

Proceedings of the  
Dialogue on  
**P-TOMS**  
**: The Muslim Dimension**

- Proceedings
- Annex I- P-TOMS Agreement
- Annex II- Supreme Court  
Decision on the P-TOMS

Council for Public Policy  
July 2005, BMICH

The Dialogue on 'P-TOMS: The Muslim Dimension' was organized by the Council for Public Policy (CPP) on Monday July 18<sup>th</sup>, 2005 at the BMICH with participation of over 75 eminent Muslims in Sri Lanka, representing a wide cross section of the Muslim community in the country.

In his opening remarks, the Chairman of CPP Mr. Nirmal C Peiris welcomed all present to the event and explained that, amongst the principal purposes of the CPP is to provide inputs to and options towards public policy formulation especially in the area of conflict transformation. He added that presently, Muslim participation is the most critical factor in the successful implementation of the P-TOMS and expressed that CPP's effort would contribute to exploring common grounds and ways to move forward in an inclusive post tsunami relief effort. Mr. Peiris thanked all VIPs and other invitees for attending the event and stressed that the *Chatham House Rules* of non-attribution is applicable to the proceedings of the session.

### Session I

Dr. Thusitha Tennakoon, Executive Director, BCIS was invited to Chair and to moderate the dialogue by the MC. Dr. Tennakoon welcomed the dignitaries and mentioned that CPP has lined up four eminent speakers with first hand experience of P-TOMS as well as the Muslim concerns for the first session and invited the first speaker to address.

### Speaker I

The first speaker thanked the CPP for organizing a dialogue on the Muslim dimension. Muslims are a very important minority playing a valuable role in the political, economic and cultural life of Sri Lanka. The rights of Muslims have been a primary concern of the government in drafting the PTOMS. In addition the primary purpose of the MOU was to ensure that all who suffered from the tsunami whether Sinhala, Tamil or Muslim in the North and East enjoy equal treatment in receiving the foreign aid granted by the international community.

To avoid possible confusion the Supreme Court (SC) decision was repeated for better understanding of the order; The interim order is not granted in the entirety of the MOU. The structure provided in the MOU consisting of committees may be established and become functional subject to the restrictions imposed by this judgments. The Supreme Court issued a stay order on the following clauses of the MOU: Some functions of the regional committee, location of the Regional Committee and Regional Fund.

In respect to the Regional Fund the Attorney General's department has already filed letters from the Secretary to the Treasury and from the Country Director of the World Bank, Colombo which makes it abundantly clear that the procedure the government had in mind under section 7 fits well within the framework laid down by the Supreme Court. The government will file its objections on the different aspects of the MOU which the Supreme Court had difficulties with. But the government plans to speedily implement the clauses cleared by the SC.

***'Muslims are a very important minority playing a valuable role in the political, economic and cultural life of Sri Lanka and the rights of the Muslims has been a primary concern of the government in drafting the PTOMS'***

The slow pace of the peace process is not uncommon. For example the Arab-Israeli negotiations have dragged on for years with ups and downs. There is also the Northern Ireland Peace Process. However, negotiations between GAM and the Indonesian Government on Aceh has met with success after receiving an impetus from the Tsunami. But it is regretted that the same has not happened in Sri Lanka.

The speaker said that he personally knew that the President consulted the Muslim leaders before and after the P-TOMS was signed. It is evident what the primary concerns of the Muslims are;

The speaker went on to address a number of specific concerns expressed by Muslims:

1. *'Muslims who are most affected by the tsunami are dominated by the LTTE in the regional committee, with a majority of members and the chairmanship, in addition to the committee being based in Kilinochchi'.*

Preponderance in numbers in the regional committee will not enable one party to dominate as there are safeguards laid down. The High Level Committee which is equally represented by the Muslims, the Government and the LTTE will overlook the functions and be responsible for the allocation of funds. Muslim representation in the High Level Committee is quite unprecedented, as for the first time the Muslims are represented at the highest level. Also Muslims are represented in large numbers in the district committees where Muslims are the majority. Therefore the regional structure should be seen in context and not in isolation. It is important that the LTTE has finally agreed to enter into a MOU with the government on an issue of governance. The LTTE has also formally agreed to work with Muslims as a separate party and not as a part of the government delegation in the regional, district as well as in the high level committees. Also a Muslim holds the deputy chairmanship of the committee on par with a government member. However, it is still felt that Muslim concerns would be out voted at the Regional Committee.

The government representation in the committee will ensure a balance. If any 2 members feel that any proposal adversely affects the Muslims, such a proposal would require 7/10 votes to be implemented. In such a structure the government would definitely safeguard the concerns of the Muslims in casting their vote.

With regard to selecting Kilinochchi as the base for the Regional Committee, one must keep in mind that SIHRN too was based in Kilinochchi, with permanent Muslim employees stationed there. But at the time neither Mr. Rauf Hakeem nor anybody else raised any objections. In addition, there are scores of Muslims including government officials who visit Kilinochchi regularly. The regional committee being based in Kilinochchi doesn't mean that the meetings should be held there too. Similarly the SIHRN MoU clearly defined that such regional meetings could be held in any one of the 6 districts covered by the MoU.

2. *Another concern of the Muslims is as to why they were not a signatory to the P-TOMS.*

The government tried very hard to include the Muslims as a signatory, but did not receive a favorable response from the LTTE. It was similarly impossible to include a Muslim delegation in the 6 rounds of peace talks during the previous government as inclusion of a 3<sup>rd</sup> party to a 2-way discussion is not possible without the consent of both parties involved.

Therefore, the President seeks the possibility of entering into a separate MoU with the Muslim parties identical to the one entered into with the LTTE, which will be comparable to having a tripartite agreement. The government has also suggested that it could appoint a Muslim as one of the government nominees, but there has been no clear response from the Muslim parties as yet on that.

Most importantly it must be made clear that the PTOMS is a humanitarian endeavor ensuring equitable allocation of donor funds to all tsunami affected coastal communities. The allocations are based on the needs assessment surveys conducted by Task Force for Rebuilding the Nation (TAFREN) in cooperation with several multilateral agencies. These survey results, which are public documents, reveal that 60% of the damage is caused in the North and the East and the 40% in the South and the West and the funding is to be distributed proportionate to the damages. It must be noted that fundamental human rights principles on discrimination against ethnicity, religion, language, sex, political opinion, social origin etc are embodied into the MoU to guarantee that no ethnic group is marginalized in the process.

Also since the Cease Fire Agreement (CFA) will continue to function in full force the security of the government controlled coastal zone will be ensured.

Representatives from the donor community in the regional and the high level committees will participate to observe whether the funding is utilized according to the actual needs and ensure accountability and transparency in the process. The government will also implement proper approved procedures mentioned in section 7, through Secretary to the Treasury and the World Bank. Donors such as the Australian Government, who has banned LTTE in their country and World Bank, who will be custodian of the regional fund operating under the US Law, will ensure that funding is not directed to the LTTE but is exclusively for the rehabilitation process under PTOMS. However, the situation differs in taking into consideration organizations such as the Tamil Rehabilitation Organization (TRO), who are registered both here and abroad.

Dr. Thusitha Tennakoon, summarising the facts discussed by the 1<sup>st</sup> speaker said that many measures are being adopted by the government to ensure that the concerns of Muslims are addressed in implementing the PTOMS and invited the 2<sup>nd</sup> speaker to address the participants ;

**Speaker 2**

The speaker at the outset thanked the chair and stated that he doesn't wish to argue with the fact that Muslims were left out of the negotiations or on the inadequate representation at the Regional Committee, but emphasized the need to look at the process from a conflict transformation perspective.. Muslims face the dubious situation of being the worst affected by the tsunami as well as being inadequately represented in the Regional Committee. However, the PTOMS has recognized representation for Muslims at the highest

***The legitimate concerns of the Muslims are by-passed by the political position. And therefore, the Muslim concerns should be pitched above that. PTOMS should not be used to further any political agenda. Most importantly, the Muslims must arrive at a common position.***

level and proportionately at the regional level, unlike the CFA. Compared to LTTE representation, the Muslims have a legitimate grievance. However the Supreme Court decision has dealt with some of the grievances, the Muslims had. If the government decides to appoint a Muslim as a government representative the count would be 4. Then the question arises whether or not to participate in the PTOMS. My personal opinion is that we Muslims should participate in the PTOMS, whilst emphasizing our legitimate right to have participated in the negotiations. We complain that our participation is inadequate at the regional level, and no one can argue with that. At the same time, we must participate even at a minimum level in the PTOMS or it will be a total let down of the tsunami affected of our community.

