

ARBITRARY DETENTION IN POST-CONFLICT SRI LANKA

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I. Introduction

In May 2009, the Sri Lankan government broadcast to the world that they had achieved complete military victory over the Liberation Tigers of Tamil Eelam (also known as the Tamil Tigers or LTTE). The Tigers had been in conflict with the Government for nearly thirty years, launching frequent violent attacks in an attempt to win a separate state for the Tamil-controlled areas of northern Sri Lanka. While previous leaders had tried negotiations, President Mahinda Rajapaksa was elected in 2006 under promises of victory through military force – and he delivered on those promises. With unprecedented amounts of the nation’s GDP poured into the Sri Lankan armed forces, the military began steadily regaining control of former LTTE areas, slowly pressing the Tigers into a small northeast corner of the island. When the smoke cleared, many of the top LTTE leadership were dead, including the top LTTE commander, Velupillai Prabhakaran, who was found with a suspiciously neat bullet hole to the head.

The Government had ended the Tiger military threat, but now faced a new challenge: what to do with the people who had been living under LTTE control for the past several decades, and, even more pressing, what to do with those who had served with the LTTE against the Government? Balancing the international pressure for accountability with their fear of security risks from the remnants of the LTTE, the Sri Lankan government elected to supplement standard post-conflict measures with more controversial tools including civilian internment and a “rehabilitation” program for former combatants. Allegations also began surfacing that many former LTTE members were being imprisoned without charge and without court supervision, leading human rights activists to worry about the possibility of torture or disappearances.

This Paper will explore these detention policies, analyzing them both from the perspective of international law as well as the actual effectiveness of the policies as compared to

the Sri Lankan government's stated goals. This Paper is the product of field research conducted in Sri Lanka from January 1 to January 16, 2012. I interviewed government officials, including members of the Ministry of Defense,¹ the Commissioner General of Rehabilitation,² the Presidential Adviser on Reconciliation,³ and the supervisor of the Poontottam rehabilitation center in Vavuniya.⁴ I was also able to speak with several Tamil citizens who were detained after the war, including many people who lived in the internment camps and twelve individuals who went through the rehabilitation process.⁵ In addition, I interviewed many local activists, including community organizers who work with families of detained persons and attorneys who have ex-cadre⁶ clients that are detained in the prison system without charge.⁷

Due to the close government monitoring of people who have gone through rehabilitation and the growing number of abductions of lawyers and activists working on these issues,⁸ every Tamil citizen that I met with requested the utmost confidentiality. Many were anxious that talking with me about the problems with the detention system would lead to abduction or

¹ Interview with Major General Kapila Hendawitharne, National Intelligence Chief, and Suresh Sallay, Coordinator of Foreign Intelligence, Sri Lanka Ministry of Defense, in Colombo, Sri Lanka (Jan. 4, 2012 and Jan. 16, 2012).

² Interview with Major General Chandana Rajaguru, Commissioner of Rehabilitation, in Colombo, Sri Lanka (Jan. 5, 2012).

³ Interview with Prof. Rajiva Wijesinha, MP, in Colombo, Sri Lanka (Jan. 5, 2012).

⁴ Interview with Lt. Col. Manjula Gunasinghe, Supervisor of Poontottam Rehabilitation Center, in Vavuniya, Sri Lanka (Jan. 10, 2012). Interviews were also conducted with a source involved with the rehabilitation program who has asked to remain anonymous, cited as Interview 1, in Colombo, Sri Lanka (Jan. 4, 2012).

⁵ These interviews include Interview 8, with two ex-detainees and one former internally displaced person (IDP) camp resident, Sri Lanka (Jan. 8, 2012) (differentiated as M28, F42, M25 – referencing their gender and age), Interview 9, with seven IDP camp residents, Sri Lanka (Jan. 8, 2012) (differentiated as F1, F2, F3, F4, M5, M6, M7 – referencing gender), Interview 10, with ten ex-detainees, Sri Lanka (Jan. 9, 2012) (differentiated as M1, F2, F3, F4, M5, M6, M7, M8, M9, M10 – referencing gender), and Interview 11, with family member of missing girl and last witness to see her, Sri Lanka (Jan. 9, 2012) (differentiated as Relative, Witness).

⁶ In discussions of detention and rehabilitation this term is frequently used in Sri Lanka to describe anyone who had association with the LTTE. The term sometimes includes people who were forcibly recruited into the LTTE.

⁷ These interviews include Interview 5, Vanni activists, Sri Lanka (Jan. 6, 2012), Interview 6, Vanni activists, Sri Lanka (Jan. 6, 2012), Interview 7, Vanni activist, Sri Lanka (Jan. 7, 2012), and Interview 13, Attorneys, Colombo, Sri Lanka (Jan. 12, 2012). This Paper does not claim that these accounts represent a statistically significant sample of any population or group in Sri Lanka. Instead, the individual accounts highlight problems with the detention system that, while possibly not representative of the experience of every detainee, have been reported by numerous individuals.

