ICES Lecture/ Discussion Series

Self Determination and Conflict Regulation in Sri Lanka, Northern Ireland and Beyond

Address by
Dr. Brendan O'Duffy

at the
ICES Auditorium, Colombo
May 8, 2003

International Centre for Ethnic Studies, Colombo

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Sri Lanka

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Introduction

Those who assume the LTTE's concession on negotiating within the framework of a united Sri Lanka are, to paraphrase Richard Falk, pretending that the self-determination genie remains in the doctrinal box of a statist world. Instead, as Falk and others recognise, the post-Cold War era has presented *real-political* challenges to positivist attempts to define or restrict international legal rights of self-determination. The implications for the current Sri Lankan political process are significant. On one hand, the Cold War moratorium on self-determination has been replaced by a potentially more open system of recognition based on political expedience and new norms of sovereignty recognition which make the mistreatment of ethnic minorities (or ethnic majorities by a dominant minority) a potential grounds for external intervention and eventual state recognition. On the other hand, the dominant principle of self-determination remains that of non-secessionist or internal self-determination, based on regional autonomy (devolution), federalism, power-sharing and individual and group rights protections. The ambiguity between the evolving norms of external and internal self-determination need to be addressed if a stable constitutional settlement is to be reached. I will argue below that such a stable regulatory framework must build in the seemingly destabilizing right of external self-determination,

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1 This research for this paper is part of a larger project comparing inter-governmental approaches to conflict regulation in Northern Ireland, Cyprus and Sri Lanka. The research is supported by the Leverhulme Trust (UK) and the British Academy.

albeit with mutual veto rules which balance safeguards to territorial integrity with safeguards against unilateral assertions of executive power.

In the case of the British-Irish sovereignty dispute over Northern Ireland, the tensions and uncertainties generated by these opposing trajectories of international law have been regulated successfully through the use of a novel bi-national consent mechanism. A modification of this mechanism could contribute to a durable settlement of the Sri Lankan conflict. This article aims first to provide an overview of the recent developments in International Law regarding national self-determination. Secondly, I will try to show from an 'outsider's' perspective,[2] how these international legal developments impact on some contemporary academic and public debates regarding negotiation and design of a political settlement in Sri Lanka. Thirdly, by way of comparison with the British-Irish led process over Northern Ireland, it will be shown that agreement on a novel mechanism for self-determination in 1993 was a pivotal aspect of the pre-negotiation phase leading to the Good Friday Agreement (1998). Finally, I hope to show how a modified version of the concurrent majority formula could be applied to balance the Sinhalese majority wish for the preservation of territorial integrity, with Tamil desires for national self-determination. The overall aim is to show how creative mechanisms for self-determination and constitutional reform can contribute to the search for mutual exchanges between the protagonists in conflict.

National self-determination in international law

The principle and practice of national self-determination has recently evolved with important implications for conflicts centred on ethno-nationalism. The dominant paradigm from the end of the Second

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2 Irish-American dual citizen, educated in Boston, Montreal and London, currently Lecturer in Politics at Queen Mary, University of London.

World War to the end of the Cold War was based on the primacy of maintaining the integrity of states. Despite its name, 'Inter*national* law' continued to recognize only states, not nations, as holders of rights of self-determination. The UN 'Friendly Relations' Declaration rejects any right of secession from an independent state and condemns 'any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state'.

The first notable exception to the statist bias in international (sic 'inter-state') law came with the UN General Assembly Resolution on the Granting of Independence to Colonial Countries and Peoples (1960). This development was meant to recognize and encourage de-colonisation but was qualified in an important way by the assertion of the principle of *udi possidetis juris*, which required that newly recognised post-colonial states retain their colonial borders.[3] While perhaps preventing precipitate fracturing of colonial borders along ethnic/tribal lines, it is arguably the case that the imposed stricture of at least many African states into western civic-style state forms has not been successful – witness the perennial instability of Nigeria, Somalia, Ghana, Ivory Coast etc. The partition of the colonial entity into India and Pakistan occurred before the establishment of the principle of *udi possidetis juris*. Without such a radical surgery – as the Kashmiri and Gujarati remnants attest – it is doubtful whether federalism would be capable of reconciling or regulating Muslim and Hindu interests.

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3 UN General Assembly Resolution 2625 (XXV) 'Declaration of Principles Concerning Friendly Relations Among States' adopted Provision 6 of the UN General Assembly Resolution 1514 (XV) 'Declaration on the Granting of Independence to Colonial Countries and Peoples', which declared: 'Any attempt at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'. Quoted in Richard Falk 'Self-Determination Under International Law' in Wolfgang Danspeckgruber (ed.) The Self-Determination of Peoples: Community, Nation and State in an *Interdependent World* (London: Lynne Reinner, 2002) p. 44.

Subsequent modifications to the international legal status of self-determination expanded the potential justification of national self-determination in states whose regimes denied representation to particular sections of the population and were discriminatory based on race, creed or colour.[4] More recent developments with implications for diminishing the statist status quo include international treaties such as the Copenhagen Agreement (signed by 35 states, including the US), which justifies intervention to uphold democratic regimes. It remains to be seen if the US attempt to assert this right in international law will be successful. Interventions in Yugoslavia (over Kosovo), Grenada, Haiti, Somalia, and most recently Iraq threaten to establish a new paradigm which elevates inter-state political practice (ostensibly based on democracy and human rights) above positive international law. As Richard Falk has emphasized, the legal justification of the recognition of new states following the break-up of the Soviet Union and Yugoslavia stretched the international legal interpretation of post-colonial exceptionalism to the point of breaking.[5]

> This recent practice is a significant confirmation of the extent to which the effective political outcomes that are consistent with geopolitical preferences ... produce *legal* results incompatible with earlier conceptions of legal doctrine. Community responses to such state-shattering practice are registered by way of diplomatic recognition and admission to international institutions.[6]

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4 See Falk's analysis of the 1970 Declaration on Friendly Relations. Ibid. p. 46.

5 Richard Falk 'Self-determination under International Law' in Wolfgang Danspeckgruber *The Self-Determination of Peoples: Community, Nation and State in an Interdependent World* (London: Lynne Reinner, 2002) pp. 51-52. See also Hurst Hannum 'Self-Determination, Yugoslavia and Europe: Old Wine in New Bottles?' *Transnational Law and Contemporary Problems*, 3, pp. 59-69.

6 Richard Falk, 'Self-determination Under International Law' p. 51.

Precisely because of the limits of positive international law within the statist paradigm to manage deep-seated ethno-national conflict, modifications have evolved which attempt to preserve the stability of the inter-state system while encouraging internal or 'non-secessionist' forms of national self-determination, including forms of federalism and devolution, power-sharing, individual *and* collective minority rights protections.[7] The Liechtenstein Draft Convention on Self-Determination Through Self-Administration treats the latter (devolution and federalism) as necessary steps through which parties to a dispute *should* attempt to manage conflict, but also recognizes the need for mechanisms of self-determination. Section I, Art. 1b. defines 'rights of self-determination' as the

> free determination by those possessing that right of their political status and their free pursuit of their economic, social and cultural development, and may be implemented by establishment as a sovereign and independent State, free association or integration with an independent State, or emergence into any other political status freely determined by the people concerned.[8]

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7 The Liechtenstein Draft Convention on Self-Determination Through Self-Administration is an important recent example, see Ibid. pp. 38-39; see also Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, Revised Edition (Philadelphia: University of Pennsylvania Press, 1996). For developments in the Canadian and European contexts see Michael Keating *Plurinational Democracy* (Oxford: OUP, 2001); James Tully *Strange Multiplicity* (Cambridge: Cambridge University Press, 1996); Will Kymlicka, 'Federalism and secession: at home and abroad', *The Canadian Journal of Law and Jurisprudence* Vol. XIII, No. 2, (2000).

8 Liechtenstein Draft, see also the commentary on the agreement by Arthur Watts, 'The Liechtenstein Draft Convention on Self-Determination Through Self-Administration: A Commentary', Appendix B in W. Danspeckgruber, *The Self-Determination of Peoples*, p. 372.