The role of the Muslims should be to participate in PTOMS and push the issues of concern of the community to achieve the maximum.

However, if these efforts fail, we have the option of pulling out, creating a larger impact than not participating at all. We Muslims must join and push both the government and the LTTE on behalf of the tsunami victims. On the one hand we say we want to sign the MoU and on the other we say we are not agreeable to the MoU. But, if one is to sign, one has to agree in full to it. So, I don't see any point in that argument. Nevertheless, as of today, we are not a signatory to the MoU. Therefore, there is a greater responsibility on the Government and on the LTTE. The LTTE has missed the opportunity to reach out to the Muslims and win the confidence lost over the years. The CFA was a good opportunity where they missed out. Here, the government, a government of all citizens of Sri Lanka, has greater responsibility over Muslim concerns. And the Muslims must work towards it and demand that the government looks after their interests.

***'We Muslims should participate in the PTOMS, whilst pursuing our legitimate right to participating in the negotiations. We complain that our participation is inadequate at the regional level, and no one can argue on that. At the same time, we must participate in the PTOMS or it will be a total let down of the tsunami affected of our community'***

When the 'Jemiyathul Ulama's' or the Council of Theologians of the North and East met with the President, where I was present, they enquired from her, if they could come back to her if everything fails. She said they could and the government would redress if everything fails. Also I, hear that she has expressed that the government would withdraw, if things go completely wrong.

Unfortunately, a total absence of a rational discourse on the PTOMS amongst the Muslims is noticed, which is a must at this stage. The Muslim discourse is an emotional agitation, with an eye on the political reality, that there is going to be an election in the near future. The legitimate concerns of the Muslims are by-passed by political concerns. Therefore, Muslim concerns should be pitched above that. The PTOMS should not be used to further any political agenda. Most importantly, Muslims must arrive at a common position.

Finally, the speaker stated that the CFA signed 3 years back was meant to pave the path to a negotiated settlement and to find a sustainable solution to the ethnic problem. Since then we have failed to arrive at a common position. I believe PTOMS is a wakeup call for all Muslims to join in arriving at a common position.

Dr.Thusitha Tennakoon thanked the speaker for the provoking comments and invited the next speaker to address the participants;

### Speaker 3

At the outset the speaker mentioned that she represented civil society unlike the other speakers and wished to voice the perspective of the same. All this time the Sri Lankan Muslims thought of themselves as Sri Lankans and not as Muslims. Suddenly, emotions have started to rule and the Muslims are identifying themselves as a separate community. However, if not for this agitation by the Muslim community we would not arrive at an involvement on the Muslim dimension at the present level. It is only after such agitations that the

***'All this time the Sri Lankan Muslims thought of themselves as Sri Lankans, but not as Muslims. Suddenly, the emotions have started to rule and the Muslims have become Muslims as a community.'***

peace secretariats as well as the government's attention was drawn to Muslim concerns. Nevertheless, one must not forget that national identity is more important than community identity. Due to inadequate explanation given to the people, the PTOMS has created a lot of confusion amongst the general public. People should be informed of the facts, for example that it is a humanitarian endeavour, etc. As a member of the civil society, a question many of us have today is whether the issue of the Regional Committee is a politicized one or not, and how the representatives are chosen and as to who chooses them. We know that the high level is comprised of politicians. But we have doubts regarding the impartiality of the Regional Committee. As the previous speaker mentioned, we have by-passed many wake up calls during CFA, the tsunami and now the PTOMS. We Muslims haven't stood up to such wakeup calls of national interest, as much as we do to the more concrete calls five times a day. This has been merely due to the fact that the Muslims believe the state would not let us down. Since we have been a positive asset to the government we have always looked up to the government as the Government of Sri Lanka, but not as a Sinhala Government. I would like to request the Peace Secretariat representative present today to dispatch this message to the Muslim community of our country. I too believe that the Muslims must work with PTOMS, and expect the government to act fair and to give us our own share. And I don't believe that we should be a signatory to a document, which we hardly know the workings of. I would like to invite all sects amongst us, to get our act together. Finally, I would like to thank CPP for organizing this event in recognition of the importance of the Muslim dimension of the PTOMS.

Dr.Thusitha Tennakoon thanked the speaker for raising valuable points and for the simulating comments. The moderator also expressed that this was an important event as any clarifications on the PTOMS can be made from the government officials present at the event and also dialogue could be made possible between the different political parties and the civil society members present;

### Speaker 4

The speaker thanked the moderator and started by stating that the Muslim question is indeed the national question. Addressing the Muslim question is critical to solving the ethnic conflict overall. This is due to a couple of reasons; The Muslims naturally empathize and understand the problems faced by the Tamil community as both are minorities in the country and many

Muslims speak Tamil. However, the Muslims are frustrated and hurt by the treatment received by them from the Tamil community on the issue of PTOMS. This is an important element of democracy and pluralism in the minority problem in Sri Lanka. Muslims live everywhere in Sri Lanka and are not separatists by nature. Therefore, they have to find solutions to their problems within an undivided country. Thus, the Muslims can play a facilitative role in addressing the minority issue, whilst keeping the country together and the Muslims should give leadership in addressing the ethnic problem overall, and not only address Muslim concerns. There are few overall fundamental concerns of the Muslims in resolution of the ethnic conflict. The first is the issue of *cultural identity*, where Muslim concerns are mainly on the Tamil political formations, which has subsumed Muslim identity. Second, is the issue of *political participation*, where the main strategy of the Muslims have been to be a part of coalition governments. This strategy has its benefits as well as its disadvantages. The third and the most over riding concern is *security*, which at any point should not be underestimated. After the CFA and whilst war was on, the Muslims in the East felt that they were caught in the crossfire. The Muslims in the North felt that they were targeted. Therefore, there is a great deal of distrust amongst Muslims about the Government and the LTTE. All these concerns come into play in the PTOMS discussion. Their cultural identity makes them oppose the location of the Regional Committee in Kilinochchi, which is far from their cultural background. As far as political participation is concerned, they have raised the question of numbers. In response the President has implicitly accepted that there should be more Muslim members and she is essentially committed to increasing Muslim representation by appointing a Muslim government representative. The President also addresses the security issue, where she comments that if fundamental interests of the Muslims are violated she would join the Muslims in suspending cooperation within the PTOMS.

I would like to make a personal comment on Muslim acceptance of the PTOMS; I believe that there are 3 options; firstly to accept it in total, secondly to reject it totally and thirdly to accept it with reservations. The third would be the best option, as I believe, they have the option of pulling out if it doesn't work out all right for them. Finally, a fact that we cannot reject is that the PTOMS is a part of the peace process and if you look at it from that point of view, you might not see that Muslim participation is inadequate.

Dr. Tennakoon, thanked the speaker and summarized the main points highlighted by the 4 speakers (2 government and 2 Muslim community leaders) once again and adjourned session I inviting the participants for tea.

***'Muslims live everywhere in Sri Lanka and are not separatists by nature. Therefore, they have to find solutions to their problems within an undivided country. Thus, the Muslims can play a facilitative role in addressing the minority issues, whilst keeping the country together and the Muslims should give leadership in addressing the ethnic problem overall, but not only address the Muslim concerns'***

## Session II

Dr.Tennakoon welcomed the participants for Session II. He briefly discussed the current status of the PTOMS and the Supreme Court decision and invited the 5<sup>th</sup> Speaker to address;

### Speaker 5

The speaker started by stating that the Muslims were the worst affected by the tsunami and that Muslim concerns are two fold ; Firstly the Muslims have not been consulted in drafting the PTOMS and secondly the PTOMS is a one sided structure. Hence, the aid cannot be expected to be distributed equitably amongst all the affected communities. The total deaths due to the tsunami are 30,178 out of which 12,000 are of Muslims, amounting to 41% of the total. Sri Lankan population consists of 8% Muslims. Of the total deaths by the tsunami, 1/3, totaling to a little over 10,000 are from Amparai district. In Trincomalee 3,800 out of 4,500 deaths are of Muslims. Therefore, the Muslim demand for adequate representation cannot be denied. At the apex level, Muslim representation is adequate, where there is one each from the government, the LTTE and the Muslim community, and the chairmanship is rotated every 2 months.

