

NEGOTIATIONS TO ESTABLISH AN INTERIM AUTHORITY FOR THE NORTH EAST

Godfrey Gunatilake

Defining Positions for the Resumption of Negotiations

The resumption of negotiations has been stalled as the government and the LTTE have not been able to agree on what ought to be the subject and scope of the negotiations. Both parties are agreed that an interim authority/administration should be established. The UNF government had presented their proposals for Provincial Administrative Council on 17.7.2003. The LTTE did not accept the government's proposal as a basis for negotiations. They responded with their own proposal for an Interim Self Governing Authority on 18.10.2003 and requested Norwegian facilitators (in the wording in the LTTE letter) "to arrange for a meeting at which we can discuss the proposal, in your (the facilitator's) presence with the representatives of the GOSL at a mutually convenient time and place." The UNF government made no definite response to the LTTE proposal. However the initial statements of the government spokesman indicated that the LTTE proposal went far beyond what had been proposed by the government.

The present government when it assumed office stated that it is prepared to discuss the LTTE proposals for the ISGA but that the negotiations must proceed concurrently with negotiations on the core issues related to a final political settlement. The LTTE has not accepted this proposal and has insisted that the negotiations on the ISGA must be concluded and that the ISGA must be institutionalized before negotiations on the core issues commence. The disagreements on this basic issue of the subject matter of the next stage of negotiations have stalled the peace process.

To break the deadlock the government has announced that it would formulate its own position on the interim authority and present it to the LTTE through the Norwegian facilitators. From the most recent information available the LTTE appears to have expressed concern that this would be another set of counter proposals that might signify that the government is not willing to discuss the proposals of the LTTE. The present situation therefore may result in further deferment of negotiations.

The LTTE has to be persuaded that in formulating its proposals on the interim authority government is not rejecting the LTTE's proposals but responding to them and stating the government position. This initial statement of the government's position becomes part of the negotiating process. The government can indicate that negotiations can commence on the understanding that the proposals of the LTTE for the ISGA will be taken up for discussion and that the government will provide the LTTE with its initial response to the proposals in the form of a comprehensive statement of its own position on the interim authority.

This will be in the interests of both parties as both parties begin with a clear understanding of each other's positions. The negotiations can then endeavour to bridge the differences and reach agreement on an interim authority which is mutually acceptable.

The ISGA as an extra-constitutional arrangement.

The LTTE has taken the position that the ISGA has to be negotiated outside the Sri Lankan constitution. It relies on "international precedents for establishing interim governing arrangements in war torn countries having the force of law based solely on pacts or agreements between the warring parties recognized by the international community". How will this affect the negotiations? By taking this position the LTTE attempts to achieve two objectives. The first objective is to maintain its parity of status with the Sri Lankan government. To do this the LTTE insists to state that it does not come under the Sri Lankan Constitution. Second it seeks to pre-empt the argument that might be raised by the government that any interim arrangement cannot assume and exercise powers that cannot be granted to it by the existing constitution and that the interim authority may have to be conceived within the limits imposed by the present constitution. This would have been a useful negotiating position for the government in order to underscore the intrinsically interim character of any arrangement made pending a final political settlement. It would have also facilitated the acceleration of the negotiations on the final settlement.

The government would have to respond to the LTTE position that the interim authority could be an extra-constitutional arrangement based on an agreement. The LTTE has not cited any specific international examples to support its position. Pro LTTE analysts have argued that the interim arrangements in Bougainville bear some similarity to the situation in Sri Lanka. But these have been firmly set within the "shared acceptance of the sovereignty of Papua New Guinea." Furthermore, the agreement repeatedly refers to the guarantees and the ratifications by the national constitution and the national Parliament. The LTTE probably has in mind the Israeli-Palestinian arrangement where the origins of the conflict are very different and the acceptance in principle of the existence of two states was an intrinsic part of the peace accord from the inception. Probably the more pragmatic approach would be to avoid any time-consuming discussion on the issue of extra-constitutional arrangements and the relevance of the international precedents and go directly to the nature of the substantive powers needed by the interim authority to fulfill its objectives. After the parties have broadly agreed on the powers and structure of the interim authority they could examine the constitutional implications and modalities of establishing it. The over-riding principle guiding the negotiations on the interim arrangement is that it must be compatible and consistent with the final political settlement, as agreed by both parties, should be

explored in terms of a federal structure and a united Sri Lanka. Even the issue of an extra constitutional arrangement when placed within this overall context becomes more amenable to discussion.