Where persistent claims exist for national self-determination, the absence of guidance from international law makes it imperative for governments to confront and clarify the conditions under which self-determination could be exercised. Arthur Watts emphasizes in his commentary on the Liechtenstein Draft Convention that: 'where even an adequate degree of self-determination has not been acknowledged, the absence of recognized rules and procedures to deal with the situation has often resulted in war or other forms of conflict leading to extensive human suffering.' For Sri Lanka, given the uncertainties inherent in delivering internal self-determination in the form of federalism, it would be naïve to ignore the need to also regulate processes of external self-determination. In fact, in the discussion of some cases below I will argue that regulating external and internal self-determination is a mutually re-enforcing strategy for state-craft.

National self determination and the Sri Lanka conflict

Some may have been surprised by the *apparent* concession on Eelam announced by the LTTE and the UNP government at the Oslo round of talks in November 2002. The statement issued by the Norwegian facilitators announced that the two parties agreed to 'explore a solution founded on the principle of internal self-determination in areas of historical habitation of the Tamil-speaking people, based on a federal structure within a united Sri Lanka. But close observers noted the conditionality attached to the word 'explore'. Internal self-determination is to be *considered* by both parties but neither has actually committed to accepting a purely internal form. Leaving aside the capacious differences between a confederal versus a federal model, or between a federal and a devolved model, two fundamental obstacles remain in bridging the gap between the Sri Lankan government and the LTTE. From the government's side, a clear obstacle to selling a federal solution is the lack of confidence among the Sinhalese public, civil society and opposition political establishment as to the

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Arthur Watts, 'A Commentary' Ibid, p. 368.

permanence of a federal solution. Quite simply, there is widespread fear that federalism (or devolution) would be the first step on the slippery slope to the break-up of the country.[10] As a local government representative (from the PA opposition) declared: 'What this [UNP] government is negotiating is not federalism, it is simply the break-up of the country. They are giving the LTTE what they couldn't get through war'.[11]

Such fears are long-standing, even foundational of conflict. In the post-independence period the mainly Tamil, Federal Party's advocacy of a federal solution created a Sinhalese nationalist backlash against what was perceived as the inevitable dismemberment of the country. The claims to territorial statehood made in the Vaddukkottai resolution in 1976 were followed by the TULF manifesto for the 1977 General Election:

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10 Dayan Jayatilleka is among the most trenchant critics of the international 'peace lobby' who, he claims, are too ready to accept the LTTE bona fides concerning a settlement based on autonomy instead of Eelam (independence). 'Tamil Eelam (sovereign independence) is an axiom, thus non-negotiable. His [Prabhakaran] commitment to it is absolute, fundamental. No alternatives are admitted of as possibilities...The mind-set is hermetically sealed: the contradiction is antagonistic, the game, zero-sum. Deyan Jayatilleka, 'Sri Lanka's Separatist Conflict: The Causes of Intransigence', *Ethnic Studies Report*, vol. XIX, no. 2, (July) 2001, p. 218. Jayatilleka's analysis is based on his highly tendentious interpretation of Prabhakaran's Heroes Day speech of November 2000. See also K.M. De Silva's discussion (really dismissal) of federal options in 'Sri Lanka's Ethnic Conflict and the Search for a Durable Peace' in *Ethnic Studies Report*, Special Issue, Peace Making, Peace Processes and Peace Treaties: Central America, Northern Ireland, Phillipines, Sri Lanka, (2001) pp. 313-327.

11 Interview with Aruna Gunaratne, ex-chairman, Pradeshiya Saba (Matara), Colombo, 10 March 2003. These views echo those of legal commentators such as H.L. de Silva and others who warn that the Sri Lankan government is being hood-winked onto the slippery slope leading from federalism to the break-up of the country.

> There is only one alternative and that is to proclaim with the stamp of finality and fortitude, that, 'we alone shall rule over our land that our forefathers ruled. Sinhalese imperialism shall quit our homeland'. The Tamil United Liberation Front regards the general election of 1977 as a means of proclaiming to the Sinhalese government this resolve of the Tamil nation. And every vote that you cast for the Front would go to show that the Tamil nation is determined to liberate itself from the Sinhalese domination.[12]

Further suspicions of ultimate Tamil motives were raised in 1984-85 when the Tamil United Liberation Front (TULF) first appeared to accept the Sri Lankan government's proposals for a devolution package, only to reject the proposals after coming under pressure from hard-liners in its base-in-exile, Tamil Nadu. Many in the Sri Lankan political establishment became convinced that even ostensibly moderate Tamils were committed only to Eelam.[13] Thus the Tamil consensus enunciated in the Thimpu principles in 1985, based on the recognition of Tamil nationhood, self-determination, traditional homelands and full citizenship rights were interpreted by governments and Sinhalese nationalists, in Jehan Perera's words, as meaning 'nothing short of independence'.[14] More recently, a prominent critic of the peace process, Dayan Jayatilleka, has argued that a federal system for Sri Lanka would be 'centrifugal' i.e. would lead to the dismemberment of the country.[15] K.M. de Silva has argued that federal or quasi-federal devolution is not appropriate because the areas outside of the North and (parts of) the East do not desire devolution (though

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12 Quoted in K. T. Rajasingham, *Sri Lanka: The Untold Story*, ch. 25, serialised in *Asia Times Online*, 2 February, 2002. See also K.M. de Silva, *Regional Powers and Small State Security* pp. 86-ff.

13 Ibid. pp. 142-44.

14 Jehan Perera, 'From Confrontation to Accommodation' in *LMD* Special Issue, 'Peace: What Next?', February, 2003, p. 85.

15 D. Jayatilleka, 'Sri Lanka's Separatist Conflict' p. 216.

this is contradicted by the demands from Sinhalese-majority provinces for the full implementation of devolution following the establishment of Provincial Councils in 1987). In my own research to date I have been struck by the near consensus across Sinhalese society of their belief or at least suspicion that the LTTE will use devolution or federalism as a staging post to independence. A former Army Officer's comments were typical: 'They [LTTE] are setting up their own government, courts, extracting taxes. They have a navy and a merchant marine fleet. And their army fought the Sri Lankan Army to a truce. What does this add up to if not an independent state?'[16]

Yet as significant as Sinhalese fears are of a federal settlement, they are matched by the Tamil fears of majority domination in a unitary constitution. (In fact, it is almost axiomatic that groups in conflict under-estimate the obstacles to moderation of maximal goals and over-estimate the unanimity of opinion of 'the other' when involved in negotiations). Against those who assume that the LTTE leadership has a commanding grip on its local political branches and cadres, one should consider the likelihood that the LTTE concession on Eelam (if it is one) will present significant internal management problems, not least from those supporters and families of cadres who sacrificed their lives in pursuit of Eelam. Observers of the contemporary internal politics of the LTTE describe deep cleavages between the leadership's ostensible commitment to federalism and power-sharing and local rivalries with Tamil-speaking Muslims and Sinhalese, especially in the East.[17] One is reminded of the comments of the sister of Bobby

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16 Interview with ex-Army Officer, Colombo, 7 March, 2003.

17 The most comprehensive source to date for the internal politics of the North and East are the reports of the University Teachers for Human Rights (Jaffna); the views of UTHR(J) were echoed by a consultant working for the Asian Development Bank (personal communication) Colombo, 11 March, 2003; see also Centre for Policy Alternatives 'Fact finding mission to Valaichchenai and Batticaloa' *Peace Monitor*, Vol. 4, Issue 2 (June, 2002) pp. 5-8; Kumar Rupasinghe, 'Enhancing Human Security in the Eastern Province', Road Map Program, Centre for Policy Alternatives and the Berghof Foundation for Conflict Studies, Colombo, 2002.

Sands, the Irish Republican Army prisoner who led nine other republicans to fast to death in pursuit of political status. Ms. Sands rejected the Good Friday Agreement (1998) and formed the political wing of the so-called 'Real IRA',[18] responsible for the Omagh bombing which killed 28 people three months after the ratification of the Good Friday Agreement. Sands' justification for her anti-Agreement stance was that her brother and hundreds of other activists did not die for power-sharing and cross-border (confederal) bodies. Looked at another way, how could an organisation assassinate in 1999 a moderate Tamil like Neelan Tiruchelvam for contributing so productively to the devolution debate, and three years later commit to negotiations on that basis? Anything short of a 'federal' model could be seen as a defeat in the context of Tamil politics.

