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Negotiation and the Dispute Resolution in the Sri Lankan Context: Lessons from the 1994-1995 Peace Talks

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Abstract

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NEGOTIATION AND DISPUTE RESOLUTION IN THE SRI LANKAN CONTEXT: LESSONS FROM THE 1994-1995 PEACE TALKS

*David M. Rothenberg**

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INTRODUCTION

On October 13, 1994, four negotiators from the government of Sri Lanka arrived in the rebel-held territory of the Liberation Tigers of Tamil Eelam ("LTTE") to begin face-to-face peace talks with the LTTE. After eleven years of civil war that left over 34,000 dead, both sides realized that a window of opportunity for negotiating a peaceful solution to the intractable military conflict had emerged.¹ The mood throughout the island of Sri Lanka was euphoric. Thousands of ordinary Tamil civilians, who gathered to witness the arrival of the opposing-government delegation, streamed through LTTE barricades in an outpouring of support for the peace process, throwing flower petals and kissing the hands of the government officials.² The opportunity for a peaceful resolution of the violent civil war was historic.

Six months later, the LTTE abrogated a cessation of hostilities agreement by attacking a Sri Lankan Navy ship. The government of Sri Lanka responded by mounting a major offensive to recapture all LTTE-held territory. The years since the breakdown of the peace talks have been characterized by intense military conflict. The use of sophisticated, heavy weapons, the confrontation of large battalions of ground troops, and the resulting number of deaths among military and civilian populations suggest that the war has now entered into a particularly fierce

1. *Sri Lanka and Guerrillas Agree to End Blockade*, INT'L HERALD TRIB., Feb. 18-19, 1995.

2. *Cease-fire Talks for Day Two*, DAILY NEWS (Sri Lanka), Oct. 15, 1994, at 12.

stage.³ Recently, the LTTE has responded to its loss of territory by using suicide bombers to attack major Sinhalese cultural and military sites. The most sacred Buddhist shrine in Sri Lanka, The Temple of the Tooth, was attacked by suicide bombers in January 1998 to disrupt celebrations of Sri Lanka's fiftieth anniversary of independence, just days before the visit of Britain's Prince Charles. The government has since banned the LTTE, outlawing all communications with the group. In short, the current divide between the two sides has never been so wide, hostile, and destructive.

How did this happen? How did the Sri Lankan government and the LTTE move so quickly from embracing a historic opportunity for peace to all-out war? Careful analysis of the 1994-95 Sri Lankan peace talks reveals that a major obstacle in the negotiations was a poorly designed *process*. Despite the momentous nature of the talks, and despite the captivation of the country that the talks inspired, the government and the LTTE failed to consider systematically-important process issues of the negotiations. In this Article, the process of the 1994-95 peace talks—how they were conceived, structured, and conducted—will be dissected in order to identify the process-oriented obstacles that impeded a negotiated agreement. Once the lessons from the 1994-95 talks are elicited, this inquiry will suggest alternative processes that might facilitate a negotiated settlement if talks are held in the future.

Two caveats in this study's approach must be mentioned at the outset. First, although the substantive issues and competing positions of the parties will be examined, this author will not be so bold as to suggest solutions or arrangements to end the hostilities. The difficult and complex military and political arrangements will have to be worked out by the parties themselves. This inquiry will instead seek to explain how errors in the *process* of the peace talks contributed to their breakdown and to provide recommendations should future talks be held. Second, the examination of the weaknesses in the process of the peace talks is not meant to serve as a comprehensive explanation for why the talks failed. As will be subsequently explained, many factors, of which the process is only one, can be credibly identified as obsta-

3. Rashna Writer, *Sri Lanka Takes the Cautious First Steps Toward Ending the War*, DEF. & FOREIGN AFF. STRATEGIC POL'Y, June-Jul. 1996, at 21.

cles to peace.⁴ The argument that this Article will put forth is that the process of the peace talks significantly impeded the negotiations, and reforms to the process may advance the peace dialogue. It is likely, however, that other factors must also be present for peace talks to be successful.

The inquiry into the process of the 1994-95 Sri Lankan peace talks is important for several reasons. Perhaps most obviously, it is meant to assist and inform practitioners of peace in Sri Lanka. One of the central tenets of this Article is that the peace talks were constructed in such an ad hoc and unprofessional manner that a negotiated solution to the complex conflict was virtually precluded. Identifying process-oriented obstacles, and potential paths around these obstacles are vitally important if future talks are to be successful.

The importance of understanding the mistakes of the 1994-95 peace talks is heightened by the unlikelihood of a military resolution to the Sri Lankan conflict. According to Sri Lanka's most noted military columnist, neither the government nor the LTTE has been able to secure a lasting victory over the other, and little has changed militarily to suggest that such a military solution is possible.⁵ Although the Sri Lankan Army recently gained significant territory, there is little reason to believe the LTTE will not remain a significant military threat, as recent LTTE bombings in Colombo indicate. As long as a military solution remains unattainable or unlikely, understanding the mistakes and failures of past negotiations will have significant value.

The level of death and destruction in the Sri Lanka conflict also justifies greater effort in understanding paths to peace. Unlike the ethno-political conflicts in Bosnia and Northern Ireland, the dispute in Sri Lanka has escaped sustained international attention from dispute resolution analysts, policy makers, and the general public. The Sri Lankan government's ability to keep journalists out of the war-torn areas of the Northern and Eastern Provinces has helped keep reports of abominable suffering out of the world news. By analyzing errors of the 1994-95 peace

4. Issues of political will, strategic considerations, and substantive understandings of the issues all affected the success of these negotiations.

5. Interview with Harry Goonethilleke, Sri Lankan Air Vice Marshall, in Colombo, Sri Lanka (Jan. 21, 1998).

talks, this Article seeks to add to the effort of ending the violence in Sri Lanka.

From an academic and research perspective, an analysis of the process of the 1994-95 peace talks would add significantly to the literature on the Sri Lankan conflict because such a study has not been undertaken. There are virtually no published materials that systematically analyze the process of the 1994-95 peace talks. This lack of analysis is due partly to the relatively recent conclusion of the talks and partly to the focus of academics on other, more visible international conflicts. In addition, exciting constitutional reform in Sri Lanka has attracted a great amount of attention, perhaps at the expense of examinations into the failed peace talks. The challenge and importance of this study is therefore tied to a lack of scholarship on the 1994-95 peace talks.

In a broader context, lessons from the peace process in Sri Lanka might be useful, if only marginally, to structuring ethno-political peace talks in other parts of the world. The lessons from the 1994-95 Sri Lankan peace talks and the recommendations suggested for reforming the process might inform efforts to arrive at peaceful settlements in Burundi, Cyprus, Kashmir, Georgia, Northern Ireland, Sudan or the Middle East.

This Article consists of four parts. Part I sketches the historical background of the Sri Lankan ethnic conflict and the process of easing ethnic tensions. This overview seeks to introduce the reader to the principal parties, issues, and developments in the dispute resolution process, as well as to elicit historical trends that inform current efforts to achieve peace. Part II systematically presents, through published reports, letters, and joint statements of the parties, and through interviews with negotiators and officials from both the government and the LTTE, the events and the process of the 1994-95 peace talks. Part II aims to characterize and to identify the difficulties encountered in these talks. Part III explicates and dissects the lessons from the 1994-95 experience. Part III explores in depth how the lack of an operating framework, agent and principal tensions, modes of communication, procedures within the talks, and efforts to structure implementation impeded a negotiated settlement. Part IV draws from the lessons learned from the 1994-95 talks and provides six recommendations for the government and the LTTE to overcome the main process-oriented obstacles that

emerged. Finally, the conclusion provides a brief assessment of the prospects for reviving the peace talks and an appraisal of the most urgent steps needed to repair the relationship between the government and the LTTE.

I. *THE HISTORICAL BACKGROUND*

To understand the 1994-95 peace talks, it is necessary to examine briefly the historical roots of the conflict. Such an overview will not only identify the major issues, positions, and parties involved, but also offer insights into the undercurrents influencing past peace efforts that continue to hinder the modern peace process. Three such undercurrents are: 1) the legacy of deep mistrust between the parties, even when settlements are reached, 2) the omnipresence of intra-party rivalries leading to the encouragement of chauvinist sentiments, and 3) the tendency to dismiss issues of process in efforts to ease ethnic tensions. The main goal of Part I is to highlight the major historical developments that will provide insights into the current deadlock, thereby familiarizing the reader with the history of the Sri Lankan ethnic conflict and peace efforts.

A. *The Pre-Colonial Period*

The Sinhalese, comprising 74% of Sri Lanka's population, or 13.4 million people, are thought to be of the Aryan race, migrating from Northern India in about 500 BC.⁶ The Mahavamsa, a sacred text compiled by Sinhalese Buddhist monks in the sixth century, provides a mythological account of the settlement of Sri Lanka in which Vijaya, a northern Indian, inspired by the teachings of Buddha, arrives in Sri Lanka to expel its semi-human inhabitants. There are also accounts in the Mahavamsa of Sinhalese leaders, such as Prince Dutthagamani, fighting and defeating Tamil rulers in the northern regions of the island.⁷ Those who claim a "timeless" dimension both in the historical struggle between the Sinhalese and Tamil people, and in Sinhalese dominance, often cite the Mahavamsa as evidence.⁸

The Tamils, comprising 18% of the current population of

6. S.S. MISRA, *ETHNIC CONFLICT AND SECURITY CRISIS IN SRI LANKA* 36 (1995).

7. David Little, *Sri Lanka: Ethnic and Religious Differences* 4 (1997) (unpublished paper) (on file with the *Fordham International Law Journal*).

8. ALAN J. BULLION, *INDIA, SRI LANKA AND THE TAMIL CRISIS 1976-94*, at 14 (1995).

Sri Lanka, or 3.2 million people, are of Dravidian descent and largely practice the Hindu religion. They arrived in Sri Lanka through successive invasions from Southern India and inhabited the northern and eastern regions of the island. Tamil nationalists have claimed a historical dominance of the northern and eastern regions as a basis for current efforts for self-determination. The waves of Tamil invasions, coupled with the large Tamil population in neighboring India, gave the Sinhalese a feeling of being a minority in a regional context.⁹ Although there is evidence of competitions between the Tamil and Sinhalese people in the pre-colonial period, it is unclear whether such rivalries were extensive enough to be considered the beginnings of the current ethnic divide. Rather, as David Little argues, the pre-modern period was characterized by diffused social and political relations,¹⁰ suggesting that the real birth of the current ethnic conflict lies in modern, post-colonial experiences.

B. *The Colonial Period*

Portuguese traders looking for spices were the first to colonize Sri Lanka. When they landed on the shores of Sri Lanka in 1505 they encountered three major kingdoms: a Hindu kingdom on the Jaffna peninsula in the northern area, a Sinhalese kingdom in the lowlands of Kotte, and a separate Sinhalese kingdom in the highlands of Kandy.¹¹ The interior Kingdom of Kandy successfully resisted Portuguese colonization, partly due to Dutch aid. By the middle of the seventeenth century, the Dutch were able to control much of the island, although they never exercised full control over the Kingdom of Kandy. The British were the first to control the island completely, by defeating the Kingdom of Kandy in 1815.¹² By 1833, the British had instituted a centralized form of government in the Crown Colony of Ceylon and had created five administrative districts based on ethnic and geographical considerations.¹³ The introduction

9. *Id.* at 15. More than fifty-five million Tamils currently live in the southern Indian province of Tamil Nadu, just twenty-six miles across the Palk Strait from Sri Lanka.

10. Little, *supra* note 7, at 4.

11. SUMANTRA BOSE, STATES, NATIONS, SOVEREIGNTY: SRI LANKA INDIA AND THE TAMIL EELAM MOVEMENT 47 (1994).

12. ELIZABETH NISSAN & R.L. STIRRAT, SRI LANKA: HISTORY AND ROOTS OF CONFLICT 27 (Jonathan Spencer ed., 1990).

13. *Id.* at 29.

of roads, railroads, and English education offering social mobility, all served to bring Sinhalese and Tamil communities into greater contact.¹⁴

The British established large tea, coffee, and rubber plantations in the Kandyan highlands and brought Tamils from southern India as laborers. These laborers, the descendants of whom are known today as "Estate Tamils" to distinguish them from the Sri Lankan Tamils who preceded the British, settled in the Sinhalese heartland. The emergence of enclaves of these Tamil-speaking laborers, drawn largely from lower Hindu castes, created tensions with the Sinhalese over land and employment. The Sri Lankan Tamils, meanwhile, were able to take advantage of their English education, a result of the many English language mission schools that had been established in the Tamil areas to acquire a disproportionate number of jobs in government service.¹⁵ The lopsided success of the Sri Lankan Tamils in the colonial civil service and the injection of Estate Tamils into the Sinhalese heartland sowed seeds of resentment within the Sinhalese community.

In the first two decades of the twentieth century, however, Tamil and Sinhalese politicians worked together in their struggle against British colonialism. The first Sri Lankan member of the Legislative Council was a Tamil, as was the first president of the Ceylon National Congress.¹⁶ By the early 1920s, however, the Ceylon National Congress had split along ethnic lines, and by the 1930s, Tamil and Sinhalese politicians were battling over issues of representation in the new legislature and voting rights of Estate Tamils. On the eve of independence, Sri Lanka's political parties were largely splintered along ethnic lines.

C. Independence

The transfer of power to the independent nation of Ceylon in 1948 was peaceful, especially compared to the violence surrounding Indian independence.¹⁷ The United National Party ("UNP"), under the Sinhalese leadership of D.S. Senanayake, won the general election of 1947, securing forty-two of ninety-

14. MISRA, *supra* note 6, at 38.

15. *Id.* at 28.

16. BULLION, *supra* note 8, at 16.

17. Ainslee Embree, *Statehood in South Asia*, 51 J. INT'L AFF. 1, 18 (1997).

five seats in Parliament and assuming power in 1948.¹⁸ The Tamil Congress, which won only seven seats, decided to ally itself with the UNP. When the UNP passed the Indian Citizenship Acts of 1948 and 1949, which deprived Estate Tamils of citizenship and voting rights in Ceylon, a newly-formed Federal Party split from the Tamil Congress seeking a self-governing Tamil nation.¹⁹ Although ethnic issues were beginning to dominate Ceylon politics, historians view the tensions immediately following independence as “strikingly peaceful and orderly.”²⁰

Order began to disintegrate in the 1956 general elections, when S.W.R.D. Bandaranayake, the leader of the opposition Sri Lanka Freedom Party (“SLFP”), won a landslide victory on a platform to make Sinhala, rather than English, the nation’s official language.²¹ “Sinhala Only” became the popular slogan of the campaign and a call for Sinhalese nationalism.²² The passage of the Official Language Act, making Sinhala the new official language, had more than symbolic effect; it required that Tamils be proficient in Sinhala to maintain government jobs. For the Sinhalese masses, this policy helped negate the perceived Tamil advantage for popular public sector jobs due to their greater proficiency in English and helped to reestablish Sinhalese hegemony over the Ceylon. Because few Tamils speak Sinhala, Tamil parties viewed this legislation with great alarm. The Federal Party demanded equal status for the Tamil language, a federal constitution, the repeal of discriminatory citizenship laws, and an immediate halt to the colonization of Tamil areas by Sinhalese people, threatening direct non-violent action if these demands were not met within a year.²³

D. *The Bandaranayake-Chelvanayakam Pact*

Eleven months later, in July 1957, the SLFP and Federal

18. BULLION, *supra* note 8, at 17.

19. K.M. DE SILVA, *SEPARATIST IDEOLOGY IN SRI LANKA: A HISTORICAL APPRAISAL* 6 (1987).

20. ROBERT N. KEARNEY, *COMMUNALISM AND LANGUAGE IN THE POLITICS OF CEYLON* 40 (1967).

21. Nihal Jayasinghe, *The Sri Lankan Conflict: Is It Really Ethnic?*, 13 INT’L J. COMP. & APPLIED CRIM. JUST. 27, 28 (1989).

22. BULLION, *supra* note 8, at 18.

23. Elizabeth Nissan, *Sri Lanka: Negotiations, Agreements, and Statements of Principle of the Sri Lankan Government and Tamil Parties*, INT’L ALERT 1995 (Int’l Alert, London, U.K.), Nov. 1994, at 1.

Party entered into an agreement on the ethnic issues. In the Bandaranayake-Chelvanayakam Pact ("BC Pact"), named for the leaders of the SLFP and the Federal Party, the parties agreed on two major issues.²⁴ First, the Tamil language was to be recognized as a national minority language allowing government work in the Northern and Eastern Provinces to be conducted in Tamil. Bandaranayake had refused to take any steps to abrogate the popular "Sinhala Only" legislation. Second, Regional Councils were to be created in the Northern and Eastern Provinces through direct elections, and Parliament was to delegate to the councils powers over agriculture, land development, colonization, housing, health, and social services.²⁵ No agreement was reached on citizenship, and nuances in the relationship between the central government and the Regional Councils, such as whether the central government could appoint Regional Commissioners, were left unclear. The BC Pact, however, was never implemented. In April 1958, under mounting pressure from Sinhalese nationalists, including the influential Buddhist clergy, Bandaranayake abrogated the agreement and abandoned the proposed legislation.²⁶ Non-violent protests by Tamils led to Sri Lanka's first modern anti-Tamil race riots in 1958 in which hundreds were killed.

Bandaranayake was assassinated by a right-wing Sinhalese Buddhist monk in 1959. This event, in turn, led to a brief UNP government in March 1960, followed in July 1960 by an SLFP government led by Bandaranayake's widow.²⁷ The SLFP won the election with the support of the Federal Party, to whom the SLFP pledged to implement the BC Pact. The SLFP won the elections but once again failed to implement the BC Pact due to opposition from Sinhalese nationalists. The Federal Party, unable to maintain lasting commitments from either the UNP or SLFP, enumerated four demands before ending its campaign of civil disobedience: 1) devolution of power to regional councils, 2) recognition of Tamil as an official language, 3) establishing citi-

24. Peter R. Blood, in *SRI LANKA: A COUNTRY STUDY* 46 (Russell R. Ross & Andrea Matles Savada eds., 1990).

25. The Bandaranayake-Chelvanayakam Pact, Jul. 26, 1957, Sri Lanka Freedom Party ("SLFP")-Federal Party, *reprinted in* CHELVADURAI MANOGARAN, *ETHNIC CONFLICT AND RECONCILIATION IN SRI LANKA* 187, 189 (1987).