⁸ See *Sri Lanka 'hit by rise in abductions'*, BBC NEWS, Mar. 14, 2012, <http://www.bbc.co.uk/news/world-asia-17362691>.

detention. The purpose of this paper, therefore, is not only to examine the legality of the detention mechanisms used in Sri Lanka, but also to call attention to this issue and give voice to those who are afraid to speak out. Although this paper is in no way intended to condone the violence of the LTTE, the disparity between the accounts of detention given the Government and media as compared to the accounts of the people who were actually detained must be recognized by the wider Sri Lankan community and addressed.

II. Background History

To understand the current state of Sri Lanka, especially the government's deep suspicion of anything remotely connected to the LTTE, it is necessary to understand the roots of the conflict. Following the end of British colonial rule in Sri Lanka, then known as Ceylon, in 1948, power shifted to Sri Lanka's two largest ethnic groups: the Sinhalese, primarily Buddhists living in the south of Sri Lanka, and the Tamils, who were generally Hindus that were ethnically related to the Tamil populations in southern India and were concentrated in northern Sri Lanka. In an attempt to eradicate the vestiges of colonialism, the Government decided to remove English as the official language. The difficulty with this, however, was that English had served as a link language between the two ethnic groups: the Sinhala and Tamil languages were spoken almost exclusively by the Sinhalese and Tamil peoples, respectively. While there was some discussion of a double official language (both Sinhala and Tamil), in 1956, Prime Minister Bandaranaike passed the Sinhala Only Act, making Sinhala the official language of Sri Lanka and sparking ethnic riots, including the murder of over 150 Tamils in the eastern province of Gal Oya.⁹ This ethnic tension, including increased Tamil fears about discrimination, violence, and eradication of their culture, led to the formation of separatist groups.¹⁰ These groups believed that the only way

⁹ WILLIAM CLARENCE, *ETHNIC WARFARE IN SRI LANKA AND THE UN CRISIS* 36 (2007).

¹⁰ *Id.*

to secure true freedom and respect for the Tamils of Sri Lanka was to create an independent state, known as “Tamil Eelam” where Tamils could self-govern.¹¹ Thus, at its heart, the conflict in Sri Lanka was an ethnic conflict founded on fears of discrimination and cultural eradication.

While other groups, such as the Tamil United Liberation Front (TULF), pursued Tamil Eelam through political activities, militant groups such as the LTTE quickly became a haven for frustrated youth.¹² Beginning in the 1970s, the LTTE targeted the Government, including policemen and Tamil politicians whom it viewed as being too moderate.¹³ By the 1980s, however, the LTTE had begun frequent attacks on civilians as well. These attacks were often countered by massacres of Tamil civilians by nationalist militias. By 1983, the conflict had escalated to the level of civil war.¹⁴ Although peace talks were frequently initiated by mediators such as India and Norway, they did little to resolve the conflict, which continued to escalate in cycles of suicide bombings by the Tigers and the killing of Tamil civilians, including human rights activists, by government forces. As the number of casualties mounted, the LTTE began to establish an effective hold over provinces in north and east of Sri Lanka, creating a de facto state. By the 2000s, the LTTE-controlled areas ran their own schools, had their own police force and judiciary, and conducted a border patrol similar to international customs.¹⁵ In addition, the LTTE exercised a strict policy, under which every family was expected to send one child to work or fight for the LTTE.¹⁶ The complete control of the LTTE over areas in the North and East made it almost impossible for Tamil civilians to avoid contact with the organization and its members.

¹¹ *Id.*

¹² *Id.* at 39-41. The LTTE, originally called the Tamil New Tigers (TNT), was formed by Prabhakaran in 1972.

¹³ One of the first major operations was the assassination of Jaffna mayor Alfred Duraiappah in 1975. *Id.* at 41.

¹⁴ CLARENCE, *supra* note 9, at 44.

¹⁵ Barry Parker, *Tamil Eelam – A De Facto State*, Jan. 26, 2006, <http://tamilnation.co/tamileelam/defacto/060126omanthai.htm>.

¹⁶ *Sri Lanka: Amnesty International urges LTTE to live up to its pledge to end child recruitment*, July 10, 2007, <http://www.amnesty.org/fr/library/asset/ASA37/017/2007/fr/95f5eb96-d37c-11dd-a329-2f46302a8cc6/asa37017200>.

Indeed, many worked in “LTTE positions” that had nothing to do with fighting, including drivers, cooks, nurses, and teachers.

