



INTERNATIONAL
COMMISSION
OF JURISTS

ICJ Briefing Note

**Beyond Lawful Constraints:
Sri Lanka's Mass Detention of LTTE Suspects**

September 2010

Table of Contents

I EXECUTIVE SUMMARY	5
II BACKGROUND.....	8
A CIRCUMSTANCES SURROUNDING ARREST	8
B HOW MANY DETAINEES ARE THERE?	9
C WHAT HAPPENS IN THE 'SURRENDEE' CAMPS?.....	11
D LEGAL AND POLICY FRAMEWORK	13
III APPLICABLE LAW.....	17
A INTERNATIONAL HUMAN RIGHTS LAW	18
i. <i>The Right to Liberty and Security</i>	18
ii. <i>Administrative/ Preventive Detention</i>	21
B VIOLATIONS OF INTERNATIONAL LAW AND STANDARDS.....	25
i. <i>Detainees as security threats</i>	25
ii. <i>Detainees as 'surrendees' and 'rehabilitees'</i>	28
a. <i>'Surrender'</i>	28
b. <i>'Rehabilitation'</i>	29
c. <i>Indefinite detention for investigation and charges</i>	31
d. <i>Vague and overbroad legal grounds for criminal charges</i>	33
iii. <i>Rights of children</i>	35
C SUMMARY OF HUMAN RIGHTS CONCERNS	36
i. <i>Clear and transparent legal framework for surrendees and rehabilitees</i>	36
ii. <i>Procedural safeguards need to be put in place</i>	36
iii. <i>Need for an independent monitoring agency with a protection mandate</i>	38
IV RECOMMENDATIONS.....	39
A TO THE SRI LANKAN GOVERNMENT	39
i. <i>Voluntariness of surrender and rehabilitation</i>	39
ii. <i>Due process rights</i>	39
iii. <i>Children</i>	39
iv. <i>Amnesty</i>	39
B TO THE SRI LANKAN PARLIAMENT AND GOVERNMENT.....	40
C TO THE DONOR COMMUNITY AND THE UNITED NATIONS	40

I EXECUTIVE SUMMARY

This report addresses human rights concerns arising from what may be the largest mass administrative detention anywhere in the world. The Government of Sri Lanka is currently holding approximately eight thousand individuals under administrative detention without charge or trial. They are alleged former associates of the LTTE and therefore required to undergo 'rehabilitation' under Sri Lanka's 2005 emergency regulations. Hundreds of others have been screened and held separately for criminal prosecution.

The ICJ is concerned that the Government's 'surrendee' and 'rehabilitation' regime fails to adhere to international law and standards, jeopardizing the rights to liberty, due process and fair trial. There are also allegations of torture and enforced disappearance. Access required for reliable and accurate monitoring by international agencies, including the International Committee of the Red Cross (ICRC), has been denied. Political expedience and secrecy have tended to take precedence over legality and accountability.

With the end of the armed conflict, conditions on the ground cannot be considered to give rise to a threat to the life of the nation so as to justify a state of emergency in Sri Lanka, under international standards. Even if a state of emergency were so warranted, the Government has not provided sufficient evidence that the mass detention regime for the purposes of rehabilitation is strictly required to meet any specific threat. In any event, these questions of whether detention is strictly necessary must be subject to judicial review on an individual basis and such review has been unavailable.

The ICJ acknowledges the enormity of the challenge faced by the Government since the end of the armed conflict in May 2009. It has dealt with both massive displacement and security risks. It has the ongoing task of identifying the scope and nature of rehabilitation and other post-conflict assistance needs, including the special needs and rights of children.

Important progress has been achieved. As of August 2010, approximately 200,000 IDPs had been returned or released from camps, with 70,000 that remain displaced or in transit sites near their home areas and less than 35,000 others that still await release from emergency sites. It was reported that 565 children identified by the security forces in May 2009 as associated with the LTTE were almost immediately separated from the adult detainees, held in separate rehabilitation centres monitored freely by UNICEF, and all released by May 2010. These figures come from reliable sources but have not been made public.

However, notwithstanding these positive developments, the Sri Lanka Government has not accepted that "rehabilitation" does not mean surrendees and rehabilitees are no longer entitled to due process and fair trial rights.

Reliance on emergency regulations and counter-terrorism legislation that fall short of international law and standards effectively places detainees in a legal black hole. There is no recourse to an independent and competent tribunal to determine their rights. Obstructed access for independent monitoring further clouds these practices and has made it impossible to verify reports of enforced disappearance, torture and other ill treatment, or the continuing presence of children among the adult detainees.

In assessing the human rights impact of the mass detention regime, this report applies international human rights law as the relevant legal regime, particularly in respect of the right to liberty under article 9 of the *International Covenant of Civil and Political Rights* (ICCPR) and its *Optional Protocol*, both ratified by Sri Lanka. It is the State's duty to respect and protect these rights and to provide a remedy when these rights are violated. International humanitarian law in non-international armed conflict is contested regarding internment and detention, as there are few express rules in IHL treaty sources. In any case, hostilities in Sri Lanka's internal armed conflict ceased more than one year ago.

There are at least two bases for this detention under Sri Lankan legislative and emergency regulations. First, preventive detention without trial on security grounds for up to one year is authorized under ER 2005, Regulation 19. While magistrates are to be informed of such detentions (21(1)), the regulation excludes judicial review (19(10)), declares all such detentions lawful (19(3)), and denies the Magistrate power of bail without consent by the Attorney General (21(1)). This regulation remains applicable to those to whom it was applied before May 2010, when the maximum detention period was reduced to 3 months and the appearance before the Magistrate required within 72 hours (1651/42, 2 May 2010).

Preventive detention is the administrative restriction of liberty not undertaken in contemplation of criminal charges, but instead based on suspicion of future criminal behaviour. The substantive grounds for such detention include offences contained in the *Prevention of Terrorism Act No. 48* (1979) (PTA), which itself authorizes preventive detention under patently vague and overbroad grounds for up to 18 months (s.9) and indefinitely pending trial.

Administrative detention without charge or trial is also permitted for purposes of the rehabilitation of 'surrendees' under Regulation 22 of the *Emergency Regulations 2005* (ER 2005 as amended by ER 1462/8, 2006). Administrative detention of a 'rehabilee' may continue without judicial review or access to legal representation for up to two years. These regulations and procedures deny the right of detainees to have the lawfulness of their detention and other rights determined by a court, as established in ICCPR article 9.

The longstanding state of emergency powers in Sri Lanka has led to a situation in which the use of exceptional powers has become the rule. The ICCPR article 4 strictly limits derogations to those strictly required in

response to specific threats to the life of the nation. Even in these situations, the right to habeas corpus may not be suspended, nor the right to legal representation, access to family, and measures to protect against torture and other ill treatment.

Prolonged and indefinite administrative detention of 'rehabilitees' for up to two years without charge may amount to individual and collective punishment without charge or trial. In addition to this disguised form of punishment for alleged criminal offences, 'rehabilitees' face the prospect of a second punishment upon conviction for crimes if criminal prosecutions are eventually initiated. The ICJ is also concerned that detainees are vulnerable to the violation of other rights, including the prohibition against torture and other cruel, inhuman or degrading treatment, the prohibition against enforced disappearance, as well as of a number of particular rights applicable to children.

Once the human rights of the detainees are properly respected, the international community should provide diplomatic and financial support to the Government's plan for processing the detainees according to the rule of law. However, such assistance should hinge on a careful examination of the legal framework guiding Government practice. This report outlines key elements that should be taken into account.

While the ICJ recognizes Sri Lanka's obligation to protect its population, including from threats that may be posed by members of armed groups such as the LTTE, this should not be done at the cost of detainees' rights, or outside the framework of the law. Measures taken by the Government of Sri Lanka to ensure that those suspected of serious crimes, such as war crimes, are brought to justice must also ensure that others are given assistance, including human rights compliant rehabilitation services, to facilitate assimilation into civilian life. This is as much a matter of confidence building and reconciliation at this delicate post-conflict juncture in Sri Lanka, as a question of respecting and strengthening the rule of law – both, in fact, are mutually constitutive. For example, except where alleged acts amount to crimes under international law or serious human rights abuses, the Government could consider adopting a reconciliation program that provides for the possibility for amnesty for ex-combatants as a way to foster reconciliation in post-conflict Sri Lanka.

Given the current legal vacuum and uncertain conditions under which 'surrendees' are being detained, external donor support for Sri Lanka's rehabilitation efforts must be provided only on condition of compliance with international law and standards, or else risk complicity in a policy of systematic mass arbitrary detention.

Part II of this Briefing Paper provides the background to ongoing mass internment of LTTE suspects. Part III (A) outlines international human rights law and standards applicable in Sri Lanka. Part III (B, C) sets out the violations of these laws and standards under the current administrative detention regime. Part IV provides recommendations for addressing these violations.

II BACKGROUND

This section reviews the circumstances and conditions surrounding the internment of individuals now subject to overlapping regimes of security screening following 'surrender', 'rehabilitation', or criminal prosecution. Some of the information for this section was collected through interviews with affected individuals as well as humanitarian aid workers. The identities of researchers and interviewees are not attributed to preserve confidentiality and security.

A Circumstances surrounding arrest

As the military conflict culminated at grave cost to civilian life and security in May 2009, many current detainees were separated from their families by the Sri Lanka Army (SLA) at reception points as they fled into government-controlled areas.¹ Others were arrested after arrival to the militarized internment camps for the internally displaced,² including Manik Farm, as a result of screenings conducted by the SLA, as well as the police Terrorist Investigation Division (TID) and Criminal Investigation Division (CID).³ The screening and resultant arrests continued over the months that followed the end of the conflict, sometimes with the assistance of Tamil informants amongst the internees.⁴ Such arrests continued in the Manik Farm camps at least up to December 2009.⁵ Some of these arrested individuals were taken to 'surrendee' camps.

Any alleged association with the LTTE appears to have been grounds for arrest. Those arrested include individuals who were recruited by the LTTE in the days and weeks before their defeat, as well as individuals who carried out official functions in LTTE administered areas and received a salary from the LTTE, but had not taken any active part in hostilities.⁶ *Bona fide* civilians who did not wish to be separated from relatives who had been identified as LTTE suspects were also detained at reception points such as Omanthai.⁷ The basis

¹ Most notably at Omanthai, the main checkpoint on the north/south axis cutting through the Vanni.

² The UN High Commissioner for Human Rights stated in September 2009 that the IDPs were 'effectively detained under conditions of internment.'

http://www.bbc.co.uk/sinhala/news/story/2009/09/090914_navipillai.shtml (last accessed July 2010).

³ Interview with detainees, January 2010. The Military Intelligence Corps also conducted a screening in at least one camp, but this was a detainee camp, not Manik Farm.

⁴ Interview, humanitarian aid worker, February 2010.

⁵ According to reliable reports, immediately prior to the opening of the internment camps in December 2009, groups of IDPs were screened by the SLA, with the assistance of previously identified LTTE cadres, and taken to camps holding individuals with suspected LTTE links.

⁶ Interview with detainees, January 2010.

