, 2008.
- Rotberg, Robert, ed. *Creating Peace in Sri Lanka: Civil War and Reconciliation*. Washington D.C.: Brookings Institution Press, 1999.
- The Economist*. "Imperfect Peace: The government spars with aid agencies; the displaced still suffer." March 31, 2010.
- Tierney, Stephen. *Constitutional Law and National Pluralism*. Oxford: Oxford University Press, 2004.
- Tiruchelvam, Neelam. "Devolution and the Elusive Quest for Peace." In Robert I. Rotberg, ed. *Creating Peace in Sri Lanka: Civil War and Reconciliation*. Washington, D.C.: Brookings Institution Press, 1999.
- Udagama, Deepika. "Taming the Beast: Judicial Responses to State Violence in Sri Lanka." *Harvard Human Rights Journal* 11 (1999): 269-294.
- United States Department of State. *2009 Country Reports on Human Rights Practices – Sri Lanka*. Washington, DC: US Department of State, 2010.

Welikala, Asanga. *A State of Permanent Crisis: Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka*. Colombo: Centre for Policy Alternatives, 2008.

CHAPTER THREE: AN OPPORTUNITY FOR A NEW BEGINNING: THE FUTURE OF THE ELECTORAL SYSTEM AND THE PARTY SYSTEM IN SRI LANKA - ZSUZSANNA BLANKA MAGYAR

“1:1 The crisis in the Sri Lankan Polity has arisen because, although the country is multi-ethnic and multi-religious, the numerically smaller ethnic groups have not had their share of State power which in their opinion, would have facilitated greater integration.

*1:2 This has resulted in the minorities being sidelined and becoming alienated from the Sri Lankan State, as initial efforts to redeem this situation by a power sharing mechanism failed.”*²⁰²
All Party Representative Committee Report of Group A. 2006

Introduction

In 1957, J. A. Laponce starts his article, *The Protection of Minorities by the Electoral System*, stating that Ceylon's new (sic!) constitution establishes that “the electoral law should protect the minorities.”²⁰³ The author is overtly optimistic about the future of the ethnic relations in Sri Lanka. Today we know that this may have been the last moment for a long time when the island provided a reason for optimism. At the present moment the electoral system of Sri Lanka has very few electoral institutions which facilitate interethnic cooperation.²⁰⁴

The electoral institutions are just one element of a good constitutional design, nevertheless electoral rules matter: they have an impact on the strength and size of the parties in a given country and they shape the norms and practices of campaigns and political behaviour.²⁰⁵ In ethnically divided societies ethnic lines often serve as a basis for exclusion and ethnic groups compete for resources.²⁰⁶ As theory and practice show in these societies, the electoral design can make or break the interethnic peace. It can facilitate interethnic cooperation or it can reinforce interethnic competition. If ethnic struggle arises the minority may get excluded from the polity which often leads to violence.²⁰⁷ This process has happened in Sri Lanka repeatedly. Consequently, both political scientists and the Sri Lankan political elite have been suggesting reform proposals to remedy the situation and there has been an ongoing societal debate about these reform propositions. However, the dispute has been fruitless so far in pointing to a permanent solution.²⁰⁸

The military defeat of the LTTE (Liberation Tigers of Tamil Eelam) created a special window of opportunity in the history of this debate. While seemingly the leverage of the Tamil ethnic minority has plummeted, in reality their defeat has opened a new playing field for both the minority and the majority parties. As the LTTE was completely defeated, its demise may have pre-empted the future possibility of the ethnic outbidding in party politics which has been the norm in the past century.

²⁰² Rohan Edrisinha et al. Power-sharing in Sri Lanka: Constitutional and Political Documents 1926-2008. Colombo, Centre for Policy Alternatives, 2008. p. 785

²⁰³ JA Laponce. The Protection of Minorities by the Electoral System. Political Research Quarterly 10, (2) 1957, p.318

²⁰⁴ Ben Reilly. Democracy in Divided Societies: Electoral Engineering for Conflict Management. Theories of Institutional Design. Cambridge, New York: Cambridge University Press.2001.p. 124

²⁰⁵ D Rae. W. The Political Consequences of Electoral Laws Yale University Press. 1967.

²⁰⁶ Alvin Rabushka, and Kenneth A. Shepsle.. Politics in Plural Societies: A Theory of Democratic Instability. Longman Classics in Political Science. 1st Ed. New York: Pearson/Longman. 2009; 1972, p. 74

²⁰⁷ Ibid., p.82-88

²⁰⁸ Ibid., p.139-141, Reilly 2001, p.124

Outline of the Chapter

This chapter will explore the strength and weakness of the current electoral system and institutional design of Sri Lanka and will recommend changes to decrease the risk of minority exclusion and ethnic violence. First, the chapter will describe the status quo of the electoral system and party politics as a background for the recommendations. It will then examine the current situation of minorities and will discuss the possible flaws of the present electoral design. Finally, it will propose short- and midterm recommendations to remedy the discussed shortcomings, and it will conclude that certain electoral changes could be in the interest of both President Rajapaksa and the ethnic minorities.

The Legal Framework

The legal framework of the current electoral system of Sri Lanka is enshrined in the 1978 Constitution. The procedural issues are clarified in the Parliament Elections Act (No. 1 of 1981), Presidential Elections Act (No. 15 of 1981)

The current governance system of Sri Lanka, instituted after the initial post colonial Westminster type government system, was modelled after the French semi-presidentialism in 1978. The system has two components: the first one is a strong executive President. The Presidency combines in one person the head of state, the head of government, and the commander in chief.²⁰⁹ Although the ministers are appointed by the President, they are accountable to the parliament.²¹⁰

The second component of the system is the legislative Parliament. The members of the Parliament have important responsibilities: they have the power to manage appropriations,²¹¹ and most importantly, a two-thirds majority has the authority to change the constitution.²¹² The parliament is unicameral and has 225 seats.²¹³ The parliamentary election is run by proportional representational (PR) rules and it has two tiers. On regional lists 196 MPs are elected from 25 multi-member electoral districts (with a 5% threshold). The remaining seats are distributed for candidates whose party received the most of the national vote. The party lists are open. This means that the voters can choose up to three candidates from a set of names who they would like to see in the parliament. The actual representatives who will get elected will be the most preferred candidates. Consequently, people can vote MPs in and out of the parliament, even if they do not have a personal representative.²¹⁴

The President is elected with preferential voting (or alternative vote): voters can rank up to three candidates on the ballot.²¹⁵ The President is elected by majority rule. If a candidate instantly receives a majority of the votes, they will be elected. However, if all the candidates receive less than half of the votes only the two most popular will remain in competition. After reducing the number of candidates, the second and, if necessary, the third preferences of the voters whose first choice was eliminated will be counted. A President cannot serve more than

²⁰⁹ CR de Silva.1979. The Constitution of the Second Republic of Sri Lanka (1978) and its Significance. Commonwealth & Comparative Politics 17. (2) p.193

²¹⁰ The Constitution of the Democratic Socialist Republic of Sri Lanka (1978) Chap VIII 43(1).

²¹¹ L. Jayasuriya, The Changing Face of Electoral Politics in Sri Lanka (1994-2004). Singapore: Marshall Cavendish International.2005,p.17

²¹² The Constitution of the Democratic Socialist Republic of Sri Lanka (1978) Article 81

²¹³ Fourteenth Amendment to the Constitution 1988

²¹⁴ Reilly 2001,p. 124

²¹⁵ W. Mishler, S. Finkel, and P. Peiris. 2007. The 2005 Presidential and 2004 Parliamentary Elections in Sri Lanka. Electoral Studies 26, (1): 205-9.p. 206

two six-year long terms. The current President, Mahinda Rajapaksa has been elected for his second term in 2010.

There have been two Constitutional Amendments relevant to the electoral rules. First of all, *The Fourteenth Amendment to the Constitution* in 1988 modified some of the rules of the PR elections and its districts. *The Seventeenth Amendment to the Constitution* in 2001 called for an independent Election Commission to ensure free and fair elections.²¹⁶ So far, however, this Commission has not been created.²¹⁷

Executive Summary, Background of Ethnic Exclusion and Current Interethnic Politics

According to the Department of Elections there are sixty-six parties registered in Sri Lanka, and many independent groups join in to compete in each election.²¹⁸ However, only a few parties are actually shaping the politics.

Only two parties have an actual chance of winning in an election. These have been the major parties since 1951 when, after the country gained independence, a Westminster type electoral system was introduced in Sri Lanka.²¹⁹ The UNP (United National Party) and the SLFP (Sri Lanka Freedom Party) have been the most important political actors in the post colonial period.²²⁰ The UNP traditionally has been considered a right wing party, while the SLFP has been seen as a left wing one.²²¹ Beyond policy battles, however, both have been appealing to the Sinhalese nationalism.²²²

Initially, the Ceylon National Congress, established in 1919, was designed to accommodate all ethnicities. However, after a short period of interethnic cooperation, interethnic competition started.²²³ This was partly due to the fact that with only 12% of the population the Sri Lankan Tamils could not hold a significant influence during the independence struggle. Consequently, when the Sri Lankan nationalism formed, it became predominantly Sinhalese and Buddhist. Also the majority Sinhala resented the Tamils, who were the preferred ethnicity during the colonial period.²²⁴ Several laws were passed against the Tamils from the mid 1950s²²⁵ and they also got excluded from the major political parties and from the political life. Violent Tamil protests started in the late 1960s and 1970s.²²⁶ Following this, the major parties defined their platform against the Tamil violence and the Tamil minority, and the UNP and the SLFP began outbidding each other to claim the votes of the Sinhalese majority during the 1960s and 1970s.²²⁷

In 1978 the change in the electoral system induced a change in the party system as well. Due to the PR electoral system of the parliamentary elections, a limited number of smaller parties were able to secure election into the Parliament (at this time the threshold was 12.5%).²²⁸ In the mean time, however, the majoritarian Presidential electoral system reinforced the gravity

²¹⁶ Seventeenth Amendment to the Constitution of the Democratic Socialist Republic Of Sri Lanka L. D. - O. 47/2001

²¹⁷ European EU Election Observation Mission. 2004. Parliamentary elections 2 April, 2004.

<http://ec.europa.eu/external_relations/human_rights/election_observation/sri_lanka_2005/final_report_en.pdf>. Last visited: 22 April, 2010 p.7

²¹⁸ <<http://www.slelections.gov.lk/pp.html>> last visited 21 April, 2010

²¹⁹ Jayasuriya 2005, p.7

²²⁰ Ibid., p.12

²²¹ Ibid., p.11-12

²²² Ibid., p. 15

²²³ D. Horowitz. "Making Moderation Pay" in Joseph V. Montville, Ed, Conflict and Peace Making in Multiethnic Societies New York: 1990 Lexington Books, p.456

²²⁴ Rabushka, Alvin, and Kenneth A. Shepsle, p.139

²²⁵ For instance the Sinhala Only Act in 1956, or the Standardization (the Sri Lankan Numerus Clausus) in 1973,

²²⁶ Horowitz 1990, p.462

²²⁷ Ibid., p. 463,

²²⁸ Jayasuriya 2005, p.20

power of the two major parties. The big parties formed group alliances with the smaller parties. The United People's Freedom Alliance (formerly People's Alliance) has been led by the SLFP while the UNP has been leading the United National Front.²²⁹

The altered governance system and the changed electoral system failed to bring moderation to the interethnic conflict, and up till the elections of 2004, major Sinhala parties used predominantly anti-Tamil messages in their political campaigns.²³⁰ In the mean time, ethnic parties emerged. The ethnic vote has three elements in Sri Lanka: that of the Muslim minority, the Sri Lankan Tamils and the Indian Tamils (who were brought in by the British colonial powers to work at the plantations).²³¹ The Indian Tamils allied briefly with the Sri Lankan Tamils in the 1960s, but since the 1980s they have been part of political competition between the UNP and the SLFP.²³² Major Tamil parties have been the Tamil National Alliance and The Eelam Peoples Democratic Party. The main party of the Muslim ethnicity has been the Sri Lanka Muslim Congress (SLMC), which became powerful as an ally to the SLFP in 1993.²³³ Until now, the Muslim parties have aligned their interests with the Sinhalese majority (to defeat the LTTE). Consequently, they have been participating in the party alliances.²³⁴

Among the smaller parties, there are extremist Sinhala parties as well. The JVP (Janathā Vimukthi Peramuna or People's Liberation Front) is a nationalist, communist party which engaged in violence in 1971 and between the years of 1983-1989.²³⁵ This party was part of the United People's Freedom Alliance in 2004, but now it is part of the Democratic National Alliance established by General Sarath Fonseka. The JHU (Jathika Hela Urumaya or National Heritage Party) is a nationalist party established by Buddhist monks. It was one of the main advocates of the fight against the Tamil Tigers. Like the JVP, it has been part of the United People's Freedom Alliance.²³⁶ The existence of these parties may make ethnic accommodation for the bigger ethnic majority parties difficult.

2010 Elections

In the latest parliamentary elections held on April 8, 2010, the United People's Freedom Alliance won 144 of the seats. This put the party six votes shy from getting two-thirds of the parliamentary seats, which would allow them to change the Constitution and the electoral laws. Apart from the UPFA, two Sinhala parties won seats: the UNP and the Democratic National Alliance.²³⁷ The Tamil National Alliance became the third strongest party in the parliament by winning 14 seats. Consequently, they are in a position to give power to the SLFP and President Rajapaksa to change the constitution. The question is whether there is any possibility that these parties will cooperate.

Background: Minorities in Numbers

²²⁹ Ibid.,p.20

²³⁰ Ibid.,p.26

²³¹ Ibid.,p.56

²³² Ibid.,p.56

²³³ Ali 260,261

²³⁴ Jayasuriya 2005,p.33

²³⁵ Jayasuriya 2005,p.16,106

²³⁶ Ibid.,p.106,107

²³⁷ Data Source: Department of Election, Colombo Sri Lanka. Parliamentary General Election – 2010
http://www.slelections.gov.lk/parliamentary_elections/province.html last visited 22 April,2010

To be able to make recommendations on the electoral design and to understand the strategic choices that parties face, it is very important to understand the current interethnic dynamic of the Sri Lankan society. Having suffered military defeat, the Tamil ethnic group will have to rely on peaceful political tools to demand their share of the resources. The leverage of an ethnic group depends on two factors: 1) the weight of the given minority as a percentage of the population and 2) whether they can find strategies to make their influence felt within the electoral system.

There has not been a census in the Northern and Eastern provinces since 1981, as it was impossible to enter the military zone.²³⁸ Some Western commentators suggest that during the long years of the Civil War there was a modern day emigration exodus of the Tamils. As a result, the proportion of the minority currently may be too small to have an influence on politics.²³⁹ One thing is important: as the parliamentary elections are conducted on a district by district basis, the overall success of the Tamil parties can tell nothing about the actual numbers of the Sri Lankan Tamil population. As electoral participation has been relatively low in the Northern and Eastern district (compared to the rest of the country where it has been about 80%) fewer votes are needed to elect a candidate in these districts than in the Southern ones.²⁴⁰

In 1981, the proportions of the different ethnicities were the following: 74% of the population was Sinhalese versus the 12.6% Tamils, 5.5% of Indian Tamils, and 7.1% Muslims.²⁴¹ These data already show a big disproportionality towards the ethnic majority. It is essential to try to estimate their numbers to be able to make better recommendations. To estimate the current proportions of the ethnic minority this study will rely on two sources. The first one is the election results from the General Elections of Sri Lanka in 2004 in the Northern and Eastern territories compared to the 1981 census.

²³⁸ Department of Census and Statistics Sri Lanka <http://www.statistics.gov.lk/>

²³⁹ Comment from Honourable Bob Rae, University of Toronto, Toronto 2010

²⁴⁰ Jayasuriya 2005, p.28

²⁴¹ Department of Census and Statistics, Ministry of finance and planning, Colombo Sri Lanka. Statistical abstract 2006 in Edrisinha 2008, p. 887

Figure 1 Comparison of election results 2004 and 1981 census results					
Batticaloa	Results of the general elections 2004			1981 census%	
	POLITICAL PARTY/ INDEPENDENT GROUP	VOTES OBTAINED	PERCENTAGE	Total percentage/ ethnicity	
Tamil	ILLANKAI TAMIL ARASU KACHCHI	161,011	66.71%	67.77%	70.9
	EELAM PEOPLES DEMOCRATIC PARTY	2,556	1.06%		
Muslim	SRI LANKA MUSLIM CONGRESS	43,131	17.87%	18.02%	23.9
	UNITED MUSLIM PEOPLE'S ALLIANCE	366	0.15%		
Sinhala				14.20%	5.2
Digamadulla	Results of the general elections 2004			1981 census %	
	POLITICAL PARTY/ INDEPENDENT GROUP	VOTES OBTAINED	PERCENTAGE	Total percentage/ ethnicity	
Tamil	ILLANKAI TAMIL ARASU KACHCHI	55,533	19.13%	19.68%	20.1
	EELAM PEOPLES DEMOCRATIC PARTY	1,611	0.55%		
Muslim	SRI LANKA MUSLIM CONGRESS	76,563	26.37%	26.49%	41.5
	UNITED MUSLIM PEOPLE'S ALLIANCE	335	0.12%		
Sinhala				53.83%	38.3
Jaffna	Results of the general elections 2004			census 1981 %	
	POLITICAL PARTY/ INDEPENDENT GROUP	VOTES OBTAINED	PERCENTAGE	Total percentage/ ethnicity	
Tamil	ILLANKAI TAMIL ARASU KACHCHI	257,320	90.60%	97.15%	95.30%
	EELAM PEOPLES DEMOCRATIC PARTY	18,612	6.55%		
Muslim	SRI LANKA MUSLIM CONGRESS	1,995	0.70%	0.7%	1.70%
Sinhala				0.00%	3.00%
Trincomallee	Results of the general elections 2004			1981 census%	
	POLITICAL PARTY/ INDEPENDENT GROUP	VOTES OBTAINED	PERCENTAGE	Total percentage/ ethnicity	
Tamil	ILLANKAI TAMIL ARASU KACHCHI	68,955	37.72%	38.02%	33.8
	EELAM PEOPLES DEMOCRATIC PARTY	540	0.30%		
Muslim	SRI LANKA MUSLIM CONGRESS	65,187	35.66%	35.72%	29
	UNITED MUSLIM PEOPLE'S ALLIANCE	117	0.06%		
Sinhala				26.26%	37.2
Vanni	Results of the general elections 2004			census 1981 (unweighted average of Mullaithivu, Mannar, Vavuniya) %	
	POLITICAL PARTY/ INDEPENDENT GROUP	VOTES OBTAINED	PERCENTAGE	Total percentage/ ethnicity	
Tamil	ILLANKAI TAMIL ARASU KACHCHI	90,835	64.71%	65.49%	61.17
	EELAM PEOPLES DEMOCRATIC PARTY	1,097	0.78%		
Muslim				0.00%	12.8
Sinhala				34.49%	26.03

Data Source: 1. Department of Census and Statistics, Ministry of Finance and Planning, Colombo Sri Lanka, Statistical Abstract 2006. 2. Department of Election, Colombo Sri Lanka. PARLIAMENTARY GENERAL ELECTION - 2004 Final District Results

As the data shows, the percentage of the voters supporting ethnic parties in 2004 seems to be dramatically close to the ethnic distribution shown in the 1981 census. Of course this striking similarity can have several explanations. It is possible that ethnicities do not vote with the same probability. Alternatively, there is the possibility that, in these regions, both the numbers of the Tamil and the Sinhala population declined in equal proportions. The only clear thing drawn from the data is that the Muslim population declined in these areas. To see how the absolute number of the Tamils may look, we have to turn to the Special Enumeration which was conducted in 2007 by the Department of Census and Statistics of Sri Lanka. This was an attempt to supplement the 2001 census and was conducted in the northern and eastern districts except for Vanni district, which was being liberated at the time.²⁴²

Figure 2					
Sri Lanka Tamil population in Northern and Eastern Electoral Districts in 1981/2007					
	Ampara	Batticola	Jaffna	Trincomale	Total
1981	77,826	233,713	715,892	87,760	1,115,191
2007	109,188	381,841	559,142	95,652	1,145,823
Displaced	23,061	47,558	130,534	15,512	216,665
					1,362,488
Tamil population as a ratio of total					
	Northern, Eastern Total	Population of Sri Lanka	Total		
1981	1,115,191	14,846,800	7.5%		
2007	1362488	20,010,000	6.8%		
Data Source: Department of Census and Statistics, Ministry of Finance and Planning, Colombo Sri Lanka. Population and Housing Statistics Special Enumeration 2007 Preliminary Reports, Statistical Abstract 2006					

Besides the situation in Vanni at this time, a problem is caused by the large number of dislocated people. If we assume that a large percentage of these people are Sri Lankan Tamil and add their numbers to that of the Tamil minority in these areas, we can see that the percentage of the Sri Lanka Tamil population within these areas compared to the total population of Sri Lanka declined somewhat (from 7.5% to 6.3%), but the change is not at all that dramatic. Based on the numbers in Figure 1 and Figure 2 it can be assumed that the Sri Lankan Tamil population must be at least around ten percent of the total population.