As the LTTE developed their de facto state, the 9/11 bombings and the U.S. campaign against terror led to increased international tolerance for the Sri Lankan government’s use of military force against the Tigers, as the LTTE had been labeled a terrorist organization in 32 countries.¹⁷ This focus on eliminating terrorist organizations also dried up many of the LTTE’s international funding sources. In 2006, the Sri Lankan government launched major military initiatives and succeeded in re-securing the Eastern province. They then turned their attention to the North, where Tamil civilians were repeatedly forced to move with the shifting military lines as the Tigers retreated and the Sri Lankan Army advanced. International concern grew over the fate of these civilians, as allegations of war crimes such as government shelling of civilians and the intentional withholding of food and medical aid emerged. After trapping the Tigers and thousands of Tamil civilians in a one square kilometer strip of land,¹⁸ the Sri Lankan government declared military victory over the Tigers on May 18, 2009.¹⁹ With much of the LTTE leadership dead, the remaining Tamil civilians and LTTE cadres were now under the control of the government. Three particular manifestations of this control, namely internment of civilians, rehabilitation of ex-cadres, and detention without charge of ex-cadres in the prison system, will be explored in this Paper.

¹⁷ *The LTTE in Brief*, SRI LANKA MINISTRY OF DEFENSE, May 2007, <http://www.defence.lk/pps/LTTEinbrief.pdf>.

¹⁸ *LTTE Leaders Boxed in Less than One Square Kilometer Stretch*, SRI LANKA MINISTRY OF DEFENSE, May 17, 2009, http://www.defence.lk/new.asp?fname=20090517_04.

¹⁹ *See LTTE Defeated: Sri Lanka Liberated From Terror*, SRI LANKA MINISTRY OF DEFENSE, May 18, 2009, http://www.defence.lk/new.asp?fname=20090518_10.

III. Legal Framework for Detention

In its 1978 constitution, Sri Lanka included a prohibition on arbitrary arrest and detention. Located in the section of the constitution entitled Fundamental Rights, Article 13 states in part:

(1) No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.

(2) Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.

(3) Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.²⁰

This provision is in line with the International Covenant on Civil and Political Rights (ICCPR), which Sri Lanka acceded to in 1980.²¹ Among the protections the ICCPR extends to individuals is the right to be free from arbitrary arrest and detention. Article 9 of the ICCPR provides:

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.

²⁰ 1978 Constitution, Art. 13.

²¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter ICCPR].

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.²²

In General Comment 8, the UN Human Rights Committee issued clarification on Article 9, stating that paragraph one should not be construed narrowly as to apply only to criminal cases, but instead was “applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.”²³ In addition the Committee explained that “promptly”, as used paragraph 3, means that a person who is arrested or detained on a criminal charge must be brought before a judge a matter of days.²⁴ The Committee also specifically addressed preventative detention, a primary issue in Sri Lanka, saying:

[I]f so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5).²⁵

Although Article 4 of the ICCPR allows for derogation of these rights in “time of public emergency which threatens the life of the nation,” such derogations must be taken only to “the extent strictly required by the exigencies of the situation” and the derogating party must immediately inform the United Nations.²⁶

²² *Id.* Art. 9.

²³ U.N. Human Rights Committee, *General Comment No.8: Right to Liberty and Security of Persons*, at ¶ 1, 16th Sess. (1982), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f4253f9572cd4700c12563ed00483bec?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument).

²⁴ *Id.* ¶ 2.

²⁵ *Id.*, ¶4.

²⁶ ICCPR, *supra* note 21, Art. 4.

The United Nations General Assembly has also issued guidance on detention in its publication of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Body of Principles, although not binding on States, is persuasive and possibly indicative of customary law. It reiterates the prohibition on arbitrary arrest (Principle 2), as well as the rights to be informed of the reason for arrest,²⁷ to be heard by a judge,²⁸ and to meet with legal counsel.²⁹ The Body of Principles also requires that States keep records of all prisoners including the reason for arrest and place of detention, and notes the rights of prisoners to humane treatment and to notify their family and counsel of their location following a transfer.³⁰

Article 9 and the other guidance on detention are intended to be applied broadly to all forms of detention, not just criminal charges or formal imprisonment. It is appropriate to use these as the basic legal framework for the three forms of detention at issue in Sri Lanka: internment, rehabilitation, and imprisonment without charge. The following sections will examine these types of detentions individually and explore the particular legal issues with each.

IV. Internment

The Tamil civilians unaffiliated with the LTTE have always been in a difficult position. They were mistreated by the LTTE, with accusations circulating that the LTTE were using civilians as human shields and that they shot at civilians who tried to cross over to government-controlled areas.³¹ Certainly the LTTE made no effort to distance themselves from the civilian settlements, a tactical move that made it difficult for the Government to fire on the LTTE

²⁷ G.A. Res. 43/173, “Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,” Principle 10, U.N. Doc. A/RES/43/173 (Dec. 9, 1988).

²⁸ *Id.*, Principle 11.

²⁹ *Id.*, Principle 18.

³⁰ *Id.*, Principles 1, 16.