However, the High Level Committee is a 'toothless tiger' as it can not execute any projects, but only monitor the functions of the Regional Committee. Furthermore, , the Regional Committee would function even if the apex body ceases to function. The Regional Committee is located in Kilinochchi, has 10 members with a majority of LTTE members i.e. 5 LTTE members, 3 Muslim members and 2 government representatives. The chairman is appointed by the LTTE who has a casting vote. Decisions are made by consensus or by simple majority. If there is an objection by 2 or more members 2/3 majority has to be sought. However, the LTTE will have the majority. The sittings in Kilinochchi will make it difficult for the other members to stand up to their rights.

In short, we do recognize the need for a joint mechanism and LTTE's participation in it. However, what we suggest is to confine the Regional Committees to the LTTE controlled areas and the District Committees to be strengthened and projects to be implemented by them. Projects in the government controlled areas should be under the direction of the High Level Committee. Alternatively, set up a committee in the East. If however, the existing committee remains, rotate the chairmanship in the I Regional Committee. Muslims should be given adequate representation and the Committee should sit in the East.

Finally, I believe that PTOMS should be worked out in an equitable manner in order to bring quick relief to the affected and guarantee ethnic harmony in the country.

***'We do recognize the need for a joint mechanism and that the LTTE's participation in it. However, what we suggest is to confine the regional committees to the LTTE controlled areas and the district committees to be strengthened and projects to be implemented by them'***

Dr.Tennakoon thanked the speaker for the much focused presentation, as well as the important suggestions, which will be taken up during the discussion.



## Speaker 6

At the outset the speaker expressed that he has devoted all his public life towards achieving peace in Sri Lanka. Peace can be achieved only through structural solutions by means of power sharing both at the periphery and the centre, which some call federalism.

I believe in a plural democracy in which all communities exercise power over local matters concerning them. You might also call it 'subsidiarity'. I do not believe in majoritarianism. In this light, I address this audience as a non Muslims addressing the Muslim dimension, but within a pluralistic Sri Lanka. *I believe there are 5 major concerns of the Muslims;*

- 1. Muslim aspirations of being treated as a primary stakeholder has not been fulfilled.*
- 2. Alleged non-consultation during the formulation of the PTOMS.*
- 3. Not being made a signatory to PTOMS, in spite of the damage to Muslims being proportionately high*
- 4. Equal representation as the LTTE in the Regional Committee*
- 5. Location of the office of the Regional Committee in Kilinochchi, which is dealt by the Supreme Court right now.*

PTOMS is a limited exercise, confined to a stretch of 2kms of the coastal belt in the North and the East with a suspension clause built-in. However, I believe that these questions are raised by almost all Muslim leaders not to disrupt the process, but to enrich it. That is well accepted. The Regional Committee is responsible for the approval of projects to be implemented. The recent Supreme Court judgment has passed the responsibility to the relevant Ministry. In any case problems would arise only if there are more projects than the available funds, leading to the necessity of rationing. This is not so. Tsunami restitution requirement of the North and East provinces are identified as US\$1bn. Total requirement for the Island is US\$1.5bn and the available funds add up to US\$3bn. Therefore, any well formed project will automatically be accepted. The PTOMS MoU, states that the Regional Committee in consultation with the High Level Committee will determine the procedures for the discharge of its functions. Therefore, one can clearly argue that if the apex body is suspended, there is no room for the Regional Committee to function either. PTOMS is a part of Sri Lanka's paradigm change and the opportunity must not be used to recite the wrongs done to the Tamils, Muslims or the Sinhalese, but to look at it (PTOMS) as a stepping stone that will kick start the peace process. Finally, it reminds me of a well-known Chinese verse; '*May You Live in Interesting Times*'. We certainly do live in interesting times today. Let us make these interesting times for the betterment of our society, which might be the stepping stone for the peace process.

## Speaker 7

The Speaker thanked the chair and commended the very important presentations made by the speakers. By listening to the presentations made by the senior government officials today, he said he had increased confidence in the President. I believe that we have to sink our petty, partisan politics to serve the unfortunate tsunami affected people. We as a community need to

***'I believe that we have to sink our petty, partisan politics to serve the unfortunate tsunami affected people. We as a community need to consult with other communities to get the best results'***

consult with other communities to get the best results. We all should think as Sri Lankans, not as Muslims, for example take Malaysia, where the Malays, the Chinese and the Tamils live in harmony. We Muslims had been living in amity with all communities for all these years. I have personally known the President for over 50 years and as a member of the Muslim community I am sure that she is above all petty, party communal politics, and that she will ensure fairness to the Muslim community. I believe all stake holders should act to diffuse, but not to confuse the situation. Finally the speaker urged all Muslim parties to come together leaving aside their differences to think collectively in achieving equitability in PTOMS.

Dr.Tennakoon thanked the speaker and all speakers who presented before. Summarizing all presentations, Dr.Tennakoon said that he identified 4 common elements highlighted by all speakers;

- 1. The Need for a management structure to address the tsunami affected coastal community.*
- 2. The lack of consultation of Muslim parties in drafting the PTOMS*
- 3. The fact that the contents of the PTOMS doesn't address Muslim concerns (i.e. composition and the location of the regional committee*
- 4. Operationalization of PTOMS*

The moderator also requested the participants to stick to the said main elements as much as possible in the discussion.

## **Discussion**

### ***Comment;***

*. The Muslims have taken 3 fundamental positions;*

- 1. Should the North and East be merged, the parity of status should be ensured*
- 2. Muslims identified as separate ethnic entity.*
- 3. Whole process should be an inclusive one*

*Looking back into the past, it's evident that the Muslims have been sidelined. Muslim dimension has not been taken into consideration at all. The Government should not have had the Muslims involved in this MoU., but should have had a separate one for the Muslims. To address the issue of 44 DS divisions in the LTTE controlled areas the government has offered the whole of North and East on a platter.*

Dr.Tennakoon pointed out that there are two crucial points highlighted in the comments;

1. Inclusiveness
2. Parity of status which is of importance

The panel decided to accept it as a comment and invited the others to come up with their views on it.

**Comment;**

*The primary demand t of the Muslims has been a political demand and the request is to seek re-negotiation to achieve an acceptable parity of status.*

**Comment;**

*The 1<sup>st</sup> speaker mentioned that PTOMS is a humanitarian endeavor. But I see no logic in it when the worst affected Muslims are left out. t. We cannot accept the fact that the government representatives would support the Muslim community. What about the pressure from the Muslim community? If the PTOMS is ensuring equitable allocation, how can the Muslims who are worst affected be sidelined. I would say the Muslim community has been penalized totally.*

**Response**

We have heard three gentlemen echo their words in scepticism of the PTOMS. As previously mentioned this is for humanitarian purposes. . If we look at the Precursors of the PTOMS, the most obvious precursor would be SIHRN. Even leaving side SIHRN, until the PTOMS, the Muslim community was not brought in as the 3<sup>rd</sup> layer in any process. This was resisted by the LTTE as it's only the government and LTTE who were the parties involved in the armed conflict. However, the President has been insisting that this should be an inclusive process. There has been a lot of statements on the exclusion of Muslims who, the worst affected and statistics articulated. The government after negotiations agreed to a 5:3:2 formula for the regional level and now in discussion with the Muslim community the government has offered to appoint one Muslims as a government representative, to make it 5:4:1. I don't see any logic in demanding for 5:5 ratio and call it parity of status. While we recognize the political aspects of the PTOMS it's very regrettable that the unfortunate timing of possible elections and partisan politics is making it impossible to make real progress.