26. Nissan, *supra* note 23, at 2-3.

27. BULLION, *supra* note 8, at 21.

zenship with voting rights to Estate Tamils, and 4) cessation of colonization of traditional Tamil lands by Sinhalese people.²⁸

E. *The Senanayake-Chelvanayakam Pact*

A third attempt at easing the ethnic tensions and building a coalition between Tamil and Sinhalese parties occurred following the election of the UNP in 1965. Dudley Senanayake, the leader of the UNP, made a pact with the Federal Party in exchange for its support in creating a coalition government. The two sides agreed that the Tamil language would be the language of government administration in the Northern and Eastern Provinces, that District Councils would be created and powers subsequently devolved to them, and that colonization schemes in the Northern and Eastern Provinces would be structured to give preference to Tamil-speaking people.²⁹ The two sides could not agree on the citizenship issue. Once again, however, the Sri Lankan government was unable to deliver on its end of the bargain. Although the UNP was able to pass the Tamil Language Regulations in March 1966, the laws were never implemented.³⁰ Strong opposition from back-benchers in the UNP coalition prevented the passage of legislation to create the agreed-upon District Councils.³¹ In response, the Federal Party withdrew its support from the UNP-led coalition government.

The first two decades of Sri Lankan independence were characterized by Sinhalese nationalism. The end of British rule was marked by Buddhist revivalism in which the newly-consolidated Sri Lankan majority aggressively advocated its religious and historical glory.³² The reemergence of Buddhist nationalism was amplified by the perceived threat that Tamils disproportionately controlled political and economic powers in the country and the threat of Tamil hegemony in a regional context. Moreover, the political system left by the British contained few protections of minority rights, enabling the Sinhalese super-majority to easily enact discriminatory legislation. In fact, such discriminatory policies, such as the "Sinhala Only" laws and the deprivation of citizenship for Estate Tamils, were promulgated

28. Nissan, *supra* note 23, at 4.

29. *Id.* at 6.

30. *Id.* at 8.

31. Bose, *supra* note 11, at 63, 64.

32. Little, *supra* note 7, at 4.

and maintained due to the political competition to capture the Sinhalese nationalist vote. Although race riots erupted in 1958, Tamil parties in the 1950s and 1960s confronted the discriminatory policies within the bounds of the political and legal system.

F. *The 1970s: The Jantha Vimukti Permuna Uprising and Constitutional Reforms*

The 1970s marked a time of increasing political violence and ethnic polarization in Sri Lanka. Mrs. Bandaranayake and the SLFP returned to power in 1970 and within a year faced a major threat to their government. A Maoist group of Sinhalese youth, disaffected from the political and economic processes of the nation, mounted an uprising, comprised of an estimated 10,000 insurgents, and simultaneously attacked seventy-four police stations.³³ Known as Jantha Vimukti Permuna ("JVP"), this group of insurgents nearly toppled the SLFP government. The JVP uprising highlights a thorough willingness on the part of the government to combat threats to its power with ruthless force. Death tolls from unofficial sources estimate that more than 6,000 JVP insurgents perished in just a few weeks, while the government itself claimed 14,000 arrests.³⁴ The SLFP instituted a state of emergency that remained in effect for six years.³⁵ The political landscape became colored with violence and a preoccupation for security concerns.

Legal reforms in the 1970s served to increase ethnic polarization. In 1972, the SLFP introduced a new constitution, which changed the country's name from Ceylon to Sri Lanka, established the country as a republic, and further entrenched Sinhalese nationalism.³⁶ The constitution defined Sri Lanka as a "unitary state" and the devolution of legislative power was forbidden.³⁷ The state was duty-bound "to protect and foster Buddhism,"³⁸ as it was given a "foremost place" in Sri Lanka, essen-

33. See Bryan Pfaffenberger, *Ethnic Conflict and Youth Insurgency in Sri Lanka: The Social Origins of Tamil Separatism*, in CONFLICT AND PEACEMAKING IN MULTIETHNIC SOCIETIES 254 (Joseph V. Montville ed., 1991). "About 90% of the insurgents were under thirty years of age, while almost three-quarters were under twenty-five." *Id.*

34. *Id.*

35. BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, BACKGROUND NOTES: SRI LANKA 3 (Jan. 1995).

36. MANOGARAN, *supra* note 25, at 56-57.

37. Nissan, *supra* note 23, at 8 (citing 1972 Sri Lankan Constitution).

38. *Id.*

tially making it the national religion. Moreover, Sinhala was enshrined in the 1972 Constitution as the official national language. The SLFP also reformed education policy in such a way as to gain the support of the Sinhalese heartland at the expense of Tamil citizens. A new policy of "standardization" in university admission examinations allowed weighted grading in favor of Sinhalese students.³⁹ Tamil parties, realizing the marginalization of their communities from the scarce resources of the state, and witnessing symbolic overtures to the Sinhalese chauvinist element, formed the Tamil United Front ("TUF") to protest the discriminatory legislation and to demand regional autonomy.

While the Tamil leadership presented demands to the SLFP government, Tamil youths in the Northern and Eastern Provinces were feeling the immediate effects of the discriminatory policies: unemployment was on the rise and a sharp decline in admission to universities was underway.⁴⁰ Violent Tamil youth groups began to emerge in the early 1970s from which a charismatic lower-caste man named Velopillai Prabhakaran formed the LTTE.⁴¹ The LTTE's express purpose was to liberate the Northern and Eastern Provinces from domination by the Sri Lankan government. Even mainstream Tamil politics were becoming more radical. Tamil political parties, responding to youth frustrations, formed the Tamil United Liberation Front ("TULF"), which called for the union of the Northern and Eastern Provinces into an independent Tamil Eelam. "Eelam" is the Tamil word for "Sri Lanka." In the 1977 elections, the TULF won all the seats in Tamil areas on a platform of independence.⁴² The Tamil political scene was divided as to the appropriate method for achieving political reform. The TULF advocated peaceful negotiation while the LTTE advocated armed resistance.⁴³ But the proposition that political separation from

39. Jayasinghe, *supra* note 21, at 28.

40. MISRA, *supra* note 6, at 52.

41. *Id.* at 29. The precursor to the Liberation Tigers of Tamil Eelam ("LTTE") was a group called the Tamil New Tigers ("TNT"), which Prabhakaran founded. The TNT is credited with the assassination of the Mayor of Jaffna in 1975, committed, some speculate, by Prabhakaran himself, marking the first major terrorist act in the Northern Province.

42. BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, *supra* note 35, at 4.

43. It should be noted that in the 1970s and early 1980s, many militant Tamil

the Sri Lankan government was necessary to protect minority rights gained widespread acceptance in the Tamil community.

The alarming levels of political violence and ethnic polarization became increasingly apparent and worrisome to the Sri Lankan government. Following the 1977 election, the new UNP-led government, headed by J.R. Jayewardene, introduced a new constitution purporting to ease the mounting ethnic tension. The second Republican Constitution of 1978 was created through a Parliamentary Select Committee, rather than through an all-party conference, leading the TULF to refuse participation.⁴⁴ Nonetheless, the 1978 Constitution did take small steps to relieve discrimination against the Tamil minority. Freedom of religion was established, although broad discretionary powers remained with the government. Tamil was defined as a "national language," rather than "official language," allowing government administration, including education, in the Northern and Eastern Provinces to be conducted in Tamil.⁴⁵ Proportional representation was also revised in ways that might have advantaged Tamil communities. Core discriminatory tenets in the 1972 Constitution, however, were left either unchanged or unrepudiated. The new constitution still defined Sri Lanka as a "unitary" state, thereby dismissing possibilities of federation. Additionally, it re-codified Sinhala as the only "official" language and again included the phraseology that Buddhism would occupy the "foremost" place in Sri Lanka.⁴⁶ Equally important, Tamil parties were marginalized from the process of reforming the constitution. The 1978 Constitution also introduced a De-Gualle style presidency with wide executive powers, which, S.J. Tambiah has argued, began the "slide to authoritarianism."⁴⁷ At best, the reforms of the 1978 Constitution were too little and too late to make an appreciable difference in the growing ethnic tensions.

Thus, the late 1970s marked the beginning of a retaliatory escalation in ethnic violence. Reports of attacks on Sinhalese

groups existed. This Article highlights the experiences of the LTTE because they remain the only dominant Tamil militant group today.

44. Nissan, *supra* note 23, at 10 (citing 1978 Sri Lankan Constitution).

45. *Id.*

46. *Id.*

47. S.J. TAMBIAH, *SRI LANKA: ETHNIC FRATRICIDE AND THE DISMANTLING OF DEMOCRACY* 38, 39 (1986).

policemen by Tamil militants sparked an anti-Tamil race riot in 1977.⁴⁸ The LTTE responded by intensifying attacks on government establishments and government sympathizers in Tamil areas. The government retaliated violently through its security forces and drastically through legislation. In 1979, the Sri Lankan government passed the Prevention of Terrorism Act, which allowed the army and police to hold prisoners up to eighteen months without trial.⁴⁹ Government abuses, in turn, were met with more violent action from Tamil militants, sparking a backlash from the Sinhalese community. Thus, the ethnic tension began to spiral into violence.

The UNP government did make overtures to the TULF to discuss partial regional autonomy. In 1980, the District Development Council Act was passed, which outlined a framework for greater Tamil governance in their localities. The delegation of power, however, occurred slowly, just a month before the 1982 presidential election, and the TULF complained of a substantial lack of resources and influence on local development projects.⁵⁰ The perceived failure of a serious commitment by the UNP to regional autonomy, combined with increased pressure from Tamil militants in the wake of repressive legislation, led the TULF to boycott the 1982 presidential elections and referendum, extending the life of the UNP government another six years.⁵¹ As the political influence of the TULF diminished, Tamil militants became a more dominant force in the Northern and Eastern Provinces.

G. *The 1983 Race Riots*

If there is a spark that ignited the current civil war, it may well be the 1983 race riots. The events of July 1983 raised the ethnic conflict to a new level of political violence. On July 23, 1983, the LTTE ambushed and killed thirteen government soldiers. Reaction in the capital city of Colombo was intense. Burning and looting of Tamil homes and businesses began in the areas surrounding Colombo's main cemetery, where the corpses of the dead soldiers had been brought for burial.⁵² The

48. MANOGARAN, *supra* note 25, at 13.

49. TAMBIAH, *supra* note 47, at 18.

50. Nissan, *supra* note 23, at 13.

51. Blood, *supra* note 24.

52. TAMBIAH, *supra* note 47, at 15.

riots were more than a response to the public funeral, however, for the violence lasted well beyond a day. For the next five days, a rampage of ethnic violence ensued in the capital and throughout the country where as many as 2,000 Tamils were massacred and 200,000 refugees created.⁵³

The role of the government in these race riots also explains why some scholars view this event as a turning point in the ethnic conflict.⁵⁴ The *organization* of the mob violence, replete with the use of buses and voter lists to identify Tamil addresses, suggests planning and some official complicity.⁵⁵ Tambiah argues that the breakdown of law and order was not just the result of marauding Sinhalese civilians, but required the "active participation or passive encouragement of the ultimate guardians of law and order—the police and the army."⁵⁶ Although the government blamed the rioting on lawless civilians, the slowness with which law enforcement responded credibly implicates state inaction.

The aftermath of the riots was multifaceted. One consequence was a rise in the popularity of the LTTE within the Tamil community. Experts estimate that before the 1983 riots the LTTE had less than 700 members, whereas after the riots, membership may have risen to a total of 10,000 members.⁵⁷ The riots also led to an internationalizing of the ethnic conflict. More than 100,000 Tamils fled to southern India, while wealthier Tamils escaped to Europe, Australia, and North America. India's interest in the region increased when it was faced with the refugee problem, and world attention was drawn to Sri Lanka's historic outburst of communal violence. Perhaps the greatest consequence of the riots was the deepening rift between the Sinhalese and Tamil leadership and communities. The psychological effect of the violence, followed by hardening of positions on both sides, created serious obstacles to constructive dialogue. After the 1983 riots, the government passed the Sixth Amend-

53. BULLION, *supra* note 8, at 32.

54. See Marshall R. Singer, *Prospects for Conflict Management in the Sri Lankan Ethnic Crisis*, in CONFLICT AND PEACEMAKING IN MULTIETHNIC SOCIETIES 259, 285 (Joseph V. Montville ed., 1991).

55. See TAMBIAH, *supra* note 47.

56. *Id.* at 24.

57. Singer, *supra* note 54, at 263. The Sri Lankan army increased threefold by 1987 from its pre-1983 levels.

ment, which imposed a ban on anyone advocating separatism. The effect of the amendment was to obligate TULF representatives to swear an oath against their movement for autonomy. When all sixteen TULF members of Parliament refused to swear such a loyalty oath, they were expelled from Parliament. The declining leverage of the TULF was again met with a growing role for the Tamil militant groups. The North and East of the country quickly became war zones between insurgents and security forces.

H. *The Thimpu Talks*

India attempted to broker peace talks between Sinhalese and Tamil leaders. A summit held in July 1985 between Indian Prime Minister Rajiv Gandhi and Sri Lankan President Jayawardene, led to a commitment from the Sri Lankan government to end the current crisis through political means. A month after this summit, at India's insistence, Indian, Sri Lankan, and Tamil officials, ten from militant groups including the LTTE and three from the TULF, met in Thimpu, Bhutan to discuss a cease-fire and a peaceful solution to the conflict.⁵⁸ The parties, however, were unwilling to moderate their positions. The Sri Lankan government proposed a system of district councils, which the TULF had previously rejected. The Tamil delegation advanced four cardinal principles, which, according to the LTTE's London spokesman, remain the current basis for an acceptable political solution. These principles are: 1) recognition of the Tamils as a nation, 2) recognition of the existence of the Northern and Eastern Provinces as a Tamil homeland, 3) recognition of the right of self-determination, and 4) recognition of the right of Sri Lankan citizenship and fundamental rights of all Tamils in the country.⁵⁹

The government rejected these principles and demanded renunciation of violence as a precondition to any political settlement and the surrender of arms and the closure of military training camps in Sri Lanka and Tamil Nadu as a precondition to amnesty.⁶⁰ Tamil parties walked out of the talks and called off

58. Nissan, *supra* note 23, at 17.

59. BULLION, *supra* note 8, at 56; Interview with Anton Rajah, LTTE Spokesman, in London, U.K. (Jan. 9, 1998).

60. Nissan, *supra* note 23, at 18.

the cease-fire following a massacre of Tamil civilians by Sri Lankan forces, leaving some commentators with the impression that certain factions within the government and army may not have wanted to see the peace talks succeed.⁶¹

Extremists from both sides prevented a negotiated settlement. The LTTE put pressure on TULF officials not to accept anything less than a fully independent Tamil Eelam. Because the LTTE was not averse to using force against government sympathizers, this pressure was more than political. On the government side, the SLFP was eager to use any concession made by the UNP as an opportunity to make inroads into the Sinhalese nationalist vote. Intra-party pressures silenced moderate proposals, leaving little room for compromise.

I. *The Indo-Sri Lankan Accord*

The escalation of the civil war in the late 1980s led to direct Indian military involvement in the Sri Lankan conflict. A 1987 government offensive, coupled with an effective embargo, which included food and medicine, created a level of Tamil suffering that the Indian government, with a large Tamil population, could not ignore. On July 29, 1987, the governments of India and Sri Lanka signed the Indo-Sri Lankan Accord with the purpose of establishing peace in Sri Lanka. The accord called for a cease-fire, the surrender of arms by militant Tamil groups, the disbanding of paramilitary government forces, an amnesty to all prisoners held under emergency regulations, and a commitment from India to expel all non-Indian Tamils that advocated separatism.⁶² The political solution recognized Sri Lanka as a "unitary" state but noted that Sri Lankan Tamils have historically inhabited the Northern and Eastern Provinces. Tamil and English were to have "official language" status, embodied in the Thirteenth Amendment to the constitution.⁶³ A system of devolution of powers to provincial councils was created and India agreed to underwrite and to guarantee the accord. This agreement in-

61. BULLION, *supra* note 8, at 56.

62. The Indo-Sri Lanka Peace Agreement, Jul. 29, 1987, India-Sri Lanka, *reprinted in* DENNIS AUSTIN, DEMOCRACY AND VIOLENCE IN INDIA AND SRI LANKA 87 (1994).

63. Tamil parties once again complained that the amendment to the constitution was drafted and approved without any consultation of the Tamil parties and gave provincial councils little control over development projects in their areas. Nissan, *supra* note 23, at 26-28.

cluded the deployment of an Indian Peace-Keeping Force ("IPKF") to implement and to maintain the cease-fire in Sri Lanka. All Tamil parties accepted the provisions of the accord, but the LTTE withdrew its support in October 1987 following the arrest and mass suicide of fifteen Tamil Tigers who were caught smuggling arms.⁶⁴ The LTTE, not having been allowed by either India or Sri Lanka to participate in the negotiating process because the UNP government still considered the LTTE to be a terrorist organization, had little stake in the success of the accord. Indeed, the accord seemed more directly aimed at relieving the ethnic tensions in a way that would provide short-term gains for the governments of India and Sri Lanka, rather than bridging long-standing differences between the Tamil and Sinhalese leaders through the communication of interests and options. The net result left the LTTE outside the peace process, thus contributing to its ultimate failure.