²⁴² Sri Lanka: LTTE forcibly threw children into Vanni battle – Survey, Govrenment, Sri Lanka
<http://www.reliefweb.int/rw/rwb.nsf/db900sid/AZHU-83KMKL?OpenDocument> . last visited 26 April,2010

As we can also see from the data presented, the Muslim population was decimated in the Northern and Eastern regions of Sri Lanka from 1981-2007. Consequently, we can assume that the 8.3% that the 2001 census showed must be somewhat higher than the reality.²⁴³

The Need for Reform

Political scientists argue that well designed electoral systems can create incentives for interethnic cooperation.²⁴⁴ There are two opposing opinions among political scientists on how electoral institutions should be designed in deeply divided societies. One is the recommendation that aggregation should be facilitated; the other is that articulation should help minorities. Those who argue for aggregation say that given the proper electoral system, parties can become truly interethnic. The advocates of this design claim that for a divided society, a SMD electoral system or a presidential system may be advantageous.²⁴⁵

Horowitz argues that one of the best ways to do this is to have a presidential system with alternative vote. Elections should be decided by majority rather than plurality rules. Horowitz argues that under this system each ethnic group will choose a candidate from their own ethnicity as their first choice.²⁴⁶ There will be intra-ethnic competition for first votes and probably no candidate will be able to win a majority.²⁴⁷

As the intra-ethnic competition will be severe for the first votes, people will give their second votes to a party which does not represent their ethnicity. In this case, second and third preferences will be important and the second votes of the minority group will decide the elections, and bargaining will start between different ethnic groups for these secondary votes. Consequently, all majority candidates will try to appeal to the minority and they will moderate their message. Finally, the president, who will be elected as a result of this bargaining, will create the ethos of unified leadership.²⁴⁸

Problems with the Alternative Vote System

According to this theory, the semi-Presidential electoral system that the 1978 *Constitution* installed should have created moderation in the ethnicized politics. Not only was the alternative vote system supposed to be advantageous for the minority, but they could also gain parliamentary seats that they could not win under the Westminster style system.²⁴⁹

Even the contemporary parties “feared” that the system will result in too much ethnic accommodation. The main opponents of the semi-Presidentialism when it was introduced were not the ethnic minorities but ethnic majority parties in opposition.²⁵⁰ According to Reilly the SLFP especially was against the provision as they were extreme in their political views and were afraid that the changes would result in the election of the more moderate candidates.²⁵¹

²⁴³ Department of Census and Statistics 2008, Ministry of Finance and Planning, Colombo Sri Lanka. Statistical abstract 2006 in Edrisinha 2008, p. 887

²⁴⁴ Reilly 2001, p.11

²⁴⁵ Matthijs Bogaards. Comparative Strategies of political party regulation in Reilly, Benjamin & Per Nordlund, eds., 2008 Political Parties in Conflict-Prone Societies: Regulation, Engineering and Democratic Development. United Nations University Press, 2008, p. 51

²⁴⁶ D. Horowitz, L. 2004. The Alternative Vote and Interethnic Moderation: A Reply to Fraenkel and Grofman. Public Choice 121, (3), p. 507

²⁴⁷ Horowitz 1990, p. 463; Horowitz 1991 p.162-203

²⁴⁸ Horowitz 2004, 508

²⁴⁹ de Silva 1979, p.206

²⁵⁰ Ibid., p.194

²⁵¹ Reilly 2001, p. 199

However, the dreaded moderation never came. According to Horowitz the alternative vote electoral system of 1978 did not work because “(s)oon after these changes came into effect, however, conditions were anything but normal.”²⁵² Horowitz compares the Sri Lankan case to the Malay one and he lists three reasons why moderation did not happen in Sri Lanka. The first one is that this change came too late in the history, only after the ethnic violence was on its way. However, Rabushka and Shepsle use mathematical modelling to show that this is what we can expect in divided societies with rational actors.²⁵³ The more salient question to ask would probably be why the ethnic cooperation did not break down in Malaysia.²⁵⁴ His second argument is that the ethnic composition of the electorate is much more diverse and mixed in Malaysia as a whole, as well as in the individual electoral districts. Overall, as there were not many minority districts, the interests of the minorities were not taken into account. This may be true, but we have to note that with only 11-12% of the votes, the Tamils could almost disappear if they mix into the Sinhala majority. Horowitz’s third argument is that interethnic party coalitions existed and survived in Malaysia while they did not exist in Sri Lanka. This is true but it is probably more the outcome of the first two arguments than an individual factor in itself. In summary, Horowitz argues that the lack of accommodation was not the fault of the electoral rules.²⁵⁵

Contrary to Horowitz’s theory, this report proposes that the preferential voting system may not be a moderating force in all cases. This report suggests that the lower the percentage of the ethnic minority in a given society, the more a preferential electoral voting system with majority rules will resemble a plurality electoral system.

The argument of Horowitz has two basic logical components: one is that each ethnicity will vote for their own ethnic candidate in the first round of elections and the second is that the second vote of the minorities will decide the outcome of the voting. First of all, no minority of 10 or 8 % will rationally expect to have a winning candidate. Consequently, they will either stay away from the elections (the electoral participation in the Tamil territories has been low but it is unclear whether this was the influence of the LTTE or not) or they will choose one of the most powerful majority candidates as their first choice. While even under these circumstances any of the majority candidates may decide to campaign to gain the minority vote, with a niche of only 8-10% electoral power (and not ideal participation rates) it is entirely possible that he or she might lose an equal or bigger percentage of the majority voters who would not want to give up their privileges to the other side.

The Sri Lankan case shows that there were no significant ethnic candidates during the history of the Presidential elections, and even third party majority candidates could not show a big enough support base to serve as swing votes.

²⁵² Horowitz 1990, p.463

²⁵³ Rabushka and Shepsle 1972, p. 139

²⁵⁴ Horowitz 1990, p. 465

²⁵⁵ Ibid., p. 469

Figure 3 First Three candidates, Sri Lanka Presidential Elections 1982-2010				
1982				
1	Mr. J.R. Jayawardene (UNP)		3450811	53%
2	Mr. H.S.R.B. Kobbekaduwa (SLFP)		2548438	39%
3	Mr. Rohana Wijeweera (JVP)		273428	4%
	Total		6522147	
1988				
1	Mr. Ranasinghe Premadasa (UNP)		2569199	50.4%
2	Mrs. Sirimavo Bandaranaike (SLFP)		2289960	45%
3	Mr. Osvin Abeygunasekara (SLMP)		235719	4.6%
	Total		5094778	
1994				
1	Mrs. Chandrika Bandaranaike Kumarathunga (P		4709205	62%
2	Mrs. Vajira Srimathi Dissanayake (UNP)		2715285	36%
3	Mr. Hudsan Samarasighe (Independent)		58886	1%
	Total		7561526	
1999				
1	Mrs. Chandrika Bandaranaike Kumarathunga (P		4312157	51%
2	Mr. Ranil Wickremasinghe (UNP)		3602748	43%
3	Mr. M. D. Nandana Gunathilaka (JVP)		344173	4%
	Total		8435754	
2005				
1	Mr. Mahinda Rajapaksha (UPFA)		4,887,152	50.29%
2	Mr. Ranil Wickramasinghe (UNP)		4,706,366	48.43%
3	Mr. Siritunga Jayasuriya (United Socialist Party)		35,425	0.36%
	Total		9,717,039	
2010				
1	Mahinda Rajapaksha(UPFA)		6015934	57.88%
2	Sarath Fonseka (UNP)		4173185	40.15%
3	Mohomad Cassim Mohomad Ismail (DUNF)		39226	0.38%
	Total		10,393,613	
Data Source :Department of Election, Colombo Sri Lanka. Past Presidential Electoral Results				

In 1982, the first and the last time a Tamil candidate ran for presidency, G.G. Ponnambalam from the Akila Illankai Tamil Congress received 2.8% of the votes.²⁵⁶ In 1999 another minority candidate, Abdul Rasool from the Sri Lanka Muslim Congress, received 0.2%

²⁵⁶ <<http://www.slelections.gov.lk/pdf/1982%20Presidential.pdf>> last visited, 21 April,2010

of the votes.²⁵⁷ Every minority voter under these conditions will understand that only the two strongest candidates have a chance of winning. The psychological component of the Duverger Law seems to be in play here, as people will not vote for candidates who do not have a chance of winning.²⁵⁸ Consequently, it is not surprising that the preferential electoral system has never been used up till today.²⁵⁹

It seems that it may be risky to campaign for the support of a 10% minority if the candidate can lose more on the majority side. In the 2010 Presidential election, Mahinda Rajapaksa was running against the general who won the civil war, Sarath Fonseka. The majority of the Tamils supported the latter candidate, who indeed won in the Northern and Eastern districts. However in the countrywide tally, Rajapaksa won the election with clear majority. While all the factors behind Fonseka's defeat are not clear, it is clear that catering to the minority with an opponent engaging in nationalistic politics can mean a defeat for the politician.²⁶⁰

While this report only focuses on the Sri Lankan case, a wider political science study could prove this hypothesis and could establish a more refined variant of Horowitz's theory (by possibly showing its limits). However, one of Horowitz's observations is very important: that is that the lack of unified political culture of Sri Lanka has been destructive. Many have observed that the Tamil and Sinhalese do not feel as if they are part of the same political community. Now as the LTTE got defeated there may be an opening to remedy this situation.

It can be concluded that presidentialism with an alternative vote electoral system has been a fruitless experiment in the history of the Sri Lankan constitutional design. Consequently, this report recommends that to achieve real moderation, the electoral system may have to be changed from presidentialism to parliamentarism. However, due to the ethnic tensions extra caution should be made as to which way the system can be transformed.

The Parliamentary electoral system

The first question is whether Sri Lanka should further experiment with aggregation and institute an SMD first-past-the-post electoral system. Norris demonstrates that contrary to common assumptions, minorities do not feel disenfranchised in a well designed majoritarian electoral system.²⁶¹

The supporters of this system furthermore argue that this electoral system is first of all simple, which is desirable in a divided society.²⁶² Secondly, single-member district representatives are more connected and more accountable to their districts. Thirdly, usually leading parties win with a large margin, which can make the country more governable. However, as we could see in Sri Lanka's history, the Westminster style electoral system has already failed to deliver results. Another problem with plurality/majority systems is that they often result in big electoral swings between two major parties in the parliament. It is unlikely at the present moment that any electoral party would desire this arrangement, even the biggest ones in Sri Lanka. This

²⁵⁷ <<http://www.slelections.gov.lk/pdf/1999%20Presidential.pdf>> last visited 21 April, 2010

²⁵⁸ Maurice Duverger, 1972, *Factors in a Two-Party and Multiparty System*, in *Party Politics and Pressure Groups* (New York: Thomas Y. Crowell, p. 23–32

²⁵⁹ Reilly 2001, p.119

²⁶⁰ H. L. D. Mahindapala, January 16, 2010, Mahinda Heading for Victory; Fonseka Heading for Oklahoma. Lankaweb <<http://www.lankaweb.com/news/items/2010/01/16/mahinda-heading-for-victory-fonseka-heading-for-oklahoma>> last visited 22 April, 2010

²⁶¹ Pippa Norris. 2002. Ballots Not Bullets: Testing Consociational Theories of Ethnic Conflict, Electoral Systems, and Democratization. in Andrew Reynolds, Ed., *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* Oxford University Press: Ch. 8, p. 233

²⁶² Rein Taagepera. 2002. Designing Electoral Rules and Waiting for an Electoral System to Evolve in Andrew Reynolds, ed., *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*. Oxford: Oxford University Press, ch. 9, p.257

rule would also threaten smaller Sinhala parties, resulting in ethnic violence from minority and majority parties alike.

Therefore, this report does not recommend aggregation as a way forward in the case of Sri Lanka. Consociational political scientists have been arguing that deeply divided societies do not need aggregation but articulation.²⁶³ Starting from Laponce in 1957, many political scientists find that the proportional system is the most advantageous for a divided society.²⁶⁴ The basic argument is that under the PR rule, ethnicities can form their own parties and can get representation. Moreover, the outcome of an election conducted by these rules will be more proportional—which will not only help ethnic minorities but any type of minorities.²⁶⁵ However, pure PR systems can also have disadvantages in an instable society. A PR electoral system in Sri Lanka would probably lead to the bigger fragmentation of the ethnic majority. Without the presidential elections, there would be no point in keeping long term alliances. At the same time, ethnic minority parties could probably not disband because the electorate is only slightly above 5%. It would be difficult to govern the country with unstable coalition governments. It is also important, as Maiwaring and Shugart argue, that there is a danger of fragmentation when a country changes its electoral system from presidential to parliamentary, and this should not be done without first strengthening the parties.²⁶⁶

This report finds that it would be best if Sri Lanka implemented a system which has a balance between governability and minority representation. This report recommends a mixed-member majoritarian electoral system for the country. This would have two tiers: one of single member districts and one with list PR. While, according to Norris, minorities do not always support this system and, according to Taagepera, the opportunity cost is high, the mixed-member majoritarian system may provide enough stability for the governments to govern and enough representation for the ethnicities not to revolt.²⁶⁷

Moreover, mixed-member majoritarian systems often result in two large parties, and smaller ones become essential for these parties to ensure majority. Often stable coalitions emerge, and small parties can have a bargaining power way beyond their vote share.²⁶⁸ The question in Sri Lanka will probably be whether minority parties could cooperate in order to take advantage of this structural opportunity, whether the power of the minority parties could be stronger than the extremist Sinhala parties.

As the data in Figure 1 and Figure 4 show, Tamil parties have been remarkably efficient in delivering votes, which may play to their advantage. The LTTE was eradicating the Muslim minority from the North and the East, which created ethnic tensions between the two groups²⁶⁹. Consequently, the Muslim parties have been supporting the anti-Tamil parties up until now. However, there are those in the Muslim community who say that the voice of the Muslim people is getting lost within the majority politics, and they should articulate their interests with the Tamil parties instead of against them.²⁷⁰ The 2001 census data shows that 84.2% of the Sri Lankan Muslim community is literate in Tamil as opposed to the 38.5% which is literate in Sinhala.²⁷¹ It is clear that Muslim, Sri Lankan Tamil, and Indian Tamil groups may be able to

²⁶³ Bogaards 2008, p.55

²⁶⁴ Norris 2002. p.210

²⁶⁵ Lijphart 2004

²⁶⁶ S. Mainwaring, and Matthew S. Shugart. 1997. Juan Linz, *Presidentialism and Democracy*. Comparative Politics, Vol29(4) p.449-461. p.468

²⁶⁷ Taagepera 2008, p. 248

²⁶⁸ Margarita Estevez-Abe, and Magyar, Zsuzsanna Small but Strong: The Role of Small Parties in Mixed Electoral Systems in Hungary, Italy and Japan, research paper, forthcoming

²⁶⁹ A. Ali. The Muslim Factor in Sri Lankan Ethnic Crisis. *Journal of Muslim Minority Affairs* 17, (2): 1997, p. 258

²⁷⁰ Ibid., p. 266

²⁷¹ Department of Census and Statistics <Sri Lanka www.statistics.gov.lk/>

cooperate on language issues and on religious issues too (as non-Buddhist communities) . If the ethnic minority parties could become the third power in the Sri Lankan politics they could get a lot out of the electoral changes.

Since the enemy is gone now, the majority parties will have to find non ethnic platforms, and the minority parties will have to become strategic players within the institutional setting of Sri Lanka. In the new era, the LTTE- free Tamil parties may have the chance to gain legitimacy. The Muslim parties will probably have to advocate their other interests beyond the anti-Tamil sentiments and may have to look beyond their alliance to the majority parties. On the horizon of the interethnic battlefield, the real opportunity of a new electoral culture and electoral design has been rising. In either case, if Sri Lanka decides to introduce a system which includes articulation, it has to be very careful to raise interethnic trust on one hand, and to facilitate the emergence of stronger parties that could credibly bargain between each other, on the other hand.

Recommendations

Short term recommendations, procedural issues

The first set of short term recommendations are meant to generate interethnic trust and promote a common political identity for all the ethnic groups in Sri Lanka. This section will flesh out changes that could immediately be introduced, without having serious debate about them in the society.

First, *The Seventeenth Amendment to the Constitution* should be implemented and an independent electoral commission should be created. With an independent commission in place, all ethnic minorities could feel safe that the elections are clean, and their interests are protected. To prevent interethnic violence, this is a necessary step.

Secondly, based on the proposition of the *All Party Representative Committee*,²⁷² minorities should get guaranteed, high ranking representative positions in the polity. This would create a sense of unity without threatening the interest of the majority. Ethnic vice presidents, in the case of a continued presidential system, or a representative upper chamber, in the case of a parliamentary system, could serve this function. These representatives, if they attended international meetings and are treated with respect, could generate a feeling of pride in the minorities, and could generate international support. There may be a political will to do this as lately President Rajapaksa has been trying to show some gestures to the Tamil community more or less successfully. For instance he spoke Tamil in the UN in 2008.²⁷³

Thirdly, to create a unified Sri Lankan political community, an island wide civic educational program should be installed. This program should ensure that the different ethnic groups would get to know political parties and political ideas different from those of their own

²⁷² The *All Party Representative Committee* was established by the All Party Conference in 2006. The conference was delegated by president Rajapaksa to find a solution to the interethnic conflict. The President later added a panel of seventeen experts to the committee which consisted of one member from every party. This panel identified the disenfranchisement of ethnic minorities as the core cause of the ethnic conflict. Consequently, their recommendations, among others addressed the problem of how to create an electoral system which would include the minorities in the political system. They proposed a parliamentary system with PR election rules. They also proposed that the parliament should have two Chambers, a House and a Senate with sixty members who are elected from the regional councils. The president would have become a representative title and would have fallen under the direction of the Prime Minister. Furthermore, the committee proposed that there should be two Vice Presidents from different ethnic groups than the president.

Edrisinha 2008, p.772

²⁷³ Lanka: Rajapakse speaks in Tamil at UN. September 26, 2008 Rediff India Abroad <http://www.rediff.com/news/2008/sep/26un.htm>. last visited 22 April, 2010

ethnicity. The dominant parties of the ethnic majority may support this program as they would probably welcome minority voters. On the other hand, this could provide an opportunity for the minorities to understand how to get involved in regular politics and find ways to obtain resources.

Another short term recommendation is the goal to strengthen the parties in Sri Lanka. Reilly argues that on the PR level in Sri Lanka, aggregation does not work because the party lists are open so that any candidate can be rejected by the electorate. This means that majority political parties cannot guarantee that a certain number of minority politicians can get into the parliament on their list.²⁷⁴ Even though this report argues that articulation may be a better way for Sri Lanka, it must conclude that weak parties, which emerge due to the open list, are not advantageous even if Sri Lanka chooses a mixed-member majoritarian electoral system. If the parties are weak they will be unable to credibly commit to interethnic coalitions or participate in interethnic bargaining. Consequently, regardless as to whether or not the electoral system will change in the future, the open list should be changed to a closed list. Having a strong party may be desirable for the leaders of the majority parties as well.

Mid-term recommendations and possibilities

In the short run, this report recommends that President Rajapaksa consider changing the electoral system to a parliamentary mixed member majoritarian one. This report argues that this would be the optimal solution for him to preserve his power in Sri Lankan political life after his second presidential term is over, to gain international and domestic legitimacy, and to break the vicious circle of ethnic violence.

According to the Sri Lankan constitution, a president can be elected only twice in his lifetime for two six year long terms.²⁷⁵ It is questionable, however, whether or not a president as strongly supported by the public as President Rajapaksa would be likely to withdraw from politics. If he wants to keep his power he can do two different things. The first option would be to modify the Constitution to allow for more or longer presidential terms, specifically abolishing Chap. VII 31 (2), which states that, “No person who has been twice elected to the office of President by the People shall be qualified thereafter to be elected to such office by the People.”

This change however, would most likely get a very negative response from the international community as well as from the other competing parties. After the lawful or unlawful imprisonment of General Fonseka, the fear that Sri Lanka is becoming an authoritarian state would run high.

The other possibility is that President Rajapaksa could try to change the electoral law in such a way that would eradicate presidency and strengthen the role of the Prime Minister, a role that he could legitimately assume afterwards. This strategy would be similar to what Putin did in Russia, except that Putin left the Russian Constitution intact. The ban there is only for consecutive terms of presidency so he may eventually return as the president of Russia. President Rajapaksa does not have this option.

On the one hand, changing the electoral system may give the promise of greater accommodation for ethnic minorities as well, which could generate a wide international support. On the other hand, domestically, President Rajapaksa could show that he is advocating democratic reforms which could have a wide popular appeal.

²⁷⁴ Reilly 2001., p. 124

²⁷⁵ The Constitution of the Democratic Socialist Republic of Sri Lanka (1978) Chapter VII 30(2) 31(2).)

Probably not coincidentally, arguments from UPFA have been made lately about a possible abolishment of the presidential system. From the last days of February 2010, the ruling coalition the United Peoples Freedom Alliance (which includes the SLFP) started to campaign for a 2/3 majority in the parliament.²⁷⁶ The party argued that if they would have the majority, they could change the constitution and modify the electoral system. Various ministers made statements on this issue throughout the month of March. They promised that after the party has erased the executive presidency they would introduce an “amended PR system” with added first-past the-post rules.²⁷⁷ Essentially, the party proposes a mixed-member majoritarian electoral system. The fact that the party is running on this platform could become fairly convenient for President Rajapaksa, in case the opposition would try to undermine his suggestion, he could argue that the voters casted their votes for the reform.

Another problem may be that there are six votes missing for the two-thirds parliamentary majority which is necessary to change the constitution. However, the government seems to be trying to get closer to the Tamil minority. Rajitha Senaratne, cabinet minister of construction and engineering services, in his speech noted that the new government is planning to get rid of the Sinhalese extremists and begin coordination with the Tamil and Muslim leaders.²⁷⁸ A bargain between these forces would make the electoral reform suggestion a real possibility.

Figure 4: Summary of the recommendations

Short term:

A. Goal: Generating interethnic trust:

Setting up the Election Commission

Bringing in symbolic representatives of the minorities

Introducing Universal Civic Education

B. Goal: Strengthening parties:

Closing the open list on the PR tier

Midterm:

Goal: Governance and Representation, with articulation: Changing the semi -Presidential system to mixed-member majoritarian parliamentary electoral system

All of these recommendations could gather enough political support to pass in the next five years, which shows how remarkable the opportunity is that Sri Lanka has now.

Conclusion

From the documents produced by the *All Party Representative Committee* in 2006,²⁷⁹ we can deduce that the Sri Lankan elite has a clear understanding that the underlying reason for ethnic violence was that minorities were excluded from political representation. Time after time, the Sinhalese politicians made efforts to engineer an electoral system which would encourage cross cutting ethnic coalitions. As the chapter showed, these attempts were often followed by backlashes. In spite of the initial political will, ethnic majority politicians always found newer and newer ways to exclude minorities. This, as the chapter argued, was not necessarily an

²⁷⁶ MSM Ayub. Whither Smaller Parties in the UPFA? March 22, 2010, np.

²⁷⁷ Rajitha Senaratne, minister on February 28 2010 in Ayub 2010

²⁷⁸ Ayub 2010, np.

²⁷⁹ Edrisinha, 2008. p. 785

irrational move; a minority of only 12% can be sacrificed for getting the majority voters. The chapter argued, however, that in spite of this difficult incentive structure, efforts should be made to create accommodating institutions.

The chapter argued that there are incremental changes that can be instantly introduced. Short term recommendations included focussing on interethnic trust building and creating the institutional basis for interethnic accommodation or bargaining. However, the chapter showed that within five years, the ethnic minorities of Sri Lanka may face a situation in which their interests will align with that of President Rajapaksa. After this term he has to choose between withdrawing from politics, creating a semi-autocratic political system, or reforming the electoral system. To prevent further violence and to achieve international acclaim, this report would strongly recommend President Rajapaksa choosing either the first or the last option.

Indeed, this is an historic opportunity. Should President Rajapaksa choose the electoral reform, he could create a new era of interethnic relations in Sri Lankan history.