⁷ Interview with humanitarian aid worker, February 2010.

for arrests has included allegations by fellow IDPs and paramilitary groups in the internment camps, raising issues of credibility.⁸

Other detainees responded to public calls from the SLA for the surrender of anyone who had spent "even one minute with the LTTE in any way".⁹ This blanket call led many detainees with minimal involvement with the LTTE to report themselves, including children brought forward by their parents. UN Special Envoy Patrick Cammaert reported that, "[a]s a result, many children's families, fearing later harassment, encouraged their children to report themselves, even if they only spent hours in the custody of the LTTE in the final days of the fighting." The SLA promised that, once registered, those who 'surrendered' would be released, but surrender instead triggered continuing indefinite detention without charge or trial.¹⁰

It should be noted that, with its policy of conscription and forced labour, the LTTE was all-pervasive in the lives of civilians in its area of control.¹¹ As such, most IDPs would have had some link with the LTTE. Any screening of the displaced will have required informed, clear and calibrated criteria to identify genuine security threats, evidence of serious crimes, and persons in need of protection or assistance.

The Ministry of Human Rights and Disaster Management, supported by the international community, prepared a policy framework and action plan addressing the rehabilitation and reintegration of ex-combatants, but this has not been approved.¹² The Government also promised other policy and regulatory measures for the identification, rehabilitation or prosecution of detainees, but such measures have either not emerged or been insufficient to address the human rights issues addressed below. While piecemeal information has emerged, there is to date no overall coherent framework that addresses the rights of detainees in accordance with international law and standards.

B How many detainees are there?

It is estimated that about 12,000 individuals were arrested and detained during the final months and immediate aftermath of the end to military conflict in May 2009, including many who had at most a tenuous link to the LTTE and others who had been subjected to forced conscription during the latter stages of the conflict. Some of these detainees, including children, were taken selectively from the mass internment camps that once held up to three-

⁸ Interview with detainees, January 2010. One detainee had counted 103 people with no LTTE involvement, and 268 with 'very little' involvement at Pompaimadu camp for 'surrendees'.

⁹ United Nations Mission Report, Visit of Major General (ret.) Patrick Cammaert, UN Special Envoy of the Special Representative for Children & Armed Conflict to Sri Lanka, 05-11 December 2009, p. 7. [http://www.reliefweb.int/rw/RWFfiles2010.nsf/FilesByRWDocUnidFilename/SNAA-83W4HH-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFfiles2010.nsf/FilesByRWDocUnidFilename/SNAA-83W4HH-full_report.pdf/$File/full_report.pdf)

¹⁰ Interview with detainee, January 2010 and interview with humanitarian aid worker, February 2010.

¹¹ HRW, *Trapped and mistreated – LTTE abuses against civilians in the Vanni*, December 2008.

¹² Both the Framework and Action Plan have a key omission: a legal framework governing the rehabilitation and reintegration process that complies with Sri Lanka's international human rights law obligations. See section D, below, for a discussion regarding both documents.

hundred thousand internally displaced, now reduced in number through the long-awaited process of return that began in October 2009. At least 565 children appear to have benefitted from emergency regulations (1580/5 of 15 December 2008) that led to their separation from the adult population approximately one year ago. These children were released in recent months following close international monitoring by UNICEF and other organizations. This is a welcome development, and the Government's interest in locating and releasing the detained children won praise from a number of international aid workers interviewed for this report.¹³ However, since the Sri Lanka Government has not provided independent observers complete and consistent access to the adult detention centres, it is unclear as to whether any of the current detainees were children at the time of their alleged association with the LTTE.

As of the end of July 2010, more than one year after the military defeat of the LTTE by the SLA, it was estimated that up to 8,000 adults were being held in at least a dozen centres for 'rehabilitation' on the basis of alleged links with the LTTE. At least 1300 others have been identified as "hard-core" LTTE and who have been designated by the Government of Sri Lanka to face criminal prosecution; of these approximately 700 are in a special detention centre in Omanthai.¹⁴ Approximately 3,000 detainees had been released in the past year.¹⁵ Most of these individuals were arrested in April and May 2009, during the final stages of the conflict between the SLA and LTTE.

Statements by the Government regarding the number of detainees held have been inconsistent. In November 2009, the then Commissioner General for Rehabilitation (CGR) indicated that 10,992 'surrendees' were under his custody.¹⁶ Several weeks later, the Sri Lankan Permanent Representative to the United Nations stated that 12,700 'former combatants' had been identified amongst the IDPs.¹⁷ Informally, the previous CGR had spoken of a figure of 12,000 detainees, most recently on 2 February 2010.¹⁸ Yet in a later press interview, his successor quoted a figure of 10,732 individuals under his custody.¹⁹

An authoritative, independent account of the number of detainees is not available. The Sri Lankan Government has not permitted systematic monitoring by an independent body. The screening process by which IDPs

¹³ Interviews with international aid workers, August 2010. These interviewees agreed to speak with ICJ on condition of non-attribution to preserve confidentiality and security.

¹⁴ Interviews with humanitarian aid workers, July 2010.

¹⁵ Interviews with humanitarian aid workers, July 2010.

¹⁶ This figure, along with a breakdown of 8,894 males and 2,098 females, including children, was presented to donors by the then CGR, General Daya Ratnayake, during a meeting hosted by the Minister of Justice on 16 November 2009.

¹⁷ Asia Tribune, 5 December 2009, "The Elders statement on IDPs in Sri Lanka – Sadly outdated and inaccurate – Dr. Kohona", <http://www.asiantribune.com/news/2009/12/05/elders-statement-idps-sri-lanka-sadly-outdated-and-inaccurate-%E2%80%93-dr-kohona> (accessed on 27 July 2010).

¹⁸ Interview with humanitarian aid worker, March 2010.

¹⁹ The Sunday Observer, 28 February 2010, "Businessmen, Tamil diaspora should help rehabilitation" <http://www.sundayobserver.lk/2010/02/28/fea03.asp> (accessed 27 July 2010). This lower figure may have taken into account the release of disabled and injured detainees.

were triaged at reception centres, internment camps and other locations has lacked sufficient accountability or transparency. The government has failed to inform the Human Rights Commission of Sri Lanka of all detentions within 48 hours of the event, as required by law.²⁰ The Commission has in fact been denied access to the internment camps, including the 'surrendee' camps.

Although the ICRC had access to the 'surrendee' camps until early July 2009, and was able to register close to 10,000 detainees by that time, there was no independent protection monitoring of the detainees in their places of detention through to July 2010.²¹ During this period, transfers between the CGR-administered 'surrendee' camps and other places of detention appeared to be ongoing.²² The ICRC was denied full access, a key measure of the willingness of the Government to abide by international law and standards. As noted earlier, as of July 2010, the best available information suggests approximately 8,000 detainees in 'rehabilitation' centres, at least 1300 others already separated to face criminal charges, and 3,000 released, including minors. However, conditions are not in place for the creation and maintenance of a complete, accessible and reliable registry of detainees.

C What happens in the 'surrendee' camps?

The screening process continued after transfer to 'surrendee' camps. Interrogations were conducted by the army (including the Military Intelligence Corps in at least one camp), the TID and CID.²³ Detainees were asked to sign three or four documents in Sinhala. Many are exclusively Tamil speaking and did not understand the meaning of these documents.²⁴

Although the detainees believed that they were deprived of their liberty for alleged links with the LTTE, authorities had not individually informed them of the reason for their detention.²⁵ Those released on 15 January 2010 were not informed of the basis of either detention or release.²⁶ Those remaining in the camps had not been informed of the duration of their detention, nor the conditions for their release.²⁷ Detainees expressed anxiety over the uncertainty surrounding their future.²⁸

²⁰ See the Human Rights Commission of Sri Lanka Act No 21 of 1996 (Section 28). In addition, a Presidential Directive of July 1997 to the heads of the armed forces and the police require detaining authorities to issue "arrest receipts". Such receipts have not been consistently issued to all the detainees suspected of LTTE links.

²¹ ICRC, "Sri Lanka: ICRC continues to respond to humanitarian needs"

<http://www.icrc.org/web/eng/siteeng0.nsf/html/sri-lanka-update-180210> (accessed 27 July 2010).

²² See, for example, TamilNet, 24 February 2010: "54 women detainees taken to Boosa prison from detention camps in Vavuniyaa". Interview with humanitarian aid worker, March 2010.

²³ Interviews with detainees, January 2010. Detainees interviewed in this sample could recall more than ten individual interrogations during their stay in the 'surrendee' camp.

²⁴ Interviews with detainees, January 2010.

²⁵ Interviews with detainees, January 2010.

²⁶ Interviews with detainees, January 2010. Detainees speculated that those who had done 'small things' with the LTTE were being released.

²⁷ Interviews with detainees, January 2010.

²⁸ An aid worker who has had access to the 'surrendee' camps stated that "the first question people ask when you go into the camp is when will they be let out." Interview with humanitarian aid worker, March 2010.

In spite of the Government's designation of the detainees as 'rehabilitees', it was unclear whether 'rehabilitation' was actually taking place in the 'surrendee' camps. Only a third of detainees were actually undergoing rehabilitation-related activities, which appeared to vary from camp to camp, and which included vocational training, secondary education, and Buddhist meditation.²⁹ Since security screening continued in the 'surrendee' camps, it was clear that the designation of 'rehabilitee' did not necessarily mean participation in rehabilitation. The law provides for a continuing risk of criminal prosecution, as set out below.

Conditions in the camps were reported to be cramped and unhygienic but not life-threatening, a basic benchmark used by humanitarian agencies.³⁰ Following the termination of food aid from the World Food Program (WFP) for the detainees in December 2009, the SLA was supplying food to the detention camps, and detainees reportedly had access to limited medical attention.³¹

As of February 2010, the adult detainees under the custody of the CGR were being kept in 16 locations, most of them in the Northern Province.³² Referred to alternately as 'temporary accommodation centres' and 'rehabilitation centres' by the Bureau of the CGR, many of these camps were educational institutions requisitioned in order to accommodate the detainees. As of July 2010, reliable reports indicated a dozen 'Protective Accommodation and Rehabilitation Centres' (PARC), most of which had been gazetted as places of detention.³³

In spite of the emergence of more specific details over the period of more than a year, the ICJ remains concerned that the existing detention regime violates international legal standards and creates a legal black hole in which detainees are vulnerable to serious violations. These concerns are more than justified when set against the well-documented history of arbitrary detention, torture and other ill-treatment, extra-judicial killings and enforced disappearances in Sri Lanka. In addition to testimony regarding torture and ill treatment, some family members expressed concern regarding the possible enforced disappearance of detainees whom they were unable to locate.³⁴

²⁹ AFP, 9 January 2010, "Sri Lanka on Saturday released more than 700 former Tamil Tiger fighters from military custody following a rehabilitation program, an official said".

³⁰ Various interviews with humanitarian aid workers, Colombo, February 2010.

³¹ Some LKR 88million is reportedly spent by the army on food for the detainees. See Sunday Observer, February 2010, "Businessmen, Tamil diaspora should help rehabilitation".

³² These are: Pompaimadu Campus Hostel Centre; Technical College (Vavuniya); Kandapuram Maha Vidyalaya; Tamil Primary College; Rambakulam H/F Convent; Kovilkulam Maha Vidyalaya; Vellikulam Muslim Girls College; Co-op Training Centre, Poonthotham; Omanthai Maha Vidyalaya; Mudaliyarkulam R/C Tamil Mix School; Pompaimadu Zone 1; Thellipallai Centre; Kalithaddy Centre; Welikanda Centre; Zone 6B, Manik Farm; and Maradamadu.

³³ The gazetted PARCs are in Thellipallai and Welikanda. The Technical College (Vavuniya) was gazetted as a police detention centre under emergency regulations 19 and 21 by the Inspector General of Police on 8 February 2010.