The Indo-Sri Lanka Accord was a disaster for both governments. India found itself in the dangerous position of trying to enforce the accord on efficient and elusive guerrilla fighters of the LTTE. The Sri Lankan government faced internal opposition for allowing a regional hegemon to deploy over 50,000 troops on Sri Lankan soil.⁶⁵ A rekindled JVP insurrection opposed all threats to Sri Lanka's national sovereignty, from both India and the Tamils, by intimidating supporters of the Accord. With Indian troops fighting the LTTE, the government was free to use its security forces to squash the JVP rebellion. The LTTE may in fact have benefited from the Indo-Sri Lankan Accord. The LTTE was able to solidify its position as the preeminent Tamil militant organization by mounting a campaign of terror against Tamil militant groups that had surrendered weapons as part of the accord. The LTTE was also able to disrupt the 1988 provincial council elections through intimidation—Sinhalese and Muslim⁶⁶ participation was low—and non-participation.

64. SRI LANKA: A COUNTRY STUDY, *supra* note 24, at xxxiv. Tamil Tigers carry cyanide tablets around their necks and when captured often commit suicide rather than divulge information. The LTTE claimed that the militants were forced to take the tablets in custody and retaliated by attacking Sinhalese villages. *Id.*

65. BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, *supra* note 35, at 4.

66. About 1.2 million Muslims, or 7% of the population, live in Sri Lanka, predominantly in the Eastern Province. AUSTIN, *supra* note 62, at 69. Sri Lankan Muslims have opposed the merger of the Northern and Eastern Provinces into a Tamil

Without LTTE involvement, the provincial council's authority was questionable. The presidential elections of 1988, won by the UNP's heir-apparent Ransinghe Premadasa, would mark another change in the government's approach to the LTTE.

J. *The Premadasa-Liberation Tigers of Tamil Eelam Talks*

From April 1989 to June 1990, Premadasa established direct negotiations with the LTTE. Both the Sri Lankan government and the LTTE had come to view the IPKF as a foreign-occupying army and wanted its withdrawal. Reports have indicated that Premadasa's government even furnished arms to the LTTE to help evict the IPKF.⁶⁷ India was wary of withdrawing its forces in disgrace, but because of significant losses agreed to remove its troops from Sri Lanka by the end of 1989. The talks between Premadasa's government and the LTTE were not formalized through a series of written agreements and difficult political issues were not broached.⁶⁸ Instead, a cease-fire was reached through slight Sri Lankan military concessions, while the LTTE registered as a political party to contest provincial elections.⁶⁹ The major political issues were to be discussed after the elections.⁷⁰ In June 1990, much to the surprise of the Premadasa government, the LTTE broke the cease-fire by attacking a police station in the Eastern Province. After the departure of IPKF, the common enemy, the government and the LTTE could not sustain their marginal common ground for peace. The UNP government, which had opened itself to considerable attack from rival Sinhalese parties for making military concessions to the LTTE, responded with an overwhelming military campaign to crush the LTTE. The Sri Lankan government, however, was unable to win a decisive military victory, and the parties became embroiled in an intractable civil war. Premadasa, following the fate of Indian Prime Minister Rajiv Gandhi, was assassinated by

Eelam fearing that they will have less voice in a large Tamil region where their percentage of the province will be less. *Id.*

67. BULLION, *supra* note 8, at 134 (noting that Premadasa narrowly escaped impeachment after this policy became public knowledge).

68. Dayan Jayatilaka, *The Premadasa-LTTE Talks: Why They Failed and What Really Happened*, INT'L ALERT (Int'l Alert, London, U.K.), forthcoming 1998.

69. Chelvadurai Manogaran, *Sri Lankan Dilemma: Negotiated Settlement or Continuing War*, INT'L ALERT (Int'l Alert, London, U.K.), forthcoming 1998, at 5.

70. *Id.*

an LTTE suicide mission in 1993.⁷¹

The reasons that the LTTE broke the 1990 cease-fire and withdrew from the talks with Premadasa remain unclear. Some believe that the government's delays in trying to repeal the Sixth Amendment, overtures to rival Tamil militants with links to India, and demands that the LTTE surrender its arms sparked LTTE mistrust.⁷² Others figure that Premadasa's peace initiative caused a "peace trap" whereby the LTTE was deprived of a clear enemy and, worried about rising war weariness, aborted the peace process in order to repel potential leadership challenges.⁷³ Such intra-party concerns are also leveled against Premadasa, who was precariously forced to concede some regional autonomy to bring the LTTE into the peace process without giving away too much and alienating the Sinhala nationalist vote. The surprise withdrawal of the LTTE escalated the war, ended dialogue, and induced a feeling of betrayal that led to greater distance between the Tamil and Sinhalese leadership and communities.

K. *Historical Trends: Process-Oriented Obstacles to Peace*

To understand the process-oriented obstacles of the 1994-95 talks, it is helpful to further explicate their historical roots. Even this brief survey of the Sri Lankan ethnic conflict highlights important historical trends that inform our understanding of the talks. The legacy of deep mistrust between Tamil parties and the government, for instance, grew out of failures within the peace process and has become a fundamental barrier to negotiations. The government's inability to implement the BC Pact and the Senanayake-Chelvanayakam Pact ("SC Pact") produced acute suspicion within the Tamil leadership of the government's commitment to honoring its obligations on the ethnic question. This tension between "agreement in principle" and "agreement in practice" resurfaces distinctly in the 1994-95 talks. Deep mistrust developed through more subtle means as well. Military actions and the government's inclination to offer what it knew would be unacceptable to Tamil parties, as the Thimpu Talks

71. Three of the most infamous LTTE assassinations include the March 3, 1991 assassination of the Sri Lankan Deputy of Defense Ranjan Wijeratne, the May 21, 1991 suicide bomber assassination of Rajiv Gandhi, and the May 1, 1993 killing of Premadasa.

72. MANOGARAN, *supra* note 25.

73. Jayatileka, *supra* note 68, at 1-2.

suggest, led Tamil leaders to interpret the government's actions as a calculated decision to negotiate in bad faith. Indeed, Tamil groups consider the government's efforts to ease the ethnic tensions, such as the BC Pact or the 1978 constitutional reforms, as little more than token attempts to provide a temporary reprieve in ethnic polarization. The rhetoric and the concern over bad faith and tokenism remain central to the 1994-95 peace talks. Finally, the government's approach to the armed conflict, in which bombing campaigns and an economic embargo create extreme hardships on the Tamil non-combatants, served to raise the level of mistrust and antipathy between Tamil and Sinhalese leaders. Efforts to build trust, therefore, are first tied to stopping violent confrontation. As the 1994-95 talks indicate, however, initially limiting peace talks to cease-fire issues creates distinct obstacles to long-term peace.

The Sri Lankan government has developed an equally strong mistrust of the LTTE. After all, the LTTE is the party that abrogated the recent cease-fires. The LTTE broke the cease-fire following Thimpu, pulled out of the Indo-Sri Lankan Accords, and ended the talks with Premadasa. The result of such abrogation was suspicion and a seriously harmed dialogue between the parties. In fact, following the LTTE's abrogation of the talks with Premadasa, virtually no communication existed between the government and the LTTE until the beginning of the 1994-95 talks. Moreover, the LTTE's approach to armed confrontation has been perceived by the Sinhalese public and leadership as extraordinarily brutal, and, in turn, generates increased apprehension. The LTTE has shown not only a willingness to silence Tamil moderates and to assassinate government officials, but also to engage in suicide bombings that injure innocent civilians. Any efforts at peace that do not seek to systematically improve the level of trust between the government and the LTTE have little chance of long-term success, to which the 1994-95 talks unfortunately attest.

A second historical trend in the process-oriented failures to ease ethnic tensions in Sri Lanka is the pervasive existence of intra-party rivalries which breed chauvinistic and nationalistic sentiments. The story of Sri Lanka's modern ethnic conflict is largely the story of competition between the UNP and the SLFP to capture the nationalist vote. This competition is not hidden. Agreements with the Tamil leaders, such as the BC Pact and the

SC Pact were breached by the Sri Lankan government precisely to maintain the support of chauvinist back-benchers. More subtly, the rivalry between the UNP and SLFP led the Sinhalese parties to distance themselves from proposed legislation, such as the 1980 District Development Council Act, which sought to devolve power to Tamil parties. The competition between Sinhalese parties, combined with the lack of protection of minority rights in Sri Lanka's constitution, heightened ethnic tensions and impeded efforts to resolve the conflict peacefully.

On the Tamil side, intra-party rivalries served to silence moderate voices. The LTTE has been ruthless in its efforts to elevate itself as the only voice for the Tamil people. The LTTE's campaign of terror against Tamil militant groups that abided by the Indo-Sri Lankan Accord is a case in point. Although the LTTE remains the dominant voice of the Tamil movement and diaspora today, the remnants of its historical competition with other Tamil parties remain significant. That is, the LTTE may feel the need to attain a settlement that is better than a settlement that non-violent Tamil parties might be able to attain, such as the current Devolution package,⁷⁴ in order to justify the armed resistance, the sufferings of the Tamil people, and the LTTE's extreme leadership. Intra-Tamil rivalries not only suppressed moderate Tamil voices, but also may have raised the bar in the 1994-95 talks.

Finally, and perhaps most importantly for the purposes of this Article, peace and reconciliation efforts largely ignored issues of process. Attempts to amend the constitution in 1978, for example, were conducted without preparatory discussions on how to include Tamil leadership in the reform process. Instead, the constitution was amended without Tamil input. Similarly, the Thimpu talks lacked a systematic preparatory process, leading each party to advocate positions that were unsuitable to the other. The Indo-Sri Lankan Accord explicitly excluded Tamils from the process of peace. Although all Tamil parties accepted the Accord, the LTTE's stake in the agreement was seriously undermined by the design of the negotiation process in which it was prohibited from participating. Finally, the Premadasa talks, which were conducted directly with the LTTE, represented an *ad hoc* methodology in which agreements were left unwritten and

74. See Part II.

the process was never formalized. Without serious consideration of how to structure peace negotiations, the government and the LTTE were unable to generate serious commitments to peace. The failure to think decidedly about the process and not just the substance of negotiations continues to plague Sri Lankan peace efforts.

II. *THE 1994-95 PEACE TALKS*

Before beginning an analysis of the process-oriented obstacles to the 1994-95 talks, it is important to present the basic facts and developments of these negotiations. Only after an introduction to the issues and the process of the 1994-95 talks can one begin to identify the obstacles to peace and to dissect the lessons to be learned. Such an introduction is made even more important because there is precious little literature on the issues and process of the 1994-95 peace talks. Much of this modern historical presentation is derived from interviews and printed sources available only in Sri Lanka. This section will also briefly present the developments since the end of the peace talks.

A. *The Election and Round One*

The People's Alliance ("PA"), led by Chandrika Kumaratunga, the daughter of former Prime Ministers Mr. and Mrs. Bandaranayake, came to power through the parliamentary elections of August 1994 on the promise of peace. The PA campaigned on a platform that called for negotiations with the LTTE to end the suffering and to create a peace dividend to ease youth unemployment and to alleviate poverty.⁷⁵ As a sign of goodwill, the PA government partially lifted the economic blockade on the Northern and Eastern Provinces and, during the first session of Parliament, announced that the government would seek to resume talks with the LTTE without preconditions. The government sent a letter to the LTTE through the International Committee of the Red Cross ("ICRC") inquiring about beginning peace talks and, by September 1994, had announced a government delegation.⁷⁶

75. Writer, *supra* note 3, at 21-22 (stating that projected government expenses for war with LTTE were US\$760 million in 1996.).

76. *Sri Lankan Government Waiting for the Rebel's Reply*, XINHUA NEWS AGENCY, Sept. 27, 1994. The delegation consisted of: Kusumsiri Balapatabendi, the Secretary to Presi-

The first round of peace talks were held on October 14 and 15, 1994 in an LTTE-controlled area near the northern city of Jaffna. The government delegation arrived via helicopter and was greeted by cheering crowds of Tamil civilians and a high-level LTTE delegation.⁷⁷ As the two sides had not been in contact for several years, the first round focused on exchanging ideas to develop a broad strategy for peace. The chief government negotiator explained that his mandate was "very much one of ascertaining the views of the LTTE and the people of the North in regard to the shape of the national polity which they would wish to see. To that extent, we are here to listen to you, obtain clarification etc."⁷⁸ No systematic preparatory process for these historic face-to-face talks existed, and the first round was largely centered on developing a working relationship between the two sides.

Without a predetermined agenda, the LTTE suggested that the peace process should move forward by first creating conditions of normalcy for the people in the Northern and Eastern Provinces.⁷⁹ On the second day, discussions turned to the reconstruction of roads, hospitals, and power stations, and the opening of supply routes for food and medicine.⁸⁰ The urgency of basic reconstruction was accepted by the government as a first step in the process and as a building block to a "speedy establishment of peace."⁸¹ Symbolic of the new partnership, the LTTE unilaterally released eighteen prisoners of war and agreed to resume negotiations within ten days.⁸² The leadership of the LTTE and government negotiators continue to view round one of the peace talks as a sincere effort by both sides to consider

dent and leader of the government delegation; Lionel Fernando, the Secretary to the Ministry of Information; Rajan Asirvadan, a Tamil and former Chairman of the People's Bank; and Navin Gunaratne, an architect and personal friend of Kumaratunga.

77. *Peace Talks Enter Second Day Amid Violence*, AGENCE FRANCE PRESSE, Oct. 14, 1994. The LTTE delegation consisted of: Karikalan, the LTTE's deputy political leader; Ilamperadi, the LTTE's leader of the Jaffna political section; Ravi, the LTTE's leader of the economic division; and Dominic, the LTTE's head administrator.

78. *LTTE Stressed Need for Cease-fire*, DAILY NEWS (Sri Lanka), Oct. 21, 1994.

79. Interview with Anton Rajah, *supra* note 59.

80. Interview with Navin Gooneratne, Government Negotiator, in Colombo, Sri Lanka (Jan. 19, 1998).

81. See *LTTE Stressed Need for Cease-fire*, *supra* note 78 (quoting Secretary Balapatabendi).

82. *Peace Talks Enter Second Day Amid Violence*, *supra* note 77.

alternatives to war.⁸³

The first hindrance in the peace process occurred on October 24, 1994 when the opposition UNP leader and Presidential candidate Gamini Dissanayake and fifty-three others were murdered by a suicide bomber.⁸⁴ Although the LTTE denied any involvement, the Sri Lankan government and international observers are quite confident that the LTTE was responsible. In response, the government indefinitely postponed the peace talks. The UNP nominated Dissanayake's widow, Mrs. Srimala Disanayake, as its presidential candidate and advanced a hard-line platform calling for the LTTE to renounce its demand for a separate Eelam as a precondition for negotiations.⁸⁵ On November 9, 1994, Kumaratunga won an unprecedented 62.7% of the presidential vote and the peace process was reinvigorated by the perceived mandate for peace.⁸⁶

B. Rounds Two and Three

The second round of the 1994-95 talks, which occurred on January 3, 1995, focused on creating a cessation of hostilities⁸⁷ between the parties before the impending visit of Pope John Paul II.⁸⁸ The government added both an army and navy officer to their negotiating team to provide expertise for designing and implementing a cease-fire, while the LTTE upgraded its delegation with the inclusion of the head of the LTTE political wing, Thamilselvan. The parties agreed to a cessation of hostilities with a fourteen day trial period.⁸⁹ The truce went into effect on

83. Interview with Anton Rajah, *supra* note 59; Interview with Navin Gooneratne, *supra* note 80.

84. *Chronology of Tamil Separatist Campaign*, AGENCE FRANCE PRESSE, Oct. 15, 1997.

85. Ravi Velloor, *Tigers Must Drop Claims to Separate State: Opposition*, THE STRAITS TIMES (Singapore), Nov. 5, 1994, at 9.

86. THE NEW SRI LANKAN CONSTITUTION (Nov. 15, 1997) <<http://www.lanka.net/constitution>> (on file with the *Fordham International Law Journal*) [hereinafter NEW CONSTITUTION].

87. In this Article, the terms "cessation of hostilities" and "cease-fire" are used interchangeably; the term "permanent cease-fire" will connote a long-term peaceful arrangement. In the phraseology of the peace talks, the term "cessation of hostilities" was sometimes used to suggest a more interim arrangement than a "cease-fire," but this use was certainly not uniform and therefore is not employed in this Article.

88. Amal Jayasinghe, *Truce Offers Breakthrough in Sri Lanka Peace Bid*, AGENCE FRANCE PRESSE, Dec. 7, 1994.

89. *Sri Lankan Truce Extended, Military Eases Good Embargo*, AGENCE FRANCE PRESSE, Jan. 22, 1995.

January 8, 1995, the birthday of Kumaratunga's slain father. The government and the LTTE could not agree on when parallel talks regarding future political arrangements could begin.⁹⁰ The LTTE was reluctant to discuss political arrangements until reconstruction had begun in earnest.

Round three commenced on January 14, 1995, and again was a one-day affair near Jaffna. Issues of implementing the cessation of hostilities dominated the discussions, including the use of monitoring committees comprised of representatives from the government and the LTTE and led by international observers.⁹¹ Perhaps the most noteworthy accomplishment of the talks was an agreement by both sides to extend the cessation of hostilities on an open-ended basis.⁹² There was again, however, little dialogue on substantive political issues. The LTTE refused to discuss future political arrangements until the government delivered on its commitment to reconstruct the Northern and Eastern Provinces. Specifically, the LTTE insisted that the government open the Pooneryn supply route and withdraw its Army camp there. The government refused to cede territory and offered two alternative routes.⁹³ The rhetoric became increasingly polemical.

The major stalemate of the 1994-95 peace talks occurred between the third round and the final fourth round. In letters between the leaders, the government accused the LTTE of slowing down the peace process by avoiding the political dimension of the talks, and the LTTE accused the government of not delivering on its commitments to rebuild the North and East.⁹⁴ Although the government negotiators agreed to ease fishing and embargo restrictions, the LTTE complained that in practice, very little had changed since before the negotiations. Press reports indicate that the embargo was lifted on only twelve items

90. *Official Statement of the Presidential Secretariat*, DAILY NEWS (Sri Lanka), Jan. 5, 1995.