In other words, assumptions of the other side's inflexibility can be a self-fulfilling prophecy. Scepticism is warranted, but the fact that it is mutually felt is in some ways advantageous because it reveals symmetry and the need for mutualist mechanisms and approaches to conflict regulation. Most importantly, scepticism and distrust should not be allowed to cloud strategic approaches to constitutionalism. Hiding behind essentialist legal or cultural arguments will only perpetuate conflict because they re-enforce perceptions of unjust status hierarchies. Can this gap in conceptual understanding be bridged? One possible approach could be adapted from the mechanism of self-determination that became the fulcrum for the peace process in Northern Ireland.

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[18] Not for the first time, 'Journalese' was responsible for elevating the legitimacy of this splinter-group from the larger, pro-Agreement, Provisional IRA. When a member of the splinter group announced the name in Gaelic as 'Oglagh na hEirann' (literally translated as Army of Ireland) it was mistakenly interpreted as 'Real IRA'. This group represents approximately 10% who rejected the Provisional IRA cease-fire and acceptance of the Good Friday Agreement. Since the Omagh bombing this splinter group has been marginalized through a combination of public antipathy, Provisional IRA 'policing' of its cease-fire and effective co-operation between the police of the Irish Republic and Northern Ireland.

Northern Ireland and mechanisms for self-determination

Unlike in Sri Lanka, the British 'solution' to their exit from colonial rule in Ireland was partition. The Government of Ireland Act (1920) proposed two 'Home Rule' parliaments for Ireland, one in Dublin, the capital of the Catholic-dominated south and a separate Parliament for the Protestant-dominated North.[19] However, this legislation was only partially implemented as southern insistence on full independence for the whole island clashed with British interests in a) maintaining Ireland's place within the Empire for geo-strategic and political reasons and b) protecting the interests of the nearly one million Protestants 'unionists' in Ireland. After two years of war, the Anglo-Irish Treaty (1921) granted dominion status (equivalent to Canada and Australia) to the 26 counties of the 'Irish Free State' and devolved home-rule government (within the United Kingdom) for the remaining 6 counties, which became Northern Ireland.

Irish recognition of Northern Ireland was never consummated. Both dominion status and partition were acquiesced to under threat of war at the conclusion of the 1921 Anglo-Irish negotiations.[20] Articles 2 and 3 of the 1937 Irish constitution claimed legal sovereignty over the entire island and its territorial seas. Conversely, the British Government of Ireland Act (1920) and the Ireland Act (1949) reaffirmed British sovereignty over Northern Ireland and guaranteed its status as a part of the United Kingdom for as long as that was the majority wish of the devolved Northern Irish parliament.[21]

The opposing claims to sovereignty over the territory of Northern Ireland were central points of contention leading to and

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19 For an examination of partition as a British strategy for post-colonial conflict regulation see Thomas Fraser, *Partition in Ireland, India and Palestine* (London: Macmillan, 1984).

20 For an international legal perspective on the Anglo-Irish Treaty see Anthony Carty, *Was Ireland Conquered?* (London: Pluto, 1996).

21 See Brendan O'Duffy and Jonathan Githens-Mazer, 'Status and Statehood: Exchange Theory and British-Irish Relations, 1921-41', *Commonwealth & Comparative Politics*, Vol. 40, No.2 (July 2002), pp. 120-145.

through the 'Troubles', which broke out in 1969 following the suppression of the primarily Catholic Northern Ireland Civil Rights Movement. Since that time the (Protestant) unionist majority was adamant that the irredentist claim over Northern Ireland be removed from the Irish Constitution as the condition for any power-sharing deal with the (Catholic) nationalist minority (then 35% of the population) of Northern Ireland.[22] Gradually, after repetitive cycles of failed negotiation among moderates, followed by intensive waves of paramilitary violence, the British and Irish governments agreed to institutionalise their inter-governmental relationship, address (but not resolve) their opposing claims to sovereignty and encourage power-sharing, economic, political and judicial reform. The Anglo-Irish Agreement (1985) affirmed that a) there could be no change in the status of Northern Ireland without the consent of the majority of people of Northern Ireland and b) that if in future a majority in Northern Ireland were to vote in a referendum for Irish re-unification, the British government would allow Northern Ireland to leave the United Kingdom and unify with the Irish Republic.[23]

The reaffirmation of these parameters for national self-determination were rejected initially by the Provisional Irish Republican Army (IRA), its political wing Sinn Féin and the main opposition party in the Irish Republic, Fianna Fail. Gradually however,

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22 See Brendan O'Duffy, 'British and Irish Conflict Regulation from Sunningdale to Belfast. Part 1: Tracing the Status of Contesting Sovereigns, 1969-1974', *Nations and Nationalism*, vol. 5, no. 4 (1999); Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* 2nd Edition (Athlone Press, 1996); Paul Arthur, *Special Relationships: Britain, Ireland and the Northern Ireland Problem* (Belfast: Blackstaff, 2001); Paul Bew, Peter Gibbon and Henry Patterson, *Northern Ireland 1921-46: Political Forces and Social Classes* (London: Serif, 1996)

23 The Anglo-Irish Agreement was also significant for establishing institutional *and* informal relations between British and Irish officials in the respective Foreign offices, as well as facilitating regular summits between British and Irish Prime Ministers.

as a sense of hurting stalemate developed between the IRA and the British Army and war-weariness penetrated society, these recalcitrant republicans came to accept a separate right of self-determination for Northern Ireland in exchange for a range of constitutional, political and legal reforms.

The mutual recognition of the need to modify sovereignty claims created the basis for a progressive set of reciprocal exchanges that reaffirmed the parameters of a settlement. More specifically, the bi-national, intergovernmental conflict regulation strategy shaped the strategic and tactical choices of the parties and movements in Northern Ireland, creating more stable negotiating blocs with the two governments taking a commanding lead. But this was not simply an elite-led, top-down process of 'lowing the horses slowly' into a British-Irish paddock.[24] The conflict regulation process also required élites to recognise the legitimacy of the motivations (though not the means) of republican and loyalist[25] paramilitaries, as well as cultivating 'sufficient consensus' between constitutional unionist and nationalist parties, grounded in the respective polities. Thus, there was a clear relationship between the development of an inclusive process (bringing paramilitaries into constitutional negotiations) and the opening of sovereignty to negotiation in a more symmetrical, bargainable exchange relationship than existed hitherto.

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24 As the former Northern Ireland Secretary Patrick Mayhew described the process on BBC Radio 5, 23 May, 1998.

25 The term 'loyalist' generally refers to those groups of Protestant/unionists who advocate the use of force to maintain Northern Ireland's place within the United Kingdom.

A framework for self-determination: bi-national consent[26]

The Joint Declaration (Downing Street Declaration) signed in London on 15 December, 1993 was a significant advance in British-Irish conflict regulation because it established agreement between the two governments on the primary regulative aspect of sovereignty: a process of self-determination requiring the consent of *both* a majority of people in Northern Ireland *and concurrently* a majority of people in the Irish Republic for any change in the status of Northern Ireland. Paragraph's four and five contained the heart of the exchange:

> ***Paragraph 4:*** ...The British Government agree that it is for the people of the island of Ireland alone, by agreement between the two parts respectively, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish.
>
> ***Paragraph 5:*** [The Taoiseach] accepts, on behalf of the Irish Government, that the democratic right of self-determination by the people of Ireland as a whole must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland and must, consistent with justice and equity, respect the democratic dignity and civil rights and religious liberties of both communities.

In addition the Joint Declaration reiterated that the parameters of a settlement must be 'founded on consent and encompassing arrangements within Northern Ireland, for the whole island, and between these islands' (Paragraph 2).

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[26] This section draws on my article, 'British and Irish conflict regulation from Sunningdale to Belfast, Part II: Playing for a Draw', *Nations and Nationalism*, vol. 6, no. 3 (2000).