³⁴ Human Rights Watch, *Legal Limbo The Uncertain Fate of Detained LTTE Suspects in Sri Lanka*, February 2010, pp. 10-14.

D Legal and Policy Framework

Two grounds for administrative detention under Sri Lankan law appear to have been applied to these detainees, although the Government has never fully and publicly clarified their legal status: (i) preventive detention on the basis of security threats and (ii) compulsory participation in 'rehabilitation'. These powers are found in temporary emergency regulations (ER 2005, as amended, and ER 2006) issued by the executive pursuant to exceptional emergency powers under the *Public Security Ordinance* (s. 5) of 1947, as amended.³⁵ These regulations lapse with the state of emergency and otherwise must be renewed by parliament (when beyond 14 days) on a monthly basis. However, Sri Lanka's Parliament has never blocked the extension of a state of emergency or otherwise exercised statutory power by which any emergency regulation may be "added to, or altered or revoked by resolution of the House of Representatives".³⁶ Thus the state of emergency continued unabated after the end of the armed conflict and associated acts of terrorism. Even without a state of emergency, preventive detention is provided for as a counter-terrorism measure under the PTA.

These laws and their application give rise to serious human rights violations that are the subject of previous ICJ reports.³⁷ Their specific application in the case of currently detained LTTE suspects is taken up in further detail below in Part III. The detainees appear to have been subjected to screening on the basis of future security threats or past criminal activity (ER 2005, regulation 19; PTA, s.9) and to treatment as 'rehabilitees' deemed to have surrendered (ER 2005, regulation 22, as amended by ER 1462/8, 12 September 2006).

On 9 June 2010 the Government of Sri Lanka notified the UN Secretary General that it had terminated the derogations to articles 9(2), 12, 14(3), 17(1), 19(2), 21 and 22(1) of the ICCPR, previously notified on 30 May 2000 pursuant to a declaration of a state of public emergency. The derogation made to article 9(3), however, remained in effect. Article 9(3) provides that: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."

In October 2009, the Government of Sri Lanka presented an "Action Plan for the Reintegration of Ex-combatants" ('Action Plan'). It set out a process by which up to 15,000 former LTTE combatants would be rehabilitated and reintegrated into civilian life. The plan set out a two-stage process. The first

³⁵ *Public Security Ordinance 1947* ('PSO'); *Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2005* ('ER 2005'); *Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 of 2006* ('ER 2006').

³⁶ PSO (1947), s. 5(3). See also R. Coomaraswamy and C. Reyes, *Rule by emergency: Sri Lanka's post-colonial constitutional experience*, *International Journal of Constitutional Law* 2004 2(2), pp. 272-295.

³⁷ See, eg. International Commission of Jurists, *Sri Lanka: Briefing Paper - Emergency Laws and International Standards*, March 2009.

stage was to consist of three to 24 months of rehabilitation in a Protective Accommodation and Rehabilitation Centre (PARC). The period of rehabilitation depended on the ex-combatants' level of involvement with the LTTE and progress in rehabilitation. The second stage was to be a period of community-based socio-economic reintegration.

As of July 2010, the Action Plan had not received cabinet approval and was therefore not operational. It was unclear whether cabinet approval would be obtained, given that the Action Plan did not appear to have the support of key actors in government.³⁸ Moreover, the establishment of the legal framework for implementing the Action Plan and processing the detainees, which is the responsibility of the Attorney General, remained incomplete.³⁹

In December 2009, the CGR made available a two-page document prepared by the Attorney General's office, outlining a legal framework for the surrender, rehabilitation and reintegration of ex-combatants based on regulation 22 of ER 2005.⁴⁰ The document had no legal status, and therefore could not be considered to constitute a binding legal framework. Nevertheless, it gave some indication of the Government's approach, and raised a number of serious human rights concerns, including: 1) the mandatory and involuntary nature of rehabilitation, which involves the deprivation of liberty of the 'rehabilitee' and may amount to individual and collective punishment without criminal conviction; 2) the denial of the right to challenge the detention and rehabilitation; 3) the duration of up to two years' detention without charge or trial or access to legal representation (with no indication whether time already spent in the 'surrendee' camps counts towards rehabilitation); and 4) the failure to address legal grounds for possible amnesty for ex-combatants (the parameters set out are based on humanitarian considerations exclusively, and are not in relation to criminal offences).⁴¹

Beyond these human rights concerns, international best practice indicates that successful demobilisation and reintegration programmes should be clear on a series of key process issues: eligibility criteria (including the crucial distinction between the specific needs of individual children and the adult population), the definition of target groups and timeframes, links with transitional justice mechanisms, and formal approval through ordinary lawmaking procedures.⁴²

³⁸ The Minister of Justice and Defence Secretary, under whose authority these detentions fall, reportedly have reservations over the Action Plan, which was developed under the leadership of the Minister of Disaster Management and Human Rights. Various interviews with diplomats and government officials, November – February 2010.

³⁹ See National Action Plan, p. 5, and National Framework Proposal for Reintegration of Ex-Combatants into Civilian Life in Sri Lanka, Ministry of Disaster Management and Human Rights, 30 July 2009, p. 8

⁴⁰ Letter dated 24 December 2009 from the Commissioner General for Rehabilitation, to the Chief of Mission of IOM, annexing a letter from the Attorney General to the CGR, dated 21 December 2009, entitled 'Legal Frame Work for the Rehabilitation and Re Integration of Ex Combatants [sic]'.

⁴¹ *Id.*

⁴² United Nations: Integrated Disarmament, Demobilisation and Reintegration Standards (IDDRS), 3.30 National Institutions for DDR, 2006, p. 4-5.

While not addressing these concerns comprehensively, the Ministry of Justice and the Bureau of the CGR did develop a series of proposals for processing the suspected LTTE combatants. By March 2010, these proposals included the release of detainees who were disabled or injured (1,158 released in April prior to parliamentary elections); the release of some 140 university students to pursue their studies under the supervision of the CGR; the co-location of detained spouses, who were to undergo six months of rehabilitation together in detention sites dubbed 'family parks'; and the establishment of 'peace villages', which would involve the relocation of detainees' dependents to camps adjoining detainee detention sites. Dependents would reportedly have freedom of movement in and out of camps.⁴³

Detainees deemed to be 'low risk' reportedly would be released; the remaining detainees would either face prosecution or undergo 'rehabilitation'.⁴⁴ There are no clear criteria for distinguishing between those subject to prosecution and those to be 'rehabilitated' beyond the legal provision granting full prosecutorial discretion to the Police upon receiving authorization from the Defence Secretary (see section B(ii)(a), below). As of July 2010, it appeared that low risk individuals could be considered released, and that those remaining in detention faced either an indefinite period of rehabilitation or prosecution.

In spite of failing to design and implement an adequate framework consistent with international obligations, the government made known to the donor community its need for funding to support rehabilitation-related activities, including the construction of camp infrastructure, the transportation of detainees between 'surrendee' camps, and the socioeconomic 'profiling' of the detainees, with a view to identifying their reintegration needs.⁴⁵

A profiling exercise would not meet the standard of a required protection monitoring. This can only be credibly conducted by an agency with a mandate, expertise and capacity for protection-related work. Gathering personal information through profiling raises the issue of the accountability of the interviewer to the interviewee, and the nature of assistance flowing from that engagement.⁴⁶ Without clarity on the legal status of the detainees and respect for their rights, there is a risk that information gathered would be used against detainees in administrative or judicial proceedings and lead to further violations related to rights to liberty, security due process and fair trial.⁴⁷

⁴³ Interviews with humanitarian aid agency, February 2010.

⁴⁴ Various interviews, Colombo, January – February 2010. The number of people to be released and prosecuted is unclear, as is the criteria used to determine the categorisation.

⁴⁵ Donors have reportedly been approached by the Minister for Disaster Management and Human Rights, seeking funding for the National Action Plan, and by the Minister of Justice, seeking funding for rehabilitation and reintegration activities to be conducted by the Commissioner General for Rehabilitation. The IOM has taken steps to initiate profiling of detainees.

⁴⁶ It is worth noting, in this regard that, although the IOM profiled 1,324 disabled and injured detainees on 4-8 March 2010, only 1,158 of these individuals were actually released.

⁴⁷ The IOM has reportedly taken this risk into account in limiting the kind of information gathered while carrying out socioeconomic profiling.

More generally, the ICJ has been concerned that, without a public and effective framework setting out lawful parameters for rehabilitation and reintegration, any support is *ad hoc* and piecemeal, without due regard for international policy and best practice in disarmament, demobilisation and reintegration (DDR). In fact, the lack of transparency and accountability engendered through an *ad hoc* approach will tend to heighten mistrust and detract from a sustainable political settlement. International support to such a process would potentially implicate the donors in enabling violations of international law and human rights, and thereby undermine the prospects for a viable national reconciliation based on rule of law.

III APPLICABLE LAW

International human rights law provides the primary normative framework governing the ongoing detention of 'surrendees' and 'rehabilitees' in Sri Lanka. International humanitarian law in non-international armed conflict is contested regarding internment and detention, as there are few express rules in IHL treaty sources.⁴⁸ However, in the situation obtaining in Sri Lanka, where hostilities in the non-international armed conflict have ceased for more than one year, international human rights law is in any case the relevant legal regime applied in respect of detention and the related rights to liberty, security, fair trial, the rights of women and children, and the prohibition against torture and cruel, inhuman or degrading treatment guaranteed under the *International Covenant on Civil and Political Rights* (ICCPR).

Sri Lanka ratified the ICCPR in 1980 and in 1997 ratified the First Optional Protocol, allowing for alleged victims of violations to bring individual complaints to the Human Rights Committee. This treaty is recognized in Sri Lankan domestic law,⁴⁹ justiciable by Sri Lankan courts,⁵⁰ and otherwise

⁴⁸ More generally, international human rights law continues to apply during armed conflict, playing a role complementary to more specialized international humanitarian law provisions where available and applicable. The International Court of Justice has affirmed that:

[...] the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet other may be matters of both these branches of international law (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. (July 9), at para. 106).

The UN Human Rights Committee, along similar lines, has affirmed that:

[...] the [ICCPR] applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive (Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), at para. 11).

⁴⁹ Including the *International Covenant On Civil and Political Rights (ICCPR) Act*, No. 56 OF 2007, Supplement to Part II of the Gazette of the Democratic Socialist Republic of Sri Lanka of November 16, 2007.

⁵⁰ The Supreme Court of Sri Lanka in March 2008 overruled its 2006 *Singarasa* decision in holding that the ICCPR is justiciable by domestic courts, responding to the President's request for an opinion under article 129 of the Constitution in light of risks posed to preferential trade with the EU ('GSP+') by the earlier decision. The ICCPR does not require domestic incorporating legislation, nor consider that such legislation is always sufficient. It is up to States Parties to decide on the method of implementation, but this should guarantee both respect and protection of rights. *Human Rights Committee General Comment 3, Implementation at the National Level*, 29 July 1981. Article 27 of the *Vienna Convention on the Law of Treaties* establishes that a State Party cannot invoke the provisions of its national law as justification for its failure to perform its international obligations.

applicable to the extent that many of its guarantees have become rules of customary international law.

Part III outlines (A) the right to liberty and security under international law applicable to Sri Lanka; and (B) the related violations arising from the Sri Lankan government's current practice of administrative detention of 'surrendees' for eventual release, rehabilitation or criminal charges.