**Comment;**

*When we talk about inclusion and exclusion of the Muslims, there is a very big fear factor. Muslims lost lives, lands and livelihoods not only due to the tsunami, but due to the LTTE as well. We look at the PTOMS as a threat to us. As LTTE is part of it we have a fear in allowing the LTTE to administer our area. There should have been a process of confidence building right through. This looks a Trojan horse to the Muslims.*

*Muslims throughout the history in Sri Lanka are peace loving people. In spite of the two major uprisings in the country, the Muslims didn't join as a community in the uprising. The current global trend is to label the Muslims as terrorists. But in Sri Lanka, we try to avoid that. Though Muslims have faith in the Sri Lankan Government, a feeling of hopelessness is with the Muslims. What we say is that we have not given our proxy to another side. I think PTOMS is a dead horse as many countries have expressed that they are unwilling to fund the PTOMS.*

## ANNEX I

### Memorandum of Understanding ("MOU") for the Establishment of a Post-Tsunami Operational Management Structure ("P-TOMS")

#### Preamble

WHEREAS the tsunami that struck Sri Lanka on December 26, 2004 (the "tsunami") destroyed human lives and property on an unprecedented scale;

WHEREAS there is an urgent need for all communities, Sinhala, Tamil, Muslim and others, to cooperate on humanitarian grounds in the face of this common adversity;

WHEREAS the equitable allocation of post-tsunami funds to all parts of Sri Lanka struck by the tsunami will be based on accepted needs assessments;

WHEREAS in recognition of this urgent humanitarian need and in a spirit of partnership, the Government of Sri Lanka (the "GOSL") and the Liberation Tigers of Tamil Eelam (the "LTTE") (the "Parties") have resolved to work together, in good faith and using their best efforts, to deliver expeditious relief, rehabilitation, reconstruction and development to the coastal communities in the six districts of Ampara, Batticaloa, Jaffna, Kilinochchi, Mullaitivu and Trincomalee ("the Six Districts") and to facilitate and expedite the process of rebuilding the affected areas;

WHEREAS there is a need for establishing P-TOMS to facilitate such cooperation among communities, and between the Parties;

NOW, THEREFORE, in consideration of the foregoing the Parties have entered into this MOU and agreed as follows:

- I. Structure
  - a. An integrated operational management structure shall be established for the purpose of planning, implementing and coordinating post-tsunami work. Such structure shall consist of:
    - i. The Post-Tsunami Coastal Reconstruction Committee (the "High-Level Committee");
    - ii. The Post-Tsunami Coastal Reconstruction Committee for the Six Districts (the "Regional Committee"); and
    - iii. Post-Tsunami Coastal Reconstruction Committees for each of the Ampara, Batticaloa, Jaffna, Kilinochchi, Mullaitivu, and Trincomalee districts (the "District Committees").
  - b. The High-Level Committee, the Regional Committee and the District Committees shall discharge of their functions in such a manner as to address the concerns of all persons in the Tsunami Disaster Zone (the "TDZ", as defined below) and shall do so

without discrimination against any person on grounds such as ethnic origin, sex, language, religion, political or other opinion, social origin, birth or other status.

## **2. Scope**

- a. The scope of the High-Level Committee, the Regional Committee, and the District Committees shall be limited to performing the functions defined in Sections 5(b), 6(b), and 8(b), respectively, and having effect exclusively within the TDZ (as defined below), as further specified by Section 6(a) in the case of the Regional Committee and by Section 8(a) in the case of the District Committees.
- b. The Tsunami Disaster Zone (the "TDZ") shall be defined as the area affected by the tsunami.
- c. The TDZ shall include all that tsunami-affected land area of Sri Lanka, which is adjacent to the sea, lying within a limit of 2 kilometers landwards from the mean low water line.
- d. The High-Level Committee may decide to bring additional land areas within the TDZ; provided, however, that all such land areas must have been directly impacted by the tsunami or directly affected by the displacement and resettlement of persons as a result of the tsunami.
- e. New proposals for measures to be adopted in, or affecting the coastal areas covered by seawater, shall be undertaken under the aegis of an international agency. Such proposals might include measures to recover material lost to the sea during the tsunami, the cleaning up of shores and beaches affected, even when covered by seawater, and the repairing and construction of jetties or commercial fisheries harbors affected by the tsunami.
- f. The Ceasefire Agreement, dated as of 23 February 2002, between the GOSL and the LTTE, shall continue in full force and effect, and nothing in this MOU shall be construed to prejudice such agreement or alter its terms in anyway.

## **3. Period of Operation**

- a. This MOU shall enter into force from the date it is executed by both Parties (the "Commencement Date"), and continue in operation for a period of one year from the Commencement Date.
- b. The Parties shall by consensus have the option to extend this MOU for an additional period or periods.

## **4. Cost and Expenses**

The donors shall be requested to cover all costs and expenses incurred relating to the establishment and functioning of the P-TOMS.

## High-Level Committee

- a. Geographic Scope - The High-Level Committee shall act exclusively in relation to the TDZ.
- b. Functions - The High-level Committee shall perform the following functions:
  - i. Formulation of policies for the equitable allocation and disbursement of donor funds in the TDZ based on needs assessments submitted to the High-level Committee, guided by the principle that funds should be allocated in proportion to the number of affected persons and the extent of damage.
  - ii. Provision of advisory services; and
  - iii. Monitoring of the functioning of P-TOMS.
- c. Composition. The High-Level Committee shall consist of the following members:
  - i. 1 nominee by GOSL;
  - ii. 1 nominee by LTTE; and
  - iii. 1 nominee by Muslim parties.
- d. Alternates. Each nominating party shall designate one alternate, who will be authorized to attend meetings and act on behalf of the member only in the event he or she is unable to attend due to illness, necessary travel or other exigent circumstances.
- e. Chairperson. The High-Level Committee shall select one of the members of the High-Level Committee to serve as the chairperson to conduct and coordinate its meetings. The role of the chair shall rotate among the members, with each chairperson serving for two months.
- f. Observers. The High-Level Committee shall have one observer representing multilateral donors and one observer representing bilateral donors attend its meetings. The observers shall be nominated by the multilateral donor community and the bilateral donor community, respectively.
- g. Decision Making.
  - i. The High-Level Committee shall strive to make decisions based on consensus. All members shall work together in good faith and use their best efforts to reach a common agreement before the High-Level Committee makes any decisions.

- ii. In the event that consensus cannot be reached, the members shall immediately enter into an extensive consultation procedure with their nominating parties and the donor community with the aim to reach an agreement and to ensure continued cooperation in the High-Level Committee.
- iii. In the event that consensus can still not be reached the nominating parties may, after having followed the consultation procedure laid down in Section 5(g, i and ii) and after having given 14 days notice, suspend the cooperation in the High-Level Committee.
- h. Location. The High-Level Committee shall be located in Colombo.
- i. Procedures. The High-Level Committee shall determine its own procedures for the discharge of its functions.
- j. Servicing Secretariat. The High-Level Committee shall establish a small, independent secretariat with adequate staff.

## **6. Regional Committee**

- a. Geographic Scope. The Regional Committee shall act exclusively within those areas of the TDZ in the Six Districts.
- b. Functions. The Regional Committee shall perform the following functions:
  - i. Development of strategies for implementation and prioritization of post-tsunami emergency relief, rehabilitation, reconstruction and development measures;
  - ii. Project approval and management, with respect to projects for post-tsunami relief, rehabilitation, reconstruction and development;
  - iii. Overall monitoring of projects; and
  - iv. Fund management, with respect to the fund specifically defined in Section 7.
- c. Composition. The Regional Committee shall consist of the following members :
  - i. 2 members nominated by GOSL, out of which one will serve as Deputy Chairperson;
  - ii. 5 members nominated by LTTE, out of which one will serve as Chairperson;