³¹ VK Shashikumar, *Cornered LTTE using civilians as human shield*, CNN-IBN, Apr. 26, 2009, <http://ibnlive.in.com/news/cornered-ltte-using-civilians-as-human-shield/91116-2.html>.

fighters without risking civilian lives. In addition, many Tamils harbored resentment against the LTTE for its “one family, one child” policy, which obligated each family to provide a son or daughter for “the cause.”³² This forced recruitment and the subsequent high casualty rates of children in the custody of the LTTE caused many Tamils in the North to become disillusioned with the LTTE. As one interviewee put it, “At the beginning the LTTE had good goals of supporting the Tamil people, but the conscription brought bitterness.”³³

Although many families had attempted to flee from the LTTE during the final stages of the war, others either felt that they did not have the means to leave or were more scared of the Government than they were of the LTTE.³⁴ Those who chose to stay paid a heavy cost. While the exact figures have been disputed, some activists estimate that over 100,000 civilians were killed during the final stages of the war.³⁵ The Government claims about 7,000 civilians were killed during the fighting.³⁶ The United Nations, which suggests a casualty count significantly above the figure reported by the government, has alleged that the majority of these casualties were the result of government shelling.³⁷ The result for all the surviving civilians, regardless of whether they chose to leave before the end of the war, was the same. The families that left the LTTE-

³² *Sri Lanka, supra* note 16.

³³ Interview 8, with two ex-detainees and one former IDP camp resident, Sri Lanka (Jan. 8, 2012) (M28).

³⁴ This feeling continues even now, as many interviewees expressed that they felt more secure under the LTTE than they do presently under the government. *See id.* (M28) (detainee expressing fear and distrust of the government, and a general feeling of insecurity since the LTTE lost power). While the LTTE was a known threat, the Government’s capabilities and intentions were and remain unknown to Tamil civilians. In addition, many people felt that they could trust the LTTE’s word (for example, to not require more than one child per family), but do not have the same confidence in government promises. *See id.* (M28) (recounting how he was let go by LTTE after pointing out that they had violated their one child policy by recruiting his brother as well).

³⁵ These estimates are based on census data which shows that the population in the North dropped from 430,000 in the authenticated census of 2008 to 290,000 after the war, a population change of approximately 140,000 in three years. Rajasingham Jayadevan, *Death toll claim climbs from ‘Zero’ to over ‘100,000,’* SRI LANKAN GUARDIAN, Apr. 17, 2011, <http://www.srilankaguardian.org/2011/04/death-toll-claim-climbs-from-zero-to.html>. *See also* Interview 7, Vanni activist, Sri Lanka (Jan. 7, 2012) (also relying on census data to discuss missing person estimates).

³⁶ According to the Sri Lankan government’s Department of Census and Statistics, in 2009, a total of 7,934 people died due to “other deaths” and 2,523 died due to natural causes in the Northern Province. *Enumeration of Vital Events 2011: Northern Province*, SRI LANKA DEPT. OF CENSUS AND STATISTICS, 20 (2011), http://www.statistics.gov.lk/PopHouSat/VitalStatistics/EVE2011_FinalReport.pdf.

³⁷ *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka*, iii, Mar. 31, 2011, available at http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf.

controlled areas before the end of the war were sent to IDP camps, and the families that stayed with the LTTE joined them there at the close of the war.

Interviewees who fled before the war ended, often leaving all of their possessions behind to cross through sea inlets or along the coast,³⁸ were sent to screening posts where they were kept for several days of interrogation. They reported being questioned family by family, each time asked if they had any connection to the LTTE.³⁹ While some said they were given food and water during the interrogation, others reported limited food and a lack of sanitation facilities.⁴⁰ After this initial screening, they were sent to government-run IDP camps, including sites such as Menik Farm,⁴¹ where they were required to remain. In the district of Vavuniya, the United Nations Human Rights Council (UNHCR) estimated that as of March 30, 2009, approximately six weeks before the end of the war, nearly 50,000 civilians were living in these IDP camps, a figure that was already well above the capacity of the camps.⁴²

The camp conditions would only deteriorate, however, as the war ended and the remaining civilians from the North entered into government control. After the Government had declared victory, the remaining Tamil civilians who had been retreating with the LTTE were

³⁸ At least three individuals reported experiences similar to this. Interview 9, with seven IDP camp residents, Sri Lanka (Jan. 8, 2012) (F2, F4, M5).

³⁹ *Id.* (F2).

⁴⁰ One female interviewee reported only being given food at midnight and that her screening post in Trincomalee did not have toilets. *Id.* (F4).