The Joint Declaration was a decisive turning point because of its acknowledgement of the core causes of conflict. This form of self-determination went beyond a simple reaffirmation of Britain's neutrality regarding the constitutional status of Northern Ireland as established with the Anglo-Irish Agreement (1985). By stating that the process of self-determination was for the Irish people alone, the citizens of the Irish Republic were also being given a veto on any unilateral exercise of self-determination by the current unionist majority.[27] In other words, if the current unionist majority, fearing abandonment by their British patron, declared unilateral independence from the United Kingdom, they would be prevented by the current agreement from doing so without the consent of a majority in the Irish Republic. Henceforth, *both* Irish nationalist and British unionist preferences for self-determination were required for any change in the status of Northern Ireland. For the first time since 1918 the rights to self-determination were subject to all-Ireland consent, to be exercised concurrently in both parts of the island.[28]

The effects of the bi-national treaty in turn shaped the internal debates within republicanism and unionism over participation in negotiations. While the Sinn Féin leadership privately supported the Joint Declaration in its internal negotiations, the majority of the grass-roots, especially in border areas and further south, believed it sold short by assuring a "unionist veto" on unity and ancillary levels of

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27 In order of preference, unionist opinion on self-determination favours further integration with the United Kingdom, followed by outright independence for the 6-counties of Northern Ireland, followed by devolution within the United Kingdom, based on majoritarian government within Northern Ireland. See Brendan O'Leary and John McGarry, *The Politics of Antagonism* pp. 290-95.

28 The Good Friday Agreement (1998) provides for simultaneous referenda in Northern Ireland and the Irish Republic if, in the judgement of the two governments, there is evidence of public desire for a change in constitutional status. The Agreement stipulates that such referenda can occur with a minimum interval of 7 years.

reform. One significant incumbent-level obstacle was vital in the delay in the IRA's decision to call a cease-fire. The British opposition Labour party had as a policy mandate a commitment to promote "Irish unity by consent". Given the fragility of Major's Conservative government which was deeply divided over further European integration, some IRA leaders felt it was worth seeing out the Major government with a costly "commercial" bombing campaign, and then calling a future Labour government on its commitment to act as a persuader for Irish unity. Against this view, the surprising victory of the Conservatives in the British election of 1992, in the midst of recession, led to speculation about the un-electability of a British Labour government.[29] IRA attacks continued while the internal debate was taking place, but the targeting and nature of the attacks (such as the firing of un-charged mortars at London's Heathrow airport on 9 March 1994) suggested that the IRA leadership was being steered towards accepting an unarmed strategy. Crucial to the ascendancy of the political over the militant positions within republicanism was the facilitation by the Clinton administration of the Adams-McGuinness leadership of Sinn Féin, after lobbying from powerful Irish-American business and political interests.[30] In January 1994, despite strong British objections, Clinton authorised a 48-hour visa that allowed Adams entry to the United States. This high-profile visit and subsequent visits by other republican leaders was vital in demonstrating to grassroots republicans that constitutional politics could achieve diplomatic recognition and pressure on the world stage. External recognition and facilitation was the clear condition of commitment on behalf of the republican movement to constitutional means.

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29 Ivor Crewe 'Voting and the Electorate' in Dunleavy, Patrick, Gamble, Andrew, Ian Holliday and Gillian Peele, *Developments in British Politics* (London: Macmillan, 1993) p. 92.

30 Conor O'Clery, *The Greening of the Whitehouse* (Dublin: Gill and Macmillan, 1997); see also Paul Arthur, '"Quiet diplomacy and personal conversation". Track Two diplomacy and the search for a settlement in Northern Ireland', in Ruane, J. and J. Todd (eds.), *After the Good Friday Agreement: Analysing Political Change in Northern Ireland*, Dublin: University College Dublin, 1999) pp. 82-83.

Conversely, the Ulster Unionist response to the Joint Declaration was clearly determined by the implications for constitutive and regulative aspects of sovereignty. The consensus among party leaders was that unionist consent for any change in the constitutional status of Northern Ireland was protected by the Declaration (the core regulative aspect). In addition, by 1993 the demonstrated strength of the inter-governmental relationship in standing up to unionist pressure against the Anglo-Irish Agreement and then responding to the failure of the Brooke-Mayhew talks with the Joint Declaration was a sobering reminder to unionists of the need for constructive engagement with the British government rather than obstruction.

The negotiations leading to the Good Friday Agreement itself are beyond the scope of this article.[31] Suffice to say that the mechanism for self-determination was necessary, but not sufficient, for transforming the conflict from violence to constitutionalism. The agreement on a mechanism for self-determination preceded the negotiation of the subsequent aspects of agreement, including creative power-sharing institutions, substantive devolved authority from the UK, confederal links between Northern Ireland and the Irish Republic, and reciprocal individual and collective rights protections in both jurisdictions. A vital element in Ulster Unionist leader David Trimble's ability to sell the Good Friday Agreement to a bare majority of his sceptical community was the success in converting the Irish claim to sovereignty to an aspiration for unity by consent. The mechanism for self-determination was the centre-piece of the separate British-Irish Treaty which is both constitutive and regulative of the Good Friday Agreement. The Irish government amended Articles 2

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31 See my article, 'British and Irish conflict regulation from Sunningdale to Belfast, Part II: Playing for a Draw 1985-1998', *Nations and Nationalism*, vol. 6, no. 3, September, 2000. See also Brendan O'Leary, 'Comparative Political Science and the British-Irish Agreement', in John McGarry, (ed.), *Northern Ireland and the Divided World (Oxford)*; Joseph Ruane and Jennifer Todd (eds.), *After the Good Friday Agreement*.

and 3 of its constitution to convert its claim to sovereignty over Northern Ireland into an aspiration for unity by consent. In exchange, the British government rescinded two sources of its claims to sovereignty over Northern Ireland as found in Section 75 of the Government of Ireland Act (1920) and the Ireland Act (1949). While the United Kingdom's claim to sovereignty over Northern Ireland remains (based on the Act of Union of 1800) the agreement to relinquish sovereignty based on the concurrent majority rule establishes a clear constitutional mechanism for re-unification. It should also be noted that bi-national, concurrent majority principle is operative at subsidiary levels of governance, both within the power-sharing executive (now suspended) and at the confederal level in terms of decision-rules within the North-South Ministerial Council.

Implications for Sri Lanka

If the concurrent majority formula was pivotal to encouraging the IRA to modify its ethno-centric claim to self-determination, can a similar mechanism gain LTTE acceptance of a qualified right of self-determination in Sri Lanka? Dayan Jayatillika has rejected any comparison between the IRA's acceptance of a diminution of its goal of a united Ireland and the LTTE's conditional acceptance of an internal, non-secessionist compromise. He points out that, unlike the LTTE's complete dominance over the TNA, the militant wing of the republican movement, the Provisional IRA, was gradually eclipsed by the political wing, represented by Provisional Sinn Féin.

> The IRA, the Palestine Liberation Organisation (PLO), the FMLN, the Unidad Revolucionaria Nacional Guatemalteca (URNG) of Guatemala and all other outfits that eventually entered the democratic mainstream, were all politico-military organisations, not military-political ones like the LTTE ... [T]he Tigers are a different species from the IRA, FMLN and PLO. They are a vanguard army, totalitarian in character; a *Juggernaut* or

Leviathan. And Prabhakaran is one Tiger who cannot be tranquilised.[32]

At least three objections can be raised to these comparisons. First, while it is true that the politically-minded leadership of Gerry Adams and Martin McGuinness came to dominate the movement, their (alleged) involvement with the IRA Army Council did not lead to the unequivocal abandonment of the goal of Irish unity, nor to the abandonment of militancy. It should be recalled that the IRA caused far more bomb damage between 1990 and 1997 than all of its previous campaigns combined since 1918.[33] Bombing got them to the negotiating table but the leadership was aware that it could not deliver more than a hurting stalemate. Sinn Féin's political strategy was integrated and calibrated with the military strategy in the context of the parameters maintained by the Irish and British governments. The agreement on the mechanism for self-determination meant that the goal of unity could be preserved and pursued through peaceful, constitutional means. This agreement did not stem from a fundamental compromise of its core goals, just of the means used to achieve them.

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32 D. Jayatilleka, 'Sri Lanka's Separatist Conflict' pp. 232-33.

33 Three bombs in the heart of London's financial district between 1993 and 1996 caused close to two billion pounds (sterling) worth of damage, more than all bomb damage caused by the Provisional IRA since its inception in 1969. The evolution of the commercial bombing campaign is discussed in the author's forthcoming book, *Violent Politics: Contesting Nation and State in Ireland*.