The preamble and the framework for negotiations

The LTTE's proposals contain a preamble. A first round of negotiations on the preamble would provide an opportunity to agree on the framework of the negotiations. Almost all peace negotiations have had such a framework. The preamble could strengthen the OSLO commitment to seeking a solution within a federal structure and a united Sri Lanka and include some of the norms and principles underscored by the donor community in their Tokyo Declaration and other statements.

The ISGA and its compatibility with a federal structure.

Does the ISGA as it stands in the LTTE formulation provide room for negotiating an interim authority which is consistent with a federal system of government and a united Sri Lanka?

It is difficult to give a firm unambiguous answer to this question. The ISGA proposal contains parts where the language as well as the structures envisaged do not specifically acknowledge the relationships that should exist between a federal unit and the central government. The answer to this question will emerge only in the process of negotiations.

Those who have argued that the LTTE's proposals for the ISGA are tantamount to a separate state with sovereign power have pointed to

- ◆ the use of language such as "plenary power for the governance in the North East";
- ◆ the independent institution such as the Human Rights Commission, the Judiciary envisaged under the ISGA; the absence of any reference to national institutions or any appellate jurisdiction by national institutions;
- ◆ the control over marine and offshore resources and the control over the natural resources;
- ◆ power to alienate and determine the use of all land in the North East.
- ◆ The fact that the only explicit reference to the role of the central government in the ISGA is in the appointment of members to the ISGA and the allocation of resources from the Consolidated Fund.
- ◆ Powers to borrow internally and externally, receive aid directly, engage in and regulate internal and external trade.
- ◆ Powers to raise revenue impose taxes and duties.
- ◆ Government expenditures in and for the North East being subject to the control of the ISGA.
- ◆ The ISGA having its own Auditor General. No mention of the Auditor general of the Central government.

The ISGA proposals constantly seek to maintain the "parity of status" between the LTTE and the GOSL. In the words of the document "The ISGA is established by an agreement between the GOSL and the LTTE

and disputes regarding interpretation will go for arbitration by a tribunal appointed by the two parties. The arbitrators shall ensure the parity status of the LTTE and the GOSL in the determination of any dispute.

As pointed out in my recent paper on the ISGA, and the comparative analysis made by the CPA many of the powers proposed for the ISGA could be brought within the ambit of powers enjoyed by a provincial unit in a system of government as envisaged in the 1995 proposal and the 2000 draft constitution. There are however some areas such as the control of government expenditure where the central government seems to have no role, regulation of internal and external trade, absence of the appellate jurisdiction of national institutions which clearly go beyond the limits. The government would have to negotiate on a basis that both parties agree to the overriding principle of negotiation - that the interim authority should be compatible with a final political settlement which envisages a federal system.

The character of the ISGA as defined in the ISGA proposals.

In the light of what has been discussed above, what is the character of the ISGA as defined in the proposals? Does the LTTE envisage it as a regional authority? How is it situated within the national system of government? The LTTE proposals do not deal adequately with this issue. The LTTE appears to have placed the ISGA in an indeterminate category in which the ISGA can act without consultation or reference to the Central government. The ISGA itself however does not have government representatives but the LTTE will be in an absolute majority. This disposition of power would have been still within the autonomy of a regional unit if the proposals made clear what powers the Central government would exercise within the region in discharge of the powers exercised by it for the entire country as in the case of the Federal Government in the federal system. The section describing the jurisdiction of the ISGA talks of plenary powers. Much has been made of this term by those who view the proposal as the "blue print for a separate state," but the term plenary power itself does not mean the plenary power of a sovereign state. The term can be used for the full exercise of the power that is given to any constituted body. The LTTE speaks of powers "in relation to resettlement rehabilitation reconstruction and development for the purpose of demands powers to raise revenue, including imposing taxes revenue levies and duties, law and order, and over land." If these are taken together the ISGA will enjoy the authority of a state. However, in a further definition of the powers that are exercised by the ISGA the document states that its powers will include the "all powers and functions in relation to regional administration exercised by the GOSL in and for the North East." This could be interpreted as the limiting clause which makes the ISGA a regional unit which enjoys power as in a federal system. The language of the document is crafted in a manner which leaves room for alternative interpretations within a spectrum ranging from federal to confederal.