⁴¹ Menik Farm was one of the largest IDPs camps. Divided into eight zones in the Vanni region, the Menik Farm system held over 150,000 people. See UN Office for the Coordination of Humanitarian Affairs (OCHA), *Map of IDP Site Locations and Capacity, as of 04 June 2009, District: Vavuniya*, OCHA/ LK/ Vavuniya/ IDP Site Locations/ 001/V23, June 4, 2009, available at <http://www.unhcr.org/refworld/docid/4a2cbdd50.html> [hereinafter OCHA June 4, 2009 map] (showing the location of all IDP camps as of June 4, 2009); see also *Sri Lanka: Menik Farm Welfare Center of the Internally Displaced Persons*, Feb. 26, 2009, <http://reliefweb.int/node/299069> (giving government account of the Menik Farm construction). Menik Farm still holds several thousand Tamils who have been unable to return to their land due to government acquisition or reports of land mines. See UN Office for the Coordination of Humanitarian Affairs (OCHA), *Areas of Origin in Mullaitivu District of Remaining Population in Menik Farm as of 28 March 2012*, Mar. 28, 2012, available at http://www.sangam.org/2012/04/MenikFarm_Origin.pdf.

⁴² See UN Office for the Coordination of Humanitarian Affairs (OCHA), *Map of IDP Site Locations and Capacity as of 31 March 2009*, OCHA/ LK/ Vavuniya/ IDP Site Locations/ 001/V13, Mar. 31, 2009, available at <http://www.unhcr.org/refworld/docid/49d3630c2.html> [hereinafter OCHA March 31, 2009 map].

taken to screening posts by the Government as part of its “humanitarian rescue operation.”⁴³ It was estimated that by the end of this operation, a total of 276,785 people had crossed to the government-controlled areas.⁴⁴ The altruism of this “rescue,” however, is questionable. After leaving the conflict area, the IDPs were taken to screening centers and interrogated in a manner similar to those who had left the conflict area earlier.⁴⁵ They were then sent on to the IDP camps where the earlier IDPs were being held and where all the civilians from the North were forcibly kept for the next six months.⁴⁶ The camps had armed surveillance and barbed wire surrounding their borders.⁴⁷ As the Army attempted to screen out anyone with LTTE affiliations, residents were forced to live in substandard conditions. The camps were reported to be overcrowded, with interviewees claiming that four families were expected to share a ten foot by ten foot room, and one toilet was to be shared by sixty residents.⁴⁸ Several residents also reported that they were forced to wait for hours to get water, tying a bottle to a string in order to keep their place in a two kilometer line.⁴⁹

More troubling than the living conditions, however, was the atmosphere of the camp. Interviewees reported that they were interrogated every 15 days,⁵⁰ and that they felt like they

⁴³ This phrase has been used in numerous contexts, including where the Sri Lankan government defended its actions by attacking the war in Iraq, saying Sri Lanka remains the only country to have conducted a successful humanitarian rescue operation freeing almost 300,000 Tamil civilians from the LTTE. See *UK War Crimes in Iraq*, SRI LANKA MINISTRY OF DEFENSE, Aug. 23, 2011, http://www.defence.lk/new.asp?fname=20110823_02. See also *All Hostages Rescued – Army*, SRI LANKA MINISTRY OF DEFENSE, http://www.defence.lk/new.asp?fname=20090517_03.

⁴⁴ UN Office for the Coordination of Humanitarian Affairs (OCHA), *Vanni Emergency: Situation Report #19*, May 30, 2009, available at <http://ochaonline.un.org/srilanka/SituationReports/tabid/2583/language/en-US/Default.aspx>. This total included all persons who crossed between October 27, 2008 and May 28, 2009. When comparing the May numbers to the numbers reported in late March, it appears the majority of the IDPs came in May during and after the final government offensive on the Tigers. See *id.* Cf. OCHA March 30, 2009 map, *supra* note 42.

⁴⁵ Interview 9, with seven IDP camp residents, Sri Lanka (Jan. 8, 2012).

⁴⁶ *Id.* For locations of the camps, see OCHA June 4, 2009 map, *supra* note 41.

⁴⁷ *War on the Displaced: Sri Lankan Army and LTTE Abuses against Civilians in the Vanni*, HUMAN RIGHTS WATCH (2009), available at http://www.hrw.org/sites/default/files/reports/srilanka0209web_0.pdf.

⁴⁸ Interview 9, with seven IDP camp residents, Sri Lanka (Jan. 8, 2012) (F1).

⁴⁹ *Id.* (F1).