A International Human Rights Law

i. The Right to Liberty and Security

Detention is the deprivation of a person's liberty. The primary permissible basis for a lawful deprivation of liberty, with narrow and limited exceptions, is the enforcement of criminal law. The International Covenant on Civil and Political Rights (ICCPR), to which Sri Lanka is a party, provides for the obligation (under article 9) of states to respect and protect the right to liberty, including by ensuring that any such deprivation is not arbitrary.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

The UN Human Rights Committee, pursuant to its mandate under the ICCPR, provides authoritative interpretations of the ICCPR and monitors compliance by States parties. Its views contain the authoritative statement of the states parties' obligations under the ICCPR. The Committee has considered many cases involving alleged breaches of obligations under article 9. In so doing, the Committee has clarified the scope of two key criteria stated in article 9(1): that arrest and detention must be lawful and not arbitrary, and that there is an enforceable right to reparation for violations of this right.

'Lawful'

The grounds and procedures for arrest and detention must be prescribed by law (ICCPR, art. 9(1)),⁵¹ meaning that the law must be accessible understandable, non-retroactive, applied in a consistent and predictable way to everyone equally, including authorities, and be consistent with other applicable law. Lawfulness under the ICCPR relates to both domestic and international legal standards.⁵²

'Not arbitrary'

Lawfulness is a necessary but insufficient condition to satisfy the requirements of ICCPR article 9. Deprivations of liberty "must not only be lawful, but also reasonable and necessary in all the circumstances".⁵³

The criteria of reasonableness and necessity relate both to the substantive nature of the law and to procedural safeguards, as set out below.

Procedural safeguards

The following safeguards apply at all times, including during proclaimed states of public emergency (under ICCPR article 4).

- **Inform detainee.** Detainees must be promptly informed of the grounds for arrest and detention (ICCPR, art. 9(2)) and of their rights and how to avail themselves of those rights, including safeguards against torture or ill-treatment.⁵⁴ Indefinite detention without charge is prohibited.⁵⁵
- **Inform others.** Incommunicado detention is forbidden and detainees

⁵¹ It is worth recalling the emphasis of the Human Rights Committee on "maintenance of the principles of legality and rule of law" as especially important and needed during states of emergency. Human Rights Committee, General Comment No. 29 – States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 2. The Committee states further: "When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with article 4. In order that the Committee can perform its task, States parties to the Covenant should include in their reports submitted under article 40 sufficient and precise information about their law and practice in the field of emergency powers."

⁵² See *Report of the Working Group on Arbitrary Detention, Addendum, Mission to China*, (2004) UN Doc. E/CN.4/2005/6/Add.4, para. 54.

⁵³ Communication No. 305/1988, *Case Hugo van Alphen vs The Netherlands*, CCPR/C/39/D/305/1988, 15 August 1990, para. 5.8. See also Communication N° 631/1995, *Case Aage vs Norway*, para. 6.3 (CCPR/C/67/D/631/1995), 5 November 1999; Communication N° 458/1991, *Case Albert Womah Mukong vs. Cameroon*, (CCPR/C/51/D/458/1991), 21 July 1994, para. 9(8); Communication No 560/1993, *Case A (name deleted) vs. Australia*, UN Doc. CCPR/C/59/D/560/1993, 3 April 1997, para. 9.2.

⁵⁴ *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/2004/56, 23 December 2003, para. 30-33, affirming and elaborating on principles 13 and 14 in *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, A/RES/43/173, 9 December 1988. The prohibition against torture and procedures to enforce this prohibition are non-derogable rights of detainees.

⁵⁵ *Concluding observations of the Human Rights Committee - Zambia*, CCPR/C/79/Add.62, 3 April 1996, para. 14, regarding two journalists "held in indefinite detention before release, contrary to the provisions of article 9 of the Covenant."

must be kept in a recognized place of detention.⁵⁶ “In all circumstances, a relative of the detainee should be informed of the arrest and place of detention within 18 hours.”⁵⁷ Registries of both detainees and responsible officials must be accessible to those concerned, including doctors, lawyers, relatives and friends.⁵⁸

- **Facilitate access to lawyer.** A detainee must be given prompt and regular access to legal counsel within 24 hours of arrest.⁵⁹
- **Ensure judicial control.** A detainee must be brought promptly before a judge or other competent authority (ICCPR, art. 9(3)) and has a right to have a court determine the lawfulness of the detention (ICCPR, art. 9(4)).⁶⁰ The *habeas corpus* remedy must not be limited under any circumstances.⁶¹

⁵⁶ Human Rights Committee, *General Comment No 20: concerning prohibition of torture and cruel treatment or punishment*, para 11. “To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against *incommunicado* detention. In that connection, States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.” See also *Concluding Observations of the Human Rights Committee - Nigeria*, CCPR/C/79/Add.64, 3 April 1996, para. 7, stating: “*incommunicado* detention for an indefinite period and the suppression of *habeas corpus* constitute violations of article 9 of the Covenant.”

⁵⁷ *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/2004/56, 23 December 2003, para. 31. See also, E/CN.4/2003/68, para. 26 (g). See also *Report of the Special Rapporteur*, UN Doc A/57/173, of 2 July 2002, para. 16-17.

⁵⁸ Human Rights Committee, *General Comment No 20: concerning prohibition of torture and cruel treatment or punishment*, para 11. Principle 15, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, A/RES/43/173, 9 December 1988.

⁵⁹ Principles 15, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, A/RES/43/173, 9 December 1988; Human Rights Committee, *General Comment No 20: concerning prohibition of torture and cruel treatment or punishment*, para 11; *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/2004/56, 23 December 2003, para. 32, citing Commission on Human Rights Resolution 1994/37; Human Rights Committee, *Concluding observations of the Human Rights Committee - Israel*, CCPR/CO/78/ISR, 21 August 2003, para 13. In paragraph 12 of the latter report, the Committee examined Israel’s emergency derogation practices, expressing concern regarding “the frequent use of various forms of administrative detention”, including “restrictions on access to counsel”, that endanger “the protection against torture and other inhuman treatment prohibited under article 7 and derogating from article 9 more extensively than what in the Committee’s view is permissible pursuant to article 4.”

⁶⁰ *Body of Principles on Detention*, Principles 11, 32, 37; *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/2004/56, 23 December 2003, para. 39; Human Rights Committee, *Concluding Observations of the Human Rights Committee - Nigeria*, CCPR/C/79/Add.64, 3 April 1996, para. 7, stating: “*incommunicado* detention for an indefinite period and the suppression of *habeas corpus* constitute violations of article 9 of the Covenant.” See also *Concluding observations of the Human Rights Committee - Israel*, CCPR/CO/78/ISR, 21 August 2003, para 12, where the Committee expressed concern regarding “the frequent use of various forms of administrative detention particularly for Palestinians from the Occupied Territories entailing restrictions on access to counsel and to full reasons of the detention. These features limit the effectiveness of judicial review, thus endangering the protection against torture and other inhuman treatment prohibited under article 7 and derogating from article 9 more extensively than what in the Committee’s view is permissible pursuant to article 4.” Regarding these rights during states of emergency, the Human Rights Committee, *General Comment No. 29: States of Emergency* (article 4), para. 15, states that “The presumption of innocence must be respected. In order to protect non-derogable rights [including the right to life; the prohibition against torture, inhuman or degrading treatment; prohibition against discrimination; the principle of legality; recognition of everyone as a person before the law; freedom of thought conscience and religion], the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant.”

⁶¹ During non-international armed conflict, the right to fair trial continues with all judicial guarantees. See ICRC,

Any delay of judicial scrutiny beyond 48 hours would be hard to justify under international law.⁶²

- **Provide humane treatment.** All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person (ICCPR, art. 10)⁶³ and to have access to prompt medical care.⁶⁴
- **Ensure right to fair trial.** If charges are brought, the detainee is entitled to a fair trial by a competent, independent and impartial tribunal established by law within a reasonable time or release (ICCPR, art. 9(3), art. 14).⁶⁵ The trial must be conducted in accordance with internationally accepted fair trial standards.⁶⁶

Additional considerations apply if administrative (or preventive) detention is invoked by a State, as discussed below.

ii. Administrative/ Preventive Detention

Preventive detention is a form of administrative deprivation of liberty ordered by the executive branch of the Government without any judicial

Rule 100. With regard to international human rights law in general, see UN Human Rights Committee, General Comment No. 29, paras. 14 and 16; Concluding Observations of the Human Rights Committee: Japan, CCPR/C/79/Add.102, 19 November 1998, para. 24; Also see, among others, the Concluding Observations of the Human Rights Committee: Nigeria, CCPR/C/79/Add.64, para. 7; Views of 26 October 1979, Communication No. 9/1977, *Edgardo Dante Santullo Valcada vs. Uruguay*, CCPR/C/8/D/9/1977; Views of 29 July 1980, Communication No. 6/1977, *Miguel A. Millan Sequeira vs. Uruguay*, CCPR/C/10/D/6/1977; and Views of 27 March 1981, Communication No. 37/1978, *Esther Soriano de Bouton vs. Uruguay*, CCPR/C/12/D/37/1978; *Concluding Observations of the Human Rights Committee: Dominican Republic*, CCPR/CO/71/DOM, 26 March 2001.

⁶² See *Aksoy v Turkey*, European Court of Human Rights, Judgment of 18 December 1996, 23 EHHR 417; and *Concluding Observations of the UN Human Rights Committee on Thailand*, CCPR/CO/84/THA (13), 28 July 2005 (Advanced Unedited Version).

⁶³ ICCPR, art. 10. See also Human Rights Committee, *General Comment No. 29 – States of Emergency* (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 13(a).

⁶⁴ *Body of Principles on Detention*, Principle 24; *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/2004/56, 23 December 2003, para. 42.

⁶⁵ Human Rights Committee, *Concluding Observations of the Human Rights Committee - Jordan*, 10 August 1994, CCPR/C/79/Add.35, section 4, expressing concern about administrative detention and prolonged pre-trial detention without charge; *Concluding observations of the Human Rights Committee: Viet Nam*, 5 August 2002, CCPR/CO/75/VNM, para. 8, expressing concern regarding prolonged administrative detention (referred to by State as 'probation') and recommending "that no persons are subjected to arbitrary restriction of their liberty and that all persons deprived of their liberty are promptly brought before a judge or other officer authorized to exercise judicial power by law, and that they can only be deprived of their liberty on the basis of a judgement based on law, as required by article 9, para. 3-4, of the Covenant". See also *Concluding observations of the Human Rights Committee - Cameroon*, CCPR/C/79/Add.116, 4 November 1999, para. 19, expressing concern about the "indefinite extension" of administrative detention without remedy by way of appeal or *habeas corpus*. Regarding these rights during states of emergency, see Human Rights Committee, *General Comment No. 29: States of Emergency* (article 4), para. 16: "The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected."

⁶⁶ ICCPR, article 14; *Human Rights Committee, General Comment 32*, para. 6: "While article 14 is not included in the list of non-derogable rights of article 4, para. 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights."

authorization or criminal charges.⁶⁷ In many instances, the detainee may not even be suspected of criminal conduct. Under certain forms of preventive detention the detainee is held for purposes on the assumption that he or she poses a future threat to national security or public safety. In other cases, not considered here or relevant to this discussion, an individual may be preventively detained in order to address other risks (for example, of inflicting harm due to mental illness, flight from immigration proceedings, or of failure to appear in court).