The LTTE seems to be arguing that these powers can be exercised under an agreement between the government and the LTTE such as the Ceasefire Agreement, SHRN or NERF and do not need any formal constitutional ratification for the duration of the ISGA. From the point of view of the government the ISGA will exercise the powers

government now exercises in the regional administration of the North East and which the government delegates to the ISGA under the agreement. The ISGA which has no binding constitutional guarantees will last as long as the agreement lasts, like the Ceasefire agreement and will be presumably revocable by either party if there is a breach of the conditions to which they agree when the ISGA is established.

The LTTE's proposals are vague about several aspects of the ISGA's powers. The ISGA is not defined as a fully fledged body with legislative powers. In clause 14 the LTTE talks of the ISGA's "effective exercise of its legislative and executive powers" but elsewhere it defines the ISGA as an executive authority.

If the ISGA is seen primarily as an executive authority whose main functions are those of resettlement, rehabilitation, reconstruction and development, which it will carry out for a period of five years pending the final political settlement, then the negotiating parties could first agree on the extent and nature of powers that are needed. Such an authority must enjoy the political control and the administrative autonomy that is needed to carry out these functions effectively. In short it may need to have the executive powers of the Board of Ministers of Provincial Council. Could these powers be delegated from the centre under a special arrangement which does not require constitutional changes? These are some of the parameters within which the negotiations would have to be set.

The Interim Authority and the dual regime in the North East

How will the Interim Authority/ISGA relate to the dual regime that prevails in the government controlled and LTTE controlled areas in the North East? This will become one of the most contentious areas in the negotiations on the interim authority. The LTTE envisages an ISGA which will be in control of the entire North East. In such a regime the central government must enjoy the normal access it enjoys and be able to exercise its responsibilities as a central government in all parts of the North East including the areas which are presently under the control of the LTTE. Such a regime must also ensure, as was emphasized in the recent communique of the EU, that "good governance, pluralism, human rights and democracy ... which are the cornerstones of a settlement for an everlasting peace in Sri Lanka" prevail in all parts of the North East. The practical compromise would be to establish the ISGA with a well-defined area of authority which allows the dual regime to continue for the interim period in the contentious areas of justice, security, law and order until the final settlement is reached. These contentious matters are part of the core issues which have to be negotiated in the process of reaching the final settlement.

The Ceasefire and the Interim Authority

The issues concerning the dual regime takes us to the relationship between the Ceasefire Agreement and the Interim authority. The Ceasefire Agreement the mandate of the SLMM and its methods of operation would have to be re-examined in the context of the Interim Authority which is likely to operate for a fairly long period. The Ceasefire which is now revocable with two weeks notice should take the form of a more durable peace accord with a commitment to renounce war and violence and to seek solutions to conflicts and disagreement exclusively through peaceful negotiations. The mandate of the SLMM and the monitoring activities should cover the whole of the North East including the territory now controlled by the LTTE.

The Interim Authority, the Muslim minority and the Sinhala minority in the North East

The proposals of the LTTE provide for representation of the Muslim and Sinhala community in the ISGA but the LTTE will command an absolute majority. The UNF proposals also provided for an LTTE majority in the Interim Council. Within such a structure, the negotiating parties would have to examine how minorities have an effective voice and an equitable share in decision-making and implementation particularly in those matters which vitally affect their interests. This could be done by identifying certain areas of decision-making where decisions require the consent of the minorities.

The position of the minorities, their participation in governance and the protection of their rights may not become a central issue for the interim authority as long as the executive power of the interim authority does not extend to security, justice, law and order. These issues will then have to be negotiated when the parties deal with the core issues relating to the final political settlement. During the period the interim authority functions the issues of human rights and security relating to minorities would have to be dealt with through a revised and strengthened CFA or Peace Accord.

The Structure of the ISGA

The structure proposed by the LTTE is one in which power is highly concentrated in a strong line of command from the Chairman who is the chief executive of the District Committees and their Secretaries. The mode of appointment of members to institutions at the District level and below should be designed so as to be genuinely representative of the community and to promote community participation and empowerment. Local participation becomes particularly important for both transparency and accountability in a context in which the Interim Authority will be undertaking large scale programmes involving heavy expenditure. There is no room in the proposals that have been made by the LTTE for the activation of local government institutions. This is an important aspect which needs attention. ■

Godfrey Gunatilake is former Chairman, Marga Institute, Colombo.