References

- Ali, A. 1997. *The Muslim Factor in Sri Lankan Ethnic Crisis*. *Journal of Muslim Minority Affairs* 17, (2): 253-67.
- Anstey, Mark, Peter Harris, and Ben Reilly. 1998. *Democracy and Deep-Rooted Conflict: Options for Negotiators*. Handbook Series. Vol. 3. Stockholm, Sweden: International IDEA.
- Ayub, MSM Whither Smaller Parties In The UPFA? March 22, 2010
<<http://www.Dailymirror.lk/Print/Index.Php/Opinion1/6470-Whither-Smaller-Parties-In-The-Upfa.Html>>. April 2, 2010
- Bogaards, Matthijs. 2008. Comparative Strategies of political party regulation Reilly, Benjamin & Per Nordlund, eds., 2008 *Political Parties in Conflict-Prone Societies: Regulation, Engineering and Democratic Development*. United Nations University Press chs. 1, 2 & 3.
- Carey, J. M., and M. S. Shugart. 1995. Incentives to Cultivate a Personal Vote: A Rank Ordering Of Electoral Formulas. *Electoral Studies* 14,: 417-40.
- de Silva, CR. 1979. The Constitution of the Second Republic of Sri Lanka (1978) and its Significance. *Commonwealth & Comparative Politics* 17, (2): 192-209.
- Duverger, Maurice 1972, Factors in a Two-Party and Multiparty System, in *Party Politics and Pressure Groups* (New York: Thomas Y. Crowell, 23–32
- Edrisinha, Rohan. 2008. *Power-Sharing in Sri Lanka: Constitutional and Political Documents 1926-2008*. 1st Ed. Colombo: Cpa.
- Estevez-Abe, Margarita and Magyar, Zsuzsanna Small but Strong: The Role of Small Parties in Mixed Electoral Systems in Hungary, Italy and Japan, research paper, forthcoming
- EU Election Observation Mission. 2004. Parliamentary elections 2 April, 2004.
<http://ec.europa.eu/external_relations/human_rights/election_observation/sri_lanka_2005/final_report_en.pdf>. Last visited: 22 April, 2010
- Horowitz D. 1990 “Making Moderation Pay” In Joseph V. Montville, Ed, *Conflict and Peace Making In Multiethnic Societies* New York: Lexington Books
- Horowitz, D. 1991. *A Democratic South Africa? Constitutional Engineering in a Divided Society*. Berkeley: University Of California Press.
- Horowitz, D. 2003. Electoral Systems: A Primer for Decision Makers. *Journal of Democracy* 14(4):115-127.
- Horowitz, D. L. 2004. The Alternative Vote and Interethnic Moderation: A Reply to Fraenkel and Grofman. *Public Choice* 121, (3): 507-17.
- Jayanntha, Dilesh. 1992. *Electoral Allegiance In Sri Lanka*. Cambridge South Asian Studies. Cambridge England; New York: Cambridge University Press.
- Jayasuriya, L. 2005. *The Changing Face of Electoral Politics in Sri Lanka (1994-2004)*. Singapore: Marshall Cavendish International.
- Lanka: Rajapakse speaks in Tamil at UN. September 26, 2008 Rediff India Abroad
<http://www.rediff.com/news/2008/sep/26un.htm>. last visited 22 April, 2010
- Laponce, JA. 1957. The Protection of Minorities by the Electoral System. *Political Research Quarterly* 10, (2): 318.
- Lijphart, Arend. 1979. Consociation and Federation: Conceptual and Empirical Links. *Canadian Journal of Political Science* 12(3):499-515.
- Lijphart, Arend. 2004. Constitutional Design for Divided Societies. *Journal of Democracy* 15(2):96-109.

- Mahindapala H. L. D. , January 16,2010, Mahinda heading for victory; Fonseka heading for Oklahoma. Lankaweb .<http://www.lankaweb.com/news/items/2010/01/16/mahinda-heading-for-victory-fonseka-heading-for-oklahoma/> last visited 22 April, 2010
- Mainwaring, S. 1993. Presidentialism, Multipartyism, and Democracy: The Difficult Combination. *Comparative Political Studies* 26, (2): 198.
- Mainwaring, S. and Matthew S. Shugart. 1997. Juan Linz, Presidentialism and Democracy. *Comparative Politics*, Vol29(4)p.449-461
- Manning, C. and M. Antic. 2003. The Limits of Electoral Engineering. *Journal of Democracy* 14(3):45-59.
- Mishler, W., S. Finkel, and P. Peiris. 2007. The 2005 Presidential and 2004 Parliamentary Elections in Sri Lanka. *Electoral Studies* 26, (1): 205-9.
- Neto, O. A., and G. W. Cox. 1997. Electoral Institutions, Cleavage Structures, and the Number of Parties. *American Journal Of Political Science* 41, (1): 149-74.
- Norris, Pippa. 2002. Ballots Not Bullets: Testing Consociational Theories of Ethnic Conflict, Electoral Systems, and Democratization. in Andrew Reynolds, Ed., *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* Oxford University Press: Ch. 8
- Rae, D. W. 1967. *The Political Consequences of Electoral Laws*. Yale University Press.
- Rabushka, Alvin, and Kenneth A. Shepsle. 2009; 1972. *Politics in Plural Societies: A Theory of Democratic Instability*. Longman Classics in Political Science. 1st Ed. New York: Pearson/Longman.
- Reilly, Ben. 2001. *Democracy in Divided Societies: Electoral Engineering for Conflict Management*. Theories of Institutional Design. Cambridge; New York: Cambridge University Press.
- Reilly, Benjamin & Per Nordlund, eds., 2008 *Political Parties in Conflict-Prone Societies: Regulation, Engineering and Democratic Development*. United Nations University Press
- Reynolds, A. 2002. *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* Oxford University Press, USA
- Sabaratnam, Lakshmanan. 2001. *Ethnic Attachments in Sri Lanka: Social Change and Cultural Continuity*. 1st Ed. New York, NY: Palgrave
- Sisk, T. 1995. *Democratization in South Africa: The Elusive Social Contract*. Princeton: Princeton University Press.
- Sri Lanka: LTTE forcibly threw children into Vanni battle – Survey, Government, Sri Lanka <http://www.reliefweb.int/rw/rwb.nsf/db900sid/AZHU-83KMKL?OpenDocument>
- Taagepera, Rein. 2002. Designing Electoral Rules and Waiting for an Electoral System to Evolve in Andrew Reynolds, ed., *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*. Oxford: Oxford University Press, ch. 9.
- Warnapala, Y. and Z. B. Yehiya. 2005. Minority Electoral Politics: A Sri Lankan Case Study. *Journal of Asian and African Studies* 40(6):439-462.

Electronic Resources:

Constitution of Sri Lanka <http://www.priu.gov.lk/Cons/1978Constitution/Introduction.htm>
 Department of Census and Statistics-Sri Lanka www.statistics.gov.lk/

Department of Election Sri Lanka www.slections.gov.lk/

United National Party – Home www.unp.lk/

Welcome to MahindaRajapaksa.com www.mahindarajapaksa.com/

CHAPTER FOUR: ECONOMIC AND SOCIAL POLICIES TO MITIGATE RISK IN THE POST-CONFLICT SITUATION AND REDRESS GRIEVANCES TO PREVENT FUTURE CONFLICT - ANNA-MARIA CAPPELLA

Introduction

Despite being a developing country, Sri Lanka has always been praised for its achievements in human development relative to its South-Asian neighbours. Sen has referred to Sri Lanka and its particular development model as an ‘outlier’ because of high levels of social development despite relatively low per capita income, a population boom and low levels of economic development.²⁸⁰ Colonial inheritances set the foundation for a high development standard, and Sri Lanka’s social indicators such as literacy, health and education were envied by the developing world during the 1960s and 1970s, and remain among the best in South Asia.²⁸¹ These achievements demonstrated the success of the consistent investment in social and economic policies implemented by the country’s successive governments in a short period of time after political independence in 1948. However, the full benefits of a liberalized economy are yet to be achieved, largely because high defence expenditures have drained the national budget in recent years.²⁸² The protracted civil conflict has caused the policy-makers to lose ground in maintaining Sri Lanka’s reputation as a development success.

Sri Lanka is emerging from a 26-year civil war and anticipates a better future within the ongoing peace process. The decisive military victory of the Government of Sri Lanka over the *Liberation Tigers of Tamil Eelam* (LTTE) has opened up prospects for the country to push ahead with development priorities, so that Sri Lanka can work to achieve the level of human development that it has previously enjoyed. President Mahinda Rajapaksa (hereon President Rajapaksa) is expected to meet the development expectations of Sri Lankans, and has set an ambitious development program to regain economic growth and social stability, now that the civil war (that was an obstacle to development) is over. In addressing the nation President Rajapaksa stated that he believes “...that the dreams of Sri Lankans will become a reality in the near future.”²⁸³

President Rajapaksa is recognized by the Sri Lankan electorate as the national leader who liberated the country from the violence of the LTTE, and set the country on the path to peace and rapid economic development.²⁸⁴ The military victory over the LTTE is conclusive and there is little chance that it would regroup and return in the near future. As a result, the end of the conflict in May 2009 has given rise to a sense of euphoria and optimism that life in Sri Lanka will return to normal, that the state of emergency and check-points will be removed and that the economy will experience growth.²⁸⁵ However, it is irresponsible for the Government of Sri Lanka to understand the immediate post-conflict situation as secure. Instead the victory needs to be converted into a sustainable peace.

²⁸⁰ United Nations Research Institute for Social Development. (2008). “Country Paper: Development Strategies, Welfare Regime and Poverty Reduction in Sri Lanka.” *UNRISD Poverty Reduction and Policy Regimes*. 3.

²⁸¹ Nalapat, M.D. (2009). “From National Security to Human Security: The Challenge of Winning Peace in Sri Lanka: A Critique.” *Strategic Analysis*. 33:6, 828.

²⁸² Wategama, Chanuka, Nalaka Gunawardene and Hasitha Wickremasignhe. (2007). “Regional Human Development Report Sri Lanka: Promoting ICT for Human Development in Asia, Realizing the Millennium Development Goals.” *Asia Pacific Development Information Programme, UNDP*. 8.

²⁸³ Government of Sri Lanka website: <http://www.president.gov.lk/> (accessed: 03.21.10)

²⁸⁴ Ibid.

²⁸⁵ Senanyake, Darini Rajasingham. (2009). “From National Security to Human Security: The Challenge of Winning Peace in Sri Lanka.” *Strategic Analysis*. 33:6, 820.

The risk for a return to conflict remains a significant threat for Sri Lanka. Econometric analyses suggest that in the first decade of post-conflict peace, societies face roughly double the risk of returning to a conflict situation.²⁸⁶ Other long-term regional ethno-national conflicts point out that groups fighting for autonomy or rights for minorities may regroup and return years or decades later – as was the case in Nepal and Aceh, Indonesia – unless there is a political solution that addresses the root causes of conflict.²⁸⁷

Also, Sri Lanka faces a concomitant risk from the Tamil diaspora. The extent of military defeat of the LTTE in Sri Lanka has been massive, but the LTTE were not defeated in the diaspora. This group has already established a transnational government in exile, albeit one that eschews violence. The risk for reversion to conflict persists and is likely to arise in the future if the LTTE in the diaspora can retain the fiscal capacity to rebuild an insurgent force.²⁸⁸

Given these risks, the Government of Sri Lanka's social and economic development plan should implement policies supported by evidence that work to ensure a sustainable peace. In reviewing the literature, this report presents an economic perspective on the causes for Sri Lanka's civil war, based on the findings of econometric analysis that identify the empirical causes of civil war globally over the period of 1965-1999.²⁸⁹ Development economists have found that during this period, the risk of civil war has been systematically related to a few economic conditions, such as dependence on primary commodity exports and low national income. Conversely, objective measures of social grievance, such as income inequality, a lack of democracy, and ethnic and religious divisions, prove to have little effect on risk of renewed conflict.²⁹⁰

In considering the economic causes of civil war, this report seeks to offer a distinctive post-conflict development plan that considers Sri Lanka's national circumstances and mitigates the future risk of conflict. Post-conflict investments in social and economic development should be consistent with the economic theory of conflict, which argues that civil wars occur where insurgency is financially viable.²⁹¹ So, mitigating the risk of reversion to conflict requires removing the ability of groups like the LTTE from re-building their capacity.

The key idea is that insurgents will fail if they lack the ability to raise revenue and a following, which can be achieved through targeted policy development.²⁹² This report offers a bipartite economic and social policy agenda for the post-conflict situation in Sri Lanka. First, the report focuses on a policy agenda relevant for the immediate post-conflict situation to ensure that peace persists for the next decade. As the post-conflict policy framework is being implemented, policymakers can implement the conflict prevention policy framework to ensure that a long-term national development process does not contribute to future political conflict. This policy agenda will require the Government of Sri Lanka to build a credible reputation by addressing the subjective grievances of both the Sinhalese and the Tamils and ensuring that the path of

²⁸⁶ Collier, Paul, Anke Hoeffler and Mans Soderbom. (2006). "Post-Conflict Risks." *Centre for the Study of African Economies with the United Nations Department of Peace Keeping Operations and the World Bank*. 19.

²⁸⁷ Senanyake, Darini Rajasingham. (2009). "From National Security to Human Security: The Challenge of Winning Peace in Sri Lanka." *Strategic Analysis*. 33:6, 820.

²⁸⁸ JPJ2041: Hon. Bob Rae's Commentary on Team Sri Lanka's Presentation (09.04.10)

²⁸⁹ Collier, Paul, Anke Hoeffler and Mans Soderbom. (2006). "Post-Conflict Risks." *Centre for the Study of African Economies with the United Nations Department of Peace Keeping Operations and the World Bank*. 19.

²⁹⁰ Ibid.

²⁹¹ Ibid., 2.

²⁹² Under this view, insurgents are not public-spirited heroes fighting against injustice. Recent econometric analyses suggest that groups like the LTTE are the "ultimate manifestation of organized crime." Here, groups engaged in political conflict are viewed as carrying out a large-scale predation of productive economic activities. The predation thesis argues that the risks of these groups engaging in conflict is mitigated by making it harder for organizations to get established; by cutting out the fiscal capacity of groups to fund their campaigns.

development does not contribute to political conflict.²⁹³ This stage requires rebuilding a dysfunctional democracy whose institutions have been significantly eroded over the protracted conflict by war-induced emergency rule and militarization and a centrist government that sanctions its authoritarian actions.²⁹⁴

Lastly, it is important to concede that although the immediate situation requires that the post-conflict policy agenda is implemented to ensure that insurgents will not rebuild, the conflict prevention policy framework can be implemented at the same time, provided the capacity exists within the Government of Sri Lanka to implement both agendas. It is unfortunate that the post-conflict approach cannot immediately deal with the subjective grievances, but this report aims to offer an economic and social development policy agenda that is realistic and enduring. This requires mitigating the risks for future conflict to ensure that the Government of Sri Lanka can maintain peace into the future and avoid reliving its reputation for a state that experiences regular cycles of violence. Also, when political stability is more likely, the investments in economic and social policy initiatives to address subjective grievances, like addressing inequality and increasing political rights, are more secure and are less likely to be forgone by a return of civil conflict.

The Fiscal Challenge: Shifting Expenditures from National Security to Human Security

Sri Lanka has recorded a fairly solid and consistent economic performance since 1990, but there is evidence that the economy has been slowly running out of steam and is “mounting disillusionment” with the government and political leadership in general.²⁹⁵ Also, given the deteriorating international environment and scale of human rights abuses from the war, including those perpetrated by the Government of Sri Lanka, there may well be more political turbulence in the future. Nevertheless, this report argues that if President Rajapaksa desires to win the peace and secure a legacy as “the father of the nation,” the Government of Sri Lanka must exercise restraint in defence spending and instead invest in policies that target the economic causes of political conflict in the aforementioned policy framework. This section will explain the rationale for these recommendations in turn.

President Rajapaksa needs to reallocate money away from defence spending and invest in policies that get at the economic causes of political conflict. Collier and Hoeffler investigate whether the general strategy of governments to maintain their own military spending during the post conflict decade at levels much closer to wartime than to peace, and find that this behaviour substantially increases the risk of future political conflict. The economists find that far from increased military spending being effective as a deterrent, in post-conflict circumstances, it actually significantly and substantially increases the risk of further conflict.²⁹⁶ They argue that a high level of military spending may inadvertently signal to aggrieved groups that the government intends to renege on its responsibility to be inclusive, inducing insurgent groups to pre-emptively revert to conflict.²⁹⁷ The implication for the Government of Sri Lanka is that it should aim to downsize its military rapidly and substantially in the post-conflict period.²⁹⁸

²⁹³ Abeyratne, Sirimal. (2004). “Economic Roots of Political Conflict: The Case of Sri Lanka.” *The World Economy*. 27:8, 1295.

²⁹⁴ Senanyake, Darini Rajasingham. (2009). “From National Security to Human Security: The Challenge of Winning Peace in Sri Lanka.” *Strategic Analysis*. 33:6, 821.

²⁹⁵ Kelegama, Saman. (2005) “Economic Policy in Sri Lanka: Issues and Debates.” *Asia-Pacific Development Journal*. 12(1): 137.

²⁹⁶ Collier, Paul, Anke Hoeffler and Mans Soderbom. (2006). “Post-Conflict Risks.” *Centre for the Study of African Economies with the United Nations Department of Peace Keeping Operations and the World Bank*. 9.

²⁹⁷ Ibid.

²⁹⁸ The key African example of this process and its manifest success is Mozambique.

This is further supported by evidence that the Sri Lankan economy has been contracting as a consequence of defence expenditures, which have surpassed social expenditures since 1992, contributing to a decline in productivity.²⁹⁹ Most significantly, in 2000, defence expenditures totalled 17 billion, while social expenditures (inclusive of health, education, post-secondary education and anti-poverty schemes) totalled 9.8 billion.³⁰⁰ Also, the defence expenditure as a proportion of the Gross Domestic Product (GDP) in Sri Lanka is the highest in South Asia and among countries in conflict internationally, at 4.5% in 2000.³⁰¹ Such high defence expenditures are not sustainable in the long-term. In 2001, for the first time in post-independence history, the country recorded negative growth, and total public debt was greater than the GDP of the country.

A substantive peace will require a change in the currently dominant state-centric national security mindset that relies on high levels of militarization and militarism now that an immediate LTTE threat is over. Thus, it is advised that President Rajapaksa restrain defence spending and transition away from a labour-intensive military strategy by re-allocating funds to invest in policies that get at the economic causes of political conflict (these policies will be further explained in subsequent sections describing the post-conflict and conflict prevention policy agendas).

A policy priority to mitigate the risk of future conflict is to raise national income and provide economic and employment security for individuals. Peace is most likely to endure in Sri Lanka if the government can address long-standing economic grievances of Sri Lankans that initially gave rise to violence in the first instance. In the case of Sri Lanka, it is important to consider that although the majority of the literature on the origin of conflict depicts the direction of causation as running from political conflict to economic development, it ignores the possibility that a particular pattern of the development process itself has led to political conflict.³⁰² If we accept this argument, the Sri Lankan government has an incentive to design economic and social policy so that it avoids future conflict by ameliorating the inequities that have arisen from development that have contributed to political conflict.

Although the Tamil separatist movement has attracted overwhelming attention, the civil war in Sri Lanka had two major facets, and two sets of subjective grievances need to be redressed. The Rajapaksa government is challenged with addressing the subjective grievances of both the Sinhalese and the Tamils. The ethnic conflict includes two separate initiatives, namely the Tamil separatist movement, which is widely known to be between the majority Sinhala and the minority Tamil communities; and the militant movement of the Sinhala community and the *Janatha Vimukthi Peramuna* (JVP) youth uprising in the south, which has erupted into armed struggles with the aim of changing the existing political regime.³⁰³

However, if we look past these bifurcated grievances it is possible to understand both conflicts, which both arose in the early 1970s and late 1980s, as the simultaneous emergence of ambitious radical youth from both Sinhala and Tamil communities against the established traditional political system of the country from an economic background; where the economy continued to fail in meeting the aspirations of these youth.³⁰⁴

Returning to the economic theory of political conflict, this thesis contrasts popular perceptions that understand insurgencies as a protest motivated by genuine and extreme

²⁹⁹ Ibid.

³⁰⁰ Central Bank of Sri Lanka, *Annual Report*, 2001.

³⁰¹ Central Bank of Sri Lanka, *Annual Report*, 2001.

³⁰² Abeyratne, Sirimal. (2004). "Economic Roots of Political Conflict: The Case of Sri Lanka." *The World Economy*. 27:8, 1298

³⁰³ Ibid.

³⁰⁴ Ibid., 1249

grievance, but instead understands rebellion as something that is better understood from the distinctive circumstances in which it is feasible, rather than worrying about the underlying causes that motivate these agents to action.³⁰⁵ Lastly, the implication for Sri Lanka, is that poor policy decisions in post-colonial nation-building democratization failed to balance the expectations of the electorates, negatively impacted economic and social development, and as a consequence of missed economic opportunities, spurred two simultaneous economic grievances that contributed to political conflict.

Although the past illustrates a case of missed economic and social policy opportunities, an incentive exists for President Rajapaksa to make the recommended policy shift and reallocate fiscal resources. The end of the war marks a complete transformation of the security situation and the decisive military victory of the Government of Sri Lanka over the LTTE has opened up an opportunity, namely for the country to sustain peace in the long term and push for pragmatic social and economic reforms targeted at conflict prevention. The improvement of the security situation can be used as a positive force to accelerate economic growth and enables policymakers now to focus systematically on improving opportunities for Sri Lankans as a way to insure against future political uprisings in which groups access violence and avenues outside the political process as a means of achieving their variegated ends. Improving economic security for individuals through the recommended policy agendas is likely to work to address the grievances of both the Tamils, who feel like a minority relative to the Sinhalese, and the Sinhalese, who feel like a minority relative to Tamils in the Indian sub-continent and those in Tamil Nadu.³⁰⁶

The government-sanctioned economic and social development policies consist of several infrastructure projects, which include: the construction of harbours, major highways, an international airport at Hambantota, and several power stations in the North Western Province.³⁰⁷ These projects are timely since it is important for the Rajapaksa Government to implement development programmes that are “shovel ready” and get individuals into employment, boost the economy and raise national income and productivity. However, it is also important to simultaneously consider the long-term sustainable development of the Sri Lankan economy. There is a need to ensure that, when the post-war economy transitions from post-war reconstruction infrastructure projects to a more knowledge-based economy, Sri Lankans can transition easily and equitably into jobs so that they don’t experience a protracted state of unemployment, and that the state does not experience low national income.

The latter two consequences have been demonstrated to be statistically significant risk factors for civil war in Sri Lanka. In the colonial past, the British promoted the Tamil minority community over the ethnically dominant Sinhala majority, and decolonization left a disproportionate number of senior civil administration positions held by Tamil, Eurasian and Burgher minorities.³⁰⁸ The resulting lack of economic opportunities for educated Sinhala youth contributed to the JVP uprisings. Thus, the pressure to make good on the peace dividend will also be compounded by pressing economic issues, increasingly characterized by unemployment, rising income inequality and the rising cost of living. For instance, the employment needs of poor Sinhala and Tamil youth, many of whom were formerly absorbed into the military service

³⁰⁵ Collier, Paul. (2007). “Post-Conflict Recovery: How Should Policies be Distinctive?” *Centre for the Study of African Economies* Oxford University. 13

³⁰⁶ JPJ2041: Hon. Bob Rae’s Commentary on Team Sri Lanka’s Presentation (09.04.10)

³⁰⁷ United Nations Research Institute for Social Development. (2008). “Country Paper: Development Strategies, Welfare Regime and Poverty Reduction in Sri Lanka.” *UNRISD Poverty Reduction and Policy Regimes*. 17.