- iii. 3 members nominated by the Muslim parties, out of which one will serve as Deputy Chairperson ;
    - iv. The Regional Committee shall have a proper gender balance.
  - d. Observers. The Regional Committee shall have one observer representing multilateral donors and one observer representing bilateral donors attend its meetings. The observers shall be nominated by the multilateral donor community and the bilateral donor community, respectively. Other observers may be invited to attend the meetings of the Regional Committee.
  - e. Decision Making.
    - i. The Regional Committee shall strive to make decisions based on consensus. All members shall work together in good faith and use their best efforts to reach a common agreement before the Regional Committee makes any decisions.
    - ii. In the event that consensus cannot be reached, decisions shall be made by a simple majority of the Regional Committee. In the event of equality of votes, the Chairperson can exercise a casting vote.
    - iii. Notwithstanding paragraph iv below, in the event that a decision is taken on an issue having an adverse effect on a minority group, acknowledged by at least two members of the Regional Committee, approval will require two thirds majority (seven members) of the Regional Committee.
    - iv. In the event that a proposal from a District Committee does not get a simple majority in the Regional Committee and at least two members of the Regional Committee request redressing of the decision relating to the proposal, the rejection will require two thirds majority (seven members) of the Regional Committee.
  - f. Location. The Regional Committee shall be located in Kilinochchi.
  - g. Procedures. The Regional Committee, in consultation with the High-Level Committee, shall determine the procedures for the discharge of its functions.
  - h. Servicing Secretariat. A small Secretariat for the Six Districts shall be set up and may draw staff from the Secretariat for Immediate Humanitarian and Rehabilitation Needs (SIHRN). The Secretariat shall be named as the Regional Secretariat for Post-tsunami Coastal Reconstruction and Development (RSPCRD), and shall provide secretarial and administrative services to the Regional Committee.
  - i. Project Management Unit. A Project Management Unit (the "PMU") shall be established to manage the projects approved by the Regional Committee.



- j. Accounting. The Regional Committee shall appoint a suitably qualified, independent accountant.

## **7. Regional Fund**

- a. There shall be a Post-Tsunami Coastal Fund for the Six Districts (the "Regional Fund"), consisting of unspecified (program) and secretariat funds. The unspecified (program) funds shall consist exclusively of foreign funds while the secretariat funds shall consist of both foreign and local funds.
- b. The Parties shall appoint a suitable multi-lateral agency to be the Custodian of the Regional Fund.
- c. The purpose of the Regional Fund shall be to expeditiously make available funds, following proper approved procedures, to facilitate and accelerate the relief, rehabilitation, reconstruction and development program in the tsunami-affected areas of the Six Districts.
- d. The Parties and the Custodian shall agree on a mechanism for the establishment and operation of the Regional Fund.

## **8. District Committees**

- a. Geographic Scope. Each District Committee shall act exclusively in relation to those areas of the TDZ within its district.
- b. Functions. Each District Committee shall perform the following functions within its district;
  - i. Identification of needs;
  - ii. Prioritization of needs;
  - iii. To generate, receive, appraise and prioritize project proposals from various stakeholders and submit recommendations to the Regional Committee; and
  - iv. To monitor and report on project progress to the Regional Committee.
- c. Composition and Decision Making. The Districts Committees, already established and well-functioning, shall continue their work. The District Committees may further discuss and decide on issues relating to their composition and decision-making. Adequate Muslim representation shall be ensured. The District Committee shall also have a proper gender balance.

- d. Location. Each District Committee shall be located within its district.
- e. Servicing Secretariat. A small Servicing Secretariat shall provide secretarial and administrative services to the District Committees.

## **9. Execution**

This MOU may be executed in duplicate, both texts being equally authentic.

ANNEX 2

IN THE SUPREME COURT OF  
THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C.F.R. Application Nos. 228/05, 229/05 & 230/05

S.C.F.R. 228/2005	01.	Wimal Weerawansa
	02.	Vijitha Herath
	03.	Chandrasena Wijesinghe
	04.	Anura Dissanayake
	05.	K.D.Lal Kantha
	06.	Sunil Handunneththi
	07.	Nihal Galappaththi
	08.	Samantha Vidyaratne
	09.	Bimal Ratnayake
	10.	Nandana Gunatilake
	11.	Anjan Umma
	12.	Ramalingam Chandrasekarm
	13.	Mohamed Muzammil
	14.	Wasantha Piyatissa
		Petitioners
		Vs
	01.	Hon. Attorney General
	02.	Minister of Relief, Rehabilitation and Reconstruction
	03.	M.S.Jayasinghe
	04.	Shanmugalingam Ranjan
		Respondents
S.C.F.R. 229/05	01.	Jyantha Wijesekera
	02.	Nimal Premawansa
	03.	Dimuthu Abayakoon
	04.	Navaratne Banda
	05.	Sujatha Alahakoon
	06.	Namal Karunaratne
	07.	S.K. Subasinghe
	08.	Ranaweera Pathirana
	09.	Gamini Ratnayake
	10.	Anuruddha Polgampola
	11.	Wasantha Samarasinghe
	12.	Achala Jagoda

	13.	Deepal Gunasekera
	14.	P. Udayashantha Gunasekera
		Petitioners
		Vs
	01.	Hon. Attorney General
	02.	Minister of Relief, Rehabilitation and Reconstruction
	03.	M.S.Jayasinghe
	04.	Shanmugalingam Ranjan
		Respondents
S.C.F.R. 230/05	01.	L. Napaarachchi
	02.	S. Amarasinghe
	03.	P. Wijenayake
	04.	J. Samaraweera
	05.	Ajith Kumara
	06.	T. Withanachchi
	07.	J. Kithulagoda
	08.	Premasiri Manage
	09.	V. Ranaweera
	10.	P. Weerakumara
	11.	Samasiri Herath
		Petitioners
		Vs
	01.	Hon. Attorney General
	02.	Minister of Relief, Rehabilitation and Reconstruction
	03.	M.S.Jayasinghe
	04.	Shanmugalingam Ranjan
		Respondents

BEFORE : Sarath N. Silva  
Raja Fernando  
R.A.N.G. Amaratunga

Chief Justice  
Judge of the Supreme Court  
Judge of the Supreme Court

COUNSEL:	H.L. de Silva, P.C., with S.L. Gunasekera, Gomin Dayasiri, Ms. Manili Jinadasa instructed by Paul Ratnayake Associates for the Petitioners in S.C. (FR) 228/05.
	S.L. Gunasekera with Gomin Dayasiri and Manohara de Silva for the Petitioners in S.C. (FR) 229/05.
	Gomin Dayasiri with Ms. Manoli Jinadasa for the Petitioners in S.C. (FR) 229/05
	K.C. Kamalabayson P.C., Attorney General with P.A. Ratnayake, P.C., A.S.G., Ms. D. Dias Wickremasinghe, S.S.C., and Viraj Dayaratne, S.C., for 1st respondent (Attorney General)
	R.K.W. Gunasekera, for the 3rd Respondent in S.C.(FR) 228/05
	Nigel Hatch, P.C., with Ms. K. Geekiyanage for the Secretary, Ministry of Relief, Rehabilitation and Reconstruction (3rd Respondent) in S.C.(FR) 230/05

ARGUED: 8 & 12th July 2005

DECIDED: 15th July 2005

Sarath N Silva, Chief Justice

The thirty-nine Petitioners in these applications are members of Parliament. They are from a single political party, the Janatha Vimukthi Peramuna (J.V.P.) and successfully contested the general election in April 2004, as nominees of the United People Freedom Alliance (UPFA) being an alliance entered into by certain political parties including the JVP. The Petitioners have been constituents of the UPFA Government formed after the general election. The 2nd to 5th Petitioners were Ministers and member of the Cabinet of Ministers. The 6th to 9th Petitioners have been Deputy Ministers.

The Petitioners have filed these applications alleging an infringement of their fundamental rights guaranteed by Articles 12(1) and 12(2) of the Constitution. It is contended that while the impugned executive or administrative action infringes the fundamental rights of the petitions directly, such action generally affects the rights of their voters and of the People of Sri Lanka.

The alleged infringement of fundamental rights relate to the Memorandum of Understanding (MOU) for the establishment of a Tsunami Operation Management Structure (P-TOMS), which has been agreed and accepted on 24.06.2005 by the 3rd Respondent, the Secretary, Ministry of Relief Rehabilitation and Reconstruction for and on behalf of the Government of the Democratic Socialist Republic of Sri Lanka (GOSL) and the 4th Respondent for and on behalf of the Liberation Tigers of Tamil Eelam (LTTE).