91. Declaration of Cessation of Hostilities, Jan. 8, 1995, Sri Lankan Government-LTTE, *reprinted in Text of Govt-LTTE Agreement*, DAILY NEWS (Sri Lanka), Jan. 9, 1995 (noting that Canada, Holland, and Norway all volunteered representatives for monitoring committees).

92. *Sri Lankan Truce Extended, Military Eases Good Embargo*, *supra* note 89.

93. *Official Statement of the Presidential Secretariat*, *supra* note 90.

94. See Letters between Chandrika Kumaratunga, President of Sri Lanka, and V. Prabhakaran, Leader of the LTTE, *reprinted in The End of the Honeymoon*, SUNDAY LEADER, June 2, 1996.

despite agreement by government negotiators to lift the embargo on twenty.⁹⁵ The government's public release of the confidential letters between the President and the LTTE leader—to justify the PA's handling of the negotiations in the face of mounting public pressure for greater and faster accomplishment—heightened the LTTE's mistrust and suspicion of the government. The chief LTTE negotiator complained that the lack of reconstruction "showed the government's *mala fide* intentions. They are not genuine."⁹⁶

The government recognized the growing divide and suggested that a French diplomat, Francois Michel, a former French ambassador to Haiti, be employed as a mediator to help break the deadlock.⁹⁷ The LTTE rejected the use of a private individual who would not be acting on behalf of France and one who was unknown to the LTTE and suspected of having close ties to Kumaratunga.⁹⁸ Rather than jump-starting negotiations, the unilateral suggestion of a mediator was interpreted by the LTTE as the government's attempt to advance its standing in world opinion while refraining from delivering on its commitments.⁹⁹ The LTTE instituted four demands on the Sri Lankan government before reconstruction and further negotiations could begin: 1) dismantle the Sri Lankan Army camp at Pooneryn to ensure a safe supply route to Jaffna, 2) lift the embargo in practice, 3) transform the cessation of hostilities into a long-term cease-fire, and 4) establish a joint authority to implement reconstruction projects.¹⁰⁰

Although the government agreed to move the Pooneryn Army camp 500 meters from the road,¹⁰¹ the unilateral action of the government team in announcing the opening of a supply route that the LTTE had rejected spurred greater mistrust and

95. *Sri Lankan Truce Extended, Military Eases Good Embargo*, *supra* note 89.

96. *LTTE Deputy Leader on Why "Peace Talks" Failed*, SUNDAY LEADER, Jan. 28, 1996.

97. See *Dialogue for Peace that Never Was*, SUNDAY TIMES (Sri Lanka), May 5, 1996, at 5 (quoting letter from V. Prabhakaran, Leader of LTTE to Chandrika Kumaratunga, President of Sri Lanka, Mar. 28, 1995).

98. Political Committee, Liberation Tigers of Tamil Eelam, *Liberation Tigers Not Opposed to Foreign Mediation* (LTTE Int'l Secretariat, London, U.K.), Mar. 7, 1995 (on file with the *Fordham International Law Journal*).

99. *Id.*

100. *Government's Statement on LTTE Responses*, DAILY NEWS (Sri Lanka), Mar. 7, 1995.

101. *Id.*

antagonism.¹⁰² The LTTE insisted that its demands be met before both monitoring committees could properly function and face-to-face negotiations could commence.¹⁰³ With little advancement in the peace process, the LTTE issued an ultimatum, threatening possible withdrawal from the talks if their demands were not met by March 28, 1995.¹⁰⁴ While raising the stakes with an ultimatum, the LTTE also advanced its greatest concession ever in the history of the ethnic conflict. Indeed, the LTTE's chief international spokesman, Lawrence Thilakar, held a press conference in Paris to announce that the LTTE was willing to accept a federal arrangement and was ready for political talks.¹⁰⁵ This event was the first time the LTTE distanced itself from its goal of a full separation from Sri Lanka. Immediately following the ultimatum, the LTTE released fifteen Sri Lankan policemen in a sign of faith in the peace process.

C. Round Four and Abrogation

The LTTE did not withdraw from the peace process on March 28, and instead issued an extension to April 19, 1995.¹⁰⁶ The government and the LTTE agreed to hold a fourth round of peace talks on April 10, 1995, with the proviso that only reconstruction issues would be discussed.¹⁰⁷ The government changed its negotiation team, replacing Asirwatham and Gooneratne—two personal friends of the President—with three leading peace advocates: Dr. Charles Abeyasekera, Dr. Jayadeva Uyangoda, and Bishop Kenneth Fernando. These three negotiators stayed in Jaffna an extra day to try to revive the peace talks;

102. Letter from V. Prabhakaran, Leader of the LTTE, to Chandrika Kumaratunga, President of Sri Lanka, Feb. 25, 1995, *LTTE International Secretariat Press Release*, Feb. 28, 1995 (stating that “[b]ut to go ahead and make a unilateral declaration that the government has decided to open the Pooneryn and Elephant Pass routes to the public can only help to gain propaganda for the government. It cannot be any use in taking the peace process forward. We are surely disappointed over this . . .”).

103. *Government's Statement on LTTE Responses*, *supra* note 100. The LTTE also demanded that the LTTE cadre be allowed to remain armed when entering government controlled cities in the Northern and Eastern Provinces.

104. *Dialogue for Peace That Never Was*, *supra* note 97.

105. T. Sabaratnam, *President Proposes Early April Political Talks*, *DAILY NEWS* (Sri Lanka), Mar. 13, 1995.

106. Letter from V. Prabhakaran, Leader of the LTTE, to Chandrika Kumaratunga, President of Sri Lanka, Apr. 6, 1995, *reprinted in The End of the Honeymoon*, *supra* note 94.

107. *Id.*

the other negotiators returned to Colombo after six hours of talks on April 10. According to the new negotiators, the fourth round was very much a rescue mission.¹⁰⁸ The government agreed to a reconsideration and possible withdrawal from Pooneryn, as well as to a renewed commitment to ease the fishing ban and embargo.¹⁰⁹ On April 12, the government announced that the embargo was lifted on all but eight items.¹¹⁰ A fifth round of talks was set for May 5, 1995. Although the talks appeared to be making progress, Prabhakaran's final letter to Kumaratunga suggested otherwise. Convinced that the government was negotiating in bad faith while consolidating "military capability of the armed forces under the guise of the current cessation of hostilities," Prabhakaran explained in his letter that the LTTE was withdrawing from the peace process.¹¹¹ Rather than wait the agreed upon seventy-two hours before ending the cease-fire, the LTTE attacked two navy gunboats on April 19, 1995, killing eleven soldiers and seemingly ending the peace process.¹¹²

The attack was viewed with great surprise and alarm by the Sri Lankan people. The government responded swiftly by immediately reimposing the embargo. It was still unclear, however, whether the peace process was definitively over. The government, perhaps concerned that failed peace talks might affect the level of development assistance to be determined at a meeting of the Sri Lankan Aid Group in Paris on April 27-28, 1995, issued the following statement that the LTTE attack did not end the peace process: "The government considers this incident to be only a temporary setback to one stage of the peace process. It is not a defeat of the peace process undertaken by the government."¹¹³ At the Sri Lankan Aid Group meeting, Kumaratunga

108. Interview with Charles Abeyasekera, Government Negotiator, in Colombo, Sri Lanka (Jan. 16, 1998); Interview with Dr. Jayadeva Uyangoda, Government Negotiator and Chairman of the Sri Lanka Foundation, in Colombo, Sri Lanka (Jan. 23, 1998).

109. Interview with Charles Abeyasekera, *supra* note 108.

110. Letter from Chandrika Kumaratunga, President of Sri Lanka, to V. Prabhakaran, Leader of the LTTE, Apr. 12, 1995, *reprinted in The End of the Honeymoon*, *supra* note 94.

111. Letter from V. Prabhakaran, Leader of the LTTE, to Chandrika Kumaratunga, President of Sri Lanka, Apr. 18, 1995, *reprinted in The End of the Honeymoon*, *supra* note 94.

112. Rita Sebastian, *Sri Lanka: Truce Called Off, Civil War Could Enter Third Phase*, INTER PRESS SERVICE, Apr. 19, 1995.

113. *Embargo Re-Imposed*, DAILY NEWS (Sri Lanka), Apr. 20, 1995, at 1.

explained that the government was "confident of restarting the peace negotiation process."¹¹⁴ By May 22, 1995, however, Kumaratunga reversed the government's position by explaining in a televised speech to the country that the government had the firepower to defeat the LTTE and was cutting it off from the peace dialogue.¹¹⁵ On August 20, 1995, LTTE spokesman Anton Balasingham revealed that the LTTE would consider peace talks if three conditions were met: 1) a cease-fire, 2) a peaceful environment in the Northern and Eastern Provinces, and 3) moves by the government to ease the urgent economic and social problems faced by people in the Northern and Eastern Provinces.¹¹⁶ The government has established its own preconditions for talks: the LTTE must lay down its arms and must agree to a fixed time frame for political discussions.¹¹⁷ Unlike the LTTE,¹¹⁸ the government fully rejected the idea of third-party mediation. The Sri Lankan Foreign Minister stated bluntly that "[t]hird parties coming here is absolutely out of the question. This is an internal matter."¹¹⁹

With the parties so far apart on the substance and process of the negotiations, the government acted; it launched a major offensive, Operation Rivirsa, on October 17, 1995, in an effort to defeat the LTTE once and for all, and by December 2, 1995, the government had captured Jaffna.¹²⁰ The LTTE responded and overran an army camp killing 1,200 troopers in the battle of Mullativu. This ordeal led the Sri Lankan government to abandon its base at Pooneryn because it was deemed indefensible.¹²¹ The LTTE continued to counter the government's offensive and un-

114. *Restoration of Peace Govt's Major Objective*, DAILY NEWS (Sri Lanka), Apr. 28, 1995, at 1.

115. *Sri Lankan President Cuts Tigers from Peace Talks*, REUTERS WORLD SERVICE, May 22, 1995. The speech was given on National Heroes day and was, interestingly, delivered in Sinhala and not English.

116. *Sri Lankan Tamil Rebels Willing to Resume Talks*, XINHUA NEWS AGENCY, Aug. 20, 1995.

117. *Chandrika Talks Peace*, SRI LANKA MONITOR (The British Refugee Council, London, U.K.), Nov. 1996, at 1.

118. *LTTE International Secretariat Press Release*, SUNDAY TIMES (Sri Lanka), May 5, 1996 (stating that "[w]e are of the opinion that third-party mediation is vital to promote the negotiating process.").

119. Sri Lankan Foreign Minister Lakshman Kadirgamar, *quoted in* Rahul Sharma, *Sri Lanka Rules Out Mediation to End Rebel War*, REUTERS WORLD SERVICE, Feb. 20, 1997.

120. *Chronology of Tamil Separatist Campaign*, *supra* note 84.

121. Interview with Harry Goonethilleke, *supra* note 5.

leased a series of suicide bombings at Colombo's fuel depot, Central Bank, and financial center.¹²² The United States placed the LTTE on its list of foreign terrorist organizations in October 1997.¹²³ This year, the LTTE has struck several times, most notably by attacking the holiest Buddhist shrine in Sri Lanka, the Temple of the Tooth. This dramatic bombing led the government to issue a ban that made it unlawful for government officials to communicate or to negotiate with the LTTE.¹²⁴

With little prospect for negotiation, the government has proceeded to ease ethnic tensions by reforming the constitution in ways that devolve power to localities in the Northern and Eastern Provinces.¹²⁵ This devolution package envisages a union of regions in which regional councils will have meaningful autonomy in local government, law enforcement, and cultural matters.¹²⁶ While Tamil political parties have backed the plan, the LTTE, which has never been privy to the process of developing the package, has rejected it. The LTTE further claims that the devolution package is a purposeful attempt by the government to marginalize the LTTE and, therefore, cannot be considered a serious attempt to solve the ethnic conflict.¹²⁷ As of May 1998, the devolution package remains the only active process to ease the ethnic tensions, and the LTTE is not a party to this process.

III. *THE LESSONS OF THE 1994-1995 PEACE TALKS*

Even this brief outline of the 1994-95 peace talks contains a host of process-oriented obstacles that impeded a negotiated agreement. Specifically, this section will examine six process-oriented issues that contributed to the breakdown of the talks. These issues include: 1) the lack of an operating framework for the talks, 2) the perceived low-ranking status of the government delegation, 3) the use of letters, 4) the structure of implementa-

122. Writer, *supra* note 3, at 22.

123. OFFICE OF THE COORDINATOR FOR COUNTER-TERRORISM, U.S. DEP'T OF STATE, FOREIGN TERRORIST ORGANIZATIONS 2 (OCT. 8, 1997).

124. P.S. Suryanarayana, *Sri Lanka Row over President's Attitude Towards LTTE*, THE HINDU, Feb. 23, 1998.

125. See SRI LANKA: THE DEVOLUTION DEBATE (Regi Siriwardena ed., 1996); DEVOLUTION IN A MULTI ETHNIC SOCIETY (Shelton Wanasinghe ed., 1995).

126. Anthony Davis, *Does Peace Have a Chance? Colombo's Political Initiative Loses Steam*, ASIaweek, Jul. 5, 1997, at 30.

127. Interview with James Kumar, Spokesman, International Federation of Tamils, in London, U.K. (Jan. 8, 1998).

tion, 5) the procedures of the peace talks, and 6) the role of the cease-fire.¹²⁸ Taken singularly, each of these issues may not have had a very significant effect on the breakdown of the talks. Taken together, however, it is not wholly surprising that the talks were unsuccessful.

Much of the information in this section comes from interviews with LTTE spokesmen, government negotiators, Sri Lankan politicians, journalists, foreign ambassadors to Sri Lanka, relief officials, and academics. Because the LTTE is a guerrilla group and considered by the U.S. and Sri Lankan governments to be a terrorist organization, it is virtually impossible to have direct access to their senior leadership. Currently, the LTTE leadership is fortified within the Vanni jungle in Sri Lanka, and the Sri Lankan government does not allow entry into that region. The result, therefore, of this analysis is a greater concentration and critique of process-oriented errors committed by the government. It should be noted that the greater focus of the Sri Lankan government does not connote its greater level of responsibility for the failures or obstacles in the peace process. Rather, because information on government action and processes is more available, the critique of the government attains slightly greater emphasis. This section will also include, however, the LTTE's responsibilities in shaping a flawed process.

A. Lack of an Operating Framework

Perhaps the most glaring weakness in the 1994-95 peace talks was the absence of an operating framework within which the peace negotiations would take place. A set of general objectives was never agreed upon in advance of the first round of negotiations, and the 1994-95 talks therefore began with both sides very unclear about what issues would be addressed and how the negotiations would be structured. In fact, the government negotiators were given "no mandate," according to one government negotiator, other than to build a good rapport with the LTTE and to begin understanding their positions.¹²⁹ Rajan Asirwatham, another government negotiator, echoed the same sentiment, explaining that the government was seeking only to

128. A possible seventh issue—the absence of a mediator—will be explored in Part IV.

129. Interview with Navin Gooneratne, *supra* note 80.

understand the problems and expectations of the LTTE in the first round of negotiations.¹³⁰ The 1994-95 peace talks thus began in a very unconstrained environment in which both sides could begin to share their interests and positions.

It is not surprising then that the first round was characterized by open and informational exchanges. Since the end of the Premadasa-LTTE talks, the Sri Lankan government and the LTTE had not been in direct communication with each other. Certainly the new PA had no special knowledge of the latest LTTE positions for arriving at a negotiated settlement. When Kumaratunga became Prime Minister, advocating a peace platform, neither the government nor the LTTE knew exactly what peace talks would mean. Also, at the time of the first round of peace talks, Kumaratunga was the Prime Minister under a UNP President and was awaiting November's presidential election. Shared leadership helps explain why the government moved slowly and carefully at the first round. The idea to begin the talks in a free and open manner in order to build trust and to establish common ground seemed a reasonable approach to both the government and the LTTE at the time.

Without a clear understanding of what would be discussed or how the negotiations would be structured, the first round therefore began in an *ad hoc* manner. For example, the LTTE's first move was to suggest an effort to curtail the massive Tamil suffering in the north, followed by a cease-fire. At the time of the first round of talks, much of the LTTE-held area was without electricity and phone service, was subjected to indiscriminate bombing, and was facing serious shortages of medicine, food, petrol, and most commercial goods.¹³¹ The LTTE asserted that undertaking a rehabilitation effort in the Northern and Eastern Provinces would help to create the conditions for peace and a sense of partnership in the peace effort. The government, eager to rebuild the Northern and Eastern Provinces and to win the support of those populations, agreed that economic development would be the initial topic of the negotiation and expressed the hope that political issues would be discussed simultaneously.

130. Interview with Rajan Asirwatham, Government Negotiator, in Colombo, Sri Lanka (Jan. 21, 1998).

131. *Bombing the Destitute: The Price of War and the Value of Peace*, BULL. OF THE NGO FORUM ON SRI LANKA (NGO Forum on Sri Lanka), Sept. 1994, at 1-2 (on file with the *Fordham International Law Journal*).

A mutual understanding, however, of how the rehabilitation issues related to the political issues was never attained.

The LTTE thought of rehabilitation issues as a dire necessity that was the "basic right" of Sri Lankan citizens in the Northern and Eastern Provinces.¹³² The government, on the other hand, viewed rehabilitation issues, at least in part, as a bargaining chip. That is, the government expected that as it showed a willingness to help rebuild the North and the East, the LTTE would simultaneously begin discussions on a political solution. Without a clear understanding of the general approach of the talks, it is easy to see, in hindsight, how such misunderstandings helped lead to a breakdown in the talks. The government became increasingly suspicious of the LTTE when political issues were not discussed, and the LTTE became increasingly skeptical of the government's delivery on rehabilitation issues. Pressure for political dialogue only exacerbated Tamil resentment. The government envisioned a political solution at the heart of the talks, whereas the LTTE seemed to believe that economic issues and normalization of life in the North and the East were the primary aims. This incongruence of understandings was never resolved.