³⁰⁸ Senanyake, Darini Rajasingham. (2009). “From National Security to Human Security: The Challenge of Winning Peace in Sri Lanka.” *Strategic Analysis*. 33:6, 823.

of their respective forces, now need to be rehabilitated and reintegrated as the military is downsized.

If the Government of Sri Lanka insufficiently provides these services the country could experience another conflict since these concerns, if left unheeded, will create the economic conditions that fail to meet the aspirations of Sri Lankans that caused the simultaneous emergence of ambitious radical youth from both Sinhala and Tamil communities in the 1970s that marked the onset of conflict.

Post-Conflict: How to Immediately Ensure that Peace Persists

As a post-conflict society, Sri Lanka faces two policy challenges, namely rapid economic recovery and risk reduction. Post-conflict peace in Sri Lanka is fragile, and the threat of relapse remains imminent; the synthetic overview to this country report outlines the cyclical nature of the civil conflict and explains that peace is often fraught with the risk of renewed hostilities.³⁰⁹

Fortunately distinctive policy reforms have been found to be effective in the post-conflict context. Although there is no academic consensus or agreed theory on the causes of violent conflict in post-conflict situations, recent econometric studies of the causes of civil war have emphasized that determining the feasibility of insurgency is more important in the immediate post conflict period than the subjective grievances influencing the motivations of these groups.³¹⁰ The government of Sri Lanka ought to focus on post-war reconstruction with this economic argument in mind, because it needs to both identify the threats to maintaining peace and implement policies likely to protect against recurring conflict. In the immediate post-conflict period it is advisable for Rajapaksa to acknowledge the following challenges to peace³¹¹ and to consider addressing the following risks via the concomitant policy options and suggested recommendations:

♦ *Rapid Growth Will Assist Peace*

Rapid growth will mitigate the risk of future conflict because it builds government capacity, without contributing to national defence spending (which increases the risk of conflict), to protect against renewed conflict. After protracted conflict situations, economies tend to bounce back since they operate below their productive potential during a conflict. For example, economists note that in the first five years of peace after a war, economies on average grow at 6% a year.³¹² However, achieving rapid growth is challenging because during and after conflict uncertainty encourages people to behave opportunistically.³¹³ As this behaviour becomes more commonplace, society suffers a collapse into low trust, and it takes concerted action to change expectations, and meanwhile, many functions which other governments could rely on do not function.³¹⁴

The recommendation proposed to achieve immediate post-conflict peace is for the

³⁰⁹ Collier, Paul. (2004). "Economic Causes of Civil Conflict and their Implications for Policy." *Department of Economics*. Oxford University. 16.

³¹⁰ Ibid.

³¹¹ The majority of these policy alternatives were adapted from the literature on the economic theory of conflict.

³¹² Collier, Paul, Anke Hoeffler and Mans Soderbom. (2006). "Post-Conflict Risks." *Centre for the Study of African Economies with the United Nations Department of Peace Keeping Operations and the World Bank*. 12

³¹³ Collier, Paul. (2004). "Economic Causes of Civil Conflict and their Implications for Policy." *Department of Economics*. Oxford University. 1-26.

³¹⁴ Ibid.

Government of Sri Lanka to respond to the ‘opportunistic behaviour’ problem by creating coordinated changes in expectations both within the military and in government institutions through improving individual economic opportunities. Also, the government can win the peace and maintain economic growth by bringing inside the diaspora, who can play a spoiler role in maintaining the peace through the investment of their remittances. The Government of Sri Lanka can encourage the diaspora to direct their money towards improving the economic wellbeing and post-conflict recovery of Tamils instead of directing fundraising to the LTTE in the diaspora. These two policy proposals are explained in turn in further detail.

♦ *Offering Economic Opportunities to Address Entrenched Group Grievances*

The LTTE has built an effective military capability, in part by entrenching ethnic group grievances among Tamils for the purpose of political conflict. Here, it is important to recognize the metamorphosis of the LTTE from a hero of Tamil resistance to an authoritarian leader, who persecuted and killed all actual or putative challengers.³¹⁵ Rather than building consensus among the different Tamil groups the LTTE sought to eliminate them. The poor decision-making on the part of the LTTE is an opportunity for the Government of Sri Lanka to win the peace because the violence unleashed by the LTTE against moderate Tamils has left them more marginalized and traumatized than when the armed conflict began.

The Government of Sri Lanka is challenged with the need to re-direct the group grievances and intense political conflicts that exist to frame the economically motivated political conflict into a democratic process to establish a tradition of conducting their political conflict non-violently. There are two policy alternatives and recommendations for peace. On one hand peace requires that the intense political conflict continue democratically, but that the military option of conducting it should be made infeasible, and on the other hand peace requires that the political conflict itself be resolved. Each of these alternatives is difficult to achieve because Sri Lankans have become accustomed to violence, and as a result the norms in society that inhibit political violence have been eroded.

Resolving political conflict requires eliminating the ethnically framed economic grievances, or an alternate option is to transform the insurgent group into a conventional political party.³¹⁶ The latter option is largely unrealistic in the near future due to the deaths of the LTTE leadership, so it is recommended that the Government of Sri Lanka focus on resolving the political conflict by addressing economic grievances, which requires demobilizing former combatants and assisting the return of all Sri Lankans to civilian life.³¹⁷ President Rajapaksa should embrace this opportunity to win over the support of different stakeholders and move beyond a highly militarized state-centric national security paradigm. Instead of deeming Tamils opposed to the war as ‘traitors’, the Government of Sri Lanka should prioritize human security and development and welfare state principles, which at independence, had enabled the island to achieve the highest social indicators in South Asia.³¹⁸

³¹⁵ Senanyake, Darini Rajasingham. (2009). “From National Security to Human Security: The Challenge of Winning Peace in Sri Lanka.” *Strategic Analysis*. 33:6, 822.

³¹⁶ United Nations Research Institute for Social Development. (2008). “Country Paper: Development Strategies, Welfare Regime and Poverty Reduction in Sri Lanka.” *UNRISD Poverty Reduction and Policy Regimes*. 17.

³¹⁷ Ibid.

³¹⁸ Senanyake, Darini Rajasingham. (2009). “From National Security to Human Security: The Challenge of Winning Peace in Sri Lanka.” *Strategic Analysis*. 33:6, 823.

Here economic growth mitigates the risk of future violence through employment.³¹⁹ A recommended approach for the public service is to close the old civil service ministries, and establish a new, independent institution to which people are freshly recruited on an equitable basis and are subjected to more rigorous checks for honest conduct in exchange for higher pay.³²⁰ More important is the demobilization of the army. Both the Sri Lankan Army and LTTE combatants require highly specialized recruitment programs that are heavily dependent on young men. A minority of young men is pre-disposed towards violence and forms the base for the reversion to conflict in Sri Lanka. A real key to accomplishing this policy goal is for former combatants to be reintegrated into society via re-training programs that help them find jobs and generate income and address the economic impetus for reverting to conflict.

♦ *Redirecting the Support of Diaspora Communities*

Both the LTTE and moderate Tamils have formed powerful diasporas in North America, Europe, Australia, and parts of South Asia and Southeast Asia, from which remittances contributed to sustain their family members and communities as well as to subsidize the conflict in their homeland.³²¹ It was largely with the funds generated from the diaspora that the LTTE was able to operate a de facto state for almost a decade in the Northern and Eastern regions of Sri Lanka.³²²

This presents a risk of renewed conflict for President Rajapaksa because econometric analyses demonstrate that if a country has just ended a civil war and wants peace, a large diaspora increases its chances of conflict.³²³ This is particularly true for Sri Lanka because diaspora remittances have proven important for providing the fiscal capacity that has traditionally sustained the LTTE. The Government of Sri Lanka estimates that international fundraising by the LTTE approaches \$80 million a year.³²⁴ However, this is a contested estimate and the *Tamil Refugees Organization* (TRO) states that it collects approximately \$10,000 a month. Nevertheless, the crucial point remains that remittances are the key to funding the LTTE campaigns.

Although the leader of the LTTE Velupillai Prabhakaran, his intelligence chief Pottu Ammam and the LTTE's highest commanders were shot dead by security forces on May 18th 2009, the LTTE terrorist network likely persists in some form and could work to rebuild its effectiveness during the immediate post-conflict period.³²⁵ What can be done to reduce this risk? Can the Government of Sri Lanka guide the diaspora into the peace process to mitigate the risk of funding the LTTE?³²⁶ The recommendation for peace is for the Government of Sri Lanka to target public relations campaigns in the diaspora and host countries. These campaigns should emphasize that Tamils living in the country would benefit from the diaspora redirecting its support away from funding the LTTE as a means to maintain peace since the costs of violence

³¹⁹ Ibid.

³²⁰ Ibid.

³²¹ Ibid.

³²² Cheran, R. (2003). "Diaspora Circulation and Transnationalism as Agents for Change in the Post Conflict Zones of Sri Lanka." *Berghof Foundation for Conflict Management, Berlin, Germany*. 14.

³²³ Collier, Paul. (2004). "Economic Causes of Civil Conflict and their Implications for Policy." *Department of Economics*. Oxford University. 13.

³²⁴ Cheran, R. (2003). "Diaspora Circulation and Transnationalism as Agents for Change in the Post Conflict Zones of Sri Lanka." *Berghof Foundation for Conflict Management, Berlin, Germany*. 7.

³²⁵ Collier, Paul. (2007). "Post-Conflict Recovery: How Should Policies be Distinctive?" *Centre for the Study of African Economies* Oxford University. 3.

³²⁶ Ibid.

are so high. Although the diaspora are often criticized for having a ‘frozen in time’ perspective (i.e., that diasporas perceive the situation in their country of origin to be just as it was when they left) these individuals can be targeted through public campaigns and persuaded of the current situation on the ground.³²⁷ These campaigns can inform the diaspora that they bear none of the costs of what their contributions cause in terms of domestic conflict, and that investing in the renewal of the LTTE results in a high cost of violence to Tamils in Sri Lanka. President Rajapaksa can frame diaspora financial support as a choice between having a constructive or a destructive role in the lives of Tamils on the ground in Sri Lanka. A complementary policy is to build global connections with the governments of the countries in which the diaspora reside to put clear limits on the activities of the diaspora organizations, e.g., policies could delineate that political support for violent rebel organizations is legitimate, but that supplying material aid is not.³²⁸

Lastly, the Government of Sri Lanka can consider the diaspora as a potentially major asset for the development process, with skills and business connections.³²⁹ The north and east have been severely damaged by the war and rebuilding is a major challenge. One major difficulty is the availability of knowledge capital (experts and people with diverse skills) schools, universities, hospitals and technical institutions are under-staffed and lack qualified personnel.³³⁰ In addition to financial support through remittances, capacity building is another area through which the Tamil diaspora can readily play an important role. *Tromso Tamil Sangam* in Norway in collaboration with the University of Tromso is involved in two major projects, i.e., establishing a faculty of medicine in the Eastern University and setting up a faculty to oversee the development of Fisheries in Jaffna. Teachers and experts will be provided to these faculties on a rotational basis to build local capacity; and the diaspora can play a critical role in equitable economic and social redevelopment.³³¹

Conflict-Prevention: A National Development Plan that Addresses the Economic Roots of Conflict

It is important for the government of Sri Lanka to focus on the nexus between conflict and economic development and not to disproportionately analyze the conflict in terms of ethnic grievances. Instead the Government of Sri Lanka should focus on how the path of economic development in the past contributed to political conflict. This is particularly important for Rajapaksa because the root causes of political and ethnic conflict are likely to persist well beyond ethnic differences and even though the LTTE have been defeated, an insurgent group may threaten the existing political regime or thwart peace in the future. As a result, once the aforementioned post-conflict policies have been implemented, the Government of Sri Lanka can concurrently transition to the conflict prevention policy agenda. The crucial step here is to decompose the overall risk and put the most effort into reducing those risks that are most amenable to policy interventions.

To begin, it is important to recognize the historical contradictions in the development process that contributed to the conflict situation from which the Tamil separatist movement

³²⁷ JPI2041: Hon. Bob Rae’s Commentary on Team Sri Lanka’s Presentation (09.04.10)

³²⁸ Collier, Paul, Anke Hoeffler and Mans Soderbom. (2006). “Post-Conflict Risks.” *Centre for the Study of African Economies with the United Nations Department of Peace Keeping Operations and the World Bank*. 1-19.

³²⁹ Ibid, 13.

³³⁰ Ibid.

³³¹ Ibid, 14.

framed its resistance by exploiting the ethnic character of the contradictions in economic development.³³² Here, Malaysia is a good regional comparator for assessing the challenges to Sri Lanka's post-independence economic performance and ethnic conflict.³³³ At independence in 1957, Malaysia shared much in common with Sri Lanka in terms of its economic, social and cultural factors, including ethnic composition and the inequalities between ethnic groups.¹ It exhibited a similar political conflict between the majority Malay and the minority Chinese communities by the end of the 1960s. Yet, Malaysia was able to avoid the possibilities of its potential ethnic conflict and achieved sustainable growth alongside the promotion of employment and equity. Sri Lanka failed in lessening its potential for political conflict and this resulted in civil war. An important question then, is why did Sri Lanka gradually deteriorate into a state of large-scale protracted political conflict, when a similar country achieved rapid economic development while maintaining a similarly pluralistic society? What are some structural contributors to political conflict that the Government of Sri Lanka needs to prevent against in moving forward with post-war reconstruction?

In providing evidence-based policy options, several econometric analyses that conduct quantitative studies of the causes of civil war find that variables which are most readily interpreted as indicators of the feasibility of civil war are: low per capita income, slow economic growth and large exports of natural resources.³³⁴ Also, these analyses demonstrate that the defining feature of civil war is the emergence and persistence of a viable rebel army like the LTTE. Measures of social grievance, such as inequality, lack of democracy and ethnic and religious divisions have been shown to have little systematic effect on the risk of conflict.³³⁵ These economic dimensions that increase the risk of civil war offer significant opportunities for the Government of Sri Lanka to be proactive in conflict prevention. This section identifies several structural contributors to political conflict and recommends policy options to prevent future conflict.

♦ *GDP Concentrated on Export Commodities*

Countries that have a substantial share of their GDP coming from the export of primary commodities are radically more at risk of conflict.³³⁶ Fortunately Sri Lanka has been able to sustain economic growth throughout its political conflict with the exception of 2001 when the economy contracted by 1.5%. This risk factor posed by export commodities is slight in Sri Lanka because the GDP is not concentrated heavily on natural resource exports. Instead, GDP is comprised of: agriculture 15.5%, the service sector 57.7%, and industry 27% (mainly textiles).³³⁷

In preventing future conflict, it is advised that the Government of Sri Lanka should continue to pursue a liberalized economy but should strive for more diverse trading partners. The historical political instability and the reputation of the current government as an increasingly authoritarian and corrupt regime are impacting the government's ability to move forward and stymie its ability to attract foreign direct investment or developing diversified trading partnerships. Sri Lanka's lean to authoritarianism and its deepening of political and economic

³³² Abeyratne, Sirimal. (2004). "Economic Roots of Political Conflict: The Case of Sri Lanka." *The World Economy*. 27:8, 1295.

³³³ Ibid.

³³⁴ Collier, Paul, Anke Hoeffler and Mans Soderbom. (2006). "Post-Conflict Risks." *Centre for the Study of African Economies with the United Nations Department of Peace Keeping Operations and the World Bank*. 15.

³³⁵ Ibid.

³³⁶ Ibid.

³³⁷ United Nations Research Institute for Social Development. (2008). "Country Paper: Development Strategies, Welfare Regime and Poverty Reduction in Sri Lanka." *UNRISD Poverty Reduction and Policy Regimes*. 42.

ties with authoritarian regimes such as China, Iran and Burma alienate the country from developing relationships with liberal democratic countries, like India.

Both India and Sri Lanka are likely to benefit from an improved economic relationship. India, as a democratic developing country and rising economic superpower, has a geopolitical and economic interest in sustainable peace in Sri Lanka, since instability in Sri Lanka will threaten India's national security situation by way of geographic proximity and diaspora communities. At the same time Sri Lanka would enjoy increased economic opportunities internationally among liberal democratic countries, including those countries hosting the diaspora, if it reoriented its current foreign policy relationships away from authoritarian regimes.

♦ *Geography and History Matter*

If a country's population is highly geographically dispersed, then the country is harder for the government to control than if everyone lives in the same small area. A country's history is also significant because if a country has recently had a civil war its risk of future political conflict is much higher. Econometric studies indicate that immediately after the end of hostilities, as is the case for Sri Lanka, there is a 40% chance of further conflict, which falls around 1 percentage point for each year of peace.³³⁸ In considering how to prevent future conflict through post-war reconstruction, the Government of Sri Lanka should carefully consider its resettlement plans and opt for spatially concentrating people as much as possible in its land use planning because a geographically disparate population increases the risk of political conflict.

The most pressing resettlement priority in Sri Lanka is ensuring that internally displaced peoples (IDPs) return to their homes. The Sri Lankan government needs to provide resettlement services to more than 250,000 people who were displaced by the war in the north and east of the country. At the moment, Tamils are housed in state-run camps with the help of aid agencies. However, there have been strong criticisms from human rights groups about the living conditions and the lack of freedom of movement in these "welfare camps." In considering the relocation of IDPs, the government could promote enhancing land tenure and property rights and map the spatial concentration of residents as it proceeds in post-conflict development and reconstruction planning. Also, the implementation of a comprehensive rights-based policy on home, land and property restitution is vital to ensure that a durable solution is in place for returnees in the north and east where land is the major asset for most people, and agriculture comprises a large share of individual income as land plays a dominant role in the economic and social lives of the rural poor.³³⁹

Another land-based policy option is to ensure that farming households in the north and east benefit from programmes designed to improve their livelihoods and enhance their participation in the marketing and selling of their products.³⁴⁰ In conjunction with public education programmes to build human capital, agricultural and microfinance programmes can help small producers, women, landless households and young people in rural areas as these programmes demonstrate good faith efforts by the government toward addressing grievances. Lastly, financing these policy options is feasible, but requires that President Rajapaksa limit the

³³⁸ Ibid.

³³⁹ Ibid.

³⁴⁰ Senanyake, Darini Rajasingham. (2009). "From National Security to Human Security: The Challenge of Winning Peace in Sri Lanka." *Strategic Analysis*. 33:6, 823.

authoritarian nature of his government to ensure loans from international financial institutions and donor states are retained.

♦ *The Persistent Risk of Political Conflict Created By Ethnic Dominance*

Development economists suggest that the ethnic and religious composition of a country is important to consider in preventing future political conflict. If there is one dominant ethnic group that constitutes between 45% and 90% of the population, enough to give it control but not enough to make discrimination against a minority pointless, the risk of conflict doubles.³⁴¹ In Sri Lanka, the Tamils are a weak minority of around 12% of the population, and can be easily exploited by the Sinhalese majority. As a result Tamils may be sufficiently fearful of permanent exploitation that they decide to return to armed resistance if democracy itself is not sufficient reassurance of representation and human and political rights.

On the other hand, while ethnic dominance is a problem, ethnic and religious diversity does not make a society more dangerous – in fact it makes it safer. A country that is ethnically and religiously homogenous is dangerous, and increases the risk of conflict.³⁴² By comparison, a country with ethnic and religious diversity has significantly less risk of political conflict because diversity limits the commonality between potential recruits and makes it difficult for insurgent groups to achieve organizational cohesion and a common motivation to bear arms. A diverse population also makes it difficult to recruit a sufficiently large homogenous force that can cooperate and be viable within a short period of time.

However, there are limited policy solutions to increasing ethnic diversity in Sri Lanka. The most reasonable policy option to resolve this challenge would be the provision of constitutional guarantees for ethnic minorities. However, this alternative is moot in such a low-trust environment, which follows 26 years of ethnic conflict and would only be feasible in the longer-term. To address this policy challenge the most viable option for Sri Lanka is to engage in their party oversight and call on the international community to provide reassurance through an extended phase of military presence and its own guarantees such as free reporting.³⁴³

On the other hand, the narrative of perpetual ‘ethnic’ conflict ignores the fact that for most of the island’s history, prior to poor national economic development policies and decolonization, Sinhala and Tamil-speaking communities lived together peacefully and intermarried. The island also has other diverse communities, including a significant Muslim population, the Christian Eurasian Burghers, as well as the indigenous Vedda or Vanniattoo communities.³⁴⁴ Hopefully the risk posed by ethnic dominance can be addressed by the other policy options proposed in this chapter which can minimize the economic causes of conflict by alternate means.

Conclusion

At stake for President Rajapaksa and the Sri Lankan people, is the dual tension between a country that could potentially back-slide into the longstanding entrenched ethnic conflict from which it has now emerged; or alternatively, the prospect of a politically united and stable Sri

³⁴¹ Collier, Paul, Anke Hoeffler and Mans Soderbom. (2006). “Post-Conflict Risks.” *Centre for the Study of African Economies with the United Nations Department of Peace Keeping Operations and the World Bank*. 16.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Abeyratne, Sirimal. (2004). “Economic Roots of Political Conflict: The Case of Sri Lanka.” *The World Economy*. 27:8, 1298.

Lanka, that is able to forge ahead toward a more productive and promising era of social, political and economic prosperity and development. Therefore it is incumbent upon the government of Sri Lanka to come to grips with a national economic and social development agenda, like the one offered in this chapter that mitigates the risk of reverting to violence.

Summary of Proposed Policy Options

Agenda for the Immediate Post-Conflict Situation:

- ♦ Restraining military spending, as it increases the risk of renewed conflict, and redirecting funds to investing in economic opportunities to improve individual human security.
- ♦ Getting to the economic roots of political conflict by raising national income through employment opportunities for Sri Lankans and demobilized combatants.
- ♦ Harnessing the support of Tamil diasporas and the international community to direct funds toward economic development and away from financing the return of the LTTE in the future.

Agenda for Conflict Prevention Policies:

- ♦ The Government of Sri Lanka should continue to pursue a liberalized economy but should strive for more diverse trading partners. Sri Lanka should look to develop economic ties with India and shift away from its relationships with authoritarian regimes such as China, Iran and Burma.
- ♦ The Government of Sri Lanka should carefully consider its resettlement plans of IDPs and Tamils and opt for spatially concentrating people as much as possible in its land use planning because a geographically disparate population increases the risk of political conflict.