⁵⁰ Interview 8, with two ex-detainees and one former IDP camp resident, Sri Lanka (Jan. 8, 2012) (F42).

were always under suspicion.⁵¹ NGOs and other outside observers were not allowed into the camps, and one interviewee reported that the drinking water was cut off in her camp for five days after some of the residents attempted to speak with an Indian NGO about the conditions.⁵² One resident who was there at that time said the residents were explicitly told that the water was being cut off as a punishment for speaking with the NGO, and afterwards people became very afraid to talk with any outsiders.⁵³ Movement was also severely restricted, so that even obtaining permission to go to the hospital became a major ordeal.⁵⁴ The restrictions existed even for those who had relatives who were willing and able to host them.⁵⁵ Residents were not allowed to visit family members in other parts of the camps, and it was reported that those caught attempting such visits were beaten by camp authorities.⁵⁶ Headcounts were conducted daily to ensure that no one had escaped by climbing the barbed wire that encircled the camps.⁵⁷ Residents were also not allowed to leave for work.⁵⁸ This treatment caused bitterness among many of the residents and further alienated them from the government. One former resident expressed that there was nothing the Government could do now to make up for how poorly they had treated her in the camps.⁵⁹ Another man complained, “Even in prison you have some freedom, but here we did not even have that.”⁶⁰

⁵¹ *Id.* (F42)

⁵² Interview 9, with seven IDP camp residents, Sri Lanka (Jan. 8, 2012) (F1).

⁵³ *Id.* (F1).

⁵⁴ One male interviewee reported knowing families that had a child die after permission to go to the hospital was denied on the grounds of the illness not being serious enough. *Id.* (M7). Another female interviewee reported being escorted by the police on her trip to the hospital to get medicine. *Id.* (F3). She was required to leave her ID card behind at the camp as a guarantee that she would return. *Id.*

⁵⁵ Interview 8, with former IDP camp resident, Sri Lanka (Jan. 8, 2012) (F42).

⁵⁶ *Id.* (F42).

⁵⁷ *Id.* (F42).

⁵⁸ Interview 9, with seven IDP camp residents, Sri Lanka (Jan. 8, 2012) (F1).

⁵⁹ Interview 8, with former IDP camp resident, Sri Lanka (Jan. 8, 2012) (F42).

⁶⁰ Interview 9, with seven IDP camp residents, Sri Lanka (Jan. 8, 2012) (M7).

a. Legal Analysis of Internment in Sri Lanka

i. Standards from international law

Although IDP camps are common in post-war settings, the interrogations, armed guards, and extreme restrictions on movement, work, and family reunification push the Sri Lankan camps into the category of civilian internment. Internment, or administrative detention, is used to describe deprivations of liberty which are not decided in view of a trial or resulting from a trial.⁶¹ Such detention implicates not only the rights related to the process and conditions of detention, but broader rights such as the freedom of movement and choice of residence.⁶² Standards for civilian internment in internal conflict have not been well developed, but models for treatment can be drawn from more detailed treatises on the deprivation of liberty and the internment of foreign civilians in international conflict. It seems reasonable that a government should be expected to treat its own citizens at least as well as it is obligated to treat citizens of countries it is at war with.

The first consideration is what constitutes acceptable grounds for internment. Unfortunately, international human rights law has not created a specific regime for civilian internees, although commentators agree that the basis for internment must be drawn from international human rights law.⁶³ While internment for reasons such as mental illness, drug addiction, or immigration control have become well accepted,⁶⁴ it remains controversial to detain people for reasons of public security when those people are not yet suspected of crime.⁶⁵ For example in *The Republic of Ireland v. United Kingdom*, the ECHR held that while internment

⁶¹ Marco Sassoli, *Internment*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶26 (2007)

⁶² ICCPR, *supra* note 21, Art. 12.

⁶³ Sassoli, *supra* note 61, ¶22.

⁶⁴ See Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 5(1)(c), Nov. 4 1950, ETS 5. *See also General Comment No.8, supra* note 23, ¶1.

⁶⁵ Sassoli, *supra* note 61, ¶26.

was justified in order to prevent a person from committing a specific offense, detaining someone for more than 48 hours merely for the general "preservation of the peace and maintenance of order" or to interrogate them about the activities of others was impermissible.⁶⁶ Commentaries also provide that the detention should be reasonable and necessary.⁶⁷

Therefore, the internment of a person for active participation in an armed conflict is arguably lawful, but even in these situations ICCPR Article 9 and the clarifying guidance of General Comment 8 require that civilian internments (1) have a justification in domestic law, (2) be decided according to a regular procedure, including informing the internee of the reason for internment, and (3) allow the internee access to review by the courts.⁶⁸ Likewise interned civilians are covered by the protection of the UN Body of Principles, including its provision for judicial oversight and access to legal counsel.⁶⁹ The Human Rights Committee has repeatedly reiterated that internment must never be arbitrary, with arbitrary being interpreted broadly to include "inappropriateness, injustice, lack of predictability and due process of law."⁷⁰ Internment based on political views or ethnicity has been held by various courts to be inherently arbitrary.⁷¹ While countries may derogate from some of these standards in times of emergency, such derogation must be necessary to face the situation, be proportionate to the threat, and not be

⁶⁶ Ireland v. UK, 25 Eur. Ct. H.R. (ser. A), ¶196 (1978), *available at* <http://www.worldlii.org/eu/cases/ECHR/1978/1.html>. *See also* Guzzardi v. Italy, 39 Eur. Ct. H.R. (ser. A), ¶102 (1980) (allowing internment to hinder an individual from committing a concrete and specific offense, although clarifying that even in this situation the person should be produced to a court as quickly as possible).