Preventive detention, as a general matter, is a practice anathema to respect for human rights under the rule of law, creating conditions not only for arbitrary detention but related human rights violations. For this reason, the UN Special Rapporteur on Torture in 2002 concluded that "countries should consider abolishing, in accordance with relevant international standards, all forms of administrative detention."⁶⁸ Similarly, the ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights concluded the following in 2006 after extensive international deliberations and public hearings:

States should repeal laws authorising administrative detention without charge or trial outside a genuine state of emergency; even in the latter case, States are reminded that the right to *habeas corpus* must be granted to all detainees and in all circumstances.⁶⁹

In other words, to the extent that a state may resort to preventive detention, they should only do so to the extent strictly necessary to meet a threat to the life of a nation, and then only during a properly declared state of emergency pursuant to Article 4 of the ICCPR.

Security justifications are alleged in many of the preventive detention cases examined by the Human Rights Committee. The Committee has not looked favourably on purported security concerns as a ground to undermine the right to liberty and has generally found the practice of preventive detention to be in breach of the state party's obligations under article 9 of the ICCPR. The Committee has, for example, determined that preventive detention is arbitrary and a breach of article 9 as a State could not show "that other, less intrusive, measures could not have achieved the same end,"⁷⁰ or that "it is not necessary in all the circumstances of the case and proportionate to the ends sought".⁷¹ The Committee has also been emphatic that the totality of ICCPR article 9 procedural safeguards applies even when there is "a clear and serious threat to society which cannot be contained in any other manner" except through preventive detention.⁷²

⁶⁷ This does not include pre-trial detention or cases where criminal charges are about to be made.

⁶⁸ *Report of the Special Rapporteur*, UN Doc E/CN.4/2003/68, 17 December 2002, para. 26 (h).

⁶⁹ International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, p.19.

⁷⁰ Human Rights Committee, Communication 1069/2002, *Bakhtiyari v. Australia*, CCPR/C/79/D/1069/2002, 29 October 2003, para. 9.3.

⁷¹ Human Rights Committee, Communication 1324/2004, *Shafique v. Australia*, CCPR/C/88/D/1324/2004, 13 November 2004, para. 7.2.

⁷² Human Rights Committee: *David Alberto Cámpora Schweizer v Uruguay*, (1982) Communication No. 66/1980, para. 18.1. See also: *Concluding Remarks on New Zealand*, (1995) UN Doc. CCPR/C/79/Add. 47, para. 14; *Comments on Jordan*, (1994) UN Doc. A/49/40, para. 241; *ICCPR General Comment 8*, para. 4.

The UN Working Group on Arbitrary Detention, mandated by the UN Human Rights Council to consider cases of arbitrary detention, has similarly held the practice to be generally incompatible with international human rights law. In 2009, the Working Group declared administrative detention to be inadmissible in relation to persons suspected of terrorism-related conduct.⁷³ Much earlier, in 1993, the Working Group examined the use of administrative detention and concluded that it is arbitrary on procedural grounds if fair trial standards are violated. The Working Group also found that administrative detention to be “inherently arbitrary” where it was, de jure or de facto, of an indefinite nature; for example, through the repeated extension of definite periods, or if release is linked to progress in ‘rehabilitation’ (in practice, usually through performance of coercive labour). It was also “inherently arbitrary” where the objective was “mainly political and cultural rehabilitation through self-criticism,” constituting a “flagrant” violation of ICCPR rights against self-incrimination (art. 14) and to freedom of thought (art. 18).⁷⁴

Preventive detention is frequently associated with other violations, including torture and other cruel, inhuman or degrading treatment, enforced disappearance, and extrajudicial killings. The Special Rapporteur on Torture observed in 2002 that, “administrative detention often puts detainees beyond judicial control” where they are vulnerable to torture and other violations.⁷⁵

The widespread use of preventive detention also poses a danger beyond the violation of rights in individual cases. In particular, the danger arises that detention without charge may erode and even displace the normal criminal justice system. The effect over the long term is to undermine the institutionalization of principles of legality and the rule of law. The ICJ Eminent Jurists Panel, after reviewing extensive evidence from hearings conducted in 16 countries, warned in its report: “States appear to rely

⁷³ *Report of the Working Group on Arbitrary Detention*, A/HRC/10/21, 16 February 2009, para. 54. The Working Group sets out the following principles for the detention of persons accused of terrorism: “(a) Terrorist activities carried out by individuals shall be considered as punishable criminal offences, which shall be sanctioned by applying current and relevant penal and criminal procedure laws according to the different legal systems; (b) **Resort to administrative detention against suspects of such criminal activities is inadmissible**; (c) The detention of persons who are suspected of terrorist activities shall be accompanied by concrete charges; (d) The persons detained under charges of terrorist acts shall be immediately informed of them, and shall be brought before a competent judicial authority, as soon as possible, and no later than within a reasonable time period; (e) The persons detained under charges of terrorist activities shall enjoy the effective right to habeas corpus following their detention; (f) The exercise of the right to habeas corpus does not impede on the obligation of the law enforcement authority responsible for the decision for detention or maintaining the detention, to present the detained person before a competent and independent judicial authority within a reasonable time period. Such person shall be brought before a competent and independent judicial authority, which then evaluates the accusations, the basis of the deprivation of liberty, and the continuation of the judicial process; (g) In the development of judgements against them, the persons accused of having engaged in terrorist activities shall have a right to enjoy the necessary guarantees of a fair trial, access to legal counsel and representation, as well as the ability to present exculpatory evidence and arguments under the same conditions as the prosecution, all of which should take place in an adversarial process; (h) The persons convicted by a court of having carried out terrorist activities shall have the right to appeal against their sentences.

⁷⁴ Deliberation N° 4, in *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/1993/24, Conclusions at III.B. See also *Report of the Working Group on Arbitrary Detention - Visit to the People's Republic of China*, UN Doc. E/CN.4/1998/44/Add.2, para. 80-99 and 109.

⁷⁵ *Report of the Special Rapporteur*, UN Doc E/CN.4/2003/68, 17 December 2002, para. 26 (h).

increasingly on administrative detention as a preventive measure instead of seeing the measure as exceptional and temporary, and necessarily linked to a genuine emergency".⁷⁶

A measure of the seriousness of the violations posed by the widespread use of preventive detention is the Rome Statute of the International Criminal Court, which provides that "imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law", when committed "as part of a widespread or systematic attack directed against any civilian population" is a crime against humanity.⁷⁷

Administrative detention may, under narrow circumstances, be sought through a derogation from article 9 pursuant to a national emergency. For such a derogation to be ICCPR compliant the emergency must arise from a situation that constitutes a threat to the life of the nation and the state must make a formal proclamation of a state of emergency under the provisions of ICCPR article 4.

During a state of emergency, temporary derogations from certain rights are permissible, subject to strict conditions, including the ICCPR article 9 right to liberty and security of the person. The following principles are applicable to the use of emergency measures in derogation of ICCPR rights during states of public emergency formally declared under ICCPR article 4. Cutting across these principles is the non-derogable right of all persons without discrimination to a remedy for violations of the ICCPR, even during situations of armed conflict.⁷⁸

- *Principles of legality and primacy of the law.* The Constitution and law should set out the circumstances and substantive and procedural rules regulating states of emergency, including the proceedings and safeguards available to individuals whose rights are thereby affected.⁷⁹
- *Principle of legitimacy.* Derogation measures must serve the legitimate goal of responding to a public emergency that threatens the life of nation, must be the least restrictive means of achieving that goal, and must not be used to punish the legitimate exercise of fundamental rights or freedoms, such as freedoms of opinion, expression, assembly and association. A state of

⁷⁶ ICJ, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism, and Human Rights* (2009), p. 106.

⁷⁷ Article 7 of the *Rome Statute of the International Criminal Court*, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90.

⁷⁸ ICCPR, art. 2. In General Comment 31, the Human Rights Committee clarified that ICCPR applies in situations of armed conflict, when it complements international humanitarian law. *General Comment No. 31 - Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26/05/2004, CCPR/C/21/Rev.1/Add.13, para. 11.

⁷⁹ Human Rights Committee, *General Comment No. 29 - States of Emergency* (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 2: "When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with article 4. In order that the Committee can perform its task, States parties to the Covenant should include in their reports submitted under article 40 sufficient and precise information about their law and practice in the field of emergency powers."

emergency must be officially proclaimed (with notice to the UN Secretary General), of "an exceptional and temporary nature", and aimed at "restoration of a state of normalcy" as quickly as possible.⁸⁰

- *Principles of necessity and proportionality.* Any specific derogation measures taken pursuant to ICCPR article 4, based on a "careful analysis",⁸¹ must be necessary and proportionate to real and demonstrable threats to the life of the nation that give rise to the emergency situation, taking into account its "duration, geographical coverage and material scope".⁸² The derogation must be imperative where other non-derogating measures have proven to be insufficient or ineffective.
- *Principle of non-discrimination.* Derogation measures must not discriminate on grounds of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".⁸³

B Violations of International Law and Standards

The ICJ is concerned that the Government's 'surrender' and 'rehabilitation' regime subjects detainees to prolonged arbitrary detention and risks additional violations including torture and other ill treatment, enforced disappearance, extrajudicial killing, and the violation of due process and fair trial rights.

There are at least two applicable grounds for administrative detention under Sri Lankan law: (i) preventive detention on the basis of security threats and (ii) compulsory participation in 'rehabilitation'. These powers are found in temporary emergency regulations (ER 2005 and 2006) - that lapse with the end of a state of emergency - and in the more permanent counter-terrorism statute, the Prevention of Terrorism Act (1979). Both the laws and their application give rise to serious human rights violations.

i. Detainees as security threats

Sri Lanka has been governed under sweeping emergency powers since August 2005, as it was for much of the period from 1958 to 2001. Exceptional measures deployed during states of emergency have become the norm and have led to widespread abuses and undermined the normal criminal justice system.⁸⁴ The end of the internal armed conflict provides an opportunity to redress the negative impact of prolonged states of emergency on the criminal

⁸⁰ Human Rights Committee, *General Comment No. 29 – States of Emergency* (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 1.

⁸¹ *Ibid.*, para. 6.

⁸² *Ibid.*, para. 3.

⁸³ *Ibid.*, para. 8; and, ICCPR, article 26.

⁸⁴ Kishali Pinto Jayawardene, *Post-War Justice in Sri Lanka: Rule of Law, the Criminal Justice System, and Commissions of Inquiry*, International Commission of Jurists, January 2010; R. Coomaraswamy and C. Reyes, *Rule by emergency: Sri Lanka's post-colonial constitutional experience*, International Journal of Constitutional Law 2004 2(2), pp. 272-295.

justice system.⁸⁵ However, the Government continued to request and receive parliamentary extension of the state of emergency a year after the end of armed conflict. It deemed this necessary in order to prevent the re-emergence of 'terrorist' and secessionist forces, but the legitimacy of these justifications has been increasingly questioned.⁸⁶

On 30 May 2000, the Government of Sri Lanka notified the UN Secretary General that it had made derogations to articles 9(2), 9(3), 12, 14(3), 17(1), 19(2), 21 and 22(1) of the ICCPR. On 9 June 2010, the Government informed the Secretary General that it had removed all derogations except to article 9(3).