Bibliography

- Abeyratne, Sirimal. (2004). "Economic Roots of Political Conflict: The Case of Sri Lanka." *The World Economy*. 27:8, 1295-1314.
- Abeyratne, S. (2000) 'Policy and Political Issues of Economic Growth of Sri Lanka' in S.T. Hettige and M. Mayer (eds.) *Sri Lanka at Crossroads: Dilemmas and Prospects after 50 Years of Independence*, New Delhi, Macmillan
- Cheran, R. (2003). "Diaspora Circulation and Transnationalism as Agents for Change in the Post Conflict Zones of Sri Lanka." *Berghof Foundation for Conflict Management, Berlin, Germany*. 1-27
- Collier, Paul. (2007). "Post-Conflict Recovery: How Should Policies be Distinctive?" *Centre for the Study of African Economies* Oxford University. 1-23.
- Collier, Paul, Anke Hoeffler and Mans Soderbom. (2006). "Post-Conflict Risks." *Centre for the Study of African Economies in collaboration with the United Nations Department of Peace Keeping Operations and the World Bank*. 1-19.
- Collier, Paul. (2004). "Economic Causes of Civil Conflict and their Implications for Policy." *Department of Economics*. Oxford University. 1-26.
- Collier, P and Anke Hoeffler. (1998). 'On Economic Causes of Civil War.' *Oxford Economic Papers*, 50:563-573
- Horiwitz, Donald L. (1989). "Incentives and Behavior in the Ethnic Politics of Sri Lanka and Malaysia." *Third World Quarterly*. 11:4, 18-35.
- International Crisis Group. (2010). "The Sri Lankan Tamil Diaspora After the LTTE." *Asia Report No. 186. International Crisis Group*. 1-34.
- Jayasuriya, Laksiri. (2001) "Rethinking Social Development: Towards an Equitable Future for Sri Lanka." *South Asia Economic Journal*. 106 – 121.
- Kelegama, Saman. (2005) "Economic Policy in Sri Lanka: Issues and Debates." *Asia-Pacific Development Journal*. 12(1): 137 – 140.
- Kelegama, Saman. (2000) 'Development in Independent Sri Lanka: What Went Wrong?' *Economic and Political Weekly*, 35(17): 1477-1490
- Nalapat, M.D. (2009). "From National Security to Human Security: The Challenge of Winning Peace in Sri Lanka: A Critique." *Strategic Analysis*. 33:6, 828-830.
- Rangala, Anoni, D.D.M. Wiadyasekera, and Manu Tissers-Gunasekara. (2007). "Annual Report 2007." *Institute for Policy Studies of Sri Lanka*. 1-68.
- Sarvananthan, Muttukrishna. (2007). "Economy of the Conflict Region in Sri Lanka: From Embargo to Repression." *Policy Studies The East-West Centre*. 44, 1-100.
- Sen, Amartya. (1988) 'Sri Lanka's Achievements: How and When', in T.N. Srinivasan and P.K. Bardhan (eds.) *Rural Poverty in South Asia*, New York, Columbia University Press
- Senanyake, Darini Rajasingham. (2009). "From National Security to Human Security: The Challenge of Winning Peace in Sri Lanka." *Strategic Analysis*. 33:6, 820-827.
- Spencer, Jonathan. (1990). "Collective Violence and Everyday Practice in Sri Lanka." *Modern Asian Studies*. 24:3, 603-623.
- United Nations Research Institute for Social Development. (2008). "Country Paper: Development Strategies, Welfare Regime and Poverty Reduction in Sri Lanka." *UNRISD Project on Poverty Reduction and Policy Regimes*. 1-57.
- United Nations Research Institute for Social Development. (March 2007). "Conference News, Financing Social Policy." *Report of the UNRISD International Workshop, 1-2 March 2007*,

Geneva. 1-20.

Wattegama, Chanuka, Nalaka Gunawardene and Hasitha Wickremasignhe. (2007). “Regional Human Development Report Sri Lanka: Promoting ICT for Human Development in Asia, Realizing the Millennium Development Goals.” *Asia Pacific Development Information Programme, UNDP.* 1-185.

**CHAPTER FIVE: RESTRUCTURING LEGISLATURES: IMPROVING GOVERNMENT
EFFECTIVENESS, REBALANCING RELATIONS WITH THE EXECUTIVE, AND
REMOVING THE BASIS FOR VIOLENT POLITICAL ACTIVITY –
MICHAEL YOUASH**

Introduction

One of the lesser known and discussed casualties of Sri Lanka's tumultuous post-independence political history is that of parliament in the framework of executive-legislature relations. Since 1948, parliament's power has been in steady decline as successive waves of states of emergency and civil war necessitated the shifting of power to the executive, specifically the presidency after 1978. In almost all cases, constitutional reforms or change simply formalized on paper what was already established in practice – a parliament seen as a roadblock to effective, crisis decision-making.

Whereas persistent, severe security dilemmas combined with consistent use of states of emergency defined decade after decade of governance in Sri Lanka, the current situation offers a unique opportunity. The routing of the LTTE combined with highly successful presidential and parliamentary elections for the SLFP, provides a chance to consider a reform agenda within the framework of 'winning the peace' as set forth in the Synthetic Overview.

Reform of legislatures and restructuring of legislature-executive relations is necessary because disaffected segments of Sri Lanka's polity need meaningful space within the political system to participate. If they do not perceive legislatures as a place for realizing some measure of real involvement in the governance of their communities and also for being a legitimate, effective means for opposition politics they will eventually return to types of disruptive and violent political action outside the political process in securing their objectives. In the build-up to the parliamentary elections, political opposition in the southern provinces accused President Rajapaksa and his family of, "trying to rule this [part of southern Sri Lanka]," adding, "They're not leaving room for others to come forward and rule the country."³⁴⁵ The recent parliamentary elections generated the lowest voter turn-out since independence; an alarming indicator indeed for the legislature.³⁴⁶

Finally, the effective end of civil war removes a primary basis on which the general population can accept failures of government delivery of basic public goods and services. Expectations for economic, social and political dividends resulting from peace will be understandably high.

Thus, parliamentary reform serves two strategic goals which must be weighed together: effectiveness and efficiency in the provision of public goods and services while also reducing the predilection for opposition groups to hamstring governments with the politics of civil unrest at the best of times and violent opposition at the worst. Framing decision-making on parliamentary reform and a rebalancing of executive-legislature relations along this axis is meant to overcome the standard evaluation that strong executives and presidents are essential for overcoming political roadblocks to government delivery.³⁴⁷

³⁴⁵ BBC, "Rajapaksa out in force for Sri Lanka election", BBC World News, April 7, 2010. (<http://news.bbc.co.uk/2/hi/8607301.stm>).

³⁴⁶ BBC, "Rajapaksa triumphs in final count", BBC Sinhala. (http://www.bbc.co.uk/sinhala/news/story/2010/04/100421_electionfinal.shtml).

³⁴⁷ Wilson, A. Jeyaratnam. *The Gaullist System in Asia: The Constitution of Sri Lanka 1978*. (London: The MacMillan Press Ltd., 1980). P. 2.

Sri Lankan Parliamentarism Revisited and the ‘Imperative’ for Reform

The reports of the Colebrooke Commission in 1831 and 1832 provided the foundation for the 1833 Constitution in Sri Lanka. By establishing a ‘Legislative Council’ to compliment an Executive Council, it set the stage for a parliamentary form of government. The spirit of Colebrooke’s efforts aimed to destroy the “system of monopoly” of executive authority then vested in the Governor.³⁴⁸ The formation of the Executive Council which contained British/colonial representatives and Sri Lankan leaders was set astride an elected Legislative Council.

The Donoughmore Commission built on the growing tradition of providing for executive authority coupled with a strong parliamentary framework by developing the well-known ‘Executive Committee’ system. In putting forth the reports which underpinned the Donoughmore Constitution of 1931, the Earl of Donoughmore observed that, “The most striking characteristic of the Ceylon Constitution is the divorce of power from responsibility.”³⁴⁹

The Donoughmore Constitution’s ‘Executive Committee’ system resolved this problem significantly. “Each executive committee elected a chairman who acted as the minister. The minister could not take executive decisions all by himself. The executive committee members collectively took decisions.”³⁵⁰ Sir Ivor Jennings is attributed with the observation that the Donoughmore Constitution, largely because of institutions like the Executive Committee, “covered the awkward gap between representative and responsible government.”³⁵¹

The Soulbury Constitution of 1946, which became the Constitution of Sri Lanka until replaced in 1972, abolished the Executive Committee system and ushered in the standard type of cabinet government. However, the institutional memory of the ‘Executive Committee’ arrangement is still present, albeit faintly, in the national political discourse. In 2006, the Sri Lankan government’s official news portal carried an article entitled, “What Did We Get from the Executive Committee System of the Donoughmore Constitution 1931-1946”. The article reports that, “The executive committee system ... allowed the development of mutual trust and confidence among the members of each committee.” The article also makes explicit that, “The entire legislature ... came into the Executive Committees and thereby the [decision-making] process.”³⁵² The observations cited above are rather basic, but acknowledge some fairly fundamental political realities of executive-legislature relations and traditions that existed for decades after independence. What is equally important is the Government’s recognition of this discourse still being relevant for today’s political context.

The proposals in this chapter are firmly grounded in an appreciation of this important element in Sri Lanka’s history of executive-legislature relations. A return to Executive Committees is absolutely undesirable and unnecessary; they were a colonial institution after all. Yet, in terms of ethnic strife in Sri Lanka, it is also worth noting that the ITAK (Lanka Tamil State Party) memorandum of 1970 on constitutional reforms effectively called for a return of the Executive Committee structure.³⁵³ Today, the ‘divorcing of power from responsibility’ is just as real as when the Earl of Donoughmore recognized the same threat to stability in 1931.

³⁴⁸ Tyaagi, A.R. and K.K. Bhardwaj. *The Working of Parliamentary Democracy in Ceylon*. (Delhi: Sultan Chand & Sons, 1969). P. 23.

³⁴⁹ *Ibid.* P. 26.

³⁵⁰ Rahman, Taiabur. *Parliamentary Control and Government Accountability in South Asia*. (Routledge: New York, 2008). P. 176.

³⁵¹ Tyaagi, A.R. and K.K. Bhardwaj. *The Working of Parliamentary Democracy in Ceylon*. Delhi: Sultan Chand & Sons, 1969. P. 31.

³⁵² Sirimanne, Neetha. “What Did We Get from the Executive Committee System of the Donoughmore Constitution 1931-1946”. November 15, 2006. http://www.news.lk/index.php?option=com_content&task=view&id=1150&Itemid=52 (last accessed March 25, 2010)

³⁵³ Rohan Edrisinha et al, *Power-sharing in Sri Lanka: Constitutional and Political Documents 1926-2008* (Colombo: Centre for Policy Alternatives, 2008). P. 241.

Good Financial Governance – the ‘Other’ Imperative for Reform

The World Bank’s South Asia Region Financial Management Unit describes Sri Lanka’s public financial accountability framework as “archaic”. Specifically, it reports that the present system of financial management, “is no longer suitable to meet the needs of modern performance oriented management of public resources and effective delivery of government services.”³⁵⁴ This assessment is immediately followed by the observation that, “Parliament’s control over public funds is very weak.”³⁵⁵

According to the World Bank, the primary source of the system’s weakness stems from a “lack of mechanisms for monitoring and reporting outputs and outcomes of government expenditure,” and this in turn makes it “difficult to hold the executive accountable for performance.”³⁵⁶ This issue cannot be easily dismissed by the Government of Sri Lanka. It is engaging the Asian Development Bank for technical assistance on its public expenditure management system in order to access significant financial assistance within the framework of a country strategy for poverty reduction.

The Asian Development Bank is also reporting that Sri Lanka’s fiscal deficits of roughly 10 percent of gross domestic product are unsustainable. “The prevailing inefficiencies in both tax collection and expenditure management are affecting productive public investment and poverty reduction.”³⁵⁷

The reforms proposed below are not only aimed at promoting a break from the cycles of violence and upheaval, but also recognize the interdependence between that goal and supporting systems of prudent fiscal governance.

Reforms, Framework and Sequencing for National Parliament

Currently, the National State Assembly possesses ‘consultative committees’ that are paired to a department, however, their “functions are solely advisory, investigative, inquisitorial and suggestive.”³⁵⁸ Such functions need not be seen as limitations if the mechanisms and processes of the committees are conducive to robust oversight. The latent potential of Sri Lanka’s parliament to develop robust oversight systems stems from the Constitution and Standing Orders. These allow parliament to interrogate the annual budget and to require reductions to programmes.

Provision for the budget reduction authority allows members, “to raise a discussion on some particular aspect of government policy or on the activities of a ministry or a department in a ministry.”³⁵⁹ This is where the greatest opportunity exists for making parliament, through its consultative committees especially, a meaningful institution for elected representatives of all communities. Committee work on annual budgets are, “instruments of accountability, [because] estimates hearings ... provide regular opportunities ... to take advantage of the availability of public servants ... to clarify and explain the quite extensive budget and management information prepared by each agency.”³⁶⁰

³⁵⁴ World Bank. “Sri Lanka – Country Financial Accountability Assessment (final report)” (Washington, DC,: The World Bank, 2003). P. 5.

³⁵⁵ *Ibid.* P. 5.

³⁵⁶ *Ibid.* P. 7.

³⁵⁷ Asian Development Bank. “Technical Assistance to the Democratic Socialist Republic of Sri Lanka for Preparing the Public Sector Resource Management Report.” (August 2002). P. 3.

³⁵⁸ Wilson, A. Jeyaratnam. *The Gaullist System in Asia: The Constitution of Sri Lanka 1978*. (London: The MacMillan Press Ltd., 1980). P. 70.

³⁵⁹ *Ibid.* P. 85-86.

³⁶⁰ Uhr, John. *Deliberative Democracy in Australia: The Changing Role of Parliament*. (Melbourne: Cambridge University Press, 1998). P. 192.

Despite the existence of this institutional arrangement, the Sri Lankan parliament is deemed to be extremely weak even within the processing of the annual budget estimates.³⁶¹ The reasons for this are directly connected to other provisions in the Constitution and the Standing Orders of the National State Assembly. These problematic provisions constitute the focus of the rest of this section.

Currently, Standing Order 109 states that, “The duty of a Consultative Committee shall be to inquire into and report upon such matters as are referred to it by the Chairman or by Parliament, including any Bill, proposals for legislation, supplementary or other estimates, statements of expenditure, motions, annual reports or papers.”³⁶² This may not seem like a major constraint on a consultative committee’s agenda-setting prerogative. However, Standing Order 105 requires that, “[the] Chairman of a Consultative Committee shall be the Minister in charge of the subjects and functions which the Committee has been empowered to consider; provided that in the case of the Ministries which are in the charge of the President, the Deputy Minister of those Ministries shall be the Chairman of such Consultative Committees.”³⁶³

The leadership of the House, and more specifically the Minister who also serves as Chairman, determines the agenda of consultative committees. Without any structural incentive for a Minister to conduct robust oversight over their respective Ministry, it becomes clear that consultative committees lack any real agenda-setting capacity. Unable to determine their own agenda negates any possible confidence among committee members that their work can be directed at truly substantive issues.

Reform: Amend Standing Order 105, removing the requirement that Ministers serve as Chairpersons of their corresponding consultative committees. Insert wording requiring that committee members elect a Chairperson from within their ranks.

Sequencing: This is a primary condition for enabling a consultative committee’s oversight capacity and so should be implemented within 1 month of the first session of the incoming Parliament.

The next critical measure for developing the potential of consultative committees is in the area of their agenda-setting power.

Reform: Amend Standing Order 109, removing the language confining its work to matters referred to it by the Chairperson and the House. It can and should deal with matters referred to it by the House, but language should be included allowing the committee to also examine issues it determines necessary for the achievement of its goals in the governance process.

Sequencing: This should coincide with the abovementioned reform of Standing Order 105, being effected within 1 month of the first session of the incoming Parliament.

The current Standing Orders disallow open, public access to any committee meetings and their materials (reports, minutes, and other relevant documents generated by committee work). Standing Order 130(3) allows committees to sit outside of Parliament, presumably recognizing that extraordinary conditions may require such an option. It also reflects cognizance that the public may need to see committees in operation. Conversely, Standing Order 130(A)(i) only allows ‘strangers’ into a committee room with the approval of the Speaker. Standing Order 130(4) empowers a committee, with the permission of the Speaker, to call witnesses and

³⁶¹ World Bank. “Sri Lanka – Country Financial Accountability Assessment (final report)” (Washington, DC,: The World Bank, 2003). P. 5.

³⁶² Government of Sri Lanka, *Standing Orders of the Parliament of the Democratic Socialist Republic of Sri Lanka*. (as amended up to February 26, 1993).

³⁶³ *Ibid.*

technical experts to provide information necessary for a committee to successfully deal with an issue. This acknowledges that committees are highly constrained entities with respect to capacity and rely on outside sources of expertise in terms of their operations.

Greater public access, physically and in terms of inputs to committees, is required to empower committees in their work and to also bolster public understanding of the growing importance of parliamentary committees. Additionally, as committees begin to exercise their agenda-setting power, they will find themselves further constrained in terms of capacity at recognizing and helping resolve important societal challenges. The allowance for full public physical access should not come at the expense of security, but should also be seen in light of bolstering the legitimacy of parliament, by increasing public access to its committees.

Taiabur Rahman's interviews and surveys confirm the argument being set forth here. He reports that:

“Committees can hold public hearings on bills or any other matter in committee sessions which has hardly been practiced in Sri Lanka. The proposal of public hearings on legislative bills and other oversight matters was supported by 95 percent of the respondents. They felt that this kind of public hearing would add valuable information and inputs which would help the parliament to get public reactions on the bill and thus get the chance to improve the contents of the bill or the matters discussed prior to being passed by the House.”³⁶⁴

Reform: Reverse the situation which largely prohibits public access by amending Standing Orders 130(3) and 130(A)(i) to make committee meetings open to the public except in circumstances where a committee decides to hold a meeting *in camera*. Remove the language that requires permission from the Speaker to call for witnesses and technical experts by committees and provide language encouraging greater public engagement with committees.

Sequencing: It is advisable that committees be given time to adjust to their agenda-setting capacity before allowing public access to their operations as a norm. This reform should be instituted 6 months to 1 year after the agenda-setting capacity is in place and the Chairpersons are elected from among committee members.

The legislative process in Sri Lanka, not just for appropriations legislation, allows for committees to make extensive amendments and recommendations. However, Standing Orders (52 – 65) do not require a Bill to be referred to a committee. If a Bill is referred to a committee, it is sent to a ‘select committee’ established to examine that specific bill and dissolved upon completion of its work. Finally, a committee’s report may or may not be tabled for debate in the Parliament during its third reading for final passage.

The precariousness of Parliament’s meaningful involvement in the legislative process is reflected in the paucity of committee work on bills. Again, Rahman’s quantitative analysis is helpful. He found that, “the parliamentary committees play no major role in law-making. Government bills are rarely referred to committees for scrutiny. From October 2001 to December 2004, none but five private members’ bills were sent to committees for scrutiny.”³⁶⁵

Reform: Amend Standing Order 52 to require referral of bills to committees. Amend Standing Order 53 to *either* require that select committees constituted for bill review be comprised of

³⁶⁴ Rahman, Taiabur. *Parliamentary Control and Government Accountability in South Asia*. (Routledge: New York, 2008). P. 183.

³⁶⁵ *Ibid.* P. 183.

members from relevant consultative committees, or, abolish the select committee system and require that bills be sent to the relevant consultative committee, thereby enhancing committee expertise. Amend Standing Order 64 to require that every committee report on a bill be debated for at least some suitable duration of time to allow for meaningful consideration of a committee's report.

Sequencing: These reforms presume sufficient competence by committees that remains unproven. Consequently, this set of reforms should be instituted 1 year after the reforms providing consultative committees with agenda-setting powers.

The three sets of basic reforms addressed above are part of a bottom-up accountability, oversight and public participation regime intended to enable the necessary remedy for serious rifts in the current structure of accountability in executive-legislature relations. Presently, accountability is being misdirected in that it is moving from the legislature's members upwards to the Prime Minister and Cabinet (all drawn from the Legislature) while actual executive authority is exercised by the President and delegated downwards only sparingly to the Prime Minister and Cabinet.

The primary architect politically for this structure of executive-legislature relations is J.R. Jayewardene. The stability Jayewardene sought by establishing the Presidency never truly materialized. Despite not achieving the goal of stability, the position of the President is constantly growing more robust, such that the President, "is no longer *answerable* to the legislature; the Constitution only makes him *responsible* to Parliament. Then there is the fact that the Standing Orders of the House do not permit any reference to be made to him or his conduct questioned except on a substantive motion. Furthermore, the Prime Minister, members of the Cabinet and other ministers are entirely dependent on the President for their offices."³⁶⁶

Moreover, the President appoints Secretaries to each Ministry who work with the President in policy formulation. This further enhances his policy-making/executive authority which further reflects the disjuncture of accountability. Article 41(1) of the Constitution indicates that these Secretaries are there to, "assist [the President] in the exercise, performance and discharge of the powers, duties and functions of his office [...]"³⁶⁷ Compounding this situation is the reality that Presidents appoint the Prime Minister and the Cabinet. Former President Kumaratunga, when still in office, remarked to the media that, "under [Sri Lanka's] constitution the Prime Minister is merely a glorified minister. It takes just a one-sentence letter from me to dismiss the Prime Minister and his entire cabinet."³⁶⁸

An analogous situation of accountability being misdirected as a result of contradictory flows of executive authority and institutionalized structures of accountability is being observed in South Africa. Christina Murray and Richard Simeon note that in South Africa, authority and policy are developed nationally with little effective provincial or local government involvement in policy formulation. However, as implementing agents of national policies, provinces and local government bear the brunt of the consequences for poor performance.³⁶⁹

Murray and Simeon note that in order to remedy the problem, it is, "important to move accountability from the bottom up to the top down. This could begin with the Premier and Cabinet. They need to be responsible to the legislature as is standard in parliamentary systems

³⁶⁶ Wilson, A. Jeyaratnam. *The Gaullist System in Asia: The Constitution of Sri Lanka 1978*. (London: The MacMillan Press Ltd., 1980). P. 43-44.

³⁶⁷ Government of Sri Lanka. *The Constitution of the Democratic Socialist Republic of Sri Lanka*.

³⁶⁸ Rahman, Taiabur. *Parliamentary Control and Government Accountability in South Asia*. (Routledge: New York, 2008). P. 171.

³⁶⁹ Murray, Christina and Richard Simeon. "Reforming Multilevel Government in South Africa". (unpublished paper, 2010). P. 12. (this will also be discussed below in the context of Executive-Legislature relations at the provincial level where Murray and Simeon's observations of South Africa apply even more directly).

[...].”³⁷⁰ For Sri Lanka, the lesson is that either accountability be properly directed at the President, from where policy and executive authority truly flow, or, authority and power be delegated to the post of the Prime Minister and the Cabinet. As the latter seems unlikely, it is necessary for Sri Lanka to consider means by which accountability can be best directed at the whole executive, including the President.

Reform: Develop a new Standing Order 27 allowing for questions to be tabled in writing to the President and the relevant Secretary appointed by the President for a given portfolio, to be answered within a reasonable time frame (e.g. 30 days). The Prime Minister or relevant Cabinet Minister should be required to provide a short oral response to the question.

Sequencing: Consideration of instituting this reform can begin 1 year from the start of the new Parliament. By this time, the other reforms enabling more effective oversight and accountability will be in place and the President can determine how responsible and effective the Parliament is in the exercise of its oversight role.