The preamble to the MOU refers to the tsunami that struck Sri Lanka on 26.12.2004, which destroyed human life and property on an unprecedented scale. It recites the need for all communities to cooperate on humanitarian grounds to ensure an equitable allocation of "post-tsunami funds" to all affected areas. It is further stated that in recognition of the urgent need and in a spirit of partnership the GOSL and LTTE have resolved to work together in good faith and use their best efforts to deliver relief to the coastal communities in the six Districts viz: Ampara, Batticaloa, Jaffna, Kilinochchi, Mullaitivu and Trincomalee.

The MOU provides for a management structure at three levels of a:

- i) High Level Committee
- ii) Regional Committee and ;
- iii) District Committees

These committees have to address the concerns of the persons in the Tsunami Disaster Zone (TDZ) defined as an extent up to 2 kilometers landwards from the mean low water line of the Tsunami affected area within Sri Lanka.

The purview of the High Level Committee appears to extend to the entirety of the TDZ and clause 2(d) of the MOU empowers the Committee to bring within the TDZ additional land area affected, provided that such areas have been directly impacted by the Tsunami or directly affected by the displacement and resettlement of person as a result of tsunami. This Committee comprises three members.

- i. One nominee of GOSL;
- ii. One nominee of the LTTE
- iii. One nominee of the Muslim parties

Decisions of the Committee have to be based on consensus. According to clause 5(b) the main function of the Committee is to formulate policies for the equitable allocation and disbursement of donor funds in the TDZ, based on need assessments that are submitted to the Committee and guided by the principle that funds should be allocated in proportion to the number of affected persons and the extent of damage.

At the next level is the Regional Committee (Clause 6 of the MOU). The geographic scope of this Committee is the area of the TDZ in the six Districts mentioned above. The functions of the Regional Committee include the development of strategies for the implementation and prioritization of post-tsunami relief; project approval and management in respect of projects for post-tsunami relief, rehabilitation, reconstruction and development; the over-all monitoring of projects and funds management as provided in Section 7. This section provides for the establishment of a Post-Tsunami Coastal fund for the six districts to be called the "Regional Fund". The fund consists of "unspecified (program)" and "secretariat funds". The "unspecified (program)" funds consist of exclusively of foreign funds, whilst "secretariat funds" consists both foreign and local funds.

It is provided that parties meaning, the GOSL and the LTTE shall appoint a suitable multi-lateral agency to be the Custodian of the Regional Fund. The purpose of the Regional Fund shall be to expeditiously make funds available following the approved procedures to facilitate

and accelerate relief rehabilitation reconstruction and development of tsunami affected areas of the six district referred to above.

It further provides that the parties meaning the GOSL and LTTE and the Custodian shall agree on a mechanism for the establishment and operation of the Regional Funds.

According to section 6(c), the Regional Committee will consist of (i). Two members nominated by the GOSL (ii) Five members nominated by the LTTE one of whom shall serve as Chairperson (iii) Three members nominated by the Muslim parties.

The decision making process given in clause 6(e) is that they will be based on consensus and in the event that a consensus cannot be reached by a sample majority.

It further provides that if the decision has an adverse effect on a minority group as acknowledged by at least two members of the Regional Committee, the decision will require the approval of 2/3 majority. In the event a proposal from a District Committee does not get a simple majority and if required by two members the rejection of such request will require 2/3 majority. In terms of Section 6(f) the Regional Committee shall be located in Kilinochchi.

At the next level are District Committee, provided for in Section 8. The function of each District Committee is to identify the need of the TDZ within the District Prioritization of need, the submission of recommendation to the Regional Committee and monitoring the reporting on progress to the Regional Committee. There is no specific provision with regard to the composition of a District Committee and section 8(c) states that the Committee "already established and well functioning shall continue their work".

The petitioners contend that the entering into of the MOU, the management structure of P-TOMS, and the respective power and functions constitute an infringement of their fundamental rights guaranteed by Article 12(1) of the Constitution, for the following reasons:

i.	The 3rd Respondent does not have any authority to enter into the MOU for and on behalf of the Government of Sri Lanka
ii.	The MOU does not specify that the 3rd Respondent has been authorized by the President in this matter and in any event, even the President cannot grant such authority on her own responsibility in view of the provisions of Articles 42 and 43 (1) of the Constitution.
iii	There is no legal basis to enter into the MOU with the LTTE, which is not an entity recognized by law and which is identified with terror, violence, death and destruction;
iv.	The powers and functions of the Committees especially that of the Regional Committee are governmental in nature and content and cannot be validly conferred on such Committees in the manner contemplated in the M.O.U.;
v	The foreign funds committed by the donors to carry out tsunami relief through the Government, from part of the funds of the Republic and should be disbursed and accounted for in the manner provided in the Constitution and the applicable laws and procedure. The provisions in the MOU for the Regional Fund and its management by the Regional Committee are

	inconsistent with their legal requirements.
--	---

On the basis of the foregoing it is contended that the MOU set up a structure and lays down procedures that are contrary to the rule of law and deny the Petitioners equal protection of law as guaranteed by Article 12 (1) of the Constitution.

It is further contended that the MOU with special provisions in relation to six districts only of the TDZ with the establishment of a Regional Committee and a Regional Fund, discriminate against citizens in the area outside their Districts who have been equally or worse affected by the tsunami, on the basis of place of birth and residence and as such the fundamental rights guaranteed by Article 12 (2) of the Constitution is infringed.

The matters drawn in issue by the Petitioners in relation to:

i)	The ambit of Executive power of the President
ii)	The MOU ex facie agreed and accepted by the Government and the LTTE;
iii)	Structure intended to be set up under the MOU in the form of Committees and their composition;
iv)	The powers and functions of the Committees and the financial arrangements;

Are indeed unique and unprecedented in every respect.

The final relief sought by the Petitioners is that the MOU be declared void and invalid in law as being an infringement of their fundamental rights guaranteed by Article 12 (1) and 12 (2) of the Constitution. They have sought interim relief to restrain the Respondents from taking any steps to implement the MOU pending the final determination of these applications.

From the Petitioners perspective, if the impugned executive or administrative action is continued pending the final determination of these applications, which would necessarily take considerable time, the final relief would be of no avail. On the other hand, as contended by Counsel for the 1st – 3rd Respondents, if the MOU is not implemented forthwith, urgent humanitarian assistance could not be granted to people of this country, especially in the six Districts referred to, who have suffered and continue to suffer, untold hardship and tragedy from the natural disaster that befell them. In this connection, it cannot be disputed that the interests of these hapless people should be borne firmly in mind.

As regards the matter of granting interim relief, I think it appropriate to refer to the provisions of Article 126 (4) of the Constitution, which sets out the powers of the Court to grant relief in the exercise of its jurisdiction for the protection of fundamental rights.

Article 126 (4) reads as follows:

“ The Supreme court shall have the power to grant such relief or make such directions as it may deem just and equitable in the circumstances .....

It is implicit in any provision conferring power that such power should be exercised according to law. This is the basic premise of legality which should necessarily be attached to



the exercise of power. If the element of legality is read into Article 126 (4) the provision would read as follows:

“ The Supreme Court shall have power to grant such relief or make such directions, *according to law* as it may deem just and equitable in the circumstances.

The Words in italics have been included by way of interpretation as concomitant of the power to grant relief. Accordingly, the relief granted by this Court should have the effect of converting the illegality, if any, which constitutes the infringement, to a situation of legality, in a manner that is just and equitable in the circumstances of the case.

It has been contended that these applications have been filed in the public interest. Therefore the just and equitable effect of the relief granted should permeate the entirety of the public interest drawn in issue and necessarily include the interests of the victims of the tsunami in the six districts referred to above. The observations made above with regard to the relief that may be granted in these applications would in my view apply with equal force to the matter of granting interim relief. However, an interim order cannot encompass the entirety of the relief that may be considered at the end of the case since an interim order does not follow upon a full adjudication of the matter.

An interim order is generally referred to as “Stay Order” because it is primarily intended to preserve the status quo that prevailed prior to intervention of the impugned action. The Court cannot be unmindful of the consequences that may necessarily follow from such an order. In view of these ramifications, it is appropriate at this stage to consider the basis and the criteria generally applicable to the granting of interim relief.