Neither the LTTE nor the government spent much time simply talking about the peace process. Just as critical, the government and the LTTE failed to talk about talking about the peace talks. The two sides simply arrived in Jaffna hoping that some discussion and good faith effort would lead to peace. In fact, a central criticism levied against the government is that it structured and conducted the talks with "arrogance and naiveté."¹³³ One political commentator argues that the "cardinal assumption" of the government's approach was that overwhelming pressure on the LTTE and some flexibility by the government would result in a peace settlement.¹³⁴ Malinda Maragoda, a UNP adviser, blames the breakdown on "sheer inexperience and incompetence in management."¹³⁵ It seems, however, that both sides are guilty of failing to develop a mutually understood

132. Interview with Anton Rajah, *supra* note 59.

133. Interview with Paikiasothy Saravanamuttu, Executive Director, Centre for Policy Alternatives, in Colombo, Sri Lanka (Jan. 15, 1998).

134. *Id.*

135. Interview with Malinda Moragoda, United National Party ("UNP") Advisor, in Colombo, Sri Lanka (Jan. 21, 1998).

framework to the negotiations. The LTTE, which hosted the talks and set the agenda, bears responsibility for not allotting enough time to discussing and to detailing the general objectives of the peace talks and the actual process that the talks would employ. Usually, such issues are worked out in advance of peace talks. For instance, in the successful negotiations between Peru and Ecuador over disputed territory, the U.S. mediator credits the detailed mandate, painstakingly formulated before the peace talks, as the basis of the success of the talks.¹³⁶ Similarly, negotiators of the 1991 Treaty on Conventional Forces in Europe credit the success of the twenty-one-month-long negotiations on the mandate agreed upon before the negotiations took place.¹³⁷ In the Sri Lankan context, the development of a general framework was noticeably, and disastrously, absent.

Indeed, the 1994-95 talks seem more reminiscent of exploratory talks than peace talks. Both sides were interested in building rapport, finding common ground, and determining whether there was enough consensus to end the civil war. Both sides seemed sincerely interested in capitalizing on the emotional high created by the election of the PA on a peace platform. Yet despite the optimism, there was a failure prior to and during the peace talks to develop a mutually agreed upon framework out of which the details and complexities of peace could be negotiated. The peace talks reflect a visceral and vague effort to achieve peace, and the 1994-95 peace talks became yet another missed opportunity in modern Sri Lankan history.

Not only was there a failure to develop a mutually understood framework, but the general objectives that were attempted seemed doomed to failure from the outset. Despite misunderstandings in approach, the LTTE and the government first attempted to address economic issues. The success of rehabilitation efforts were, however, essentially dependent on political dialogue. Long-term infrastructure investment in the Northern and Eastern Provinces would have gone a long way in building trust, but if the two sides cannot reach common ground on a political solution to the ethnic conflict, such developmental ef-

136. Glen Weidner, Remarks at Harvard University's Weatherhead Director's Seminar: International Negotiation: An Analysis (Feb. 9, 1998).

137. Desmond Bowen, Remarks at Harvard University's Weatherhead Director's Seminar: International Negotiation: An Analysis (Feb. 9, 1998).

forts will have little lasting effect. The core issue of any peace talks—does each side share enough interests so that a negotiated settlement is preferable to the continuation of war?—were marginalized in the structure of the 1994-95 peace talks in favor of incremental, *ad hoc* economic priorities.

It is interesting to note that even when general objectives were reached, such as rehabilitation efforts in the Northern and Eastern Provinces, there was a substantial lack of procedural clarity that produced much confusion. For instance, to begin rehabilitation efforts, the government created a presidential task force that outlined priorities and announced the beginning of a large-scale investment program.¹³⁸ The government expected this move to be warmly received by the LTTE as an act of good faith and commitment to the peace process. The LTTE, however, viewed this unilateral move as a strategic attempt by the government to claim most of the credit for the rehabilitation program, and thus to gain popularity with Tamils at the LTTE's expense.¹³⁹ Indeed, the historical roots of Tamil exclusion from the process and credit of efforts to ease ethnic tensions is longstanding. The approach to accomplishing agreed-upon objectives like rehabilitation were not established in the 1994-95 peace talks, and the parties were left to pursue a course of action in piecemeal fashion.

Another element missing from the framework of the negotiations was an agenda. According to government negotiator Dr. Uyangoda, there was no fixed agenda of the 1994-95 talks.¹⁴⁰ Neither side undertook an analysis of potential peaceful arrangements and neither side approached the negotiations with a detailed plan. The date and subjects of each round of negotiations were typically decided in letters rather than in face-to-face meetings. It was unclear, for instance, when political issues would be the focus of a round of negotiations. Kumaratunga's letters to Prabhakaran indicate that the government thought that discussion of political issues would occur at the beginning of the peace talks, by the second round, and blame the LTTE for stalling and

138. DAILY NEWS (Sri Lanka), Feb. 14, 1995.

139. Liberation Tigers of Tamil Eelam, *Press Release: Why Is Government Dragging Its Feet over the Peace Process?* (LTTE Int'l Secretariat, London, U.K.), Mar. 1, 1995 (on file with the *Fordham International Law Journal*).

140. Interview with Dr. Jayadeva Uyangoda, *supra* note 108.

being insincere by not setting a date for political discussions.¹⁴¹ The LTTE may have been purposefully stalling, but it also may have had a different understanding of the timetable of the negotiations. Without an agenda, and without efforts during negotiations to arrive at a coherent agenda, the two sides were free to conceive competing understandings of when important issues, such as future political arrangements, would be discussed.

Finally, the absence of an operating framework for the peace talks reflects a fundamental lack of preparation. The hazy manner in which the negotiations were conceived and structured implies that adequate preparation was not undertaken. It was more than that, however. There seemed to be a conscious effort *not* to prepare in-depth for these historic negotiations. Government negotiators, for instance, did not study past negotiations and were instructed not to speak with former negotiators in an effort to protect them from skepticism and prejudice.¹⁴² Such purposeful lack of preparation, according to former U.S. Ambassador to Sri Lanka, Teresita Schaffer, prevented the government negotiators from realizing the importance of contentious issues, such as the problem of the Pooneryn camp, that arose as sticking points in previous negotiations.¹⁴³ Government negotiators received one session of instruction from an international non-governmental organization on negotiation techniques, such as body language and ways of responding, and typically held three meetings per round of negotiation: two short meetings prior to a round of talks and one meeting after a round.¹⁴⁴ There was no Ministry of Negotiation to research positions and to develop a coherent strategy. In fact, the government negotiators had no support staff and, for most of the six month peace process, had no office.¹⁴⁵ There was a blatant and systematic failure to plan for the negotiations and to include professional negotiators in the process.

141. Letter from Chandrika Kumaratunga, President of Sri Lanka, to V. Prabhakaran, Leader of the LTTE, Mar. 6, 1995, *reprinted in Govt's Statement on LTTE Response*, *supra* note 100.

142. Interview with Rajan Asirwatham, *supra* note 130.

143. Telephone Interview with Teresita Schaffer, Former U.S. Ambassador to Sri Lanka (Jan. 5, 1998).

144. Interview with Rajan Asirwatham, *supra* note 130.

145. Interview with Charles Abeyasekera, *supra* note 108.

B. Agent Issues: Perception and Status of the Government Delegation

Another major process-oriented obstacle was the perception by the LTTE that the government had sent a low-ranking delegation to the talks. While the LTTE sent a delegation comprised of its deputy political leader, the head of Jaffna political section, the head of its economic division, and the head of its administration,¹⁴⁶ the LTTE believed the government had sent mere messengers. Balapatabendi, the head of the government delegation, was not an elected official but simply an adviser to the President. His official title was Secretary to the President. Lionel Fernando was the Secretary of the Ministry of Information, which, to the LTTE, was not a major position within the government. The final two negotiators, Gooneratne and Asirwatham, held no position in the government; one was in private practice as an architect and the other worked as an accountant and was a former public official as Chairman of the Bank of Ceylon. Circulating among critics of the government was the joke that Kumaratunga had sent her architect, accountant, and clerk, and that next she would send her cook. The LTTE did not view the government team as representatives of the state, but rather as friends of the Kumaratunga.¹⁴⁷ This perspective created two problems. First, at a time when each side was gauging the other's commitment to peace, the LTTE began to form an impression that the government was not serious about ending the ethnic conflict.¹⁴⁸ Second, the LTTE felt rebuffed, believing that there was a purposeful rejection of parity between itself and the government in the negotiations. G.G. Ponnambalam, an LTTE sympathizer and General Secretary of the All Ceylon Tamil Congress, believes that the issue of status was so central to the talks that the LTTE should not have negotiated with the government team until high-ranking officials were sent.¹⁴⁹ The status of the delegation

146. *Peace Talks Enter Second Day Amid Violence*, *supra* note 77.

147. *Statement by Political Section of LTTE*, DAILY NEWS (Sri Lanka), Apr. 25, 1995, at 20 (stating that "Mrs. Kumaratunga's hesitation in sending officially accredited representatives of the government for these talks, and instead in sending personal emissaries who have neither political authority nor government status, has itself made the peace process spurious.").

148. Political Committee, Liberation Tigers of Tamil Eelam, *Press Release: Text of a Statement Made by the Political Section of the LTTE in Jaffna* (LTTE Int'l Secretariat, London, U.K.), Apr. 23, 1995 (on file with the *Fordham International Law Journal*).

149. Interview with G.G. Ponnambalam, General Secretary, All Ceylon Tamil Congress, in Colombo, Sri Lanka (Jan. 23, 1998).

became a serious psychological obstacle to the peace process.

The LTTE's perception that the government had sent a low-ranking delegation, however, is not necessarily correct. It is true that none of the four negotiators was an elected official, but Balapatapendi, for example, had an influential position as Secretary to the President.¹⁵⁰ He was a powerful state official with direct access to the President. Sending an architect and a banker was not entirely unreasonable either because the first round of talks was to address a reconstruction and investment package. Ironically, the government negotiators were chosen because they were considered to have deep sympathy for the plight of the Tamil people. Asirwatham is a Tamil and a Tamil speaker. Gooneratne and Fernando were considered to be pro-Tamil friends of the President. The composition of the delegation was meant to reflect a sign of good faith, but was interpreted as a sign of insincerity.

Perhaps the most salient reason why these four individuals were chosen as negotiators was their personal loyalty to Kumaratunga.¹⁵¹ In the continuous battle between Sinhalese parties for the nationalist vote, Kumaratunga wanted to make sure that errors in the peace process would not later be used against her to undermine her popularity. Fear of opposition or competition within the PA led Kumaratunga to exclude all but the most personally loyal. Also, Kumaratunga lacked political experience and was therefore unsure whom to trust within her own government. She inherited a hawkish security council¹⁵² and was aware that peace talks could jeopardize the interests of powerful officials. There were many profitable hidden economies of the war, such as arms sales and the trading of banned goods to the North. In the end, intra-party rivalries prevented the government from sending a high-ranking delegation with the consent and approval of opposition parties.

Beyond the psychological obstacles, the status of the delegation affected the actual process of the talks. The government delegation was not empowered to make important substantive decisions, but was instructed to return to Colombo after each

150. Telephone Interview with Teresita Schaffer, *supra* note 143.

151. *Id.*

152. Interview with Father Mervyn Fernando, Peace Activist, in Colombo, Sri Lanka (Jan. 23, 1998).

round to allow the President and her Security Council to make final decisions. This approach, combined with a lack of planning on both sides, led Kumaratunga and Prabhakaran to exchange letters focusing on the most controversial issues. For instance, discussions of a political arrangement to end the civil war were never discussed during the peace talks. According to an insider who has read all of the non-public letters exchanged, however, political issues were the subject of several letters.¹⁵³ The status of the government delegation, therefore, may have inadvertently helped create a two-tier negotiating system in which peace talks were held for economic and rehabilitation issues and letters were exchanged to deal with more controversial issues.¹⁵⁴ A lack of coherence between these two dimensions of the peace process and a marginalization of face-to-face dialogue for the most controversial issues were two serious process-oriented impediments that seem to have resulted from the status, or perceived status, of the government's delegation. Although it is not wholly unusual for leadership to engage each other on the most sensitive aspects outside of the official negotiation, the apparent disunity between the talks and the letters may have limited the ability of the negotiators to arrive at a settlement.

Finally, the status of the delegation may have had an effect on the implementation of agreements reached in the negotiations. The government did not send top-ranking defense department officials, but rather only two officers representing the Army and Navy, Brigadier Siri Peiris and Navy Captain Prasanna Rajaratna, to advise the government negotiators on the modalities of a cease-fire agreement. Without such high ranking defense department officials, agreements reached in the negotiations were not necessarily accepted by the government's own defense department, but had to be "sold" to them. The most striking example of the dichotomy between agreements reached by government negotiators and their enforcement by Sri Lanka's armed forces is the lifting of the embargo on banned items. Despite the fact that government negotiators agreed to lift the embargo on twenty items, the Sri Lankan military only allowed the free passage of twelve items and only fully implemented the

153. This source requested to remain anonymous.

154. Interview with Charles Abeyasekera, *supra* note 108.

agreement after significant political pressure.¹⁵⁵ The government negotiators seemed not just powerless to make major decisions, but their credibility and authority to ensure the speedy implementation of decisions was suspect. While the problem of implementation will be examined separately, it is important to note at this point that the LTTE's perception of the low-ranking status of the government negotiating team, whether accurate or not, did serve to impede the LTTE's confidence in the negotiation process.

C. *The Use of Letters*

In the 1994-95 peace talks, Kumaratunga and Prabhakaran exchanged approximately forty letters. Their correspondence was meant to jump start stalled talks, to appeal to the opposing leadership for appropriate action, to make demands, to express the importance of issues, and to discuss the most controversial subjects.¹⁵⁶ The use of letters, however, is a difficult way to express ideas and to explain positions.¹⁵⁷ Developing a common understanding of approaches and solutions to any ethnic conflict is an enormous task. Hours and days of direct negotiations often fail to produce common understanding. At the very least, however, parties to a long negotiation can explain, refine, and revise the technique of communication, including listening, so that they feel reasonably comfortable that what they say is understood in the way that it was intended. Writing, on the other hand, forces the author to choose permanently certain words and styles, leaving greater opportunity for the recipient to attach a different or competing meaning to those words. When the objective is explaining one's interests, options, and alternatives, the use of the written word in place of direct communication is a more difficult and risky technique. The fact that the letters exchanged in the Sri Lankan context were typically short in length further highlights the dangers of communicating complex ideas through writing.

The use of letters also impeded the development of trust between the government and the LTTE by providing each side

155. *Sri Lankan Truce Extended, Military Eases Good Embargo*, *supra* note 89.

156. Letters between Chandrika Kumaratunga, President of Sri Lanka, and V. Prabhakaran, Leader of the LTTE, *reprinted in The End of the Honeymoon*, *supra* note 94.

157. Interview with Neelan Tiruchelvam, Member of Parliament, and Director of International Centre for Ethnic Studies, in Colombo, Sri Lanka (Jan. 20, 1998).

with written material, or evidence, that could be used by one party at the expense of the other for public relations purposes. For instance, despite the fact that the letters exchanged were confidential, they were often printed in the Sri Lankan newspaper or in LTTE publications. When the government felt as though the LTTE was stalling or spreading false information about the talks, letters that vindicated the government's stance would appear in the newspaper. Similarly, the LTTE published some letters that portrayed its sincerity in the peace process. In the end, the exposure of the correspondence to the media served to undermine efforts to build trust between the parties. Unlike the use of alleged statements during a negotiation, which could be credibly denied, letters serve as direct evidence of a position or policy. Moreover, once the first letters were published, or perhaps even before that on the suspicion that the letters *might* be published, all letters were tainted by the understanding that they might be published in the newspapers. The incentive to draft letters in ways that play to the interest of one's own constituency—with stronger language and a less conciliatory tone—soon became apparent.¹⁵⁸ The ability to express interests, options, and alternatives satisfactorily became all the more difficult. Instead, as expectation began to overshadow the progress of the talks, letters were drafted and released to preempt and to counter potential public backlashes. In this way, the letters and the peace process became increasingly polemical.

The use of letters also created a delay in the negotiations that drained the peace process of urgency and importance. Communicating by letter took a minimum of four days and often longer. The ICRC would deliver letters overland between the LTTE in the north and the government in the south.¹⁵⁹ The time for travel, translation, consideration, and response created a manifest pause in the progress of the peace process. Although delays associated with exchanging letters can be useful in cooling passions when negotiating dangerous conflicts—as exemplified in the written exchanges between Khrushchev and Kennedy during the Cuban missile crisis—delays in communication served to create frustration among the parties and the public

158. Letters between Chandrika Kumaratunga, President of Sri Lanka, and V. Prabhakaran, Leader of the LTTE, *reprinted in The End of the Honeymoon*, *supra* note 94.

159. Interview with Max Hedorn, Country Representative, International Committee of the Red Cross, in Colombo, Sri Lanka (Jan. 15, 1998).

about the inefficiency of the talks in the Sri Lankan context. The LTTE's frustrations arose from its understanding of rehabilitation issues as urgent and the "right" of the Tamils.¹⁶⁰ The delays in responses were interpreted as indicative of the government's lackadaisical attitude toward peace and as suggestive that the government's primary concern was giving the *impression* of sincerity in the peace talks.¹⁶¹ The LTTE may have thought that the appearance of peace talks would help the government secure a large aid package from the Sri Lankan Aid Group meeting in April in Paris.¹⁶² The government frequently requested a "speedy reply" from the LTTE on the issues and conditions that it set, so that the rehabilitation work could begin and the government could show some level of accomplishment to the LTTE and to both Sinhalese and Tamil voters. While the delays did not cause the breakdown of the talks, the inability of the leadership to communicate more directly and quickly constrained the momentum of the peace process.