Reform: Create a new Standing Order 18, within the section on the ‘Business of Parliament’, making explicit that Parliament’s responsibility is to ensure accountability through oversight and public participation. This language may also be included in the section of the Standing Orders pertaining to ‘Committees’ and/or ‘Finance’. The use of such explicit language is not unprecedented, and is necessary for making clear the political culture being cultivated by these reforms. The Constitution of Sri Lanka should be amended (Chapter 8, Article 42 and 43) to include the same language on accountability, oversight and public participation. Specifically, Article 42 should be amended to make it clear that the President is ‘accountable’ to Parliament.

Sequencing: The reform to the Standing Orders should come within 2 years, well after the implementation of the other reforms. This will allow for assessment of the outcomes from the proposed reforms and for confidence to grow in the importance of building an effective oversight mechanism.

Reform: Amend Article 65(1) under Chapter 10 of the Constitution, to allow the Speaker of Parliament to appoint the Secretary-General of Parliament. Currently the President appoints the Secretary-General and removing this provision achieves, at the highest level, the same separation being achieved by removing Ministers as Chairpersons of committees.

Sequencing: This should be implemented along with the other Constitutional reforms identified above; when the President is satisfied that improved Parliamentary oversight systems and enhanced accountability are not a threat and are indeed an asset to the quality of governance in the nation.

The reforms proposed above can be considered ‘neutral’ as far as debates on ethnic and religious minority policy. The adoption and implementation of these proposals, however, can have a potentially enormous impact on the outlook of ethnic and religious minorities. The International Crisis Group, writing after the defeat of the LTTE, notes that, “The Government’s approach to the development and reconstruction of the north and east is contributing to minority fears and alienation. Government plans remain unclear, with local communities and political leaders not consulted [...]”³⁷¹ The report goes on to indicate that at the heart of the

³⁷⁰ Ibid. P. 23.

³⁷¹ International Crisis Group. “Sri Lanka: A Bitter Peace”. Asia Briefing, No. 99 (Colombo/Brussels, January 11, 2010). P. 1.

reconstruction debate in the north and east of Sri Lanka are questions about, “development by whom, on whose terms, and for whose benefit?”³⁷²

At this point it becomes clear that the structures and systems that align accountability with executive authority through an effective oversight regime and allows for public participation can begin to answer those critical questions being asked by the Tamil minority, among others. In so doing, the goal is to have these minority communities, but also potentially disaffected pockets among the Sinhala majority, grow in their confidence in national institutions such as the legislature.

Sri Lanka’s National State Assembly, which is elected directly by the citizenry, is independent of the provinces and can pass legislation by majority vote, and could be described by some as *potentially* ‘integrationist’.³⁷³ The proposals put forth here would strengthen confidence in the legitimacy of the institution, thereby increasing the likelihood of realizing its integrationist tendencies (this will be discussed in more specificity later in the chapter).

Devolution, DDCs, Provincial Councils and Good Governance

“Devolution can be done.” These are the words of the President, both in his manifesto for the recent elections, and even through his Facebook page.³⁷⁴ Substantive progress on devolution can be assessed through two major institutional developments in Sri Lanka’s history: District Development Councils (DDCs) and Provincial Councils. The former were established in 1981 and the latter in 1987. The discussion that follows, however, is limited to the same thematic issues addressed in the previous section, dealing with matters of executive-legislature relations and the problems within those structures as it pertains to accountability. In sum, there is a legitimacy crisis for these institutions which a more robust accountability framework can help to remedy, thereby fulfilling the President’s affirmation that “Devolution can be done.”

The disjuncture between executive authority and legislative accountability at the DDC level was observed within a year of their creation. The highest authority in the DDC is the ‘District Minister’, who is appointed by the President. The DDC also consists of an elected Chairperson and elected council. An Executive Committee (akin to a Cabinet), consists of the District Minister, the Council Chairman and two other members selected by the District Minister in consultation with the Council Chairman and approved by the President. The strong correlation to the executive-legislature structure at the national level is the source of the delegitimization of the structure, wherein executive authority flows from the top-down but accountability is only directed at those who follow the dictates of the executive.³⁷⁵ Bruce Matthews recognized the problem immediately, writing in 1982, “it is sometimes said that the District Minister corresponds to the President [...] likewise, the district Chairman is similar to the Prime Minister, while the elected representatives function as members of parliament.” Matthews goes on to identify the legitimacy crisis, cautioning that:

“Although this analogy may have been introduced to help explain just what the district council means, it has in turn led to speculation about how honest an adventure in

³⁷² Ibid. P. 10.

³⁷³ Choudhry, Sujit. “Does the world need more Canada? The politics of the Canadian model in constitutional politics and theory”, in *Constitutional Design for Divided Societies: Integration of Accommodation?*. (Oxford: New York, 2008). P. 148-149.

³⁷⁴ Presidential Media Unit. “All countries must join against terrorism”. August 10, 2009. <http://www.facebook.com/pages/Mahinda-Rajapaksa/97694845373>. Rajapaksa, Mahinda. “A Brighter Future - Presidential Elections 2010. http://www.mahinda2010.lk/downloads/mahinda_chintana_vision_for_the_future_eng.pdf. P. 54-55.

³⁷⁵ Rohan Edrisinha et al, *Power-sharing in Sri Lanka: Constitutional and Political Documents 1926-2008* (Colombo: Centre for Policy Alternatives, 2008), P. 277, 285.

decentralization the DDCs are. Some critics see a deliberate extension of government functions from Colombo to the districts and argue that the DDCs are in truth a subtle redefinition of centralization.”³⁷⁶

Six years after the creation of the DDCs, Sri Lanka established provinces as a formal tier of government. The very same disjuncture between executive authority and lines of accountability were built into the provincial councils. This is evident through an examination of the relevant Chapter on ‘Provinces’ in the Constitution.

The Governor of every province is appointed by the President under Art. 154(B)(2). The Governor can prorogue the Provincial Council, dissolve it and is supposed to work with the Board of Ministers (akin to Prime Minister and Cabinet) if they are supported by a majority of Provincial Council members. Article 154(F)(2), perhaps more than anything else, confirms the institutionalized preponderance of the Governor’s authority. It states that, “If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor and his discretion shall be final, and the validity of anything done by the Governor shall not be called in question in any Court on the ground that he ought or ought not to have acted on this discretion. The exercise of the Governor’s discretion shall be on the President’s direction.”³⁷⁷

Like the President and the District Minister, the Governor of a province appoints the Chief Minister and Board of Ministers, through Article 154(F)(4-7).

A rather apologetic acknowledgment of the problems in the DDC and Provincial Council tiers of government argues that, “the capacity of devolution of authority to regional units, be they districts or provinces [...], to reduce ethnic conflict is more limited than enthusiastic advocates of it are willing to concede. The successful operation of the system of decentralization [...] calls for political skills of a higher order, and also great patience.”³⁷⁸ This assessment recognizes that core problems exist for both DDCs and Provincial Councils, but mistakenly assigns responsibility for the problem to the political skills of politicians. This assessment is flawed in as much as the primary problem with the system is the disjuncture between the lines of authority and lines of accountability – a condition existing in three important tiers of government.

At the Provincial level, the Constitution further reinforces the disjuncture between authority and accountability under Article 154(R). That article establishes the ‘Finance Commission’ which apportions funding from national revenue to the respective provinces. This is a standard institution across an array of federal and non-federal systems, but the total absence of structured provincial legislature inputs to the Finance Commission is a critical weakness. By decoupling elected provincial legislatures from the means to communicate provincial needs and agendas from the budget transferred from national government, Sri Lanka is further divorcing the lines of executive authority from those of accountability. This fact, more so than the personal political skills of politicians, determines the value of the Provincial Council system and underpins its current crisis of legitimacy.

Recognition that DDCs and Provincial Councils can help to build commitment to Sri Lanka from groups that possess secessionist elements is recognized. Moreover, there is an appreciation that if DDCs and Provincial Councils can promote, “regionalism divorced from separatism”, it has the advantage of, “generating political participation in decision-making at a

³⁷⁶ Matthews, Bruce. “District Development Councils in Sri Lanka” in *Asian Survey*, Vol. 22, No. 11 (Nov. 1982). (California: University of California Press, 1982.) P. 1121.

³⁷⁷ Government of Sri Lanka. *The Constitution of the Democratic Socialist Republic of Sri Lanka*.

³⁷⁸ De Silva, K.M. *Sri Lanka: Problems of Governance*. (Delhi: Konark Publishers PVT Ltd. 1993). P. 122.

provincial or district level [...].”³⁷⁹ By focusing on processes to properly align authority with lines of accountability, Sri Lanka would be overcoming the same problem identified in South Africa, thereby realizing the, “democratic potential of provincial government.”³⁸⁰

The potential for realizing the benefits of devolution in Sri Lanka begins with what already exists in the structures and systems in place, if approached with a readiness to be creative.

Article 154(G)(3-5) consistently requires legislation originating from a Provincial Council to go through an iterative process with the Office of the President, and the other Provinces. It also allows for provinces to request legislation from the National State Assembly which must go through a similar iterative process. The spirit of this process is inter-governmental dialogue. Additionally, the Ninth Schedule of the Constitution places numerous important issues such as education, security, development, and health under Provincial competence.³⁸¹ This further provides the basis for taking advantage of what already exists to develop the legitimacy of the institutions that allow for devolution.

Reform: The idea of substantive inter-governmental dialogue should be operationalized through meetings in multilevel government policy forums. The concept of ‘integrated development planning’ is well-established. Sri Lanka should look to establish an ‘integrated development planning forum’ on a sectoral basis with a representation formula allowing for DDC, Provincial Council and National State Assembly participation in conjunction with the Executive and relevant administrative branches (e.g. the Finance Commission). A first-stage forum should exist between DDCs and Provinces and then a second stage between provinces and national government. The only formalized requirement would be for both the President and the Finance Commission to respond to the recommendations of the sectoral reports from the second stage of the forum.

Sequencing: This should be put in place within a reasonable and early time frame for this new Presidency and Parliament.

Reform: Amend Chapter 18(A) of the Constitution to require each provincial council to produce an oversight report within two months of the end of the financial year on the Governor and the Executive Committee, in addition to its oversight of the Board of Ministers. The Governor must produce an official response to the oversight report of the Provincial Council and table the response within a reasonable time frame; not to exceed two months after receipt of the report. This will ensure that enough of the financial year remains to take on board any relevant findings of the oversight report. Each oversight report should include a summary of policy issues with budgetary implications which is sent to the ‘Finance Commission’.

Sequencing: This should be done within 1 year of putting together the integrated development planning forum. The forum will empower Provincial Councils in the fulfilment of this oversight mechanism which will ensure accountability and serve to legitimize the institutions providing for devolution. This is necessary to realize the benefits of intergovernmental arrangements for building national unity and promoting stability over time.

³⁷⁹ *Ibid.* P. 120-1.

³⁸⁰ Murray, Christina and Richard Simeon. “Reforming Multilevel Government in South Africa”. (unpublished paper, 2010). P. 23.

³⁸¹ Rohan Edrisinha et al, *Power-sharing in Sri Lanka: Constitutional and Political Documents 1926-2008* (Colombo: Centre for Policy Alternatives, 2008), P. 380-4.

Reform: If an integrated development planning forum is proven to be effective, a process to institutionalize it would become the next step. This requires amending the Constitution, Chapter 18(A), ‘Establishment of Provincial Councils’, to include the structure and operations of the forum.

Sequencing: Integrated development planning is challenging under the best of conditions. The less formal ‘forum’ mechanism recommended above should exist for the life of this new Parliament. At the start of the last year of this new Parliament – early 2014 – a review commission allowed one year to work should report on the performance of the integrated planning forum. The final session of this Parliament in 2015 should prioritize amending the Constitution and legislating the institutionalization of such a forum.

Beyond Integration & Accommodation: Oversight, Accountability and Public Participation

There has been a vociferous, ongoing Parliamentary-Presidential debate in Sri Lanka as well as among some fairly renowned scholars and experts on institutional design for societies dealing with deeply-rooted ethnic and sectarian divisions.³⁸² Indeed, much of this debate among scholars is situated within a paradigmatic contest between integrationism and accommodationism.

Briefly, integration emphasizes the, “equality of individual citizens before the law and within public institutions.” Integrationists are averse to institutionalizing ethnic and/or sectarian and other group identities through formal recognition and feel their agenda is essential, “to a progressive politics, political stability, public unity, and the transcendence of group-based chauvinism.”³⁸³ Accommodation, “promotes dual or multiple public identities, and its proponents advocate equality with institutional respect for differences. [Accommodationists] believe that is what is required for the stable management of deep diversity.”³⁸⁴

At first glance, integrationism might appear as the preferred choice of President Rajapaksa. Much of his public statements about national unity, cohesion and ‘oneness’ resonate with the integrationist discourse. However, Sri Lanka’s executive-legislature relations reviewed here demonstrate the necessity of moving beyond a reductionist, often dogmatic debate, *between* these two concepts, by delving into the detailed mechanics of oversight and legislature operations.

A cursory review of basic institutional frameworks in Sri Lanka reveals the mixture between the two approaches. A single-person presidency reflects a typical integrationist arrangement while a proportional representation system for electing parliament reflects a typical accommodationist approach³⁸⁵, though the preponderance of the Sinhalese population mitigates this outcome, it is to a limited extent bolstered by a significant – though not absolute – geographic concentration of minority populations. What is known is that neither of these institutions has delivered the stability and unity desired by successive Sri Lankan governments that are predicted by either integrationism or accommodationism.

The proposals in this chapter reflect the importance of examining what some might consider the ‘minor details’, such as Standing Orders and committee operations, when examining

³⁸² See Juan Linz, “The Perils of Presidentialism” and “The Virtues of Parliamentarism” and Donald L. Horowitz, “Comparing Democratic Systems”, in *The Global Resurgence of Democracy*, 2nd ed. (Baltimore: Johns Hopkins University Press, 1996.)

³⁸³ McGarry, John and Brendan O’Leary and Richard Simeon. *Integration or accommodation? The enduring debate in conflict regulation?*, in *Constitutional Design for Divided Societies: Integration or Accommodation?*. (Oxford: New York, 2008). P. 41.

³⁸⁴ *Ibid.* P. 41.

³⁸⁵ *Ibid.* P. 71.

executive-legislature relations. This is not consistent with the focus of respected scholars in this field. For example, when a detractor of presidentialism such as Juan Linz argues that the personalization of power in the presidency results in deep suspicion, producing “constitutional bulwarks” to deter arbitrary presidential power, his reference points are far removed from the nuances of committee oversight work. Juan Linz asserts that ‘foremost’ among these bulwarks is the prohibition on re-election, legislature approval of presidential appointments, and impeachment mechanisms, among others.³⁸⁶ While the existence of these provisions may serve such a function, it is highly unlikely that most legislators go to work each day reassured in the value of their efforts and comforted in their relations with the executive by the power to impeach the president or disapprove a presidential appointee. Moreover, they will not be overly comforted just after elections knowing that a poor president will be denied re-election only years later.

It is rather far more likely that elected representatives ascertain the value of their efforts as elected legislators by their daily, weekly and monthly roles in parliament. This involves the mundane, but nonetheless *constant* requirement, to work through committees and the floor of the House on a wide array of issues. Working in committees and on the floor of the National State Assembly can either result in disaffection and delegitimization of the parliament, or, it can serve as a proxy indicator for the legitimacy of the institution and its relations with the executive.

Taiabur Rahman’s extensive interviews with Sri Lankan legislators, coupled with his quantitative and qualitative assessment of their work reveals that:

“All the respondents (100 percent, with a mean score of 4) ... were of the view that a strong parliament is a prerequisite for a strong committee system and vice-versa. They admit that within the prevailing political framework, parliament is very weak vis-à-vis the executive and so is the committee system. One opposition MP expressed his disappointment by saying that ‘parliament itself let alone the committee system has become next to useless and it does not really add any value in the progress of the nation’.”³⁸⁷

Such a serious condition in parliament demands a conceptually flexible approach to institutional design; one that is not inhibited by the precepts of the accommodationist-integrationist debate. Sujit Choudhry assists in appreciating the need to adopt a more flexible lens when assessing constitutional arrangements in divided societies. He writes, “[the] terms accommodation and integration, although helpful, are potentially misleading because they may encourage us to forget that both integration and accommodation are directed toward the same goal—maintaining the territorial integrity and political unity of the state.”³⁸⁸

The proposals here suggest that meaningful oversight processes can bolster the goal of accountability and thereby serve to enhance the legitimacy of parliament and its relations with the executive. This legitimization is a prerequisite for the realization of the integrationist or accommodationist orientation of the parliament’s and executive’s structure. In other words, if the ‘accommodationist’ legislature is enfeebled by a lack of legitimacy, it then also fails to generate the desired outcomes of accommodationism.

³⁸⁶ Linz, Juan J. “The Perils of Presidentialism” in *The Global Resurgence of Democracy*, 2nd ed. (Baltimore: Johns Hopkins University Press, 1996.) P. 127.

³⁸⁷ Rahman, Taiabur. *Parliamentary Control and Government Accountability in South Asia*. (Routledge: New York, 2008). P. 171.

³⁸⁸ Choudhry, Sujit. “Does the world need more Canada? The politics of the Canadian model in constitutional politics and theory”, in *Constitutional Design for Divided Societies: Integration of Accommodation?*. (Oxford: New York, 2008). P. 146.

If accountability and oversight, coinciding with public participation are so critical, it is important to apply some type of working definition of the concepts. For the purposes of this report, accountability simply means holding the government of Sri Lanka responsible for its actions. More important are the immediate outcomes of accountability. The three most significant are: “assurance of well-performing public institutions and that public resources are being used in accordance with publicly stated aims [...]; improvement of the efficiency and effectiveness of public policies; [and] *the enhancement of the legitimacy of government*.”³⁸⁹ Others use a more expansive, theoretical mould for framing the impact of meaningful accountability. Borrowing from March and Olsen’s notion that, “accountability regimes can assist political deliberation when they focus on justifications of political conduct assessed against what they term the logic of ‘appropriateness’”, John Uhr asserts that, “accountability requirements make their most valuable and positive contribution when they, “make decision-makers more carefully thoughtful.”³⁹⁰

Legislature ‘oversight’, quite simply, consists of the application of mechanisms and processes within the institution to ensure ‘accountability’ of the executive branch. ‘Public participation’ refers to the purposeful involvement of the public in the oversight process.

In the case of Sri Lanka’s parliament, the more mundane instruments for exercising oversight and ensuring accountability and allowing for public participation are either non-existent, tightly constrained or immobilized. As described above, this ultimately delegitimizes the institution of parliament and executive-legislature relations. This is borne out in the quantifiable performance of the institution.

With respect to the Committee on Ministry of Defence, Rahman finds that, “Within two years, the committee held only eight meetings. It met irregularly and infrequently. The average frequency of meetings was 70 days. The average attendance of members in the committee meeting was 39 percent.”³⁹¹ Qualitatively, Rahman opts to use the comments of past witnesses to the Committee. “Air Vice-Marshall [retired] Harry Goontilleke describes what it is like appearing before the [defence] committee: ‘It’s a big laugh, nothing happens. I don’t think any committee meeting has any successes [...]’.”³⁹² With respect to the prestigious Committee on Public Accounts, Rahman reports that it has a 36 percent attendance rate.³⁹³

These simple statistics and statements reveal the lack of legitimacy accorded to the legislature by elected representatives and those who are to feel accountable to it.

Oversight, Accountability, Public Participation, it is suggested here, can play the legitimating function that can activate the integrationist and accommodationist tendencies of Sri Lanka’s various institutional features with respect to the Legislatures (national and provincial) and how they relate to their respective executive branches of government. If the legislature is weak and wholly devalued as an institution, the accommodationist, proportional representation electoral system for parliament, or, the integrationist winner-take-all presidency, will not matter.

This nullification of the outcomes flowing from integrationist and/or accommodationist institutional arrangements also applies to legislatures. Choudhry notes that the House of Commons in Canada is largely ‘integrationist’ for reasons that include direct election by the citizenry, a disconnection from provinces, passing legislation with a majority, and the lack of

³⁸⁹ Rahman, Taiabur. *Parliamentary Control and Government Accountability in South Asia*. (Routledge: New York, 2008). P. 8. (emphasis mine).

³⁹⁰ Uhr, John. *Deliberative Democracy in Australia: The Changing Role of Parliament*. (Melbourne: Cambridge University Press, 1998). P. 162.

³⁹¹ Rahman, Taiabur. *Parliamentary Control and Government Accountability in South Asia*. (Routledge: New York, 2008). P. 195.

³⁹² *Ibid.* P. 196.

³⁹³ *Ibid.* P. 187.

institutionalized recognition of minorities.³⁹⁴ It is interesting that in design and practice (albeit less so for the latter), the National State Assembly shares these features. Yet, it is difficult to make the case that Sri Lanka's parliament is integrationist. The key differences with the House of Commons are not on the macro-level but instead can be found in the daily operations of these respective parliaments.

Seen in this light, the reforms proposed in this chapter transcend the accommodationist-integrationist debate. The argument here is that it is possible to establish oversight processes that minorities can support because these mechanisms will meaningfully '*accommodate*' their points of view and political positions in a strong institution. As a consequence, the integrationist outcomes have a greater chance for materializing as the legitimacy of the institution grows.

The accommodationist-integrationist debate among scholars also brings forth cautionary lessons for Sri Lanka. Kymlicka notes that the internationalization of minority rights reveals some extraordinary, but alarming inconsistencies in international norms and practices. For Kymlicka, there "was (and is) no plausible alternative to autonomy in countries such as Sudan, Iraq, Indonesia, and Sri Lanka."³⁹⁵ He observes that while the primary instruments on minorities at the United Nations promote an integrationist approach, minorities using political violence results in the United Nations employing an accommodationist set of solutions. The worry is that such a reality signals to disaffected minorities that violence may be rewarded internationally.³⁹⁶

The international community's default to accommodationist strategies for violent, secessionist minorities, and the reality of cycles of violent political upheaval in Sri Lanka, provides a robust basis for pushing ahead with the reforms set forth in this chapter. The government may see the more advanced recommendations, such as the constitutional reforms, as alarming at this point in time. It is critical to appreciate that just as important as the recommendations, are the proposals on sequencing. The timing of rolling out institutional arrangements allows for measured progress, tempered by actual outcomes. However, time can also allow for the institutions and processes to alter the nature of identities and perceptions of inter-group relations.³⁹⁷ After several years it may be possible to see the more advanced reforms as reflective of a healthy state of affairs in a pluralistic society and not the results of accommodating potentially violent, irredentist ethnic minorities. At that point, the government will have 'won the peace'.

³⁹⁴ Choudhry, Sujit. "Does the world need more Canada? The politics of the Canadian model in constitutional politics and theory", in *Constitutional Design for Divided Societies: Integration of Accommodation?*. (Oxford: New York, 2008). P. 148-149.