Regulation 19 of ER 2005, valid only during a state of emergency, allows the police or armed forces to arrest and detain individuals for up to one year as a preventive measure; in other words, without grounds for suspecting that an offence has been committed under the ordinary criminal law.⁸⁷ An amendment to regulation 19 in May 2010 reduces the maximum period of detention to three months but is not retroactive.⁸⁸ Officials can preventively detain individuals whom they believe may commit offences specifically listed in regulation 25⁸⁹ as well as the broader and patently vague category of actions

“in any manner prejudicial to the national security or to the maintenance of public order, or to the maintenance of essential services” (regulation 19(1)(a)).

None of the key terms, such as “prejudicial”, “national security”, “public

⁸⁵ *Ibid.*

⁸⁶ *The Hindu*, 2 March 2010, “Rajapaksa extends emergency laws till April”.

⁸⁷ ER 2005, Regulation 19: “(1) Where the Secretary to the Ministry of Defence is of opinion with respect to any person that, with a view to preventing such person —

(a) from acting in any manner prejudicial to the national security or to the maintenance of public order, or to the maintenance of essential services; or

(b) from acting in any manner contrary to any of the provisions of regulation 25 of these regulations,

it is necessary so to do, the Secretary may order that such person be taken into custody and detained in custody. Provided however that no person shall be detained upon an order under this paragraph for a period exceeding one year.”

⁸⁸ Published in Extraordinary Gazette No. 1651/24, 2 May 2010, amending Emergency Regulations 2005 (published in Extraordinary Gazette No. 1405/14, 13 August 2005). The detention period under regulation 19 is reduced to three months (from one year) and a 72 hour notice period is established before which a Magistrate must be notified of the detention and thereafter the suspect produced within one month. This amendment provides, however, that an order under regulation 19 is not affected if it was given before May 2010 and that, in such cases, ER 2005 “shall continue to be in force in respect of such persons, notwithstanding the amendments made herein to such regulation”.

⁸⁹ Regulation 25: “(1) Any person who (a) does any act which causes the destruction of, or damage to, property, whether movable or immovable, or any such change in any such property, as destroys or diminishes its value or utility; or (b) causes or attempts to cause death or injury to any other person with fire or any combustible matter or any explosive or corrosive substance or with any missile, weapon or instrument of any description; or (c) commits theft of any article in any premises which have been left vacant or unprotected or which have been damaged or destroyed; or (d) commits any offence under any of the Sections 427 to 446 of the Penal Code or illegally removes, or attempts to remove, any goods or articles from any such premises; or (e) is a member of an unlawful assembly as defined in Section 138 of the Penal Code the object of which assembly is to do any act referred to in sub-paragraph (a) or sub-paragraph (b) or sub-paragraph (c) or sub-paragraph (d); or (f) dishonestly receives or retains any article or goods referred to in sub-paragraph (c) or sub-paragraph (d), knowing or having reasons to believe, an offence had been committed in respect of such article or goods under sub-paragraph (c) or sub-paragraph (d), shall be guilty of an offence and, notwithstanding anything in the Penal Code or in these regulations shall, on conviction thereof before the High Court, be liable to suffer death or imprisonment of either description for life.

order", "essential services" is either defined or elaborated in a manner which affords general public notice as to what conduct might be proscribed under law, thereby violating the principle of legality.

Similarly, under section 9 of the PTA, the Minister may order a detention without charge or trial for up to 18 months simply on suspicion of a "connection" to "unlawful activity".⁹⁰ The use of the word, "connection", in this respect, is patently vague and overbroad; any link, no matter how attenuated or remote from the activity and irrespective of the detainee's intent to participate in or even have knowledge of the occurrence of the activity, could fall within the ambit of the provision. The UN Human Rights Committee in 1995 expressed similar concerns about the Secretary of the Ministry of Defence in Sri Lanka having the power to order detention under the PTA.⁹¹ These concerns have not been addressed, and this regime of preventive detention remains in force.

Of further concern is the provision under ER 2005 regulation 19(10) that preventive detention "shall not be called in question in any court on any ground whatsoever". The PTA similarly prohibits any judicial action with regard to executive discretion.⁹² This provision, denying judicial review over the grounds of detention, violates the absolute right to access to a court to have challenge the lawfulness of a deprivation of liberty. It unlawfully concentrates power in the hands of the executive and undermines the non-derogable right to remedy and reparation for violations of the right to liberty and security.

Mass internment clearly falls outside the limitations imposed by the principles of necessity and proportionality under international law. Individuals have a right under international law to challenge the legality of detention and to seek legal representation, both denied in this regime.

The ICJ urges the Government to bring the state of emergency to an end. Although the Government has removed most of its derogations to the ICCPR, it should also remove the remaining derogation on article 9(3). If the emergency is continued, the ICJ reminds the Government that no derogating measure may undermine the right to prompt judicial control of detentions.

⁹⁰ *Prevention of Terrorism Act*, s. 9(1): "Where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity, the Minister may order that such person be detained for a period not exceeding three months in the first instance, in such place and subject to such conditions as may be determined by the Minister, and any such order may be extended from time to time for a period not exceeding three months at a time: Provided, however, that the aggregate period of such detention shall not exceed a period of eighteen months."

⁹¹ UN Human Rights Committee, *Concluding Observations on Sri Lanka*, CCPR/C/79/Add.56, 27 July 1995, para. 19: "The Committee is concerned that the undetermined detention which may be ordered by the Secretary of the Ministry of Defence violates the Covenant, particularly when such detention can be challenged only one year after detention. In view of this, the Committee remains concerned about the effectiveness of the *habeas corpus* remedy in respect to those arrested under the Prevention of Terrorism Act."

⁹² *Prevention of Terrorism Act*, s. 10: "An order made under section 9 shall be final and shall not be called in question in any court or tribunal by way of writ or otherwise."

ii. Detainees as 'surrendees' and 'rehabilitees'

The ICJ is concerned that thousands of 'surrendees' and 'rehabilitees' have been placed under overlapping and sweeping administrative detention powers that include both preventive detention and rehabilitation grounds and purposes, but without a clear distinction between the two regimes. The resulting legal uncertainty for detainees exacerbates the underlying unlawful and arbitrary nature of these laws and regulations under international law.

In particular, these overlapping regimes give rise to the risk of individual and collective punishment without fair trial. As such, the process amounts to a disguised form of criminal administration and punishment without the control of the judiciary. Having been punished through administrative (preventive) detention, individuals are then still subject to criminal charges and sentencing, amounting to double punishment.

A key element in the creation of a parallel system of criminal administration and punishment is the use of the category of 'surrendee'. Administrative detention of a "surrendee" for rehabilitation purposes has many of the same consequences of 'preventive' detention measures but is legally distinguished under Sri Lankan law. A "surrendee" is defined under ER 2005 (regulation 22, as amended by Regulation No. 1462/8, 12 September 2006) as any person who surrenders to the authorities in connection with a wide range of offences, including firearms and explosives offences, offences under the PTA, certain offences under the Penal Code, or "under any emergency regulation". 'Surrender' is not specifically defined with reference to members of an armed group who surrender following hostilities.

Under ER 2005, the designation of an individual as a 'surrendee' leads automatically to one year of detention,⁹³ purportedly for 'rehabilitation' (regulation 22(6)). The period of administrative detention for rehabilitation can be extended for up to a total of two years, after which release is mandatory unless criminal charges are brought (regulation 22(10)). There is no prescribed access to legal representation or family members,⁹⁴ and even ICRC access is currently denied.⁹⁵ At any point before the expiry of two years of administrative detention, an individual can be criminally charged (regulation 22(12)). If convicted, sentencing by a judge can include a further period of rehabilitation or imprisonment (regulation 22(13)).

The category and treatment of 'surrendees' is unlawful and arbitrary in at least four ways.

a. 'Surrender'

Any person who "surrenders" to a public officer "shall be required to give a

⁹³ Regulation 22 appears to establish an automatic one-year detention. In practice, release before a one-year period has occurred.

⁹⁴ Access of family members is up to the discretion of authorities. It may be permitted on a fortnightly basis.

⁹⁵ ICRC does have access to other places of detention, including places to which some 'surrendees' have been transferred.

written statement to the officer or person authorized to the effect that he is surrendering voluntarily" (ER 2005 regulation 22(2)). The officer must then within ten days turn over the 'surrendee' to the CGR and notify the Defence Secretary (regulation 22(2, 4-5)). Three months after the 'surrender', with the Defence Secretary's authorization, the Police may initiate an investigation into any criminal offences alleged committed by the 'surrendee'. "Where it is so necessary", the 'surrendee' may be criminally tried as a result of the investigation (regulation 22(12)).

The ICJ's experience in other parts of the world is that the notion of voluntariness, which is implied by the use of the term "surrendee", is often not realized in the practice of preventive detention. In a conflict or post-conflict situation, in particular, individuals may feel obliged to surrender, or be forced to surrender, or be transferred from police or military custody. Given both the automatic administrative detention for 'rehabilitation' and the continuing risk of criminal charges and punishments, surrendering is tantamount to an admission of guilt with grave consequences. Without judicial control, legal representation and other due process rights, this gives rise not only to arbitrary detention but also to a violation of the right to fair trial under ICCPR article 14.

It is unclear whether all the detainees have signed written statements indicating voluntary surrender, as required in regulation 22(2). Even if such written surrender statements were signed, there is doubt that 'surrendees' were fully aware of the contents since they are written in Sinhala only, which many of them are unable to understand.

This situation can only be remedied by ensuring the prompt control of all detentions by the judiciary or other competent judicial authority.

A separate issue arises for a person seeking the protection of the State due to "fear of terrorist activities", as provided for in ER 2005, regulation 22(2). In spite of this distinct situation, the individual is defined as a 'surrendee' and subject to the same consequences as other 'surrendees' without additional safeguards. An individual seeking State protection of the right to liberty and security is thereby further deprived of that right.⁹⁶

b. 'Rehabilitation'

ER 2005 provides for up to two years of automatic administrative detention for all 'surrendees' purportedly for the purpose of 'rehabilitation'. The detention is to take place in 'Protective Accommodation and Rehabilitation Centres' ('PARCs', regulation 22(3)). The CGR is to "endeavour to provide the surrendee with appropriate vocational, technical or other training" (regulation 22(4)). After the first year of 'rehabilitation', further three month extensions of administrative detention (with the aggregate period of such extensions not to exceed twelve months) can be ordered based on the report of the CGR, linking progress in rehabilitation to the decision to release the

⁹⁶ Article 9 (1), ICCPR. See also UN Human Right Committee, cases of Delgado Páez v. Colombia (CCPR 195/85), Dias v. Angola (CCPR 711/96) and Jayawardena v. Sri Lanka (CCPR 916/00).

detainee (regulation 22(10)).

As of July 2010, some 3,000 detainees had been released. Many of these detainees had been held on the basis of ER 2005 mandatory rehabilitation. Others may have been detained during the interim period and placed in rehabilitation centres. At least 8,000 were being still being held for rehabilitation, as noted above. The process by which the decision to release detainees is taken remains unclear. The January 2010 releases, for example, emanated directly from the Presidency, rather than passing through the Defence Secretary upon the recommendation of the CGR.⁹⁷ A further deviation from ER 2005 relates to the location of detention. Not all places of detention for rehabilitation have been officially gazetted as a PARC in accordance with regulation 22(3).