In the case of Billmoria vs Minister of Land . Land & Mahaweli Development – (78 – 79) 1 SLR page 10, this Court considered the aspects relevant to an interim order to stay all proceedings in an acquisition of land under the Land Acquisition Act. Samarakoon C J; at page 13 made the following observations:

“ ..... *In considering this question we must bear in mind that a stay order is an incidental order made in the exercise of inherent or implied powers of Court. Without such power the Court's final orders in most cases would if the petitioner is successful be rendered nugatory and the aggrieved party will be left holding an empty decree worthless for all purposes.* “

I would describe this observation as setting out the object or purpose for which interim relief is granted. It is to prevent the injustice that would otherwise result to the party invoking jurisdiction if the final relief obtained by him is of no avail since the impugned illegality has by then run its course to an extent that may be considered as irretrievable or irremediable. Counsel for the Petitioners contended, as noted above, that the MOU has a limited span of operation and if the Management Structure provided for is established and becomes functional whatever final relief they may obtain would be of no avail.

Petitioners who have been constitutions of the Government, some holding Ministerial portfolios contend that they have been kept in the dark as to the terms of the MOU, which

was made public only as fait accompli. The contention of R.K.W Goonesekara, for the 3rd Respondent is that the MOU culminated a process of “germination” that spanned several months. Whilst this contention may be correct, considering the submission of the Petitioners that they being an integral part of the Government were kept in the dark, it has to be surmised that the “germination” referred to did not take place in the public domain. Be that as it may, the Court has to note that transparency being an essential component of good governance has not been there in the process of “germination” referred to by Mr. Gunasekara. The submission of the Petitioners is that the MOU hatched in secrecy with its manifest illegalities amounting to an infringement of their fundamental rights should not be allowed to run its course pending an adjudication of their rights by this Court. These considerations bring the Petitioners case for interim relief fairly within the dicta in Billimoria’s case provided they satisfy the criteria applicable to grant interim relief.

In considering the nature and the extent of the interim relief to be granted it is relevant to advert to the criteria generally applicable to the grant of interim relief. The criteria that is generally applicable is to be discerned from the judgments of this Court constitutions precedents that date back to the judgment in the case of Jinadasa vs Weerasinghe – 31 NLR page 33, the criteria falls under 3 different heads. I would summarize the criteria under the following heads:

i.	Prima Facie case
	The party seeking interim relief should make out a strong prima facie case of an infringement or Imminent infringement of a legal right. That, there is a serious question to be tried in this regard with the probability of such party succeeding in establishing the alleged ground of illegality.
ii.	Balance of Convenience
	Under this head the main factor to be considered is the uncompensatable disadvantage or irreparable damage that would result to either party by granting the interim relief or the refusal thereof.
iii.	Equitable Considerations
	This involves the consideration of the conduct of the respective parties warrants the grant of interim relief.

The alleged infringements relates to the MOU which provides a management structure with functions and powers assigned to Committees at three levels and in examining the criteria set out above the question to be considered is whether the Petitioners have established a strong prima facie case in respect of the entirety of the MOU or in respect of any clearly severable part of parts of the MOU. If so, the interim relief has to be restricted to such parts only.

The criteria generally described as, balance of convenience and equitable considerations would encompass the matters stated above with regard to the relief that may be granted for the protection of fundamental rights, as set out in Article 126 (4) and considered in the preceding section of this judgment. On the basis of that analysis, it would be necessary to consider the disadvantages and damage in relation to both parties. Since the MOU is intended to deliver urgent humanitarian assistance to the persons who suffered from the tsunami in the six districts referred to above, if there are any parts of the MOU in respect of which the Petitioners establish a strong prima facie case, it is incumbent on this Court to take the further step of converting the alleged illegality in respect of which a strong prima facie case has been made to a situation that is legal and according to law and thereby ensure that the interim relief would not result in undue hardship to the persons who suffered from the tsunami in these districts.

In the background stated above I would now examine the matters drawn in issue by the Petitioner and itemized as (i) and (ii) above, relating to the ambit of the executive power of the President and whether the MOU could have been validly entered into for the objectives as set out in the preamble.

Mr.H.L. de Silva , P.C., contended that although the President is identified in Article 4 (b) as the single authority to exercise the executive power which forms part of the sovereignty of the people, the exercise of such power by the President is circumscribed by the provisions of Articles 42 and 43 (1) of the Constitution.

These articles reads as follows:

42. *“ The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security”*

43. *(1) “here shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic, which shall be collectively responsible and answerable to Parliament. “*

On a careful scrutiny it is seen that Article 42 specifies the responsibility of the President to Parliament for the due exercise, performance and discharge of the powers and duties under the Constitution and the law. Article 43 (1) similarly lays down the collective responsibility of the Cabinet of Ministers to Parliament in respect of the direction and control of Government. These two provisions relating to responsibility and answerability for the exercise of executive power. The fact that these provision lay down the element of answerability bring home the point that the exercise performance and discharge of executive power and functions is primarily vested with the President. The stage at which answerability arises is upon the exercise of Power. It could not be contended on the basis of these provisions that the President should consult or seek prior concurrence of either the Parliament or Cabinet of Ministers for the exercise of Governmental power. However, the element of responsibility and answerability postulates that the President, where it is necessary may seek the concurrence of the Cabinet of Ministers and of Parliament.

In this instance the MOU has been tabled in Parliament and there is no evidence before this Court that the Cabinet of Ministers has not been apprised of the MOU at the time of its execution. In any event if there is a default in these respects on the part of the President, they are matters for immediate concern of the Cabinet of Ministers and Parliament and not of this Court.

Counsel for the Respondents contended that the ambit of executive power of the President should be considered in the light of the provisions of Article 4 (b) and 33 of the Constitution. The relevant Provisions of Article 33 which specifically deals with the powers and functions of the President reads as follows:

*“ In addition to the powers and functions expressly conferred on or assigned to him by the Constitution or by any written law whether enacted before or after the commencement of the Constitution, the President shall have the power”*

- (a) .....
- (b) .....
- (c) .....
- (d) .....
- (e) .....
- (f) *to do all such acts and things, not being inconsistent with the provisions of the Constitution or written law as by international law, customs or usage he is required or authorized to do”*

These provisions in my view confer on the President not only specific powers but also a residuary power, in respect of functions that broadly come within the realm of the executive. It cannot be disputed that as Head of the State, Head of Executive, and of the Government, being the description of the status of the President in Article 30 (1), in appropriate circumstances the President may lawfully act on behalf of the Republic and enter into agreements and arrangements that may be necessary to carry out essential Government functions.

The preamble to the MOU sets out the basis on which it was entered into, being the need to provide urgent humanitarian assistance to the persons who have extensively suffered on an unprecedented scale from the tsunami that struck Sri Lanka in December 2004, As Head of the Executive and of the Government it is the duty of the President to ensure that essential relief and assistance for rehabilitation, reconstruction and development be made available to the persons who have thus suffered. Hence in my view there is no illegality in the President entering into an MOU for the objectives and reasons set out in the preamble. The Petitioners have failed to make out a strong prima facie case in respect of matters (i) and (ii) drawn in issue by them.

Mr. S.L Gunasekara, contended that it is illegal to enter into the MOU with the LTTE which he described as a terrorist organization that caused tremendous loss of life and property in this country. The contention is that even assuming that the President could enter into a MOU for the objectives and reasons stated on the preamble, the other party to the

MOU is not an entity recognized in law and should not be so recognized due to antecedent illegal activities of the organization.

In this regard I have to note that the matter so strenuously urged by Counsel cannot by itself denude the status of the 4th Respondent to enter into the MOU. The circumstances urged by Counsel cannot and should not have the effect of placing the 4th Respondent and the Organization that he seeks to represent beyond the pale of law. We have to also to bear in mind that already a Cease-Fire Agreement has been entered into on 23.02.2002 between the Government of Sri Lanka and the LTTE, which according to section 2(b) of the MOU "shall continue in full force and effect."