34 There is a common misperception that U.N. Resolution 242 stipulates the pre-1967 Green Line as even a putative state border. Careful drafting specified that Israel must withdraw from 'lands occupied since 1967'. Note the absence of the article 'the' has allowed Israeli governments to interpret that absent article as 'some' of the lands occupied. The Palestinian legal retort is that the UN does not have legal jurisdiction because of the expiry of the British League of Nations Mandate and because of the ultra vires process of passing the original 'green line' criteria in 1947.

The same could be said for the PLO, which has resisted intense international pressure (most notably at Camp David II) to abandon what it conceives as the outer limit to self-determination: a territorial statehood based on the pre-1967 borders.[34] In other words, it could be argued that the political compromise which allowed the political leaders of these movements to eclipse the militants was made possible only because a peace process was established which allowed the maximal goals of each movement to be achieved through constitutional means. In the absence of a viable constitutional mechanism for self-determination, the political project of the PLO has succumbed to out-flanking from Hamas and from within its own Fatah organization. Causality is important here. As long as the Oslo process held out hope for the creation of a viable Palestinian state, the PLO (and the elected Palestinian Authority) remained in the ascendant vis-a-vis Islamic extremists.[35] The Declaration of Principles (DOP)[36] signed in 1993 did not include agreement on a mechanism for national self-determination but instead left this big item until last, as part of 'permanent status negotiations [including]: Jerusalem, settlements, military locations, and Israelis [settlers]'.[37] Moreover, the agreed criteria for final status was based on the intentionally vague wording of UN Security Resolution 242, which called for Israeli withdrawal 'from territories seized in 1967'. The absence of the qualifier 'the' has allowed for diametrically opposed interpretations: Israeli's interpret their commitment to withdrawal from *some* territories; Palestinians have interpreted the resolution as requiring complete withdrawal from *all* territories seized in 1967.[38] These

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[35] See Menachim Klein, 'Competing Brothers: The Web of Hamas-PLO Relations', *Terrorism and Political Violence*, 8 (2) 1996, pp. 111-32.

[36] *Declaration of Principles on Interim Self-Government Arrangements* Sept. 13, 1993, Washington, D.C.

[37] Ibid. 'Agreed minutes to the declaration of principles on Interim Self-government Arrangements', Article IV

[38] E.g. Saeb Erekat, 'Road Map Must Show the Way to Real Peace' *Financial Times*, 16 March 2003.

opposing interpretations have been a critical barrier to implementation of the DOP because the Israeli interpretation is used to justify continued settlement-building in the West Bank, which has in turn provoked Palestinian opposition and undermined faith in the Oslo process.[39] Instead of mutual and reciprocal exchanges leading to confidence-building and progressive implementation, the Oslo process has been characterised by unilateral assertions of power and force.

The third objection to Jayatilleka's characterisation of the current LTTE is based on his over-reliance on the political rhetoric of something as public as a Heroes' Day Speech. Apart from his extrapolation from Prabhakaran's highly abstract imagery, he fails to consider whether the rhetoric needed for marshalling the troops and appealing to families of victims and the Tamil Diaspora is necessarily the same as the internal debates that *may* be ongoing within the LTTE leadership. It is supremely ironic that Jayatillika, who cites Che Guevera among others as his political heroes, should then call on the guardians of the statist right like Paul Wilkinson and Walter Laquer, to denigrate the LTTE as an irreformable terrorist organisation that can only be vanquished by 'cold steel'. As I have argued elsewhere, Wilkinson's advocacy of a twin-track approach (which Jayatillika also advocates for Sri Lanka) of defeating militarily the terrorist organisation, while striking a deal with moderates, failed repeatedly in Northern Ireland as it has failed in Sri Lanka. Only the decision to move from an exclusive to an inclusive political process opened the way to a historical compromise of opposing ethno-national and civic-national claims in/over Northern Ireland. Again, the creative compromise mechanism for self-determination was the logical out-growth of the recognition of the validity of the goals (if not means) of the opposing sides.

Similar arguments can be made against other guardians of unitary statism. As noted above, H.L. de Silva has argued that federalism in the Sri Lankan context will amount to 'evolutionary

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39 See Joseph Alpher 'The Oslo Process: Failures, Lessons, Alternatives,' *Pugwash Newsletter*, vol. 38, 2 (2000); Deborah Sontag 'Quest for Mideast Peace: How and Why it Failed', *New York Times* 26 July, 2001.

secession' as de facto territorial autonomy for the North and East will merely 'whet the appetite' for more powers'. For de Silva, devolution or federalism has the potential to violate the 'final and essential postulate on which the whole legal order of the Republic rests' because it threatens to undermine the 'sense of unity and the concept of a single collective identity of the People [which is] encapsulated in the concept of the sovereignty of the people which may be properly described as the central norm of the law of the Constitution ...'[40] Such rigidly statist views ignore the extent to which this unitary, statist conception itself contributed to subsequent conflict. In particular, it could be argued that the rare conditions de Silva identifies as the justifiable causes for challenging the central norm of the constitution – a government that 'denies to the People their essential rights and freedoms and liberties' – existed in Sri Lanka in the post-independence period.[41] There are grounds, in other words, for questioning and re-examining the 'pre-existing values which precede and transcend the constitution'. To argue that these values and principles are 'eternal and irrefragable and cannot be compromised by understandings reached by itenerant negotiators or anybody else', raises them to a perennialist or even primordialist axiom whose very rigidity can be considered a source of conflict rather than a source of stability while disagreement persists on the foundational legitimacy of the state. Moreover, any constitution that agrees a mechanism for amendment has agreed *a priori* to regulate rather than reify sovereignty.

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40 Quotation from H.L. de Silva, 'The Peace Process: Are ill-conceived understandings reached at negotiating table?' *Sunday Island*, 9 March, 2003.

41 See reply to H.L. de Silva by Prof. C. Suriyakumaran, 'H.L. De Silva's fears about disintegration – history or future' in *Sunday Island*, 16 March 2003. Suriyakumaran, a government official in the Eastern Provinces during the 1950s notes that government development projects were intended primarily to increase the proportion of the Sinhalese, particularly in the North and East. See also Marasinghe* who recognizes the significance of the expanding grounds for self-determination in the Sri Lankan context in his Paper 'An outline for a constitutional settlement in Sri Lanka' delivered to the International Centre for Ethnic Studies, 24 February, 2003.

Neither does one need to accept the bona fides of the LTTE to progress a conflict regulation process. If one believes that the LTTE is bluffing concerning its acceptance of an internal solution, the best strategy is not to overturn the card table but instead to play the hand dealt and call the opponent's hand (whether or not it is a bluff). Already, there is evidence that the LTTE are facing, however grudgingly, the realities of political bargaining: committing in principle to power-sharing (with Sinhalese and Muslim parties) in the East; accepting the principle of multi-party democracy (moving away from it's 'sole representative' stance) and commiting to human rights protections.

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42 Two examples of multi-ethnic federations that have incorporated constitutional mechanisms for self-determination are Ethiopia and South Africa. The Ethiopian constitution states in Article 39 (1): Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right of secession'. The South African constitution offers a conditional right of self-determination. Chapter XIV, section 235 states: 'The right of the South African people as a whole to self-determination, as manifested in the Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation'. The last condition means in practice that secession would require a two-thirds majority in the National Assembly and possibly a majority in the Provincial Council ('upper house'). Additionally, the Principality of Liechtenstein is considering amendments to its constitution that would grant each community a right to exercise self-determination, subject to majority support in the seceding province and subject to a provision for a 'reconsideration' vote six months after an initial vote for separation. These provisions are quoted from Wolfgang Danspeckgruber, 'A Final Assessment' in his edited collection, *Self-Determination of Peoples*, pp. 351-52.

A concurrent-majority mechanism for national self-determination in Sri Lanka

An agreed mechanism for self-determination offers a necessary, though not a sufficient, approach to a settlement. The following proposal applies comparative empirical analysis of conflict transformation to recommend mechanisms for self-determination within the terms of the Liechtenstein Draft Convention.[42] The concurrent majority principle that was the lynchpin of the British-Irish (Good Friday) Agreement could be adapted to the Sri Lankan case as follows, assuming the current federalist trajectory of negotiations:

- External self-determination for any constituent part of the Sri Lankan Federation (or devolved unitary state) will be subject to the ascent of majorities in the Province seeking change *and, concurrently* in the remaining Provinces, either individually, or taken as a whole. If the former, the mechanism for self-determination could be based on either a vote within the separate Provincial legislatures or separate popular plebiscites (the choice between these two mechanisms could be determined by each legislature, as specified in the constitutional allocation of authorities). If the latter, the mechanism for self-determination could be based on a qualified majority in the upper house of a federal system.