D. *Inside the Talks: The Procedures*

As mentioned earlier, neither the LTTE nor the government spent a great deal of time discussing the process of the 1994-95 talks. It has been argued in this Article that the failure to engage in such discussions and analysis impeded the development of a common understanding of the specific purpose and objectives of the talks. The failure to analyze process issues thoroughly also resulted in an amateurishly-structured negotiation in which further obstacles were created.

First among these process issue oversights seems to be the inadequate length of time in which the parties negotiated. A typical schedule for a round of negotiations began with the gov-

160. Liberation Tigers of Tamil Eelam, *Why These Double Standards?* (LTTE Int'l Secretariat, London, U.K.), May 26, 1995 (on file with the *Fordham International Law Journal*) (stating that "[t]he very fact that the Chandrika government treats basic human rights of the Tamil people as 'concessions,' is in itself a throwback to the Sinhala-Buddhist hegemonic approach that the Tamils have been resisting for the past 40 years").

161. Liberation Tigers of Tamil Eelam, *supra* note 139.

162. *The Military: A Major Obstacle to Peace*, NEWS BULLETIN OF THE TAMIL INFORMATION CENTRE (Tamil Information Centre, Sri Lanka), Jan.-Feb. 1995, at 2; see *Chandrika Talks Peace*, *supra* note 117, at 1 ("Former Finance Minister and UNP MP Ronnie de Mel says that the government's November peace offers were aimed at the Paris Aid Group rather than the LTTE.").

ernment delegation flying by helicopter into the LTTE-held Jaffna peninsula at around 9:30 A.M. A morning session would be held from approximately 10 A.M. to 12 P.M., and each side would convene separately over lunch from 12 P.M. to 2:30 P.M. The afternoon session would be held from approximately 2:30 P.M. to 5 P.M., and by 5:30 P.M. the government delegation would be back on its helicopter heading for Colombo.¹⁶³ To experienced negotiators, five and one half hours is not considered a long time to discuss complex issues.¹⁶⁴ In fact, most peace negotiations continue for days or weeks. The Camp David Accords, for instance, were the product of hundreds of hours of negotiations. The process of clarifying issues, building trust, explaining interests, and discussing options is time consuming. The fact that much of the morning session of the peace talks was filled with speeches and party-line rhetoric suggests that even the mere five hours were not all allotted to learning new insights.¹⁶⁵ In fact, few negotiators with whom the author spoke said that the negotiations provided them with new understandings of the other side's interests and positions.¹⁶⁶ In terms of hours and days, the 1994-95 peace talks were exceedingly short.

It is unclear why the talks were held for such a short length of time. Some suggest that security issues kept the government delegation from staying longer, but this argument does not seem entirely persuasive. On the first round of negotiations, Navin Gooneratne insisted that the government delegation stay overnight and that the security was considered appropriate.¹⁶⁷ It is not entirely clear why staying a week would have changed that security recommendation. Perhaps because the delegation did not have decision-making powers, the need to leave the talks and to report to Colombo was more immediate. Even if this possibility were the case, however, it still does not seem to necessitate holding only five hours of talks. After years without communication, and after decades of increasing mistrust for each other, the

163. Interview with Navin Gooneratne, *supra* note 80.

164. Telephone Interview with Teresita Schaffer, *supra* note 143.

165. Interview with Dr. Jayadeva Uyangoda, *supra* note 108.

166. One notable exception comes to mind. Asirwatham mentioned that he gained a greater appreciation for the LTTE's position that the embargo was not greatly affecting the LTTE, especially after seeing Jaffna and LTTE capabilities, but was almost exclusively hurting the Tamil people. Interview with Rajan Asirwatham, *supra* note 130.

167. Interview with Navin Gooneratne, *supra* note 80.

LTTE and the government would have a lot of work to do in repairing their relationship and developing a common understanding of the conflict and methods of easing tensions. Indeed, the LTTE did complain about the government's short stay.¹⁶⁸ The proposition that these negotiations were only exploratory talks and not peace talks is bolstered by the fact that the delegations met for only a few hours on a few days over the course of the 1994-95 talks.

A second error in the negotiation process was a distinct lack of an informal dimension to the negotiations. Building trust and arriving at meaningful exchanges is a difficult task in negotiations, particularly for warring parties. Mediators of ethnic conflicts have suggested that informal activities are often essential to getting negotiators to trust each other and to begin meaningful exchanges. Former U.S. Assistant Secretary of State Herman Cohen has mentioned that the use of informal meetings was instrumental in arriving at a breakthrough in negotiations between Ethiopian and Eritrean leaders.¹⁶⁹ U.S. mediator Glen Weidner mentioned that significant progress on the negotiations of the Ecuador-Peru border dispute was made because of informal discussions between the negotiators at the birthday party of the wife of a Brazilian General.¹⁷⁰ Indeed, Allister Sparks, in his book on the negotiations between the South Africa's National Party and the African National Congress ("ANC"), suggests that informal activities, such as a fishing retreat between Roelf Meyer, South Africa's Deputy Minister for Constitutional Development, and Cyril Ramaphosa, Secretary-General and Chief Negotiator of the ANC, fostered personal connections between former enemies, which had a substantial impact on arriving at a negotiated settlement.¹⁷¹ Yet the 1994-95 talks were virtually devoid of informality or casual gatherings. The two sides did not even have lunch together until the fourth round, on the suggestion of the three additional government negotiators.¹⁷² Except for that lunch, there was no shared meal, jointly attended reception, or system-

168. Interview with Dr. Jayadeva Uyangoda, *supra* note 108.

169. Herman Cohen, Former U.S. Assistant Secretary of State for African Affairs, Remarks at Harvard University JFK Seminar: Mediating Deadly Conflicts, Sept. 19, 1997.

170. Weidner, *supra* note 136.

171. ALLISTER SPARKS, *TOMORROW IS ANOTHER COUNTRY* (1995).

172. Interview with Dr. Jayadeva Uyangoda, *supra* note 108.

atic effort to allow the negotiators to get to know one another on a personal level.¹⁷³ Perhaps the only activity of this sort was a field visit by Asirwatham, who was escorted by the LTTE to see his aunt who lives in Jaffna. The lack of an informal dimension to the negotiations therefore became yet another obstacle to the development of trust and friendship between the negotiators.

The tenor of the talks did not just exclude informal processes, but was decidedly too formal. There was a level of protocol in the talks that had negative repercussions.¹⁷⁴ For example, each negotiating team had its national flag on its side of the table. When pictures of the LTTE delegation negotiating under its own flag, a symbol of independence to many, hit the Sri Lankan newspapers, there was an uproar among Sinhalese nationalists. The government and the LTTE had to react to the backlash that arose out of this unnecessary formality. Although the use of flags may have great symbolic value, the practicalities of arriving at a negotiated settlement necessitated restricting protocol and formalities that were likely to cause controversy. This lack of forethought further shows how the structure and process of the talks were more accidental than the product of a calculated approach.

Thirdly, both sides failed to engage in brainstorming sessions during the peace talks. The technique of brainstorming in its most simple form includes exchanges between parties about possible options and potential arrangements for improving a current conflict. In an open and non-binding format brainstorming helps parties identify options that can facilitate efficient trades and create value for both sides. In the Oslo Accords, the creation of negotiation sessions in which all representatives were encouraged to exchange possibilities in a non-binding format, is credited with helping to achieve a breakthrough in the stalled Middle East Peace Process.¹⁷⁵ The 1994-1995 Sri Lankan peace talks were devoid of such imaginative sessions. According to Dr. Uyangoda, the great bulk of the negotiations were characterized by traditional hard bargaining, where

173. Interview with Rajan Asirwatham, *supra* note 130.

174. Telephone Interview with Teresita Schaffer, *supra* note 143.

175. JANE CORBIN, GAZA FIRST: THE SECRET NORWAY CHANNEL TO THE PEACE BETWEEN ISRAEL AND THE PLO, 1994; see Amos Elon, *Annals of Diplomacy, the Peace Makers*, NEW YORKER, Dec. 20, 1993.

rhetoric and historical interpretations dominated the talks.¹⁷⁶ It is quite possible that the LTTE's inclination to use rhetoric and long speeches during the negotiations were calculated moves to avoid substantive exchanges. The failure to suggest and to attempt different approaches and techniques, however, was shared by both sides. Indeed, the deal-breaking issues of the peace talks—such as the removal of the Army Camp at Pooneryn—seem to be exactly the type of issues where creative discussion and suggestions could have led to mutually beneficial trades. The failure to engage in such sessions seems to have severely limited the potential of the peace process.

E. *The Structure of Implementation*

One of the critical issues in the breakdown of the 1994-95 talks was the implementation of agreements reached in negotiations. Quite simply, the instruments, institutions, and process necessary to oversee the implementation of agreements were not effectively created during those meetings. These failures are most apparent through examination of the economic embargo.

When the LTTE and the government arrived at consensus regarding the lifting of the embargo for all but eight items,¹⁷⁷ they did not draft a detailed document outlining measurable guidelines for implementation.¹⁷⁸ Such a guideline is often used in negotiations to create objective standards for critiquing the behavior and commitments of the parties. While it has been argued that written instruments are unsatisfactory ways of explaining interests, options, and alternatives, a precisely drafted document is central to providing explicit and exact responsibilities for each party. Without such measurable guidelines, parties are more likely to implement their own, perhaps competing, understanding of agreements and commitments.

The failure to draft such precise guidelines had a dramatic effect on the peace talks. The LTTE claimed that the government was not implementing its promise to lift the embargo.

176. Interview with Dr. Jayadeva Uyangoda, *supra* note 108.

177. *Full Text of President's Letter*, DAILY NEWS (Sri Lanka), Apr. 13, 1995, at 8 ("Only the following items will now remain on the list of goods prohibited for transport to the north: arms/ammunition, explosives/pyrotechnics, remote control devices, binoculars, telescopes, compasses, cloth material resembling army uniforms, penlight batteries. All other goods can be freely transported to the north.").

178. Telephone Interview with Teresita Schaffer, *supra* note 143.

Prabhakaran's letters to Kumaratunga are filled with pleas to the President to implement the lifting of the embargo that the government negotiators had promised.¹⁷⁹ The government admitted that the lifting of the embargo was "hampered by some obstacles," and, in a reply letter to Prabhakaran, suggested that the government would take greater steps to ensure that the embargo is lifted in practice.¹⁸⁰ From the LTTE's perspective, the government's motives were unclear: it was agreeing to easing the embargo and to creating a favorable public perception of its interest in peace, yet in practice few materials were reaching the north and east. This perspective was informed by an historical experience of former Sinhalese governments promising measures, but failing to deliver in practice.¹⁸¹ Without specific guidelines to point to, neither the LTTE nor the government could easily or objectively show that they were in compliance.

It is unclear, however, whether the failure of the government to ease the embargo in practice was the product of bad faith. Some commentators have suggested in private that certain hawkish forces on the government's side may have been secretly impeding the lifting of the embargo. Clearly, there were sections of the armed forces whose economic and political interests were undermined by lifting the embargo and, more generally, by peace. The embargo created a hidden economy of bribes and kickbacks to officers and local level officials controlling the checkpoints. Perhaps more seriously, lucrative arms sales and the resulting administrative graft were jeopardized by peace efforts. Prabhakaran himself thought the interest of army leaders in arms sales was the central obstacle to the peace process.¹⁸² It is possible that a "third force" was impeding the government's commitments.¹⁸³ The LTTE, of course, rejects the proposition

179. Letters from V. Prabhakaran, Leader of the LTTE, to Chandrika Kumaratunga, President of Sri Lanka, Mar. 22, 1995, Apr. 6, 1995, Apr. 18, 1995, reprinted in *The End of the Honeymoon*, *supra* note 94.

180. *Full Text of President's Letter*, *supra* note 177.

181. See the Bandaranayake-Chelvanayakam Pact and the Senanayake-Chelvanayakam Pact.

182. *Prabhakaran's Interview*, DAILY NEWS (Sri Lanka), Dec. 14, 1994 ("Prabhakaran: I feel the army will stymie peace. They need the war to keep the arms deals going.").

183. Interview of President Kumaratunga by World Service of the BBC, reprinted in DAILY NEWS (Sri Lanka), Mar. 17, 1995, at 1.

Question: [Nevertheless] you did change the leadership of the military establishment recently.

Kumaratunga: Just one.

that the government was unaware of any such efforts. The LTTE sympathizers point to the Army leader, General Ratwatte, the President's uncle, and argue that this close connection belies efforts to distance the government from possible irregularities within the Army's implementation of easing the embargo.¹⁸⁴

An equally, if not more compelling explanation for the failure to ease the embargo is simply the administrative difficulties faced by a developing country informing and institutionalizing a policy that was to be implemented in regional outposts. Changing policies and bureaucratic practices simply takes time in Sri Lanka, and the expectation of immediate responsiveness by soldiers and officers in the jungle could very well have been unrealistic. Nonetheless, it is easy to see how the failure to create measurable guidelines aided the parties in escaping their responsibilities. The LTTE could vigorously claim that the government was negotiating in bad faith and escape the next step of the negotiations: discussion of a political solution. Likewise, the government could deny that delays in easing the embargo reflected bad faith and could maintain that it was meeting its agreed-upon commitments. Without detailed guidelines, commitments were simply harder to implement and to measure.

Not only were instruments of implementation lacking, but also there was a noticeable absence of monitoring institutions. Although the cessation of hostilities agreement mentioned the creation of monitoring committees, the process for establishing these committees remained unclear.¹⁸⁵ When the government unilaterally invited Canadian, Dutch, and Norwegian monitors, the LTTE demanded a briefing with all foreign monitors. These meetings were delayed by poor coordination and, by what some have suggested, a deliberate stalling by the LTTE. In the end, the monitors were never able to function effectively. Without such monitoring committees, the parties were able to avoid objective critiques of their behavior. This avoidance applies to

Question: Was that not a reflection of the fact that perhaps you were not getting all the support for the peace process?

Kumaratunga: Yes, perhaps. There were lots of other things. There was corruption, and lack of — we were not getting full support at certain level.

Id.

184. Interview with James Kumar, *supra* note 127.

185. See Text of Declaration of Cessation of Hostilities, Government of Sri Lanka and LTTE, Jan. 8, 1995, *reprinted in Text of Govt-LTTE Agreement*, DAILY NEWS (Sri Lanka), Jan. 9, 1995.

cease-fire arrangements as well as to issues relating to the embargo. Moreover, the attempt to establish monitoring commitments reveals a deeply flawed process that encouraged unilateral action and resulted in confusion, mistrust, and delays. The establishment of written guidelines could have helped direct the creation of monitoring committees. It should be noted that establishing guidelines and committees would not have ensured compliance or advanced the peace process: the LTTE or the government may purposefully ignore its commitments even with guidelines and monitoring mechanisms in place. The point is simply that such action is harder to sustain when there are instruments and institutions that can be used objectively to critique a party's behavior.

The government and the LTTE did not develop dispute resolution techniques for solving problems that arose within the negotiations. That is, there was no effort made during the negotiations to discuss how the parties would handle stumbling blocks and disagreements that arose in the talks. The *ad hoc* procedure became an exchange of letters between the leaders, but, as explained, this exchange was neither efficient nor purposeful. The development of variable techniques and options for overcoming impasses in the dialogue, such as holding direct meetings or phone calls between the leaders, secret negotiations, or a hiatus in negotiations, could have helped preserve the peace process during difficult times. Professional negotiators often create such internal mechanisms, yet none were devised or in place during the Sri Lankan peace talks. When the parties reached a stalemate after the third round of talks, the LTTE issued an ultimatum threatening withdrawal from the talks and a resumption of hostilities in the absence of certain government action. The failure to develop internal dispute resolution mechanisms dangerously raised the stakes when negotiations came to an impasse.

A final flaw in the structure of implementation was a lack of adequate trust-building steps. Trust-building steps are easily implementable agreements that are designed to demonstrate commitment to the process and to help develop a common stake in the negotiations. At the start of the talks, the government and the LTTE released political prisoners to show their good faith in the negotiating process. Aside from these initial actions, however, there were surprisingly few steps taken to build trust. The LTTE did release two captured policemen that had been en-

gaged in a hunger strike, but only after significant urging from a non-governmental envoy that met with LTTE leaders in March 1995.¹⁸⁶ The creation of confidence building exchanges simply was not systematically pursued in the Sri Lankan peace talks.¹⁸⁷

Moreover, the negotiation's approach of beginning economic reconstruction before discussing a political arrangement, left the LTTE with few responsibilities in which it could show its commitment to the peace process. Other than maintaining the cease-fire agreement, the LTTE could not demonstrate to the public any ostensible responsibilities that it could prove it was fulfilling. The LTTE's complaints regarding the government's performance were viewed by many as strategic rather than sincere, precisely because the LTTE had so few pro-active commitments that it needed to perform. The creation of more easily implementable commitments for the LTTE could have elevated their parity in the negotiation and eased harmful perceptions that the government was making all the important concessions during the peace talks.

F. The Role of the Cease-Fire

One of the great accomplishments of the 1994-95 peace talks was the establishment of a cessation of hostilities to the war. The decision to refrain from armed conflict during the negotiation was a rational attempt to ease the bitterness and devastation that accompanies war. To arrive at reconstruction and to build a common commitment to peace, both the government and the LTTE reasonably concluded that the bombings, battles, and ambushes must first be stopped. The negotiations therefore centered largely around creating a cease-fire, with rounds two and three concentrating almost exclusively on the modalities of temporarily ending the war. The cease-fire was largely effective,¹⁸⁸ holding for several months, and negotiations took place free from armed confrontation.