³⁹⁵ Kymlicka, Will. "The Internationalization of Minority Rights" in *Constitutional Design for Divided Societies: Integration of Accommodation?*. (Oxford: New York, 2008). P. 128.

³⁹⁶ *Ibid.* P. 138.

³⁹⁷ Pildes, Richard H.. "Ethnic Identity and Democratic Institutions: A dynamic perspective" in *Constitutional Design for Divided Societies: Integration of Accommodation?*. (Oxford: New York, 2008). P. 198.

Works Cited

- Asian Development Bank. “Technical Assistance to the Democratic Socialist Republic of Sri Lanka for Preparing the Public Sector Resource Management Report.” (August 2002).
- BBC, “Rajapaksa out in force for Sri Lanka election”, BBC World News, April 7, 2010.
(<http://news.bbc.co.uk/2/hi/8607301.stm>)
- BBC, “Rajapaksa triumphs in final count”, BBC Sinhala.
(http://www.bbc.co.uk/sinhala/news/story/2010/04/100421_electionfinal.shtml)
- Choudhry, Sujit. “Does the world need more Canada? The politics of the Canadian model in constitutional politics and theory”, in Constitutional Design for Divided Societies: Integration of Accommodation?. (Oxford: New York, 2008).
- De Silva, K.M. Sri Lanka: Problems of Governance. (Delhi: Konark Publishers PVT Ltd. 1993).
- Government of Sri Lanka, *Standing Orders of the Parliament of the Democratic Socialist Republic of Sri Lanka*. (as amended up to February 26, 1993).
- Government of Sri Lanka. *The Constitution of the Democratic Socialist Republic of Sri Lanka*. International Crisis Group. “Sri Lanka: A Bitter Peace”. Asia Briefing, No. 99 (Colombo/Brussels, January 11, 2010).
- Kymlicka, Will. “The Internationalization of Minority Rights” in Constitutional Design for Divided Societies: Integration of Accommodation?. (Oxford: New York, 2008).
- Linz, Juan J. “The Perils of Presidentialism” in The Global Resurgence of Democracy. 2nd ed. (Baltimore: Johns Hopkins University Press, 1996.)
- Matthews, Bruce. “District Development Councils in Sri Lanka” in Asian Survey, Vol. 22, No. 11 (Nov. 1982) . (California: University of California Press, 1982.)
- McGarry, John and Brendan O’Leary and Richard Simeon. Integration or accommodation? The enduring debate in conflict regulation?, in Constitutional Design for Divided Societies: Integration of Accommodation?. (Oxford: New York, 2008).
- Murray, Christina and Richard Simeon. “Reforming Multilevel Government in South Africa”. (unpublished paper, 2010).
- Pildes, Richard H.. “Ethnic Identity and Democratic Institutions: A dynamic perspective” in Constitutional Design for Divided Societies: Integration of Accommodation?. (Oxford: New York, 2008).
- Presidential Media Unit. “All countries must join against terrorism”. August 10, 2009.
<http://www.facebook.com/pages/Mahinda-Rajapaksa/97694845373>.
- Rajapaksa, Mahinda. “A Brighter Future - Presidential Elections 2010”.
http://www.mahinda2010.lk/downloads/mahinda_chintana_vision_for_the_future_eng.pdf.
- Rohan Edrisinha et al, Power-sharing in Sri Lanka: Constitutional and Political Documents 1926-2008 (Colombo: Centre for Policy Alternatives, 2008).
- Rahman, Taiabur. Parliamentary Control and Government Accountability in South Asia. (Routledge: New York, 2008).
- Sirimanne, Neetha. “What Did We Get from the Executive Committee System of the Donoughmore Constitution 1931-1946”. November 15, 2006.
http://www.news.lk/index.php?option=com_content&task=view&id=1150&Itemid=52
- Tyaagi, A.R. and K.K. Bhardwaj. The Working of Parliamentary Democracy in Ceylon. (Delhi: Sultan Chand & Sons, 1969).
- Uhr, John. Deliberative Democracy in Australia: The Changing Role of Parliament. (Melbourne:

- Cambridge University Press, 1998).
- Wilson, A. Jeyaratnam. The Gaullist System in Asia: The Constitution of Sri Lanka 1978.
(London: The MacMillan Press Ltd., 1980).
- World Bank. “Sri Lanka – Country Financial Accountability Assessment (final report)”
(Washington, DC,: The World Bank, 2003).

CHAPTER SIX: SRI LANKA: FOREIGN POLICY AND DIASPORA RELATIONS – IRIS TAL HALBERT

Introduction

The challenge faced by the government of Sri Lanka is how to best position its foreign policy and diaspora relations, so that it maximizes its capacity to generate goodwill and trust with the international and diaspora communities, while it furthers the cause of political stabilization and economic development goals back home.³⁹⁸ At first glance, these challenges seem straight forward and logically convergent. However, in post-conflict country cases such as Sri Lanka, balancing the government's domestic and foreign policy agendas can reveal numerous contradictions that are not easily remedied. Furthermore, in addition to internal pressures brought to bear on the decision making processes of the state, external pressures must be considered and addressed; particularly when such pressures represent the capacity of the international community to interfere with Sri Lanka's international trade relations, security and economic development.³⁹⁹

The question is what are the opportunities, constraints and desirable outcomes for Sri Lanka's diaspora and foreign relations at this critical juncture? More specifically, what are the costs and benefits of Sri Lanka's current foreign policy versus the available options currently being eroded or not in practice? Are Sri Lanka's formal ties with authoritarian regimes in the east sufficient at this stage, to stabilize and develop its political economy? Or alternatively, should the government seriously entertain a more moderate, centrist and balanced approach to its foreign policy agenda in keeping with its status as a post-colonialist democratic polity and a founding member of the 'non-alignment' movement? Finally, Can Sri Lanka seriously entertain the possibility of close and economically productive ties with diaspora communities - largely situated in the west, without acceding to western demands for accountability and transparency in its domestic arena, with a particular concern for numerous allegations of human rights abuses and non-democratic political practices?

Defining the Parameters of Sri Lanka's Foreign Policy

Sri Lanka's foreign policy opportunities and objectives need to be understood within the geopolitical context of having neighbouring India, Pakistan, Myanmar and Malaysia and an array of Western liberal democracies and authoritarian states as friends and allies.⁴⁰⁰ These countries represent the full spectrum of political realities from democracies to tyrannies. Furthermore, as a triumphant majority government that is faced with the post-conflict challenges of 'reconstruction, reintegration and redevelopment',⁴⁰¹ Sri Lanka needs to concern itself with devising policies that contribute to the fulfilment of those goals instead of alienating countries such as neighbouring India, the United States and the European Union, who are Sri Lanka's strongest trading partners.

³⁹⁸ President Mahinda Rajapaksa outlines his vision for the future of Sri Lanka in a document titled 'Mahinda Chintana' – Mahinda's thoughts, for poverty alleviation, economic and infrastructure development, under his leadership of the Samurdhi project of the Ministry of Nation Building and Estate Infrastructure Development.

³⁹⁹ Former LTTE members and Tamil diaspora supporters with irredentist aspirations continue to pose a threat in this post-conflict period; the majority of whom reside in the West.

⁴⁰⁰ The Honourable Bob Rae, Conference on Constitutional Design for Divided Societies, April 9, 2010.

⁴⁰¹ Ministry of Foreign Affairs of Sri Lanka

In carrying out its foreign and domestic agendas, Sri Lanka needs to understand the benefits of exercising restraint in its political forays with international partners and with its civilians at home. Sri Lanka's lean towards authoritarianism and - as a consequence, away from liberal democratic traditions of transparency, accountability, accommodation and inclusiveness, in conjunction with its deepening of political and economic ties with authoritarian regimes such as China, Iran and Burma could arguably enable the cycle of insurgency to be re-ignited.⁴⁰² Additionally, it can be argued that the government's recent actions will only serve to further alienate Diaspora communities formerly invested in the irredentist aspirations of the LTTE.

Ultimately it is in the best interest of the current government of Sri Lanka to appreciate the benefits of maintaining a more centrist approach in its international relations. Moral legitimacy as conferred by the international arena should be deemed desirable as this impacts on Sri Lanka's ability to engage in global economic trade,⁴⁰³ its ability to contain diaspora opposition and its interest in developing social and economic ties with moderate Tamils residing in the West.⁴⁰⁴ The argument is that a politically pragmatic and non-aligned approach to foreign relations will yield, in the long run, stronger relations with India and the West, whereby the economic and political benefits will far outweigh any opportunities gained by Sri Lanka's neglect while having leaned in favour of deepening ties with authoritarian regimes.

Sri Lanka's Emergent Political Complex

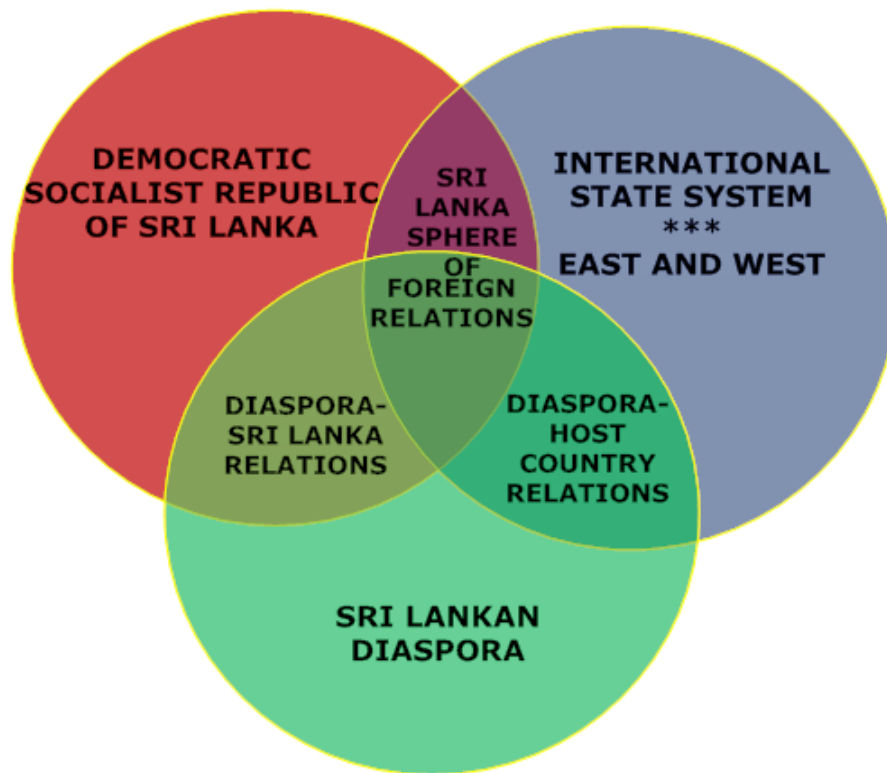
The following Venn diagram illustrates the complex and overlapping relationships that exists between Sri Lanka, the International State System and the Sri Lankan Diaspora. The emergent political complex described below provides a finer grained analysis of how these three overlapping variables shape and are shaped by the opportunities and constraints that emerge out of their mutual proximity and effects. Furthermore, in addition to the political complexities that emerge when domestic and international variables are taken into consideration, economic complexities begin to emerge with greater clarity. This is to say that where in many cases the end-goal is to increase Sri Lanka's earning base and yearly cash flows for the purposes of reconstruction and economic development, the co-dependent relationship that exists between political and economic affairs of state become increasingly relevant.

⁴⁰² The Honourable Bob Rae, Conference on Constitutional Design for Divided Societies, 09/04/10, 2010.

⁴⁰³ Canadian Council on International Law, 33 Annual Conference, 2004, *Legitimacy and Accountability in International Law*. The conference reviews norms and practices for corporate governance in the global setting and the expectations for legitimate and accountable practices by private and public institutions. 37-41, 91.

⁴⁰⁴ Comment by Professor David Cameron at Conference on Constitutional Design for Divided Societies, 09/04/10, 2010.

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA: DIASPORA AND FOREIGN RELATIONS



These overlapping relationships can be reduced to the following emergent political complex:⁴⁰⁵ The government of Sri Lanka appreciates the importance of developing a broad range of political and economic ties with states from the spectrum of political representation. However, at this juncture its ties with countries such as China, Iran, Libya and Myanmar - states that are considered to be undemocratic by Western standards suggests that Sri Lanka is leaning towards authoritarian rule as a policy move which belies its intent to circumvent international expectations that it behave in transparent and accountable ways, befitting a democratic polity.⁴⁰⁶

Since the defeat of the LTTE in May of 2009, country members of the United Nations have stepped up demands for investigations into allegations of human rights abuses in Sri Lanka.⁴⁰⁷ The implication is that Sri Lanka is backsliding from its status as a founding member of the non-alignment movement and a politically democratic state. As a consequence, the West is reticent to confer its stamp of moral legitimacy on the government of Sri Lanka at this time.⁴⁰⁸ A

⁴⁰⁵ Mark Duffield, in *Global 'Governance and the New Wars'* (2001), views 'emergent political complexes' -as opposed to 'complex political emergence' as a tangle of convergent issues and variables that shape and are shaped by each other and therefore need to be analyzed and understood holistically rather than in parts.

⁴⁰⁶ Dr. S. Narapalasingam, *Prospect of winning real peace in war-torn Sri Lanka*, http://federalidea.com/fi/2009/02/post_129.html.

⁴⁰⁷ 2009 Human Rights Report: Sri Lanka 03/11/10 <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136093.htm>

⁴⁰⁸ Ibid.

further consequence is the reduction in Western donor funded economic development and poverty alleviation programmes.⁴⁰⁹

Yet, in contrast, Sri Lanka's ties with these authoritarian regimes has provided substantive economic support for infrastructure and economic development, at a time when Sri Lanka is emerging from a protracted civil war that has considerably damaged the country's efforts to emerge as a leading developing South East Asian nation.⁴¹⁰ Furthermore, those authoritarian states currently supportive of Sri Lanka's infrastructure and economic development efforts are not encroaching on Sri Lanka's sovereign autonomy by demanding transparency and accountability in its domestic policies; in particular as these relate to the post-conflict scenario currently challenging the Rajapaksa government.⁴¹¹

Although it is in Sri Lanka's best interest to develop and maintain close ties with all nations interested in relations, trade and economic development of the country, western liberal democracies - such as the United States, Germany, Norway, Canada and Australia, are demanding a level of transparency and accountability of the Sri Lankan government that is deemed invasive and difficult to meet by President Rajapaksa's government.⁴¹² Furthermore, it is nearly one year since the decisive military defeat of the LTTE insurgency and the Rajapaksa government continues to exercise its prerogative to operate under the 'emergency powers' of the state.⁴¹³ However, the importance of positive foreign relations with the west cannot be discounted or ignored, given Sri Lanka's interest in gaining greater access to global markets, strengthening co-operative security regimes with Western allies and developing positive relationships with Sri Lankan diaspora communities that are predominantly situated in western countries.⁴¹⁴

Therein lay the contradiction at the core of the emergent political complex described herein. The government of Sri Lanka is challenged by this emergent phenomenon. The implicit ramifications of a foreign policy agenda that leans too heavily to the east, are many-fold and will have long term implications in terms of the country's capacity to stabilize its domestic situation alongside its keen interest in embracing its diaspora communities, whom - in substantive ways, have proven to be important partners in the reconstruction and economic development of Sri Lanka. The numerous overlaps in Sri Lankan foreign relations with the international community and the Sri Lankan diaspora support the argument that it is not in Sri Lanka's best interest at this critical juncture to become too heavily reliant upon its formal ties with undemocratic authoritarian regimes at the expense of improved relations with western liberal democracies.⁴¹⁵ For the west is not only capable of conferring the moral legitimacy that Sri Lanka desires on the world stage, but also, in substantive ways, is able to contribute to the economic development and security regimes that are necessary for the political stabilization of the state.

To carry this point further, Sri Lanka is a participant in multilateral diplomacy with various international bodies including the United Nations, the Non-Aligned Movement of which it was a founding member, the South Asian Association for Regional Cooperation (SAARC), the World Bank, the International Monetary Fund (IMF), and the Asian Development Bank (ADB). Sri Lanka has also developed close relationships with regional associations such as the

⁴⁰⁹ Ibid.

⁴¹⁰ FederalIdea website Dr.

⁴¹¹ Ibid.

⁴¹² U.S. Department of State Background Notes on Sri Lanka, <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136093.htm>

⁴¹³ The Rajapaksa government recently renewed its 'emergency powers' ????

⁴¹⁴ In interviews with Canadian Anti-Terror Task Force Officers, Western co-operation aimed at anti-LTTE operations have been contingent upon the perceived moral and juridical legitimacy of Sri Lankan forces.

⁴¹⁵ Gabriel Sheffer, *Diaspora Relations: At Home Abroad*, 28.

Association of Southeast Asian Nations (ASEAN), the Arab League and the African Union. These various relationships demonstrate Sri Lanka's investment in bilateral, regional and intercontinental foreign relations and the importance of it receiving continued approbation as a legitimate player. The danger of unforeseen limited sanctions may cause Sri Lanka unnecessary embarrassment and would be undesirable.⁴¹⁶

It is therefore advisable for the government of Sri Lanka to appreciate the axiomatic relationship that exists between a politically progressive and balanced foreign policy agenda, positive engagements with diaspora communities in predominantly western host countries and the Sri Lankan government's political stabilization and socio-economic development.

The Tamil Diaspora and the LTTE

As a consequence of substantive signals initiated by Sri Lanka, this complex tangle of actions within the foreign and domestic arenas could potentially translate into an improved and more trusting relationship with Sri Lankan diaspora communities. A multi-ethnic society, the Sinhalese (82%) majority and minority Tamil populations (9.2%) represent the key stakeholders in the Sri Lankan social and political landscape.⁴¹⁷

In May of 2009, the previous Rajapaksa government destroyed the Liberation Tigers of Tamil Eelam (LTTE) after a protracted 26 year civil war, ending in a decisive military defeat. The LTTE were a Tamil terrorist organization that had emerged as the dominant voice of the aggrieved minority Tamil population of Sri Lanka. This organization was enabled by legitimate remittances and criminal revenue producing operations that spanned the globe, drawing support from Tamil diaspora communities in western industrialized countries.⁴¹⁸

The Tamil diaspora played a complex role during the 26 years of civil war in Sri Lanka. With the recent defeat of the LTTE and the near conclusive demise of its significant leadership, the question now is what role, if any, will the Tamil diaspora play during this fragile transition from civil war to stable peace?⁴¹⁹ The military defeat of the Tigers and an imposed peace has changed the political opportunity structures within Sri Lanka; but does this imply that the Tamil diaspora's activities are necessarily contingent or constrained by these emergent internal dynamics?⁴²⁰ Furthermore, the Tamil diaspora has contributed significant amounts of cash to the Sri Lankan Tamil cause. Given the current vacuum that has been created by the demise of the LTTE, opportunities for a warming of relations with these expatriate communities should be seized.⁴²¹

In spite of Sri Lanka receiving substantial monetary support by countries such as China and Iran, gaining moral legitimacy -which only the west could offer, would provide the impetus for deepening ties, confidence and economic engagement with a significant portion of the Tamil

⁴¹⁶ U.S. Department of State Background Notes on Sri Lanka <http://www.state.gov/r/pa/ei/bgn/5249.htm>

⁴¹⁷ Ibid.

⁴¹⁸ Orjuela, Camilla, (2008), *Reaping The Harvest of Peace? The Politics of Reconstruction during Sri Lanka's 2002 Peace Process*, Critical Asian Studies, 40:2 (2008), 211-232: Routledge.

(2005), *Civil Society in Civil War: The Case of Sri Lanka*, Civil Wars, Vol.7, No.2

(Summer, 2005), pp 120-137: Taylor & Francis.

⁴¹⁹ (2003), *Building Peace in Sri Lanka: A Role for Civil Society?*, Journal of Peace Research, Vol. 40, No. 3, (2003), pp. 195-212: Sage Publications.

⁴²⁰ Orjuela, Camilla (2008), *Distant warriors, distant peace worker? Multiple diaspora roles in Sri Lanka's violent conflict*, Global Networks 8,4 (2008) 436-452.

⁴²¹ The previous Sri Lankan Foreign Ministry envoy in Toronto, Mr. Bandula Jayaskara was sent to Toronto in order to develop relationships with moderate Tamils, while also advocating for Anti-LTTE Operations.

diaspora.⁴²² The Tamil diaspora community represents approximately 30% of the Sri Lankan Tamil community of approximately 2.7 million. The community resides in predominantly western states such as in Australia, Norway, Britain and Canada, with some representation in key urban cities in the United States, France, Singapore and the Middle East. Most Tamil citizens living in the diaspora send remittances back home to their families in Sri Lanka, enabling an influx of available funds to be utilized by domestic Tamils.⁴²³ The effect of Sri Lankan Tamils' gaining access to remittances from abroad can have a direct impact on rehabilitation and reconstruction programs targeting poverty and underdevelopment in post-conflict areas in the north and east of the country, thereby reducing the strain on the government's coffers and increasing the investment of the stakeholders. Any foreign policy agenda that does not incorporate the active courting of diaspora communities will fall short of its potential goal of engendering a positive climate for economic development and growth.⁴²⁴

While there have been other Tamil groups that have sought to address Tamil grievances in legitimate ways in relation to the Sri Lankan ruling government of the day, it is a testimony to the degree of entrenched conflict, resentment and despair experienced by the Tamils, that the majority of the Tamil population supported the LTTE and its unconventional and extra-political forms of politics and protest.⁴²⁵ Yet despite the Tamil's high visibility and significant media coverage during the years of protracted conflict, the root causes that had served as the impetus behind the recently ended civil conflict, cannot be solely attributable to the Tamil minority's aggrieved status.

The Sinhalese majority are also stakeholders in this emergent political complex. This sector of the population should stand to gain equally from any domestic and foreign policy objectives that would be undertaken with the west. The economic development of Sri Lanka will have direct implications for the standard of living of all members of Sri Lankan society. What's more, economic development encourages bridge-building between various groups and reduces the propensity for extra-judicial acts of violence by minority Tamils and by aggrieved Sinhalese members. That is to say intra-ethnic relations can be improved by virtue of positive interactions on a level playing field: The economic development of Sri Lanka.⁴²⁶

The Tamil diaspora has historically played a significant role in the domestic economic and political affairs of Sri Lanka via remittances and financial support for the LTTE Tamil insurgency. To date, the government has lacked the legitimacy and the means to channel those resources for mutually beneficial purposes. To wit, in recent years 50 % of its GDP has been attributed to diaspora remittances from host countries and sent to families in the North and East of the Island, where the majority of the Tamils reside. However, until the defeat of the LTTE, the North and East of the Island had been under the leadership of this insurgency to the extent that any private-public development programs outside of the insurgent's sphere of influence were not

⁴²² Interviews with local anti-terror agents suggest that sympathy for Sri Lankan efforts to curtail LTTE operations in host countries is contingent upon the degree to which Sri Lanka retains its edge on moral legitimacy. If Sri Lanka is perceived as lacking a just and moral framework for addressing opposition from within its civilian population, then its efforts to gain co-operation from the West will be diminished to the Sri Lankan government's detriment.