- Internal self-determination would also be subject to the concurrent majority principle (as set out above). The regulation of internal, governmental aspects of sovereignty would be entrenched by the same provincial veto power, so that authorities devolved in the settlement constitution are immune from unilateral central retraction.

- A guaranteed minimal interval must be established (7 to 10 years) between any plebiscite on external self-determination.

- A guaranteed process must be agreed for initiating such a plebiscite on self-determination, such as through rights of

initiative or through the authority of the Provincial Council and the central government.

An international treaty with India could be made recognizing the concurrent majority mechanism for self-determination in Sri Lanka and institutionalised cooperation on a schedule of common issues, such as fisheries, naval cooperation, anti-crime initiatives. Maximally: a common secretariat staffed by representatives from each country. Minimally: regular inter-governmental meetings.

The main advantage of such an approach is to provide clarity on the related questions of external and internal self-determination. The concurrent majority veto powers should reassure the Sinhalese majority on the island that they have an effective veto over any change in the territorial status of the island. This mechanism of self-determination removes the 'slippery slope' threat that many associate with federalism or constituted devolution. At the same time, the concurrent majority formula guarantees Tamils (or any other potential secessionists) two important safeguards: first, that authorities devolved to the Provinces cannot be rescinded without their consent; secondly, that a constitutional mechanism exists for the achievement of Eelam (or independence, or a reconfigured Province) in the future, *albeit subject to the consent of the rest of the island.* This approach is consistent with even a close reading of the Thimpu principles, which currently define Tamil claims to self-determination.[43]

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[43] The Liechtenstein Draft Convention does not attempt (the impossible) of defining empirical criteria for the contested concept of nation. Instead, Article 1-a. uses the intentionally open term 'community', defined as a 'distinct group': inhabiting a limited area within a State: and possessing 'a sufficient degree of organization as such a group for the effective application of the relevant provisions of [the] Convention'. (Article 1.a.) By my reading, the Thimpu declaration claims all three bases of recognition. Whether these claims are recognized as foundational in a subsequent constitutional settlement remains open to negotiation.

This formula also fulfils the criteria of popular sovereignty identified by H.L. de Silva and others as foundational of the Sri Lankan constitution because it gives the people (or their representatives) the final say on core regulative aspects of sovereignty, albeit in separate, simultaneous plebiscites (or concurrent majority votes in representative assemblies). Moreover, these proposals address the absence of a mechanism for constituting devolved power, which was a central obstacle in securing LTTE consent in all phases of negotiation from the Indo-Lankan devolution attempt from the mid 1980s to the 1997-2000 devolution amendments.[44]

It should also be noted that such a mechanism does not preclude paradiplomacy[45] or inter-governmental links between or among

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[44] The Supreme Court ruling on the 13th Amendment reaffirmed the supremacy of the 'unitary state', thereby undermining any entrenchment of authorities at the Provincial level. See N. Tiruchelvam, 'The Politics of Federalism and Diversity in Sri Lanka' in Yash Ghai (ed.) *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States* (Cambridge: Cambridge University Press, 2000) pp. 201-213. The 1997 Draft Constitution (in chap. XV, art. 141 (4) and (5) of (PA) Government's Proposals for Constitutional Reform (October, 1997), does reassert an entrenchment of devolved powers vis-à-vis the centre. K.M. de Silva, *Regional Powers and Small State Security* (Washington, DC: Woodrow Wilson Center Press; and Baltimore and London: Johns Hopkins University Press, 1995) pp: J.N. Dixit, *Assignment Colombo* (Colombo: Vijitha Yapa, 2002; Rohan Edrisinha 'A critical overview: constitutionalism, conflict resolution and the limits of the draft constitution', in Dinusha Panditaratne and Pradeep Ratnam (eds.) *The Draft Constitution of Sri Lanka: Critical Aspects* (Colombo: Law & Society Trust, 1998); N. Tiruchelvam 'The Politics of Federalism and Diversity in Sri Lanka' in Yash Ghai (ed.) *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States* (Cambridge: Cambridge University Press, 2000) pp. 210-213.

[45] Paradiplomacy could be defined as the formal or informal negotiation among sub-national government officials. See Michael Keating (ed.) *Paradiplomacy* ** (London: Macmillan, 1998).

devolved (or federal) parts of Sri Lanka, including inter-governmental institutions with executive authority over delegated policy areas. *In theory*, such intergovernmental links could be extended to confederal relations with neighbouring jurisdictions, such as Tamil Nadu, provided there was agreement between the Indian and Sri Lankan central governments (the latter using the concurrent majority rule).

The same principle could be applied to the regulation of subsequent changes to territorial composition of Provinces, a central point of contention given the ambiguity surrounding the relationship between the Northern and Eastern Provinces. We can assume first that the constitutive recognition of Provincial boundaries will be established with any settlement agreed in talks, subject to a two-thirds majority necessary to amend the constitution. There are three primary scenarios that we need to consider, as they are central to the territorial insecurity of the majority and to the conception of viable governance and national recognition by the Tamil minorities.

1. Provisional combined north and east, with one government based on power-sharing principles (collective executive, proportional representation, positive collective and individual rights protections).

2. Symmetrical: Separate Northern and Eastern Provinces, constituted with largely symmetrical devolution with the other seven Provinces. These are also likely to be configured as power-sharing assemblies (as described above).

3. Asymmetrical: Separate Northern and Eastern Provinces, constituted with variable ('rolling') devolution powers, based on vertical *and* horizontal inter-governmental bargaining.

While also based on power-sharing principles, the asymmetrical configuration (3, above) differs from the symmetrical version (2, above) in providing more scope for separate provinces to form their own inter-governmental links, with executive authority over those

matters defined as devolved matters by the constitution. Additionally, more powers could be devolved to individual provinces, subject to inter-governmental agreement with the centre. The Canadian and Spanish models approximate this trajectory, as does the Italian approach to south Tyrol/Aldo Adige and the likely trajectory of French devolution to Corsica, Brittany, Navarre etc. Consistent with these configurations is an internal territorial self-determination mechanism based on the necessity of consent for any change to territorial or sub-national governmental institutions. In other words, any subsequent alteration of Provincial boundaries or requests for modification of the devolution schedule, would be subject to the same concurrent majority rule for regulating external self-determination, though most appropriately determined by the relevant Provincial Council(s) and the central Parliament. This rule would also apply to the subsequent determination of any provisional North-East Province (option 1, above). So if a provisional North-East Province was established, any subsequent merger into a 'final status' would require the support of a majority of voters (or representatives) in each Province, as well as a concurrent majority among the remaining Provinces (either individually or through representative institutions at the centre, such as an upper-house).

Anticipated objections:

1. *Why would LTTE sign up to a mechanism that gives the Sinhalese majority a veto on self-determination?*

This is a particularly serious objection in light of the comparative analysis with Northern Ireland because a central portion of the logic of Sinn Féin acceptance of the concurrent majority rule was and is the belief that Catholic/nationalists will soon become the majority in Northern Ireland. The Catholic/nationalist population has grown from approximately 35% in 1971, to 45% in the 2001 census, thus perpetuating the belief among many Catholic/nationalists that time

is on their side towards the existence of two Catholic majorities north and south. In fact, this is a more complex variable than it appears. Demography (population) is determined by birth-rates, death-rates and migration. Catholic birth-rates are higher (though slowing down), death-rates are equivalent, while migration patterns suggest stabilization of the Protestant/unionist population. The reason is that with peace we should expect the Protestant population to stabilize as they were the most likely group to emigrate (typically to Britain) during the 'Troubles'. Conversely, with economic prosperity in the Irish Republic increasing relative to Northern Ireland, there is a reasonable expectation that more Catholics will migrate to the Irish Republic, thus off-setting their higher birth-rate. In addition, the achievement of a Catholic/nationalist majority in Northern Ireland will not automatically translate into support for Irish unification because approximately 15-20% of Catholic/nationalists have expressed support for continuing the union with Britain. The point is that demographic uncertainty incentivises both groups to focus on internal (regulative) sovereignty, federalism and power-sharing rather than fixating on the numbers game.