The cease-fire agreement, however, created enormous pressures on the negotiations. When negotiations stalled or difficul-

186. DAILY NEWS (Sri Lanka), Mar. 18, 1995. The policemen were released at the urging of Bishop Kenneth Fernando and Dr. Uyangoda.

187. Interview with Neelan Tiruchelvam, *supra* note 157.

188. DAILY NEWS (Sri Lanka), Jan. 14, 1995 (quoting General Ratwatte, "what impressed us is that the LTTE seems to be making a sincere effort to make the cessation of hostilities a success.").

ties arose, the most readily available avenue for influencing the pace and direction of the negotiations was threats to break the cease-fire. The LTTE used this tactic twice, and a final time fulfilling its threat by attacking a Sri Lankan Navy ship and ending the peace process. Once a cease-fire is created, the temptation and ability to commit an act that will break, and likely *end*, the peace process is much greater. The 1994-95 peace talks took place under the shadow of such a quick, lasting exit. It is for this reason that mediators of ethnic conflicts often structure negotiations so that the cease-fire is the final rather than initial step. In the negotiations between Eritrea and Ethiopia, for instance, discussions of a cease-fire were only seriously entertained after achieving broad agreement on political issues.¹⁸⁹ U.S. diplomats mediating a resolution to that conflict felt that the pressures of an early cease-fire, in the absence of a general accord on political arrangements, would impede a lasting resolution to the conflict. The fact that there was no common understanding of the central issue of the Sri Lankan conflict—the future political arrangement of Sri Lanka—meant that the negotiations were going to take a long time and the cease-fire needed to hold. In their efforts to achieve a cease-fire, neither side seemed aware of, or concerned about, the time pressures that the cease-fire would create.

In the Sri Lankan context, the pressures of the cease-fire were amplified by the strain that the LTTE faced in maintaining unity and enthusiasm during the cease-fire period. Unlike the Sri Lankan Army, which during such a cessation can retreat to its barracks and remain indefinitely in a state of preparedness and organization, the LTTE as a separatist guerrilla organization may have feared a breakdown in its readiness and fissures in its command structure.¹⁹⁰ The revolutionary zeal and coordination needed to sustain jungle fighters in remote areas are challenged when a cease-fire takes effect. Yet the negotiation process was not designed to bring a speedy end to the conflict. Ultimately, the pressures of the cease-fire seem to have contributed to the withdrawal of the LTTE from the peace talks.

189. Cohen, *supra* note 169.

190. Interview with Tristram Bartlett, Sri Lanka Programme Director, International Alert, in London, U.K. (Jan. 9, 1998).

IV. *RECOMMENDATIONS*

The lessons extracted from the process of the 1994-95 peace talks imply needed reforms for productive dialogue in the future. In this section, six recommendations are presented for revising the process of the talks. The suggestions are directed toward practitioners of peace in Sri Lanka.

A. Employ Third-Party Mediation

Even in this brief presentation of obstacles in the process of the 1994-95 Sri Lankan peace talks, the deep mistrust and miscommunication between the government and the LTTE is apparent. Both sides have a history of such increasing polarization that even attempts to build rapport were misconstrued or understood in vastly different contexts. The status of the government's delegation is a prime example. As described earlier, the government's decision to name a pro-Tamil delegation was interpreted by the LTTE as a purposeful affront and rejection of parity because none of the negotiators had high official standing in the new government. After years of bitter conflict and rare and brief dialogue, the parties were unfamiliar and inexperienced in the process of communication in such a setting.

Mediators facilitate communication by assisting each side in framing and presenting their interests and positions, as well as receiving and interpreting messages. Successful negotiated settlements in ethno-political conflicts have been influenced decidedly by employing professional mediators.¹⁹¹ In the Sri Lankan context, a mediator could have impacted two features of the negotiation.

First, a mediator could have helped prevent harmful unilateral action. In the Sri Lankan peace talks, both sides took unilateral steps rather than joint action to advance the dialogue. In virtually every instance, however, such action, even if employed in good faith, had damaging ramifications. For instance, the government's action to announce a large scale reconstruction program for the Northern and Eastern Provinces was not warmly received by the LTTE, as the government expected.¹⁹² Rather, the LTTE viewed this unilateral action as a strategic move by the

191. Examples include the Philippines, Eritrea, Georgia, South Africa, Afghanistan, and Israel/Palestine.

192. *DAILY NEWS* (Sri Lanka), Feb. 14, 1995.

government to marginalize the LTTE from the popular investment program.¹⁹³ The LTTE demanded that a joint commission be created so that policies and credit could be shared. The result was a delayed and ineffective reconstruction program that failed to please both sides. Although a mediator might not solve underlying tensions between, for example, the level of capital invested and the amount of credit received, a mediator can help the parties recognize conflicts that are not readily apparent to the parties because they are separated by such psychological, historical, and even geographical distance.

Similarly, a mediator can help the parties recognize zones of agreement. Perhaps the greatest concession by the LTTE in the 1994-95 peace talks was its change in position from a total commitment to the creation of an independent Tamil Eelam to the acceptance of a potential federal arrangement.¹⁹⁴ This concession was major. Rarely do separatist guerrilla organizations accept possibilities less than full independence. This refusal partially explains why twentieth-century civil wars tend to last for many years, or even decades. Yet the significance of such a concession was not fully understood by the government and Sri Lankan people. The reflections of negotiators, journalists, and academics do not seem to appreciate the magnitude of this development. A mediator, by aiding the parties in communicating the difficulties and importance of such a concession, can help both sides identify and appreciate joint gains and common interests more effectively.

After the third round, both the government and the LTTE recognized that the progress of the talks was adversely affected by internal miscommunications. The government, in fact, suggested that a mediator be brought into the peace process. Ironically, the process of this suggestion underlines the fundamental difficulties that the parties experienced in the absence of a mediator. That is, the government, in a letter to Prabhakaran, and through public statements, suggested the use of an intermediary and, after private discussions with the French government, advocated that former French Ambassador to Haiti, Francois Michel,

193. Liberation Tigers of Tamil Eelam, *supra* note 139.

194. T. Sabaratnam, *President Proposes Early April Political Talks*, DAILY NEWS (Sri Lanka), Mar. 13, 1995, at 1.

be named as mediator.¹⁹⁵ The LTTE rejected the intermediary as a friend of the government, and perhaps more importantly, voiced opposition to a negotiation process where the consideration of a mediator was conducted unilaterally.¹⁹⁶ The negotiations were so disconnected that even the consideration of a mediator was itself subject to harmful unilateral action.

As previously noted, the LTTE is also guilty of unilaterally injurious action. One example is its ultimatum demanding certain action on penalty of a resumption of hostilities. While a mediator may not be able to insist that parties continue to negotiate, a mediator can help the parties better understand the consequences and the gravity of their actions. By encouraging cooperation and by assisting the parties in shaping their positions as warnings rather than as threats, a mediator can help prevent the parties from inadvertently locking themselves into untenable positions.

A second important role for a mediator in the Sri Lankan context would be in assisting the implementation of agreements. A mediator can impact three dimensions of implementation. First, a mediator can draft the actual agreements that the parties reached during the negotiations. As stated earlier, one of the barriers to implementation in the 1995-95 peace talks was the absence of written, measurable guidelines, especially in regard to the lifting of the embargo. A mediator can not only help the parties realize the importance of such guidelines, but also would be uniquely positioned to do the drafting. Such assistance could provide greater objective criteria for judging and critiquing the behavior and commitments of the parties.

A mediator could also be instrumental in developing and overseeing monitoring institutions. Efforts to establish monitoring committees in the 1994-95 talks were hampered by an unclear process and poor coordination. These committees, in the end, could not function effectively, leaving each side to wage public relations campaigns against the other for violating the peace process. One of the principal advantages of employing a mediator is to include an objective party to monitor the actions

195. *Dialogue for Peace that Never Was*, *supra* note 97, at 5; Letter from V. Prabhakaran, Leader, LTTE, to Chandrika Kumaratunga, President of Sri Lanka, *reprinted in* DAILY NEWS (Sri Lanka), Mar. 7, 1995, at 19.

196. Political Committee, Liberation Tigers of Tamil Eelam, *supra* note 98.

of the parties and to speak out against violations. A mediator can help to develop an expansive framework for ensuring the parties' commitments. For instance, despite the attempt to create monitoring committees for the cease-fire, there was little effort to develop independent monitoring of the embargo. Undertaking such an enterprise might not be exceedingly difficult. A few observers at relevant checkpoints could have helped the parties to identify problems and to discourage violations. Moreover, the use of an objective and independent party to discover and to relay such information can mitigate the bitterness and suspicion that accompanies complaints in the absence of a mediator. As developers of monitoring institutions, mediators bring legitimacy and independent pressure on the implementation of the agreements reached.

Finally, mediators can help the parties design internal dispute resolution techniques for overcoming impasses in the peace process. In the 1994-95 talks, stumbling blocks were typically dealt with through increasingly threatening letters and ultimatums. No discussions took place, before or during the negotiations, to consider how the parties should approach impasses. A professional mediator at the very least can help the parties consider different options for moving the dialogue forward. Such options include a secret summit between more senior representatives, direct contact between the leadership, or a delay in the negotiations in which the parties are instructed to refine positions and to suggest alternatives. There are numerous approaches to handling impasses and a professional mediator can guide the parties to explore options. Again, such a role by no means ensures more productivity. It does, however, create a more carefully and deliberately constructed process which in turn makes it more difficult for the parties to resort to violence once again.

B. Develop an Operating Framework

For peace talks to succeed, it is essential that they are structured around a mandate of common objectives. The attempt to develop such a mandate will inform the parties early on if there is enough general agreement to expect tenable peace negotiations. Should such efforts fail to identify zones of agreement, then full peace talks are not likely to be worthwhile and may in

fact be counter-productive. Because such face-to-face peace talks are rare and require the initiation of extraordinary developments, a missed opportunity could result in a degeneration of communication and a further distancing between the parties. This occurrence, unfortunately, has been the Sri Lankan experience. Exploratory talks and open exchanges are needed prior to the official talks and ensuing public scrutiny to enable the parties to reach broad zones of agreement before full peace negotiations can take place.

Developing a mandate also forces the parties to talk about the peace talks. Specifically, this means considering, developing, and refining the process of the peace talks. The 1994-95 talks were hampered by an *ad hoc* approach on both sides. Neither party entered the peace talks with a detailed plan, and the process of the talks reflected its hazy conception. The government and the LTTE, for instance, had different understandings of the general approach to the negotiations—the relation between economic development and political discussion. This incongruence remained throughout the peace process and seemed to contribute significantly to the breakdown of the talks. Creating an operating framework compels the parties to specify a systematic approach for negotiation. It makes the parties view the process itself as an important dimension of the negotiation. If a framework were developed prior to the talks, the inherent difficulties of pursuing reconstruction before political dialogue may have become evident. Although negotiating the complex details to a potential settlement will continue to form the crux of any peace talks, and may very well be acrimonious, the establishment of a setting of shared understandings of process can help to focus the energies of the parties on the difficult substantive issues.

Furthermore, the development of an operating framework forces the parties to consider and to create an agenda. Once the parties recognize broad objectives, establishing a schedule for negotiating those objectives becomes necessary. Although few negotiations occur exactly as they are planned, a general program outlining what specific issues will be discussed, and when they will be discussed, further contributes to a common understanding of the pace and progress of peace talks. The tension over when political issues would be discussed was a central factor in the breakdown of the talks. An explicit agenda could have

helped the parties develop a shared overall sense of the pace of the peace talks.

In addition, the process of building an operating framework can be an opportune time to explore sensitive process-related issues that can have harmful ramifications on the negotiation. For instance, in an exploratory session, the LTTE could have voiced its distress at the lack of senior officials on the government's negotiating team. The government may have been willing to accommodate the LTTE at an early juncture by including more senior government officials. But because there was no interaction before the first round of peace talks, there was less opportunity for the sides to directly express their concerns about potentially damaging process-related issues. Again, such an exploratory session by no means insures fewer process-related obstacles, but such an effort might at least create the opportunity for process-oriented obstacles to be discussed and negotiated early in the dialogue.

A third-party mediator can also play an instrumental role in facilitating the development of an operating framework. Whether active or passive, an experienced mediator assists parties in recognizing a common approach to the process of the talks, helps identify zones of possible agreement, and helps develop a practical agenda. In the Sri Lankan context, an impartial participant could have helped the parties clear up the confusion of who would make the first offer in political discussions. Instead, each side waited for the other to present a potential political arrangement, resulting in disastrous consequences.

C. Communicate Through Non-Written Means and Establish a Hotline Option

Roger Fisher, in his seminal work on negotiations, *Getting to Yes*, explains that improving both the relationship and the level of communication between two parties in conflict dramatically increases the prospects for arriving at a negotiated agreement.¹⁹⁷ The face-to-face dialogue between the government and the LTTE, despite its flaws, created productive communication and a peaceful relationship. The use of letters as a principal form of communication, however, restricted communication and the re-

197. ROGER J. FISHER, W. URY, & B. PATTON, *GETTING TO YES: NEGOTIATING WITHOUT GIVING IN* (1991).

lationship in a way that alternative direct dialogue might have avoided. As mentioned earlier, letters are a highly difficult and ultimately an unsatisfactory method of communicating complex ideas.¹⁹⁸ While letters can be useful in some circumstances, especially to cool passions and to create space, the process of writing, as this author can attest, makes accurately expressing and exchanging information very difficult. Because the issues in the Sri Lankan conflict are so complicated, it seems unrealistic to expect that letters could serve as an adequate medium for arriving at solutions. The fact that communicating through letters takes a great deal of time in Sri Lanka further underscores the constraints of written exchanges on developing a joint understanding on pressing issues. Oral discussions through in-person negotiation and between senior level officials provide the most direct and advantageous method of accurately communicating the interests, options, and alternatives involved. Yet this method was marginalized in the Sri Lankan peace process through the development of a second tier of written communication.

The process of communicating through letters also impeded the growth of relationships between the negotiators and the parties. The formality and brevity of a letter inhibit the building of trust and respect between the two groups. Casual conversations, open exchanges, and requests for further explanation provide the negotiators with insights into substantive issues and the commitment and professionalism of the opposing negotiator and organization. Although the exchange of letters was never meant to supplant in-person negotiations, the growing importance of this form of communication throughout the peace process directed emphasis away from oral discussions of issues. The relationships between the negotiators and the parties suffered as a result. Moreover, the use of letters provided each side with publishable ammunition to attack and to accuse the other of bad faith. This temptation proved too great to resist, and again, the status of the relationship consequently suffered. Discouraging the use of letters in favor of more comprehensive oral discussions could have positively impacted the Sri Lankan peace process.

In addition to in-person, senior level negotiation, the government and the LTTE need to create regular, open lines of

198. Interview with Neelan Tiruchelvam, *supra* note 157.

communication to provide an alternative process for continuing the peace dialogue. A hot-line, for instance, between the leadership of the LTTE and the government can serve the same intended purpose of letters—to jump-start stalled talks, to express the importance of issues, and to appeal for appropriate action. Although negotiations remain the more effective method of communication and ought to be the focus of any peace process, a hot-line can provide a second avenue for exchange and explanation between the parties in urgent situations. While some have suggested that infrastructure concerns prevented such a possibility—the LTTE leadership, after all, is fortified deep within the Vanni Jungle—the use of satellites or the assistance of outside parties, such as India or Norway, could have provided the necessary telecommunications support.¹⁹⁹ The more troubling obstacle may have been the psychological barrier for the President of Sri Lanka to communicate directly with a “terrorist” leader. Moreover, the government was afraid of legitimizing Prabhakaran through such access to the President. Nonetheless, a hot-line between the parties would have afforded a more responsive, back-up process for dialogue.

In the absence of political will to create a hot-line, a mediator could facilitate dialogue between Prabhakaran and Kumaratunga if their representatives have reached a stalemate. An impartial third-party mediator could serve as a messenger between the leaders and assist in framing the communications in the most favorable light for advancing the peace process. Indeed, even if a hot-line existed, the use of a mediator to undertake “shuttle diplomacy” could provide an effective method for exchanging information on highly sensitive issues. By drawing on the advantages of oral communication, and through skillfully shaping the tone of the dialogue, a mediator would provide a better avenue for communication relative to the exchange of letters.

D. *Use Non-Public Dialogue*

The type of exploratory talks that this Article advocates as a precursor to actual peace talks may not be politically feasible or desirable if held publicly. The political maneuvering between the government and the LTTE, and the pressures on each to

199. Interview with Harry Goonethilleke, *supra* note 5.

claim victory for its respective constituency and to present favorable national and international images seriously undermines the open, honest, and creative exchanges necessary for a successful negotiation. In Sri Lanka, holding such public exploratory talks²⁰⁰ could irresponsibly generate deep expectations, which, in turn, would make exploratory talks even more difficult and guarded. To minimize such outside pressures and to avoid creating unrealistic expectations, exploratory talks may be more effective if held secretly.

Secret talks would allow greater flexibility for the parties. For instance, outside the public eye, the parties are freer to suggest creative arrangements and to build rapport through informal activities. During the Oslo Accords, the Norwegian mediators were able to create a hidden environment in which no topic was barred from discussion. The PLO and Israeli representatives were able to recognize more common ground than had previously been apparent.²⁰¹ Without public pressures for results, parties are more amenable to spending time discussing and imagining scenarios that could in turn lead to breakthroughs in results. One of the chief process-oriented obstacles to the 1994-95 peace talks was the limited time of actual negotiation. Secret talks allow parties to spend days, weeks, even months, to exchange, to refine, and to develop their interests, options, and alternatives. Finally, the secrecy of talks minimizes the need for protocol, which had a negative effect on the peace talks. The attention to protocol in the 1994-95 talks created an overly formal atmosphere and provided the Sinhalese media with symbols, such as a Tamil flag, for condemning the peace process. Similarly, secret dialogue limits the need for the use of letters, which provide the parties with public relations ammunition to the detriment of the peace process. In non-public exploratory talks, lengthy oral discussion is *the* primary means of developing a common operating framework.