⁴²³ Ibid.

⁴²⁴ Gabriel Sheffer discusses the leverage that diaspora communities can wield in their host countries with respect to events that are unfolding in the home countries. A perfect example is the effect that the Tamil diaspora community in Norway had in getting their host country to intercede and to broker a peace agreement in 2002.

⁴²⁵ Gabriel Sheffer argues that Diaspora communities are not monolithic. In the Sri Lankan case, moderate Tamils that have disapproved of the violent and coercive tactics utilized by the LTTE have formed their own coalitions and have attempted to explore alternative options that would lead to conflict resolution.

⁴²⁶ Mutually beneficial economic projects create opportunities for cooperation between ethnic groups that – if developed legitimately, can foster positive experiences that are mutually satisfying. This type of conflict resolution project is typically developed by NGOs on the ground.

encouraged.⁴²⁷ In terms of targeted reconstruction efforts, the North and East have been the areas hardest hit by the protracted civil war; in effect rendering the infrastructure in those areas sub-par for the purposes of economic development and foreign direct investment.⁴²⁸

Therefore, the expected outcomes of improving foreign relations with the various actors are conceivably twofold, where the latter outcome is contingent upon the former: First, Sri Lanka could expect to benefit from the moral legitimacy conferred upon it by the west. Second, Sri Lanka could expect to enjoy increased access to various loans from foreign donor institutions and foreign direct investments from foreign private enterprise, beyond the current scope. In turn, those monetary cash flows can be used to target various economic and infrastructure development and poverty alleviation programs in Sri Lanka, such as those initiated under the auspices of the Samurdhi Sri Lankan Authority under the leadership of President Rajapaksa. Furthermore, economic trade can be the impetus for social, political and economic stabilization in Sri Lanka as well as positive foreign relations with other states on the basis of an economic trade platform.

In addition, a rarely noted yet salient point is that while the LTTE is now a defunct organization, Sri Lankan authorities need to remain vigilant so that disaffected irredentist diaspora individuals and groups - formerly supportive of LTTE insurgency operations, do not have an opportunity to regroup in host countries. This factor behoves the Sri Lankan government to reinforce good relations and cooperation with security and law enforcement agencies in western countries where previously pro-LTTE diaspora communities thrive.⁴²⁹ In tandem, moderate Tamil diaspora communities that seek conflict resolution and are more open to non-violent rather than extra-political actions, would be expected to increase the credibility of Sri Lanka with their host governments. In turn, the west will lend credence to the moral legitimacy of the Sri Lankan government in substantive ways. Ultimately, Sri Lankan overtures to diaspora communities that are currently reticent about supporting reconstruction efforts in their homeland - either due to political disaffection or a lack of trust in the state's governing institutions, could potentially be overcome.

Options for Sri Lanka's Political and Economic Future

In keeping with Sri Lanka's history as a founding member of the 'non-alignment movement' - considered an astute political position, a foreign policy agenda that reflects balance and political moderation, will help to stem the flow of western alienation.⁴³⁰ Such alienation can be understood in economic terms when evaluating the impact of negative foreign relations with the west regarding foreign direct investments and loans. Incorporating substantive efforts to address foreign relations issues - such as a rapprochement with the west, institutional deficiencies, human rights claims and intra-ethnic grievances, will signal Sri Lanka's commitment and capacity to engage with the global economy in earnest and morally legitimate ways.

⁴²⁷ Insurgency doctrine applied by the LTTE would not support cooperative enterprises under the tutelage of the Sri Lankan government because these would be considered legitimating the government and therefore antithetical to the insurgent's cause.

⁴²⁸ This is a typical problem in developing countries, particularly in post-conflict scenarios because in order to be competitive in global markets, various economic sectors need to have access to reliable transportation systems, energy and information and communication technology grids and banking systems.

⁴²⁹ See footnote 23.

BBC News Asia, December 21, 2009, <http://news.bbc.co.uk/2/hi/1166237.stm>.

⁴³⁰ 2009 Human Rights Report: Sri Lanka 03/11/10 <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136093.htm>

What is at stake may appear to be a binary exercise of choosing between the friendship and support of the east versus the west; but in fact this may not be the case. If Sri Lanka were to remain true to its earlier political stance as a moderate, non-aligned state – while maintaining fidelity to its original post-colonialist democratic philosophy, the West would find fewer causes for finding fault in Sri Lanka's political practices. The Democratic Socialist Republic of Sri Lanka is a post-colonialist constitutional, multiparty republic with a long history of democratic government. The current government, led by recently re-elected (January 2010) President Mahinda Rajapaksa has demonstrated its continuing commitment to democratic governance. However, given the emergent pressures of stabilizing this post-conflict society, the current government has been hard-pressed to ensure that those antecedent democratic principles are not eroded in pursuit of securitizing practices and operations at this juncture.⁴³¹

In that vein, the Rajapaksa government is making attempts to demonstrate credible advances in problematic areas of governance, legitimacy and the rule of law.⁴³² However, its actions to date have been insufficient to quell the nervousness of the international community in the west and to earn the trust of the now politically weakened Tamil minority population. Furthermore, the international community, with the United Nations Secretary General Ban Ki Moon at the helm, have voiced legitimate concerns regarding historic and current human rights abuses that may have been perpetrated by both the Rajapaksa government and the former LTTE and its supporters.⁴³³ Any progress to be achieved in Sri Lanka's foreign relations with the West will be contingent on its ability to address the issues and concerns voiced by those states committed to democracy and the rule of law. Transparency and accountability are expected performance requirements in pursuit of those foreign relationships.

The continuing instability and unresolved issues that are plaguing Sri Lanka at this stage in the transitional period, have had a direct impact on the government's ability to access sufficient loans, investment equity and business opportunities, from otherwise interested and supportive parties. The outcome is that the immediate implementation of post-conflict reconstructive poverty alleviation programs and infrastructure development projects are constrained by the limited number of foreign partners interested in supporting Sri Lanka's current efforts. The longer that it takes for the Sri Lankan government to enact substantive confidence building measures, the greater the propensity for the current government to backslide into a defensive position that erodes the democratic principles upon which the state was founded. Additionally, such a lag as is now occurring will only cause a loss of confidence in the global equity markets and serve to alienate the diaspora, foreign investors and donor states further.

Economic Implications

The economic opportunities lost at this stage may be difficult to recoup, given the entrenched nature of the political relationships that are being formed with interested states in the east. Furthermore, the west's engagement in the development of a post-conflict Sri Lanka is not only desirable, but necessary; in order to ensure a smooth and progressive transition toward social, political and economic stability. Any policy which undermines this golden opportunity - vis-à-vis its potential western partner-states – will be to the detriment of the future Sri Lanka as it emerges from this transitional post-conflict period.

⁴³¹ Sri Lankan Government Foreign Affairs Media Website, December 21, 2009, <http://www.lankamission.org/content/view/2366/40/>.

⁴³² Ibid.

Mahinda Chintana, Samurdhi Project.

⁴³³ 2009 Human Rights Report: Sri Lanka 03/11/10 <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136093.htm>

Allegations of human rights abuses and undemocratic political practices have emerged. These practices have largely contributed to the views by western countries that Sri Lanka's commitment to sustaining democracy is questionable.⁴³⁴ The dual tensions that have arisen as a result of emerging negative western perceptions on the one hand and Sri Lankan perceptions of a lack of empathy and too much meddling by the west on the other hand, have served to justify Sri Lanka's deepening engagement with trading partners and donors from non-democratic, authoritarian regimes such as China, Libya, Iran and Myanmar. The implication is that Sri Lanka is leaning further to the east and increasingly away from the west in terms of its foreign and economic trade relations. Also, in spite of the fact that the 'non-alignment movement' was a Cold War phenomenon, Sri Lanka's antecedent stance as a member of the 'non-alignment movement' is repeatedly raised in op-eds and U.S. foreign policy analyses. History has shown that developing countries have been best served by maintaining a non-aligned stance in the international arena.

The government of Sri Lanka appreciates the critical implications of sustainable economic growth as the driving engine for this post-conflict developing nation, in need of rehabilitation and reconstruction. Yet, the state has not demonstrated a nuanced appreciation for maintaining positive relations with states near and far, from the East as well as the West, in substantive ways. At this stage, macro-economic fiscal policies and micro-economic development programs that have been developed over the last decade are better positioned to be applied and implemented effectively. In particular, given the positive economic implications of the state's defeat of the LTTE insurgency- that had plagued this country for 26 years, a bloated defence budget is no longer justifiable. In substantive ways, the Sri Lankan government can now redirect this budgetary allocation toward social welfare and infrastructure development projects.

Observers of Sri Lankan foreign relations have long suspected that a weakening of ties between Sri Lanka and the west has had a direct impact on donor state commitments. The United States alone is the largest single country trading partner with Sri Lanka. The EU in its entirety is the single largest trading partner. Recent official statistics summarized in the 'Pre-Election Budgetary Position Report – 2010' confirmed that, "... the US had committed a mere US \$ 1.0 million in financial assistance for 2009, the corresponding figure for Germany is US \$ 2.8 million. In contrast, China's financial commitment towards Sri Lanka for 2009, stood at US \$ 1,206.7 million (March 22, Colombo, Sri Lanka Guardian)." Iran has committed U.S. \$450 million toward infrastructure within the energy sector. The perceived foreign relations imbalance in the budgetary report was largely glossed over and instead, the report highlighted the fact that donor commitments for 2009 had surpassed previous amounts with a total of US \$2,221.7 million.

Contrary to the impression left by the Pre-Election Budgetary Position Report (2010), it is not in the best interests of Sri Lanka to lean too heavily in any single direction at this time, for those reasons which I have stated above. Furthermore, its long history as a democratic- albeit developing state – should not be easily discounted. In crucial ways, the impact on a Sri Lanka that does not enjoy the moral legitimacy conferred upon it by the west would be extremely detrimental and would have long term ramifications in social, political and economic terms.

The war in the north deprived Sri Lanka of an estimated three percentage points of economic growth each year in the 1990s. While Sri Lanka's \$40 billion economy is forecast to grow more than 6 percent this year, protests following the presidential election in February dragged down the share market. The index has recovered, but foreign investors have been net

⁴³⁴ Ibid.

sellers. The importance of including economic variables as part and parcel of moving the current post-conflict period forward is further strengthened when one considers the fact that 50 percent of Sri Lanka's GDP is attributed to diaspora remittances and loans from donor states.⁴³⁵

The geographic proximity of India cannot be overstated. At this juncture, Sri Lanka should expect to be in a position to entice India into deeper and more meaningful economic relations. This is particularly relevant at this stage because it solves the issue of an imbalance in Sri Lanka's trading partners and creates a space wherein India can view deeper economic engagement with Sri Lanka as in its best interest when considering the encroachment of the Chinese presence in the region. As it is, India remains Sri Lanka's largest trading partner and closest neighbour. Furthermore, India has a Tamil population of approximately 80 million who are interested in seeing a political resolution to the current military victory over the Tamil minority in Sri Lanka. India's favourable engagement with Sri Lanka will create the right framework for improved relations between Tamils and Sinhalese, regardless of country of origin; and place the issue on a more equal footing.⁴³⁶

Finally, foreign direct investments by private foreign investors and Sri Lankan diaspora communities (many of whom had previously supported the LTTE insurgency in Sri Lanka) - are niche sectors in the FDI portfolio that have been relatively untapped until now.⁴³⁷ The axiomatic importance of foreign policy and foreign direct investment to the current economic development and security of Sri Lanka should not be underestimated. The importance of poverty reduction programmes, the criticality of technology transfer to developing economies and the implementation of infrastructure development programs is critical to the stabilization of the island and the future political and economic integration of its population. Ultimately, these dominant factors will contribute to the prospect of a stable and lasting peace and to the legitimization of the Sri Lankan government.

⁴³⁵ COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE, December 7, 2009,

SRI LANKA: RECHARTING U.S. STRATEGY AFTER THE WAR, <http://foreign.senate.gov/imo/media/doc/SRI.pdf>.

⁴³⁶ The Honourable Bob Rae raised the issue of India- the elephant in the room, as the obvious candidate for economic investment in Sri Lanka, suggesting that Sri Lanka should understand the leverage that Chinese involvement wields as impetus for pro-democratic engagement.

⁴³⁷ U.S. Department of State Background Notes on Sri Lanka, <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136093.htm> & COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE, December 7, 2009, *SRI LANKA: RECHARTING U.S. STRATEGY AFTER THE WAR*, <http://foreign.senate.gov/imo/media/doc/SRI.pdf>.

WEIGHING SRI LANKA'S FOREIGN POLICY RECOMMENDATIONS:

- 1. A MODERATE NON-ALIGNED FOREIGN POLICY;**
- 2. FIDELITY TO DEMOCRATIC VALUES AND INTERNATIONAL NORMS;**
- 2. IMPROVED RELATIONS WITH THE WEST;**
- 3. FAVORABLE RELATIONS WITH DIASPORA COMMUNITIES;**
- 4. TARGET FOREIGN DIRECT INVESTMENTS IN EAST AND WEST;**
- 5. ACHIEVE GREATER ACCESS TO GLOBAL FINANCIAL MARKETS.**



RECOMMENDATIONS: Implementation in the Short Term

1. A return to a moderate non-aligned political position in international affairs;
2. Negotiate terms for transparency and accountability with Western donor states;
3. Address intra-ethnic tensions on the basis of accepted juridical and constitutional rules and norms;
4. Implement short term reconstruction and reintegration programs in the north and east of Sri Lanka;
5. Encourage positive relations with Sri Lankan Diaspora communities;
6. Develop legitimate economic investment opportunity programs for foreign direct investments by diaspora and business communities.

RECOMMENDATIONS: Implementation in the Long Term

1. Maintain a moderate non-aligned political position in international affairs;
2. Enjoy the economic benefits of a stable developing political economy;
3. Deepen ties with foreign investment institutions and enterprises;
4. Encourage the development of professional and academic relationships with foreign Institutions of Higher Education and Research and Development;
5. Develop and implement programs and economic opportunities for the transfer and exchange of technological and scientific systems and information from developed economies to the developing economies of the world as the means of improving Sri Lanka's economic capabilities;
6. Consider the pros and cons of incorporating voting rights for Diaspora communities invested in Sri Lanka;
7. Focus on increased economic productivity (GDP) as the driving engine for Sri Lanka's recovery and future development;
8. Stay the course and reap the rewards of the political and economic dividends of a hard won peace.

Conclusion

The protracted 26 year civil conflict has taken its toll on the Sri Lankan people whom, as a consequence, have suffered social, political and economic setbacks to their once-prominent developing country. Having won the presidency by a majority vote, in spite of election results that are currently being contested by the leading opposition party, the Rajapaksa government is confident that it will win the upcoming parliamentary elections to be held on April 8, 2010.

Sri Lanka is now at a cross-road, as it moves into the transitional stages of the post-conflict period. At stake for President Rajapaksa and the Sri Lankan people, is the dual tension between a country that could potentially back-slide into the longstanding entrenched ethnic conflict from which it has now emerged; or alternatively, the prospect of a politically united and economically stable Sri Lanka, that is able to forge ahead toward a more productive and promising era of social, political and economic prosperity and development.

Now that President Rajapaksa has succeeded in '*winning the war*' against the LTTE insurgency, his government is further invested with the challenge of '*winning the peace*', and in the process '*reaping the dividends*' that a stable and lasting peace can offer the state and its citizens. Therefore it is incumbent upon the government of Sri Lanka to come to grips with the various challenges, opportunities, constraints and contradictions that it faces at this time; in order to chart the most realistic and beneficial course, while navigating the Sri Lankan nation, as it embarks on the path ahead.

References

- BBC News Asia, December 21, 2009, <http://news.bbc.co.uk/2/hi/1166237.stm>.
- Canadian Council on International Law, 33rd Annual Conference (2004),
Legitimacy and Accountability in International Law, Allegra Print: Ottawa.
- Carment, David and David Bercuson, eds., (2008), *The World In Canada: Diaspora, Demography and Domestic Politics*, McGill-Queen's University Press: Canada.
- Cochrane, Feargal, Bahar Baser & Ashok Swain, *Home Thoughts from Abroad: Diasporas and Peace-Building in Northern Ireland and Sri Lanka*, Studies in Conflict & Terrorism, 32:681-704, 2009.
- COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE, December 7, 2009, *SRI LANKA: RECHARTING U.S. STRATEGY AFTER THE WAR*,
<http://foreign.senate.gov/imo/media/doc/SRI.pdf>.
- Conversi, Daniele, ed., (2002), *Ethnonationalism in the Contemporary World: Walker Connor and the study of nationalism*, Routledge: London.
- Dr. S. Narapalasingam, *Prospect of winning real peace in war-torn Sri Lanka*,
http://federalidea.com/fi/2009/02/post_129.html.
- Duffield, Mark (2001), *Global Governance and the New Wars*, Zed Books: London, New York.
- Fuglerud, Oivind, *Time and Space in the Sri Lanka-Tamil Diaspora*, Nations and Nationalism 7(2), 2001, pp. 195-213.
- Global Tamil forum, <http://globaltamilforum.org/gtf/content/what-should-global-tamil-forum-stand#comment-95>
- 2009 Human Rights Report: Sri Lanka, March 11, 2010,
<http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136093.htm>
- Jenkins, J. Craig and Doug Bond (2008), *Conflict-Carrying Capacity, Political Crisis, and Reconstruction: A Framework For the Early Warning of Political System Vulnerability*, The Journal of Conflict Resolution, Feb 2001, 45,1;ABI/INFORM Global, p. 3.
- Jenkins, J. Craig and Kazimierz M. Slomczynski (2008), *Guest Editor's Introduction: The Across Nations Project and Cross-Nations Studies*, International Journal of Sociology, Vol.38, No 3, Fall 2008, pp. 3-11.
- Jenkins, J. Craig, Wallace, Michael and Andrew S. Fullerton (2008), *A Social Movement Society? Cross-National Analysis of Protest Potential*, International Journal of Sociology, Vol.38, No 3, Fall 2008, pp. 12-35.
- McAdam, Doug, Tarrow, Sidney & Charles Tilly, (2001), *Dynamics of Contention*, Cambridge University Press: U.K.
- Orjuela, Camilla (2008), *Distant warriors, distant peace worker? Multiple diaspora roles in Sri Lanka's violent conflict*, Global Networks 8,4 (2008) 436-452.
- (2008), *Reaping The Harvest of Peace? The Politics of Reconstruction during Sri Lanka's 2002 Peace Process*, Critical Asian Studies, 40:2 (2008), 211-232: Routledge.
- (2005), *Civil Society in Civil War: The Case of Sri Lanka*, Civil Wars, Vol.7, No.2 (Summer, 2005), pp 120-137: Taylor & Francis.
- (2003), *Building Peace in Sri Lanka: A Role for Civil Society?*, Journal of Peace Research, Vol. 40, No. 3, (2003), pp. 195-212: Sage Publications.
- Rotberg, Robert I., ed., (1999), *Creating Peace in Sri Lanka*, Brookings Institution Press: Washington, D.C.
- Samurdhi: The Main Poverty Alleviation Programme in Sri Lanka. Ministry of Nation Building

- and Estate Infrastructure Development.
 Scribd Social Publishing Company, January 2, 2010,
[http://www.scribd.com/doc/12797677/Liberation- Tigers-of-Tamil-Eelam](http://www.scribd.com/doc/12797677/Liberation-Tigers-of-Tamil-Eelam)
 Sheffer, Gabriel, *Diaspora Politics: At Home and Abroad* (2003), Cambridge University Press: U.S.A.
 Sokefeld, Martin, *Mobilizing in Transnational Space: A Social Movement Approach to the Formation of Diaspora, Global Networks* 6,3 (2006) 265-284.
 Sri Lankan Government Foreign Affairs Media Website, December 21, 2009,
<http://www.lankamission.org/content/view/2366/40/>.
 Tamil Web News, June 2009, www.tamilnews.com.
 Tarrow, Sidney, (2005), *The New Transnational Activism*, Cambridge University Press: U.S.A.
 (1998), 2nd edition, *Power in Movement: Social Movements and Contentious Politics*, Cambridge University Press: U.S.A.
 The Mackenzie Institute, November 2009, <http://www.mackenzieinstitute.com/>
 Tilly, Charles (2005), *Identities, Boundaries & Social Ties*, Paradigm Publishers: Boulder, Colorado.
 Thomas, Troy S., Stephen D. Kiser and William D. Case beer (2005), *Warlords Rising: Confronting Violent Non-State Actors*, Lexington Books: UK.
 U.S. Department of State, Background Notes on Sri Lanka, 16/03/2010.
<http://WWW.STATE.GOV/R/PA/EI/BGN/5249.HTM>
 United States Political Action Committee, December 28, 2009, <http://www.ustpac.org>

Primary Sources:

- Interview with Two Anti-Terror Intelligence Officers, anonymous, Canadian Law Enforcement Services.
 Interviews with moderate Tamil Diaspora members in hiding.

CONCLUSION: SRI LANKA – WINNING THE PEACE

The Status Quo Will Fail

‘Winning the Peace’ requires that the Government of Sri Lanka recognize the extraordinary opportunity it has to negotiate much-needed reform from a position of strength. The Nation’s political history since Independence is marked by cycles of violent political upheaval. Many predecessors assumed the highest office of the land with the presumption that massive electoral and security achievements provided a mandate from the population to pursue policies that entrench the status quo and their group’s interests. The governments and the policies of each of these previous governments, were either over-turned within a very short time frame, or, were neutralized by the constant state of emergency.

Already the current militarily and electorally successful government of President Rajapaksa is sustaining the constant state of emergency; no doubt as a result of perceived threats. Yet this is the path down which every government eventually locks itself into; fearful of pursuing another policy direction – fearing the unknown. What is obvious however, are Sri Lanka’s cycles of violence and political upheaval which destroy governments and their legacies.

To break out from the ‘state of emergency governance’ mould in which Sri Lanka has been trapped for almost 60 years, requires a creative, but pragmatic government reform agenda. Previous governments have also been guilty of over-reaching with ambitious reform agendas that failed and only served to discredit major efforts at constitutional and institutional reform. Informed by the lessons of the past, this report offers a package of policy proposals and reforms that are at once incremental but also full of promise. The incremental nature of the proposals is the root of their feasibility, providing the chance to work patiently towards far greater goals over a period of years.

Failure to act within this narrow window of opportunity would not be surprising. Indeed, it would be the more historically consistent road to take. Pursuing the status quo, which is in many respects the direction President Rajapaksa’s government is taking, is most likely going to result in further validation of an insight by a well known student of European society, with its unimaginably violent past, who observed:

"For the victors, at least for part of them, the war will have been politically profitable. And the responsibility for this rests on the behaviour of all that made resistance impossible. Now, as a result of the ethics of absolutism, when the period of exhaustion will have passed, the peace will be discredited, not the war."

- Max Weber, Essays in Sociology