On the other hand, the LTTE demand for external self-determination is not as deeply held as the Irish majority wish for territorial integrity and independence from Britain. In this sense, the nation-state goals are reversed as the IRA was fighting for the achievement of territorial *reunification*, claiming to fulfil the constitutional imperative to unity (Articles 2 and 3) and consistent with a central ambition of the dominant party in Ireland: Fianna Fail. By contrast, the LTTE's and other Tamil demands for Eelam emerged only after the failure to reach internal accommodation with the Sinhalese majority in the post-independence period. The goal of Eelam was arguably a result, not a cause, of Tamil disaffection with majoritarian domination, just as Sinhalese majoritarianism was a result of the iniquitous divide and rule strategy of favouring Tamils within the British colonial administration. Concurrent-majority principles can thus be seen as a way of addressing deeper structural causes of historical conflict, specifically guarding against the type of majoritarianism that sewed deeper divisions.

Secondly, the idea that the Sinhalese majority would never accede to Tamil self-determination dismisses the viability of what Ian Lustick identifies as 'state contraction' as an approach to state-craft.[46] With the internationalization of economies, the scale-advantages attributed to large territorial states are less deterministic of growth than previously.[47] As a result, the same logic that applies to Tamil aspirations to become a Singapore or Hong Kong of South Asia has potentially equal implications for the Sinhalese-dominated regions of Sri Lanka. The current government's pursuit of regional economic links with South India and Japan is further testament to potential shifts away from an Island-centric political economy.[48] A divided Sri Lanka may be unthinkable for the majority, but constitutional mechanisms should be designed to take into account potential shifts in currently dominant conceptions of governmental and state sovereignty.

Against these forces of disintegration one has to recognise the particular stabilizing factors attributed to small islands. Adrian Guelke has written authoritatively on the bias in international politics for maintaining the integrity of small islands. The same pressures that promote international opinion in favour of Irish, Cypriot, territorial integrity are likely to similarly promote the integrity of Sri Lanka.[49] So despite these counter-veiling potentials for integration or

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46 Ian Lustick, *Unsettled States, Disputed Lands: Britain and Ireland, France and Algeria, Israel and the West Bank Gaza* (Ithaca, NY: Cornell University Press, 1993).

47 See Jeffrey Herbst, 'The Future of Existing Nation States', in Wolfgang Danspeckgruber (ed.), *The Self-Determination of Peoples*, pp. 19-27.

48 Note in particular the India-Lankan treaty on Trincomolee oil tank farms, as well as more recent negotiations over a land bridge linking the two countries across the Palk Straits.

49 See, for example, Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination* pp. 497-99, who argues that in the post-Cold War era there remains 'not even a hint of foreign recognition for Tamils in Sri Lanka, rebels in the Southern Sudan, the former territory of Italian Somaliland in northern Somalia, or (with the exception of Turkey) the self-proclaimed Turkish Republic of Northern Cyprus'.

disintegration, the wider point is that the uncertainty of long-term prospects for either are best confronted and managed through political agreement which allows for *either* state-consolidation or state-contraction to be regulated rather than merely responded to.

2. *Why would Sinhalese majority give the LTTE an excuse to pursue Eelam by force if a self-determination bid was continuously rejected by the rest of Sri Lanka?*

In other words, after a generation of refusals, Tamils could argue that force was justified because of the intransigence of the rest of Sri Lanka in preventing self-determination. This is a version of the 'mega-constitutionalism' argument against consensual, inclusive governance. One (slightly optimistic) view is that if the LTTE were to abrogate their commitment to the constitutional mechanism for self-determination, their chances of recognition of any putative Eelam by the international community would be minimal. They would achieve, at best, the pariah status of the Turkish Republic of Northern Cyprus. Against this view, it is clear that current international sanctions against state disintegration are insufficient to provide external security. The break-up of Yugoslavia and Ethiopia despite explicit threats of non-recognition by the US did little to deter Slovenian, Crotian or Eritrean secession and almost over-night recognition by the international 'community'. The recognition of Bangladesh during the height of the Cold War moratorium on external self-determination gives further cause for doubt, highlighting once again the need for regulative certainty.

Regionally, Sri Lanka has, on balance, a crucial ally – India - whose interest in preventing a precedent-setting Tamil independence movement is likely to continue to act as an effective deterrence to a non-negotiated declaration of independence. Unlike the 'big brother' relationship between Turkey and TRNC, the Indian 'big brother' to Tamil separatists has a clear incentive to prevent Eelam as a bridge to a greater Tamil homeland.[50] That is why a Lanka-India Accord,

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[50] J.N. Dixit, *Assignment Colombo* (Colombo: Vijitha Yapa, 2002) pp. 405-11.

including improved formal and informal inter-governmental relations is central to managing the iterative process of conflict regulation.

Given the prominence of the India-Sri Lankan relationship, it is worth digressing for a moment to consider further this external patron of Tamil rights in light of the Indian experience of federalism. India, for many, represents a relatively successful post-colonial, multi-national state whose federal system has been, with the notable exceptions of Kashmir and Nagaland, successful in at least regulating ethno-national and ethno-linguistic challenges.[51] Some have argued that the Indian form of federalism, which is dominated by the centre and does not have a constitutional mechanism for self-determination, is an appropriate model for Sri Lanka. But as a comparator with Sri Lanka, India's fragmented ethno-linguistic pluralism is cross-cut to a significant degree by an over-arching religious 'ideology' - Hinduism - which has had similar effects as the Protestant Reformation in Britain in providing a basis upon which a shared civic nationalism evolved. Whereas like in Ireland, Sri Lanka's parallel cleavages between religious and ethno-linguistic identities are ancient and diametric, if we consider Tamil-speakers as a whole as comprising an ethno-linguistic cleavage. The dyadic (or triadic) cleavage structure makes central-dominant and symmetrical federalism more difficult.[52] Because the Tamil question, in many core areas of positive, collective legal rights like language, education, is dyadically opposed to the core Sinhalese *staatsvolk*, there is an absence of the kind civic-national

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51 Conflict 'regulators' have to cross lower hurdles than conflict 'resolvers', but over longer distance. On Indian federalism and conflict management see Balveer Arora and Douglas V. Verney, *Multiple Identities in a Single State: Indian Federalism in Comparative Perspective* (New Delhi: Konark, 1995).

52 While Muslim Tamils and Indian (estate) Tamils are considered in many ways as nationally or at least ethnically distinct from Hindu Tamils, it is also likely that they will have shared interests in securing recognition of collective rights as they affect language, education, proportional access to public services and regional development.

basis of allegiance which political scientists consider essential to stable federations. Bi-nationalism in other words, will exert pressure for proportionality and power-sharing at the centre as well as in devolved entities.

More positively, the Indian experience supports the argument that a responsive and accommodative centre can reduce separatist demands by ethno-nationalists. Both the modifications of the federal system to reconfigure states along ethno-linguistic lines, and the subsequent practice of power-sharing at the centre, however informal, are consistent with the need to regulate, rather than reify sovereignty.[31] Moreover, far from maintaining a strict moratorium on external self-determination, Kashmir was granted the right to hold a referendum on self-determination. Even though it has not been implemented, the recognition of the right to external self-determination is potentially important precedent. On balance, this reactive, ambiguous and un-implemented policy also compares unfavourably to the regulated mechanism being proposed for Sri Lanka.