In these circumstances there is no illegality in entering into the MOU with the 4th Respondent for the purpose of rendering humanitarian assistance as contemplated in the preamble to the MOU. The Petitioners have failed to establish a strong prima facie case in respect of this matter as well. In the result the Petitioners have failed to make out a strong prima facie case on any ground that warrants interim relief as to the entirety of the MOU.

From this point, I have to examine the submissions with regard to the specific provisions of the MOU in relation to the Committees and their respective powers and functions.

The basic submission of the Counsel for the Petitioners in this regard is that the three Committees proposed to be set up as the Operational Management Structure would not derive authority from any law that is applicable. The Respondents reply is that these Committees are adhoc structures intended solely to ensure the effective disbursement of post tsunami relief in the six districts referred to above. The Respondents have not identified the provisions of any statute or any other applicable law on the basis of which the Operational Management Structures are being set up. Considering the objectives as set out in the preamble to the MOU and the fact that the structure is set up to facilitate the disbursement of urgent humanitarian assistance, it would not be necessary, in my view to derive any specific authority from a statute, as contemplated by the Petitioners. The submission of the Petitioners that even in such circumstances the Structure sought to be established should derive authority from a statute imposes a undue rigidity to a process that must retain a degree of flexibility to ensure that all persons who have been affected are adequately cared for.

In this connection I would refer to a relevant passage from a book on Jurisprudence under the title the "Concept of Law" by Professor H.L.A Hart. In this book, regarded as a leading work on Jurisprudence, Hart has should from the strict theory of positivism expounded by Austin that authority should flow down from a clearly defined sovereign body which would in this instance be the legislature. Hart has posed the difficulties that would result in strict legality to cover every situation that may arise, as follows:

*" ..... If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provisions could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for a further choice. Every thing could be known, and for everything, since it could be*

*known, something could be done and specified in advance by rule. This would be a world fit for 'mechanical' jurisprudence.*

*Plainly this world is not our world: human legislators can have no such knowledge of all the possible combination of circumstances which the future may bring..... "*

*(Concept of Law – H.L.A. Hart – 2nd Ed. Page 128)*

Hart has continued analysis and postulated what he describes as the open texture of law stated at page 135 –

*" The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case .... "*

The tragedy brought about by the tsunami, the human suffering and the loss of property could not have been anticipated in its full dimension in any preceding statute. Furthermore, the matters of reaching the persons who have been affected by this tragedy in certain parts of the six districts referred to is compounded by the presence of LTTE with which organization a Cease – Fire Agreement has been entered into as noted above. These combinations of circumstances necessarily lead to a situation where an arrangement could be made by the Head of Government to ensure effective distribution of humanitarian aid. The Management Structure set up in the MOU has to be primarily seen in this light. In the circumstances in so far as the Management Structure is not responded with any power that would impinge on the rights of the people or detract from the normal and statutory functions of Government and of financial control, there would be no basis to restrain the functions of the structure by way of an interim order issued by this Court.

Counsel for the Petitioners, when narrowed down to this issue, quite rightly viewed the matter in the light stated above and did not move for any interim relief in respect of the High Level Committee and the District Committees, since their functions are purely to assist the Governmental authorities on whom the final responsibility lay. However, they urged strongly that interim relief be considered in relation to the Regional Committee which is in terms of the MOU, vested with Governmental powers and control in relation to public finance. In this connection it is to be seen Section 6 (b) (ii) and (b) (iv) deal specifically with Governmental functions and management of Public finance. (ii) reads as follows:

*"Project approval and management, with respects to projects for post-tsunami relief, rehabilitation, reconstruction and development:*

This is necessarily a function that comes within the executive to be handled by the Ministry of which the 3rd Respondent is the Secretary. In accordance with the provisions that have been laid down in applicable law and procedures.

Sub-section (iv) reads as follows:

*"Fund Management, with respect to the fund specifically defined in Section 7."*

The provisions of section 7 which established the Regional Fund have been reproduced before. The Fund consists of foreign funds and secretariat funds, including both foreign and local funds. It is clear from the provisions of the MOU that the foreign funds referred to are the donations to be received by Sri Lanka from multi-lateral and bi-lateral donors. These funds when received by the country should in terms of Article 149 (1) of the Constitution be paid into the Consolidated Fund and be disbursed in terms of the Constitution and the applicable law. Expenditure from this fund would be subject to audit by the Auditor General, as provided for in Article 154 of the Constitution. These are salutary safeguards included in respect of public finance to ensure transparency in the matter of disbursement of funds and proper accountability. Multi-lateral and bi-lateral donors being fully committed to the rule of law, transparency and good governance would necessarily insist that funds committed by them magnanimously for a humanitarian objective be properly dealt with and accounted for in this country, according to the applicable law. The provisions in Section 7 read with 6(b)(iv) are plainly inconsistent with the Constitution and applicable law. (Thus the Petitioners have in my view established a strong prima facie case for interim relief in respect of Sections 6(b) (ii) and 6(b)(iv) and Section 7 of the MOU. A question now arises as to whether any measures could be imposed by this court to convert the situation of a prima facie illegality referred to above to one of legality so that it would be just and equitable from the perspective of all parties concerned.)

In this connection it is relevant to note that Section 6(i) coming within the purview of the Regional Committees provides for Project Management Unit (PMU) to be established to manage the projects approved by the Regional Committee. When the operation of Section 6(b)(ii) with regard to project approval and management by the Regional Committee is stayed, necessarily the provisions of sub – paragraph (i) would have no effect. However, considering the objectives as set out in the preamble it would be necessary to establish the Project Management Unit that would exercise the Governmental functions in respect of projects for relief, reconstruction, rehabilitation and development in these districts. Therefore the 2nd and 3rd Respondents are at liberty to establish a Project Management Unit in accordance with applicable . The Unit so established would take into account the measures recommended by the Regional Committee in terms of Section 6(b)(i) and the Regional Committee would retain its functions in terms of 6(b)(iii) of overall monitoring of projects to ensure that relief is equally received by all persons who have been affected by tsunami.

A specific submission has been made with regard to the provisions of Section 6(f) being the location of the Regional Committee. It is provided that the Regional Committee shall be located at Kilinochchi. Counsel for the Petitioners contended that persons from certain parts of the six districts referred to would not have easy access to Kilinochchi. This matter was not disputed by Counsel for the Respondents. The safeguards contained in the decision making process set out in Section 6 (e) to be effective to any “minority group” the members of the Committee should have no fears with regard to the proper exercise of their choice. The Petitioners contention of the lack of such an environment of freedom in the designated place cannot be disputed. In the circumstances the Petitioners have made out a strong prima facie case in respect of section 6(f). Accordingly interim relief is granted restraining the operation of this provision. The parties would be at liberty to decide on a suitable site to locate the Regional Committee on the basis of criteria set out below:

i)	That the place be centrally located within the TDZ of the six districts referred to;
ii)	That all persons from every part of the TDZ of these districts should have free and unhindered access to such locations;

The criteria set out above would result in the illegality referred to above being converted to situation according to law.

The findings stated above are summarized as follows:

i)	an interim orders is not granted in respect of the entirety of the MOU referred to and the Structure as provided in the MOU consisting of Committees may be established and become functional subject to the restrictions as are imposed by this judgment.
ii)	the operation of Sections 6 (b) (ii), 6 (b) (iv), 6(b)(f), 6 (I) and 7 of the MOU are stayed pending the final determination of this application;
iii)	the funds both foreign and local intended to be deposited in the Regional Fund as provided in Section 7 may instead be dealt with according to the provisions of the Constitution and deposited in a separate account with a Custodian to be designated, if lawfully authorized;
iv)	The location of the Regional Committee may be decided on by the parties in compliance with the criteria that has been stated;
v)	A Project Management Unit (PMU) may be set up in lieu of the unit provided for in Section 6(i) by the relevant Ministry in accordance with the applicable procedure. Such Project Management Unit would be at liberty to coordinate and implementation the projects with the District Committees, the Regional Committee and the High Level Committees as provided in the MOU;

The foregoing will be operative till the final determination of these applications.

Sarath N Silva., I agree

Chief Justice

Raja Fernando J., I agree.

Judge of the Supreme Court

Amaratunga J., I agree

Judge of the Supreme Court