Aside from these elements of unlawfulness and arbitrariness introduced in practice, the formal terms of the rehabilitation regime appear to amount to an unlawful and arbitrary deprivation of liberty in three further and related ways. First, under international law, if rehabilitation is not genuinely voluntary, it may only be imposed by a judge as part of a fixed sentence for a criminal conviction after a fair trial.⁹⁸ The involuntary detention of individuals for the purpose of re-education in the absence of a criminal conviction is a form of arbitrary detention, in violation of international standards.⁹⁹ Second, rehabilitation is inherently arbitrary if the objective is "mainly political and cultural rehabilitation through self-criticism," constituting a violation of ICCPR rights against self-incrimination (art. 14) and to freedom of thought, conscience or belief (art. 18).¹⁰⁰ The precise form of rehabilitation activities currently underway is not clear in this regard, although there are reports of Buddhist training, as noted above.¹⁰¹ Third, administrative detention is also "inherently arbitrary" if, as in this case, the period of detention is linked, in law or in practice, to the executive's discretionary judgement about progress in 'rehabilitation'. This element of arbitrariness is inherent in regulation 22 of ER 2005 (as amended), amounting to prolonged or indefinite detention without charge or trial.

The ICJ is concerned that the rehabilitation regime sidelines ordinary criminal proceedings and related due process and fair trial rights. Administrative detention for up to two years is prescribed even for low risk 'rehabilitees', indicating that the mass detention has the character of collective punishment, which is prohibited in any circumstances under international law.¹⁰²

⁹⁷ Various interviews with GoSL officials and international humanitarian workers, January 2010. The decision to release several hundred detainees in January 2010 appeared to have caught the CGR's Bureau by surprise.

⁹⁸ See ICCPR, article 10 (3): "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status."

⁹⁹ *Standard Minimum Rules for the Treatment of Prisoners*, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Principle 95.

¹⁰⁰ Deliberation N° 4, in *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/1993/24, Conclusions at III.B. See also *Report of the Working Group on Arbitrary Detention - Visit to the People's Republic of China*, UN Doc. E/CN.4/1998/44/Add.2, para. 80-99 and 109.

¹⁰¹ *Op. cit.* 33.

¹⁰² Human Rights Committee, *General Comment No. 29* (article 4): "States parties may in no circumstances invoke

These violations can only be remedied by repeal and reform of ER 2005, regulation 22, in order to empower the judiciary or other competent judicial authority to ensure that participation in rehabilitation is voluntary, and that any mandatory rehabilitation through criminal sentencing does not result in indefinite detention with release contingent upon 'progress' in rehabilitation.

c. Indefinite detention for investigation and charges

Detainees undergoing 'rehabilitation' are subject to potential criminal charges without at any point having access to legal counsel or the right to challenge their detention before a judicial authority. During this period, which may extend for up to two years through administrative decisions to extend 'rehabilitation', it is the "duty" of detainees truthfully to answer police interrogations (Regulation 68(1)). Statements before a police official were, until May 2010, admissible as evidence, contrary to safeguards under normal criminal law.¹⁰³ Moreover, it was the burden of the detainee to "reduce or minimize" the weight attached to the statement (Regulation 41(4)), a provision which reversed the burden of proof under normal domestic law and under international law. The PTA, s.16(2), which has not been amended, similarly places the burden on a detainee to prove that an alleged confession or other statement is "irrelevant". The HR Committee concluded that this provision violates ICCPR article 14(3)(g) (right against self-incrimination).¹⁰⁴

There is no provision for review of detentions by a judge or other competent judicial authority during the first year of compulsory rehabilitation. An Advisory Committee appointed by the President thereafter in principle must approve three-month extensions, but this body has apparently never been established according to (publicly) available information. Discretion to detain is exclusively in the hands of the executive.

In May 2010, the Government issued an extraordinary regulation (1651/24) that repeals the provisions allowing for the admission in criminal proceedings of statements to officers above a certain rank. The amendments also include repeal of the regulation establishing a presidential Advisory Committee. However, regulation 21 of this amendment establishes that it shall have no effect on restriction orders (regulation 18) or detention orders (regulation 19) prior to the amendment in May 2010. Regulation 21 further establishes that ER 2005 "shall continue to be in force in respect of such persons".

The continuing lack of any independent check and balance on the use of such detention powers, or provision for review by the courts, significantly

article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by [...] imposing collective punishments [...]."

¹⁰³ Regulation 41 (4) of ER 2005. The normal rule in Sri Lanka is that confessions to police officers are not admissible. See also ER 2005 (regulation 63 (4)), excluding ss. 25 and 26 of the Evidence Ordinance (also excluded under s. 17 of the PTA), which declare inadmissible any confessions made to a police officer, a forest officer or an excise officer and confessions made by any person while in the custody of the these three categories of officers, unless made in the immediate presence of a Magistrate. These precautionary provisions have been displaced by the emergency law regime for decades.

¹⁰⁴ *Nallaratnam Singarasa v. Sri Lanka*, Case No. 1033/2004, 23 August 2004.

increases the risk of abuse. Detainees remain at risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment.¹⁰⁵ Officials acting “in good faith” under these laws and regulations are immune from any civil or criminal action “or other legal proceeding” unless authorized by the Attorney General.¹⁰⁶

The existence of this legal gap creates the risk that an intelligence-gathering apparatus that lacks accountability and transparency will displace the normal criminal justice system and its safeguards against abuse. This consequence has been borne out by experience in other countries. The UN Special Rapporteur on Counter-Terrorism has emphasised that this shift can fundamentally undermine the rule of law as over-arching intelligence purposes override or weaken due process guarantees for individuals accused.¹⁰⁷ Detention for the purpose of gathering intelligence has the consequence of blurring intelligence aims with the distinct purposes of criminal investigation and “rehabilitation”.¹⁰⁸ Without clear legal parameters governing the exercise of these powers and strong accountability mechanisms, serious human rights violations are more likely to occur with impunity and without recourse to a remedy.¹⁰⁹

These violations and risks to the criminal justice system can only be remedied through the reform and repeal of ER 2005, especially regulation 22, as well as related regulations and statutes (including the PTA, and ER 2006). If a person surrenders in relation to a criminal offence, then the Government must afford the individual all of the rights of a criminal suspect, as outlined above. The reform of May 2010 is insufficient and fails to correct illegalities with regard

¹⁰⁵ An in-depth investigation by Human Rights Watch has already produced compelling evidence of ill treatment of ‘surrendees’. Human Rights Watch, *Legal Limbo The Uncertain Fate of Detained LTTE Suspects in Sri Lanka*, February 2010, pp. 14-16.

¹⁰⁶ ER 2005, regulation 73: “No action or other legal proceeding, whether civil or criminal, shall be instituted in any court of law in respect of any matter or thing done or purported to be done in good faith, under any provisions of any emergency regulation or of any order or direction made or given thereunder, except by, or with the written consent of, the Attorney-General.”

¹⁰⁷ See discussion on this point in Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, (2009) UN Doc A/HRC/10/3, para. 37; see also: International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, pp. 76-77.

¹⁰⁸ See Human Rights Committee, *David Alberto Cámpora Schweizer v Uruguay*, (1982) Communication No. 66/1980, para. 18.1, finding that “[a]lthough administrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner, the Committee emphasizes that the guarantees enshrined in the following paragraphs of article 9 fully apply in such instances.” See also: Human Rights Committee, *Hugo van Alphen v Netherlands*, (1990) Communication No. 305/1988, para. 5.8; Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, (2009) UN Doc A/HRC/10/3; Jelena Pejic, “Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence”, *International Review of the Red Cross*, 2005, vol. 87(858), page 380; International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, p. 59, concluding that detention for the purposes of public security, which could include some element of intelligence gathering, should not be permitted except under exceptional circumstances, and then only if strictly in accordance with the protections set out in article 9 of the ICCPR. The imperative for a connection to public security is clear even in circumstances of international armed conflict, where procedural guarantees afforded by international human rights law to detainees otherwise are attenuated: Geneva Convention IV, articles 42, 78.

¹⁰⁹ Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, (2009), UN Doc A/HRC/10/3, para. 37.

to detentions prior to this date.

d. Vague and overbroad legal grounds for criminal charges

A 'surrendee' is vulnerable to the patently vague and overbroad grounds for arrest, detention, and prosecution under the PTA and Emergency Regulations. Under regulations 6 and 20 of the ER 2006, "terrorism" includes "any unlawful conduct" that, among a long list of other activities, "disrupts or threatens public order".¹¹⁰ "Specified terrorist activity" means any offence under a wide range of statutes, including the PTA.

Under ER 2005, regulation 7, criminalized activities include wearing the symbols of, or participating in meetings of, or advising, or being a member of a terrorist group.¹¹¹ A person who gives advice to any person or group deemed to be engaged in "terrorism" would commit an offence punishable by up to 10 years' imprisonment.¹¹² Regulation 7 does not refer to the need to establish intention (*mens rea*) to give advice to assist the act of terrorism, as would normally be required to establish a criminal offence.¹¹³

Regulation 7(c) also makes it unlawful to "obtain membership or join" any group or person engaged in "terrorist" offences (as defined in Regulation 6).¹¹⁴ Under principles of criminal law, individuals should not be held criminally responsible solely for membership in a group, even if the group engages in criminal conduct, in the absence of evidence of voluntary involvement in or knowledge of the criminal purposes of the group.¹¹⁵ The principle of individual criminal responsibility is one of the fundamental tenets of criminal law and has been expressly recognized in numerous international instruments.¹¹⁶ It is a universally accepted principle that "no one may be punished for an act he has not personally committed".¹¹⁷

¹¹⁰ ER 2006, Regulation 20.

¹¹¹ Similar provisions can also be found in Regulation 3 of the *Emergency (Proscription of Tamil Rehabilitation Organization) Regulations*, No. 9 of 2007, Gazette Extraordinary No. 1529/13 of 26 December 2007.

¹¹² Regulation 11, ER 2006.

¹¹³ By way of contrast, Regulation 14 of ER 2006 that deals with offences committed by a "body of persons", expressly provides a defence if the offence was committed "without his knowledge", which implies there must be intention to commit the offence.

¹¹⁴ Similar provisions are also contained in Regulation 3 (a), (b) and (c) of the *Emergency (Proscription of Tamil Rehabilitation Organization) Regulations*, No. 9 of 2007, Gazette Extraordinary No. 1529/13 of 26 December 2007.

¹¹⁵ This issue was considered by the second post-world war Nuremberg Statute. Articles 9 and 10 of the Statute targeted members of the Gestapo, the S.D. and the S.S. The Nuremberg Tribunal declared them to be criminal organizations. Nevertheless, members of the above-mentioned groups were not found guilty simply because they belonged to them. The Tribunal stated that for a member of these groups to have been found guilty, he had to have been involved voluntarily and in full knowledge of the criminal purposes of the group, or to have actually participated in the commission of war crimes, crimes against peace or crimes against humanity.

¹¹⁶ See e.g. the IV Geneva Convention (art. 33), the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (art. 75.4(b)), the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (art. 6.2(b)), the *Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict* (arts. 15 and 16), the *Statute of the International Criminal Tribunal for the Former Yugoslavia* (art. 7), the *Statute for the International Criminal Tribunal for Rwanda* (art. 6), the *Rome Statute* (art. 25) and the *Statute of the Special Tribunal for Sierra Leone* (art. 6). Article 5 (3) of the *American Convention on Human Rights* states that "[p]unishment shall not be extended to any person other than the criminal".