⁶⁷ Sassoli, *supra* note 61, ¶34.

⁶⁸ *General Comment No.8, supra* note 23.

⁶⁹ *Body of Principles, supra* note 27 (requiring judicial oversight of any and all detentions, including the opportunity for detainees to be heard by a judicial authority as to why they should not be detained, and the right of detainees to be informed of the reason for the detention).

⁷⁰ Human Rights Committee, AW Mukong v. Cameroon, U.N. Doc. CCPR/C/51/D/458/1991, ¶9.8 (1991). *See also* Gangaram Panday Case, Order of the Court of November 27, 1998, ¶47, reprinted in 1998 Annual Report of the Inter-American Court of Human Rights [531], OEA/Ser.L/V/III.43, doc. 11 (1999).

⁷¹ *See* Hugo van Alphen v. The Netherlands, Communication No. 305/1988, ¶5.8, U.N. Doc. CCPR/C/39/D/305/1988 (1990) (regarding political opinion); Organisation Mondiale Contre La Torture v. Rwanda, African Commission on Human and Peoples' Rights, Comm. Nos. 27/89, 46/91, 49/91, 99/93, ¶28 (1996) (regarding ethnicity).

incompatible with other international obligations.⁷² Even in cases of national emergency, some rights, such as access to habeas corpus and supervision of detentions by a judicial body, may not be derogated,⁷³ and derogations must never lead to or consist of discrimination on inadmissible grounds.⁷⁴

ii. Sri Lanka's use of internment violated international standards

The internment of civilians in Sri Lanka violated a number of these principles, including the prohibition on arbitrariness and the requirements of proportionality and a justification based on necessity. Although Sri Lanka's derogations of Article 9 of the ICCPR date back to 1983,⁷⁵ the most recent round of derogations occurred on May 30, 2000 when Sri Lanka declared a State of Emergency and announced derogation from several articles of the ICCPR, including Article 9(2) and 9(3) and Article 12 involving the freedom of movement and choice of residence.⁷⁶ Sri Lanka, however, ended many of these derogations in June 2010 following the end of the war and "the elimination of the menace of terrorism posed by the ruthless organization styling itself the Liberation Tigers of Tamil Eelam."⁷⁷ Although the period of mass civilian internment, involving 380,000 Tamils, lasted from May 2009 to December 2009 and was within the timeframe of Sri Lanka's derogations from the ICCPR, the derogations still must be limited "to the extent strictly required by the exigencies of the situation."⁷⁸ This is also echoed in the UN Guiding Principles

⁷² Sassoli, *supra* note 61, ¶39; U.N. Human Rights Committee., *General Comment No.29: States of Emergency*, at ¶16, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2011), available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/71eba4be3974b4f7c1256ae200517361/\\$FILE/G0144470.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/71eba4be3974b4f7c1256ae200517361/$FILE/G0144470.pdf).

⁷³ *General Comment 29, supra* note 72, at ¶16 ("In order to protect non-derogable rights, 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.").

⁷⁴ ICCPR, *supra* note 21, Art. 4(1).

⁷⁵ Sri Lanka derogated from Article 9(3) from May 18, 1983 to Jan. 16, 1989, 9(2) from Aug 18 1989 to Sept. 29 1994. See ICCPR, *Status of Ratification, Reservations and Declarations* [Sri Lanka], available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ ICCPR, *supra* note 21, Art. 4(1).

on Internal Displacement, which, although not binding, is recognized as an important international framework. The Guiding Principles provide that IDPs shall not be subject to arbitrary detention and, “[t]o give effect to this right,” IDPs “shall not be interned in or confined to a camp. If in *exceptional circumstances* such internment or confinement is *absolutely necessary*, it shall not last longer than required by the circumstances.”⁷⁹

The LTTE had posed a severe threat in the past, and the Government was understandably nervous of the resurgence of a group known for its violence. The war, however, had ended and Sri Lanka was broadcasting how thorough the defeat of the Tigers had been, including the death or capture of nearly all of the top leadership. This created an inconsistency, with the Government on the one hand saying that victory is complete and on the other hand saying that “exceptional circumstances” still exist to the extent that mass internment would be necessary. In particular, it seems difficult to believe that a reasonable observer would have found that threat from the LTTE during the period from June 2009 to December 2009 was severe enough to justify the internment. Sri Lankan Defense Secretary Gotabhaya Rajapaksa estimated that before the war there were approximately 30,000 LTTE cadres,⁸⁰ and Sri Lanka’s investigation into the war estimated that 22,247 of these cadres were killed during the war.⁸¹ Furthermore, 11,951 ex-cadres were removed from the IDP camps for rehabilitation,⁸² with most of those removals occurring in May 2009 within days of the end of the war. Given, then, that 34,000 ex-cadres out of the estimated

⁷⁹ U.N. High Commissioner for Refugees, *Guiding Principles on Internal Displacement*, July 22, 1998, U.N. Doc. E/CN.4/1998/53/Add.2, Principle 12 (emphasis added).