If we consider the most proximate comparator to the political and strategic calculus of Tamils in Sri Lanka - their co-ethnics in Tamil Nadu – we can offer further hope for the durability of a quasi-federal, substantively devolved settlement. Against H.L. de Silva's pronouncement that devolution to ethnically concentrated groups will

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[31] Arend Lijphart has emphasized that despite the procedural majoritarianism of the Westminster system, Indian governments have routinized consociational practices. This points to one of the paradoxes of power-sharing, which appears more stable where its rules are less formal. See Arend Lijphart, 'The Puzzle of Indian Democracy: A Consociational Interpretation', *American Political Science Review* 90(2); cf. Ian S. Lustick 'Lijphart, Lakatos, and Consociationalism' in *World Politics* 50 (1997): 88-117.

accentuate the trend towards separatism.[54] Atul Kohli has argued convincingly that separatism in Tamil Nadu has been successfully managed and reduced through the modifications to the federal system which offer incentives to cooperate within the federal union. The reversal of the 'Hindi-first' language policies of the post-Nehru era, granting Tamil co-equal status with the official federal languages (Hindi and English), combined with the opening up to opportunities for non-Brahman castes within the state administration, effectively neutralized the independence demands of the Dravida Munnetra Kazhagam (DMK). According to Kohli:

> As the DMK settled down to rule, the predictable happened. Over time, the DMK lost much of its self-determination, anti-centre militancy, as well as its commitment to socioeconomic reforms... Once national leaders made important concessions (though within firm limits) and the DMK achieved its major goal of securing increased power, realpolitik concerns took over and

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54 H.L. de Silva, 'Peace Process', *The Sunday Island*, 9 March 2003. Against de Silva's dismissal of federation of a way of managing ethno-national conflict, comparative political science offers a much more hopeful prognosis. See John McGarry, 'Federalism (Federation) as a Method of Ethnic Conflict Regulation', paper presented to the European Consortium of Political Research, Turin, Italy, 23-26 March, 2002. McGarry does caution that ethno-national federation is more suitable where strong democratic institutions exist, along with economic prosperity and supra-national links equivalent to the European Union. I would contend that Sri Lanka is comparable to India in terms of democratic foundations, potential economic prosperity and moreover, that the inter-governmental agreement on Sri Lanka's territorial integrity goes some way towards mitigating the absence of concentric, supranational links.

mobilizing ideologies slowly lost their relevance for guiding governmental actions.[55]

Like the IRA, and for a time the PLO, the DMK was transformed by changed political opportunity structures to shift from a military-political to a political-military movement. In Northern Ireland the resilience of the mechanism for self-determination is demonstrated by the reasonably solid public support for the Good Friday Agreement[56] and specifically, the solidity of the republican (Sinn Fein and IRA) commitment to it, despite the lower than anticipated census figures recently published. Despite tactical appearances to the contrary, the IRA is trading weapons for significant electoral gains, police reform and demilitarisation, thus managing its grass-roots while deepening its stake in the Agreement. It might lead to a united Ireland, but it might not, and in the margins of uncertainty there is a solid logic for power-sharing and federal*ism* to transcend any changes to constitutive sovereignty. At the same time, the process of co-opting extreme ethno-nationalists into constitutional compromise was a reciprocal exchange. Both the British and Indian governments have had to concede significant aspects of regulative sovereignty, in terms of political autonomy, collective and individual rights protections.[57]

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55 Atul Kohli, 'Self-Determination Movements in India', in Wolfgang Danspeckgruber, *The Self-Determination of Peoples: Community, Nation, and State in an Interdependent World* (Boulder, CO and London: Lynne Rienner, 2002) pp. 301-02. See also Atul Kohli, 'Can Democracies Accommodate Ethnic Nationalism? The Rise and Decline of Self-Determination Movements in India' in Amrita Basu and Atul Kohli (eds.) *Community Conflicts and the State in India* (New Dehli: Oxford University Press, 1998); on the institutionalisation of the party system and its impact on political violence, see Arun R. Swamy, 'Parties, Political Identities and the Absence of Mass Political Violence in South India', Ibid. pp. 108-48.

56 Colin Irwin, 'What now for the Agreement? Collapse of Middle-Ground Politics?' *Belfast Telegraph*, 19 Feb. 2003.

57 See Christopher McCrudden, in Ruane and Todd (eds.) *After the Good Friday Agreement* (Dublin: Univeristy College Dublin Press, 2000).

By doing so they have made the prospects of international opprobrium much higher for any group that might assert a continued right to forceful separatism.

Broadening the comparisons, we can posit that the best cure against external self-determination is the delivery of stable, regulated, internal self-determination. Against those who assume that devolved autonomy or federation will lead to secession, comparative research suggests that when devolution or federal solutions fail, it is more often due to the refusal or inability of the centre to implement commitments to devolution or federalism than because of growing demands among separatists. The case of Sikh demands in India is illustrative. It is the only case in the 11 cases studied by Ted Gurr and his colleagues, in which devolution or other autonomy arrangements led to subsequent demands for independence.[58] Even if we add the recent cases of Chechnya and Georgia within the Russian Federation, we can conclude that even these exceptions support the argument that autonomy arrangements broke down because of the refusal of the centre to implement promised devolved authorities and not simply from the whetted appetites of unilateral separatists. More recent developments in the case of Sikhs in Punjab lend further support to the argument that a responsive centre can reduce demands for independence through substantive autonomy.

In the European context, federation or significant devolution to ethno-nationally homogeneous territories has moderated demands for secession among Scots, Catalans, Basques and Flemish separatists.[59] Even if we accept the special conditions which facilitate

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58 Tedd Gurr (et al.) *Minorities at Risk: A Global View of Ethnopolitical Conflicts* (Washington DC: US Institute of Peace, 1993) pp. 301 ff.; see also John McGarry, 'Federal Political Systems and the Accommodation of Distinct National Communities' (pamphlet) Forum of Federations (Ottawa, 2003)

59 Michael Keating, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (Oxford: Oxford University Press, 2001); see also John McGarry, 'Federalism (Federation) as a Method of Ethnic Conflict Regulation' paper presented to the European Consortium of Political Research, Turin, Italy, March 23-26 2002.

inter-governmental conflict regulation in Europe, we can also recognize that the South East Asian regional context is also conducive to regulating self-determination, compared for example to most of Africa or significant portions of the Middle East. Sri Lankan economic and political relations with India and Japan in particular are likely to add to the potential reward power necessary to distribute benefits necessary to underpin a settlement.

In comparative and regional contexts, the joint Sri Lankan-Indian interest in regulating self-determination is a vital asset for conflict regulation because delivering an Indian recognition of the self-determination mechanism reinforces its constitutional sanctity. And inter-governmental co-operation in areas such as trade, infrastructure links, frontier (naval) controls will be necessary to provide psychic and physical security. It is my contention that the establishment of inter-governmental agreement on the territorial integrity of Sri Lanka, along with the principle of internal federation or entrenched devolution established with the 'Delhi Accords' in 1983, were important parameters and foundations for subsequent inter-governmental relations. Two important indicators of the success in establishing these *grundnorms* is the failure (to date) of the attempted PA-JVP alliance, which broke down because of the PA's commitment to its own federal principles and opinion polls that show rising support for Indian involvement in the constitutional process.[89] Given that the PA is also in favour of a more prominent role for India, a Lanka-India treaty guarantee would re-enforce the bi-partisan underpinning of a settlement, necessary to secure the two-thirds majority to ratify an agreement.

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[89] On the failure (to date) of a PA-JVP coalition agreement see LSSP's 'Call for bipartisan approach to peace process' *Sunday Observer*, 23 March, 2003; opinion summaries from 'Overwhelming support for peace talks – Poll', *Daily News*, 24 March 2003 (source of poll not stated).

Conclusions

Where significant historical sovereignty claims have been sought consistently, and particularly where they are based on bi-national cleavages, the structures of settlement have to be built on these 'fault-lines' rather than wished away through assumed civic-national primacy. Even for small islands. Those who advocate both strong, centralised, unitary state and/or strong local government assume agreement on the polity, when there is none. It is crucial to understand that the recognition of a right of self-determination does not mean acceptance of the veracity, historically, morally etc. of those claims, merely that they are felt subjectively by a named population (usually) living in a concentrated territorial space. Instead, as has evolved in the Canadian-Quebec and the British-Irish constitutional relationships, once recognized and constitutionally entrenched, the principle of national self-determination can be regulated in practice by international treaty, domestic judiciary and mediated through routinized inter-governmentalism. In these cases, it appears possible, indeed necessary, to constitute mechanisms for self-determination, while possibly disagreeing the trajectory of the nation-state. It is also clear that devolving or federating internal faces of sovereignty can be effective in reducing separatism, and thereby removing important sources of disagreement over the nation-state.

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