¹¹⁷ Commentary of the ICRC on Article 75 of the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, para. 3098. See also

Regulation 8 prohibits engagement in “any transaction in any manner whatsoever”, including, “contributing, providing, donating, selling, buying, hiring, leasing, receiving, making available, funding, distributing or lending materially or otherwise”, to a person or group engaged in terrorist activities (as defined in Regulation 6), or a person carrying out the activities in Regulation 7.

Regulation 8 is an extraordinarily broad provision. For example, a person who has engaged in “any transaction” with a person or group engaged in terrorist activities would appear to be guilty of an offence punishable by up to 10 years imprisonment, irrespective of whether that person knew the person or group was engaged in acts of terrorism. Given the LTTE’s *modus operandi* and its ubiquity in the lives of ordinary people (through forced labour, forced recruitment, taxation, centralisation of commerce, etc.), regulation 8 effectively criminalises a large swathe of persons who had lived in areas under LTTE control. This would most probably include the majority of the thousands of individuals detained as ‘surrendees’.

Similarly the PTA criminalizes as terrorist offences a wide range of actions accompanied by no apparent criminal intent, for example, any written or spoken words that are deemed by the executive authority to cause “disharmony or ill-will” between communities, regardless of intent or outcome. These offences carry a sentence of five to twenty years.¹¹⁸

These laws and regulations are vague and overbroad in contravention of the principle of legality. Combined with the ER 2005 rehabilitation process (regulation 22) and as grounds for even more broad preventive detention powers, their application puts into jeopardy the due process and fair trial rights of “surrendees”.¹¹⁹ These inherently unlawful and arbitrary provisions must be repealed and reformed together with measures to address the procedural defects noted in earlier sections. The ICJ provided detailed comments in this regard in its March 2009 report on the Emergency Regulations.¹²⁰

Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), presented 3 May 1993 (S/25704), para. 51; European Court of Human Rights, Judgment of 6 November 1980, *Gizzardi vs. Italy*, Series A No. 39, para. 102.

¹¹⁸ PTA, s. 2(1): “Any person who [...] (h) by words either spoken or intended to be read or by signs or by visible representations or otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups; [...] (2) Any person guilty of an offence specified in [...] (ii) paragraphs (c), (d), (e), (f), (g), (h), (i) or (j) of subsection (1) shall on conviction be liable to imprisonment of either description for a period not less than five years but not exceeding twenty years.”

¹¹⁹ International Commission of Jurists, *Sri Lanka: Briefing Paper - Emergency Laws and International Standards*, March 2009.

¹²⁰ *Ibid.*

iii. Rights of children

Sri Lanka is party to both the Convention on the Rights of the Child and its Optional Protocol on children in armed conflict.¹²¹ Child victims of armed conflict have a right to measures to promote recovery and social reintegration, including victims of compulsory recruitment to armed forces in violation of the Optional Protocol establishing 18 as the minimum age. In addition, Sri Lanka is a signatory to the Paris Principles and Commitments on children associated with armed groups and forces. This obliges the Government to give special consideration for former child combatants who now may be over 18, to ensure that children subject to prosecution are treated primarily as victims and afforded international standards of juvenile justice, to seek alternatives to judicial proceedings wherever possible, and to prohibit prosecution of children merely for membership in armed groups or forces.¹²²

Emergency Regulation 1580/5 (ER 2008) appropriately refers to children as victims rather than criminal suspects, permits communication with family members, and ensures review of detentions by a magistrate every three months after establishing initial magisterial control within 24 hours of detention. The maximum period for protective child "accommodation" or "rehabilitation" (where there is evidence of any offence) is one year.

Following his visit to Sri Lanka in December 2009, UN Special Envoy for Children and Armed Conflict, Patrick Cammaert, noted in his report that:

[...] in the case of minors accused of association with the LTTE, their cases should be swiftly handed-over to the Magistrate as per Emergency Regulation 1580/5 of 15 December 2008 and appropriate determination should be ensured of whether rehabilitation is needed or if the child can be remanded to his parents or care-givers as foreseen in the regulation.¹²³

The UN Special Envoy further pointed out in this December 2009 report that there was a real risk that children remained liable to prosecution under ER 2006.¹²⁴

As of July 2010, reports indicate that UN monitors had sufficient access to Government centres established for child protection in accordance with Regulation 1580/5. It was reported that 565 children identified in May 2009 as having some association with the LTTE had been separated from the adult population by July 2009 and all released as of May 2010 under the order of a Magistrate.

However, until complete and consistent access by international monitors to

¹²¹ Convention on the Rights of the Child, UN Doc.A/RES/44/25 (12 December 1989); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, UN Doc.A/RES/54/263 (25 May 2000).

¹²² The Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (February 2007), para. 8.7-8.8; Paris Commitments on Children Associated with Armed Groups and Armed Forces, para. 10-12.

¹²³ Ibid.

¹²⁴ Ibid., p. 11.

the entire detainee population is established in addition to a coherent and comprehensive legal framework, it is not possible to determine whether other individuals remain in the adult population who may have been children at the time of their alleged association with the LTTE.

C Summary of Human Rights Concerns

The Government of Sri Lanka's 'surrender' and 'rehabilitation' regime combines measures to address the 'surrender' of former combatants, screening for security threats, rehabilitation, and criminal prosecutions. Each of these areas of law and policy contain measures that violate the right to liberty and security of the person (ICCPR, art. 9), the right to due process and fair trial (ICCPR, art. 14), and the rights of the child. They also risk violation of the prohibition against enforced disappearance, torture and other ill-treatment, and extrajudicial killing.

i. Clear and transparent legal framework for surrendees and rehabilitees

The ICJ is concerned at the lack of a transparent and publicized and effective framework setting out lawful and human rights compliant parameters for effective rehabilitation and reintegration. The existing framework appears *ad hoc* and piecemeal, without due regard for international policy and best practice in disarmament, demobilisation and reintegration (DDR). In fact, the lack of transparency and accountability engendered through this *ad hoc* approach will tend to heighten mistrust and detract from a sustainable political settlement. International support to such a process would potentially implicate the donors in enabling violations of international law and human rights, and thereby undermine the prospects for a viable national reconciliation based on rule of law.

The ICJ remains concerned that the existing detention regime violates international legal standards and creates a legal black hole in which detainees are vulnerable to serious violations. These concerns well founded when set against the well-documented history of arbitrary detention, torture and other ill-treatment, extra-judicial killings and enforced disappearances in Sri Lanka.

Mass internment clearly falls outside the limitations imposed by the principles of necessity and proportionality under international law. Individuals have a right in all circumstances under international law to access to a court to challenge the legality of detention and to legal counsel, both denied in this regime.

ii. Procedural safeguards need to be put in place

The ICJ is concerned that the rehabilitation regime sidelines ordinary criminal proceedings and fair trial related due process and fair trial rights. Administrative detention for up to two years is prescribed even for low risk

'rehabilitees', indicating that the mass detention has the character of collective punishment, which is prohibited in any circumstances under international law.

The existence of a legal gap creates the risk that the Government's approach, which lacks accountability and transparency, will displace the normal criminal justice system and its safeguards against abuse. Detention for the purpose of gathering information, which often happens in Sri Lanka, has the consequence of blurring intelligence aims with the distinct purposes of criminal investigation and "rehabilitation". Without clear legal parameters governing the exercise of these powers and strong accountability mechanisms, serious human rights violations are more likely to occur with impunity and without recourse to a remedy.

The legal guarantees that must be provided:

- Safeguards against involuntary 'surrender' and coerced 'confessions'
- Transparent and verifiable screening and registration of detainees, to protect against human rights violations, including torture and ill-treatment and enforced disappearance
- Access to legal counsel
- Right to be informed of the reason for detention
- Prompt judicial control of detention
- Right to challenge lawfulness of detention before a judge
- Protection against inherently arbitrary detention, including prolonged and indefinite administrative detention, that permits the Government to hold someone without charge for up to two years in 'rehabilitation' and where an administrator determines whether release is 'appropriate'
- Protection against obligatory 'rehabilitation' that is imposed without judicial authority and outside the criminal justice process
- Proper screening procedures to ensure identification of children and channelling on individualized needs basis into separate mechanisms for recovery, reintegration, and care
- Avoid detention of children with adult 'surrendees'
- Protection against broad and vague grounds for arrest and detention on security grounds, leading to prolonged arbitrary 'preventive detention' without charge
- Guaranteed visits by family
- Protection against overly broad and vague grounds for criminal prosecutions, including assimilation of innocent actions or normal criminal offences to acts of 'terrorism' with severe punishments
- Protection against double punishment where criminal conviction and sentencing are added to time served as detainee under administrative detention ('rehabilitation')

iii. Need for an independent monitoring agency with a protection mandate

The lack of verifiable public information points to a larger absence of a comprehensive policy and legal framework and transparent process for detention, screening, rehabilitation, release or prosecution, accompanied by unhindered monitoring access by international agencies to adult detention centres. It is this lack of accurate, independent information that makes the presence and participation of such independent protection agencies critical to the well-being of the surrendeers and rehabilitees.

IV Recommendations

A To the Sri Lankan Government

- i. Voluntariness of surrender and rehabilitation
 - Ensure prompt judicial review and supervision to determine if 'surrender' and participation in 'rehabilitation' is voluntary.
 - Ensure that rehabilitation, where voluntary, is carried out in a manner demonstrably for such purposes and not amounting to a disguised form of criminal punishment.
- ii. Due process rights
 - Guarantee right to legal representation and access to a lawyer of the detainee's choosing at all stages, family visits, medical visits, and access by an international and independent humanitarian agency
 - Guarantee right to challenge the lawfulness of detention before judge or other competent authority
 - Guarantee prompt charge and trial, release, or genuinely voluntary participation in rehabilitation based on transparent and lawful criteria
 - Guarantee the additional due process rights enumerated on pages 35-36 of this report
- iii. Children
 - Verify that no children remain in detention, and more broadly ensure full implementation of recommendations by UN Special Envoy for Children and Armed Conflict, particularly with regard to screening procedures and risk of prosecution.¹²⁵
- iv. Amnesty
 - Consider amnesty for ex-combatants except where alleged acts amount to crimes under international law.

¹²⁵ United Nations Mission Report, Visit of Major General (ret.) Patrick Cammaert, UN Special Envoy of the Special Representative for Children & Armed Conflict to Sri Lanka, 05-11 December 2009.

B To the Sri Lankan Parliament and Government

- End the state of emergency.
- Support legislation establishing the parameters for rehabilitation, prosecution and possible amnesties for individuals who took active part in hostilities.
- Review, reform, and repeal provisions of the PTA and Emergency Regulations (2005 and 2006) identified above, to bring them into compliance with international law and standards
- Take steps to eliminate the practice of administrative (or 'preventive') detention, including statutory, regulatory, and administrative reform.
- Where administrative detention is invoked, ensure that this is done only in exceptional situations during declared states of emergency pursuant to ICCPR article 4.

C To the Donor Community and the United Nations

- Donors and the United Nations should offer technical assistance to support the development of a legal framework that complies with international law and standards and that is cognizant of the wider implications of reconciliation.
- Donors should condition their support to rehabilitation on the establishment of a legal framework that provides for due process and safeguards the internationally-recognized rights of detainees, especially children, and ensures a transparent process of ex-combatants' rights.
- The United Nations should continue to refrain from supporting Government activities within the camps until a legal framework has been put in place which provides for due process and safeguards the rights of all detainees, especially children.
- The United Nations should prioritise advocacy for the establishment of a legal and policy framework for the rehabilitation and reintegration of individuals who took active part in hostilities.