Nevertheless, secret talks are in some sense risky. The government has feared that secret talks would be exposed and that such talks would exemplify the government's weakness in dealing with the "terrorist threat" to unpopular response in the

200. By "public" the author is referring to the non-secret nature of the peace process. Of course the actual negotiations were conducted without any public admittance.

201. CORBIN, *supra* note 175.

Sinhalese heartland. During the talks, Kumaratunga repeatedly assured the Sri Lankan people that there were no parallel secret talks.²⁰² This fear, however, may be overstated. If the talks are conceived in a way that allows deniability, the fear of discovery might not be prohibitive. London or Paris, cities in which both parties staff senior officials, could serve as locations for such secret talks, especially if assisted by a sympathetic host government. Four years of secret negotiations between South Africa's National Party and the ANC suggests that if the two parties are highly organized and keep information limited to a few players, discovery is difficult.²⁰³ Although many high-profile representatives took part in the Oslo Accords, sophisticated intelligence agencies and journalists remained unaware of these proceedings. With the requisite political will, secret exploratory talks would help to provide an accommodating environment for creating the crucial operating framework necessary for the negotiations.

Another advantage of secret talks is that they do not require a cease-fire as a precursor to negotiations. By insisting on peace before discussions of political issues, the government and the LTTE may have inadvertently created pressures on themselves that ultimately proved unsustainable. When the talks were not advancing as the LTTE desired, the temptation and ability to break the cease-fire and thereby end the talks became very real. The LTTE may, in fact, have feared the consequences of letting its cadres remain idle for too long. Secret talks help to avoid these pressures by approaching the issue of a cease-fire after difficult political issues are negotiated. In this way, negotiations can continue indefinitely and are not controlled by military maneuvers. Although military actions and political rhetoric may fill the public dialogue, in secret talks, negotiators are free to continue to build relationships and to improve communication.

Third-party mediators could help establish secret talks. Discussions between senior officials of the LTTE and the government are unlikely within Sri Lanka due to security issues and the greater risk of detection. Foreign cities, however, could serve as a base for talks, and a sympathetic host government could pro-

202. DAILY NEWS (Sri Lanka), Mar. 4, 1997 (stating that "[t]here will be no secret deals of any kind with the LTTE.").

203. SPARKS, *supra* note 171, at 21, 37.

vide the necessary security. England, France, Norway, and others have expressed interest in supporting peace efforts, so the problem is not a lack of suitable mediators.

It should be noted that any third-party intervention would likely need the approval of India. The geo-political realities of the ethnic conflict in Sri Lanka implicate India as a continuing player in events in its region of influence. Although relations between India and the LTTE leadership have been strained since the assassination of Rajiv Gandhi, partly because of India's request for the extradition of Prabhakaran, India would likely insist on playing at least a supervisory role in any foreign mediation of the Sri Lankan conflict.

E. Improve Internal Procedures: Time, Informality, Creativity, and Preparation

Some relatively simple revisions to the procedures of the 1994-95 peace talks could help improve the likelihood of success of future negotiations. For instance, the negotiations ought to be longer. The 1994-95 talks were extraordinarily short. Each round typically consisted of one day, and that day usually consisted of five hours of discussions. In comparison with the hundreds of hours of negotiations in resolving many ethnic conflicts, such as the Middle East peace process and negotiations in South Africa, the Sri Lanka negotiations were distressingly brief. Both parties should consider establishing procedures for longer stays and for longer hours of negotiations to improve the ability of the parties to clarify issues, to explain interests, to exchange options, and to consider alternatives. Such tasks are time consuming when thoroughly undertaken.

Longer negotiations would likely have a positive effect on building trust between the parties. Even a cursory study of Sri Lankan history reveals a deep level of mistrust between Tamil and Sinhalese leaders. The infrequency and brevity of the negotiations made building personal relationships based on trust and respect more difficult. The less time negotiators have to get to know each other, the less opportunity there is for advancing personal relationships. Perhaps more importantly, the negotiations ought to include some informal dimension to create the environment necessary to advance the relationship of the parties. Opportunities for informal discussions often lead to break-

throughs in difficult negotiations.²⁰⁴ Professional mediators are quick to acknowledge that informal activities, such as shared meals, receptions, etc., provide a freer atmosphere for people to explore possibilities and for enemies to connect as people. In the Sri Lankan context, there was virtually no informal dimension to the peace talks.

To build trust, more explicit trust-building steps can be utilized. The government and the LTTE made important maneuvers in the beginning of their dialogue to release prisoners as a sign of good faith. Such moves were warmly received by both sides and helped to develop a spirit of cooperation that is a necessary part of any peace talks. There was little systematic effort, however, to include trust-building steps as a technique for advancing the spirit of cooperation. Inexpensive trades or joint action, even if only of symbolic value, can help to advance the momentum of peace talks. Implementable trust-building steps that place a burden on the LTTE could further evidence the LTTE's commitment to the peace process and help to elevate their reputation and their parity with the Sri Lankan government.

Developing creative trades or joint action can be more readily accomplished if the parties designate greater time in the negotiations for brainstorming. The technique of brainstorming—suggesting and considering possible options and arrangements in a non-binding format—was absent from the 1994-95 talks. Although brainstorming can only be as successful as the ideas proffered by the participants, brainstorming helps to inject creativity into traditional positional bargaining and hardball tactics. The more creative the exchange of ideas, the more opportunity for identifying efficient trades and for creating value for both parties.

Issues of preparation are also important to discuss here because they partially explain the construction of the talks. The lack of preparation, the lack of support staff, and the failure to develop mandates, techniques and deliberative procedures, resulted in a poorly designed negotiation. To arrive at a more professionally structured negotiation and to develop more coherent strategies for solving the substantive issues of controversy, both

204. The breakthrough accomplished between Ecuadorian and Peruvian negotiators occurred during a birthday reception outside the formal negotiation process. Weidner, *supra* note 136.

sides need to understand more fully their interests, options, and alternatives.²⁰⁵ The development of a Ministry of Negotiation with a support staff of professional negotiators to explore potential frameworks and political arrangements would likely empower the negotiators with greater mobility to arrive at common ground. The LTTE and the government need to prepare for the negotiations as seriously as they prepare for war.

The inclusion of a third-party mediator could help to create more effective internal procedures for peace talks. A third-party mediator could suggest longer, more frequent negotiations, as well as host informal events. Experienced mediators could also provide insights and impetus to enacting brainstorming sessions or other methods for bringing more creativity into the peace process. Finally, a mediator could assist in the preparation by assigning "homework" to the parties to explore issues further, to develop options, and to compel the parties to consider the importance of process-related issues. By helping the parties to identify underlying tensions that are creating barriers to the resolution of the conflict, and by encouraging the sides to explore and to explain such tensions further, a mediator could help to create paths around stumbling blocks. In the Sri Lankan context, such assistance and encouragement is long overdue.

F. Develop Intra-Party Cohesion

Creating a peaceful settlement to the ethnic conflict in Sri Lanka is a difficult and complex endeavor. When a party experiences internal fragmentation, tensions, and conflicts, developing a peaceful settlement becomes even more tenuous. Without intra-party cohesion, a party is either too weak to undertake the necessary steps for peace or perceived as too weak to deliver on its end of the bargain. Implementation problems can quickly sour a budding relationship. If the Sri Lankan peace process is to move forward, the government needs to improve its relations

205. When one considers the amount of money, personnel, and equipment that is invested in solving the conflict through military victory, it seems surprising that such little investment and personnel were infused into the negotiation process. If a cabinet level ministry is politically too difficult to create, at least bureaus of negotiation need to be formed to develop the approaches, research issues, conceive strategies, and coordinate implementation to advance the dialogue and the process of peace. When the government and the LTTE create such institutions, their commitment to a peaceful settlement will be more credible.

with the opposition parties, the military, and the Sinhalese public.

The historical competition between the UNP and SLFP to capture the nationalist vote and its disastrous effect on efforts to forge common ground with Tamil leaders is not altogether inconsistent with today's competitions between the UNP and PA to speak for the Sinhalese mainstream. When the PA makes overtures of peace, such as relaxing the economic embargo, the effort is laced with guarded precautions so that they do not seem *too* peace-minded. Although the PA won the election on a peace platform, there is a palpable fear in Colombo of moving too fast and of creating an impression of "giving in" or being "weak." This intra-party rivalry and its detrimental effect on the peace process has not gone unnoticed. The former British Under Secretary for Commonwealth and Foreign Affairs, Dr. Liam Fox, brokered an agreement in 1997 between the PA and UNP on this very issue.²⁰⁶ The agreement calls for the PA to consult the UNP on issues relating to the resolution of the ethnic conflict. The effect of this agreement is unclear. Although the agreement provided a hopeful sign, the latest government action to ban the LTTE was taken without consulting the UNP. This action, in turn, sparked deep resentment and further division over how to approach the peace process. As long as the UNP and PA remain so divided on central issues of the peace process, successful negotiations with the LTTE are unlikely.

The importance of secret negotiations as an avenue for developing a framework for peace talks makes the cooperation and trust between the UNP and PA even more important. Approaches to peace that wholly exclude the opposition will not only violate the Fox Agreement, but could impede broad-based Sinhalese support, which is so necessary for important peace developments. Yet, to create such extensive support and to include the opposition, the PA needs to trust that the opposition will not use inside information for its own advancement in the polls. Efforts to create common ground between the leadership of the UNP and the PA on the ethnic question would improve the chances for successful peace talks.

206. Rediff on the Net, *Landmark Peace Initiative in Lanka* (visited Jan. 4, 1998) <<http://www.rediff.co.in/news/apr/03lanka.htm>> (on file with the *Fordham International Law Journal*).

Increased government effort to involve the Buddhist clergy and the military, the two most stringent defenders of Sinhalese nationalism, into the peace process seems likely to advance the peace dialogue. Although much of the Buddhist clergy is unwilling to consider "concessions" to the LTTE, efforts to promote more moderate religious voices could support peace efforts. More importantly, the government needs to exercise greater control over the military. If forces within the military can frustrate peace efforts, such as the effort to lift the embargo, then the government's authority to negotiate a settlement will be seriously undermined. Efforts to integrate the military more fully into the peace process will be difficult. The hidden economies of the conflict and varying interests of commanding officers are difficult obstacles to overcome. Moreover, General Ratwatte seems thoroughly content to solve the ethnic problem militarily. Nonetheless, greater effort to control and to integrate the military can advance the peace process by empowering the government with greater credibility.

The government should also help prepare the public for peace through public education campaigns. There is a deep, social psychological divide between Sinhalese and Tamil communities, leading some scholars to assert that the parties inhabit "divergent realities."²⁰⁷ The Sinhalese mainstream, informed mostly by a vehemently anti-Tamil press, has developed an antipathy and suspicion of the LTTE that needs to be overcome. Former U.S. Ambassador to Sri Lanka, Teresita Schaffer, refers to this needed dimension as "constituency building."²⁰⁸ The government needs to create both grassroots and top-down mechanisms for educating the public on the benefits, risks, and costs of the peace process. If the government fails to prepare the public for peace and fails to develop a more inclusive constituency that favors peace, it is unlikely that the momentum for peace talks can be sustained.

The LTTE as a strict guerrilla organization does not suffer from the same intra-party conflicts as the government. There are, however, divergent voices within the Tamil community.

207. Interview with Dr. Donna Hicks, Deputy Director, Program on International Conflict Analysis and Resolution (PICAR), Harvard University, Cambridge, Mass. (Jan. 6, 1998).

208. Telephone Interview with Teresita Schaffer, *supra* note 143.

Most Tamil parties favor a devolution of power rather than a separate Tamil homeland, and competition between these Tamil parties does affect, if only modestly, the progress of peace. Tamil parties with links to the Sri Lankan government are fearful that concessions to the more extreme LTTE will lead to its undemocratic domination of the Northern and Eastern Provinces.²⁰⁹ The LTTE remains committed to providing results for the Tamil community that would have been unattainable through peaceful means—justifying its armed resistance and the ensuing suffering of the Tamil people. Although the intra-Tamil rivalries do not create the foremost obstacles to peace, the competition between divergent Tamil movements creates an additional barrier in the peace process. Unfortunately, there seems to be little motivation on the part of the LTTE or other Tamil parties to improve their relationships.

Again, a mediator can play a useful role in developing intra-party cohesion. In the preparatory stages, a mediator can encourage and facilitate exchanges between the PA and UNP. In fact, a mediator could serve as a “repository of trust”²¹⁰ for developing dialogue on a coherent approach to peace. On the Tamil side, a trusted mediator could serve as an interlocutor among Tamil parties that have no official relationship with the LTTE. Whether such a service will be utilized is unclear. The point is simply that a mediator could empower the parties with more options and avenues to develop intra-party cohesion.

CONCLUSION

One of the most surprising elements of the 1994-95 peace talks is that the breakdown of the talks occurred despite the fact that the parties were not very far apart on the main substantive issues that they discussed. There was movement and concession on the issue of the Pooneryn Camp, and action had been taken to improve the implementation of the lifting of the embargo. Yet these issues still became deal-breakers for both sides. The fact that the Army camp at Pooneryn was voluntarily abandoned following a successful LTTE attack on an Army camp at Mullitivo suggests that there may have been more going on at the 1994-95 peace talks than meets the eye. That is, both sides may not have

209. Interview with Neelan Tiruchelvam, *supra* note 157.

210. Interview with Dr. Donna Hicks, *supra* note 207.

been ready for peace. The LTTE's refusal to discuss political issues and its early withdrawal from the peace talks, the government's failures of implementation and commitment to a secondary solution in its devolution package, and the deeply flawed process of the 1994-95 talks, raises the suspicion that peace was purposefully unlikely. At the very least, the failure of the parties to create a constructive process for peace hindered good faith efforts.

Currently, the peace process is virtually non-existent. The war rages in the North, with General Ratwatte pursuing an open-ended mandate to crush the LTTE once and for all. The government has officially banned the LTTE and thus outlawed communication with them. Intra-party rivalries within the government have reached even greater heights following this decision.²¹¹ Internationally, the LTTE has become a pariah, banned in both the United States and Canada, due to the LTTE's terroristic bombing campaign.²¹² Even Sri Lanka's foremost peace activists, like Dr. Uyangoda, are beginning to consider that a peaceful end to the ethnic conflict that preserves a unified Sri Lanka, may, after two decades of effort, be unattainable.²¹³

There are, however, modest signals that suggest that peace and reconciliation are possible between the Tamil and Sinhalese communities and leadership. The absence of race riots following the bombing of the Temple of the Tooth, for instance, indicates that a resort to mob violence as a medium for ethnic passion is not tolerated under the PA government. President Kumaratunga's decision to present her Independence Day speech in English rather than Sinhala can be seen as a sincere attempt to downplay race pride in favor of forging reconciliation with Tamil communities.²¹⁴ The devolution package itself, while marginalizing the LTTE, at least reflects a thoughtful commitment to improving the plight of Tamil people in Sri Lanka.

Despite the territorial success of the Sri Lankan Army over

211. P.S. Suryanarayana, *Sri Lanka UNP-PA Row Threatens Peace Process*, THE HINDU, Mar. 5, 1995.

212. *LTTE- A Foreign Terrorist Organization*, SRI LANKA NEWS (Embassy of Sri Lanka, Washington, D.C.), Oct. 1997, at 1. The designation of the LTTE as a terrorist organization by the U.S. State Department has been challenged in U.S. district court. Telephone Interview with Mr. V. Rudrakumar, LTTE U.S. Representative, (Jan. 5, 1998).

213. Interview with Dr. Jayadeva Uyangoda, *supra* note 108.

214. Feizal Samath, *Sri Lanka: Kumaratunga Walks the Risky Language Tight-Rope*, INTER PRESS SERVICE, Mar. 2, 1998.

the past three years, it is unlikely that the LTTE will be fully defeated. Holding and controlling the newly-acquired territory, according to former Air-Vice Marshall Harry Goonethileke, will be difficult and costly for the Sri Lankan armed forces.²¹⁵ The LTTE continues to have access to resources and to committed young fighters, and will therefore continue to undermine territorial gains by the Sri Lankan armed forces, and to destabilize life in the South through suicide bombings. The need for negotiations and third-party mediation has not diminished since the end of the 1994-95 peace talks.

Perhaps the most urgent development needed is the reestablishment of open and regular lines of communication between the government and the LTTE. Such a move would require the government to retract its ban on the LTTE, at least where communication is concerned. Without an avenue to explore possible alternatives to war and possible frameworks for future talks, both sides are wedded to full-scale military engagement. While this Article has argued that secret negotiations are the most likely avenue for developing a framework for future peace talks, some form of communication is better than none. If the process of communicating is severed, so are realistic hopes for peace.

Building and repairing the relationships between Tamil and Sinhalese leaders will be crucial to any future success in the peace dialogue. The deep mistrust permeating LTTE and government relations may only be overcome through third-party mediation. Although the LTTE remains receptive to this idea,²¹⁶ the government has openly favored a military campaign and therefore rejects any third-party intervention. War weariness may change this dynamic over the next few years.

In the end, the 1994-95 Sri Lankan peace talks provide insights into how errors of *process* impeded the peace negotiations. The recommendations suggested in this Article provide alternatives for structuring peace talks should they occur in the future. The argument, however, is not that all of these recommendations need to be enacted for talks to be successful. Taken individually, no single process-oriented obstacle of the 1994-95

215. Interview with Harry Goonethileke, *supra* note 5.

216. *Sri Lanka's LTTE Seeks 3rd-Party Mediation for Talks*, XINHUA NEWS AGENCY, Mar. 30, 1997.

peace process marks an insurmountable barrier to peace. Rather, with greater emphasis on, and with further consideration and analysis of the process and procedure of peace talks, the government and the LTTE will likely provide themselves a better opportunity to end the civil war and to create the instruments and institutions necessary to maintain a lasting resolution to the conflict.