⁸⁰ *Gotabhaya Rajapaksa’s Testimony to the War Commission (Live)*, SUNDAY LEADER, Aug. 17, 2010, <http://www.thesundayleader.lk/2010/08/17/gotabhaya-rajapaksas-testimony-to-the-lessons-learnt-commission-live/>. Other estimates of LTTE membership in 2008 were much lower, estimating only 8,000 to 10,000 cadres. See *LTTE*, ANTI-DEFAMATION LEAGUE, http://www.adl.org/terrorism/symbols/liberation_tigers_te1.asp; *War Crimes in Sri Lanka*, INTERNATIONAL CRISIS GROUP, 9, May 17, 2010, http://www.observatori.org/paises/pais_75/documentos/191%20War%20Crimes%20in%20Sri%20Lanka.pdf.

⁸¹ *Report of the Commission of Inquiry on Lessons Learnt and Reconciliation*, LLRC COMMISSION, 37 (2011).

⁸² *Rehabilitation of Ex-Combatants*, Sri Lanka Commissioner General of Rehabilitation, 13 (2011) (on file with author).

LTTE membership pool of 30,000 had already been killed or removed, the continued internment of 400,000 people for six months of interrogation and screening seems disproportionate to any actual threat of active LTTE members hiding in the camps.

In addition, Sri Lanka has never acknowledged the internment as a detention or derogation from ICCPR Article 9, instead focusing on it only as a humanitarian effort. By failing to address the IDP situation as a derogation of the ICCPR, the Government has avoided sharing with the international community the factors it used to decide that such internment was necessary. The Government, therefore, has not submitted any evidence that there was still a credible threat to the nation at that time, and such a severe derogation should require the burden of proof to be on the Government. The Government also sidestepped charges from observers such as the UN Special Rapporteur on Internally Displaced Persons that the Government was making collective judgments instead of individualized screenings and that the closed camps solution was not proportional to the threat posed, instead simply reiterating that the IDPs would eventually be released.⁸³ As the original humanitarian motivations came under attack, the Sri Lankan government offered an alternate explanation, citing a need to screen residents for potential LTTE affiliation and determine areas of origin.⁸⁴ Even with this added justification, however, the Government has not produced any evidence indicating that the response was proportional the threat posed.

Furthermore, interning people for the purpose of interrogation and screening falls within the controversial category of internment for public security described in General Comment 8.

⁸³ U.N. Press Release, *UN Representative Discusses Freedom of Movement for Quarter Million Displaced with Sri Lankan Government*, Sept. 29, 2009,

http://www.brookings.edu/projects/idp/~link.aspx?_id=AA61D6DB03C746F08C9718F6B10A3A45&_z=z.

⁸⁴ See *Liberty and Freedom of Movement*, INTERNATIONAL DISPLACEMENT MONITORING CENTRE, Jan. 14, 2011, <http://www.internal-displacement.org/idmc/website/countries.nsf/%28httpEnvelopes%29/A71DFAB501A340BEC125781600582AE1?OpenDocument>.

The Government failed to meet the obligations that General Comment 8 provides for preventative detentions, including giving reasons for the internment and allowing court control over the process.⁸⁵ The Government also failed to prove that the preventative detention was not arbitrary, as the primary method for determining internment appears to be nothing more than the fact that these civilians were of a certain ethnicity and had been geographically near the Tigers at the end of the war. In addition to problems of arbitrariness, there was no legal process to determine who should be interned. Although the internees were screened, internment was the best possible result of the screening, with persons considered to be higher level threats removed to rehabilitation or prison. The result of the screening, it appears then, was either detention in a rehabilitation center or prison if someone was considered a threat or detention in the internment camp if they were not considered a threat. There should have been a third option, where those determined to be of very low or no security-risk would have been allowed to leave the IDP camps.

As a form of detention, under the Body of Principles for Detention the internees also should have been given a more substantive legal process, including access to counsel and full information of their rights. Internees were not informed of why they were being detained, as required by General Comment 8. Although some were given vague rationales about dangerous mines in their home territories, this reasoning that did not explain why the internees could not stay with relatives or why armed guards were necessary.⁸⁶ Internees had no ability to challenge their confinement before a judge, a non-derogable right under the ICCPR and required by General Comment 8 for all preventative detentions.⁸⁷

⁸⁵ See *General Comment No.8, supra* note 23.

⁸⁶ Interview 9, with seven IDP camp residents, Sri Lanka (Jan. 8, 2012).

⁸⁷ *Id.*

b. Conditions of the Internment Camps also Violated International Standards

The other major issue is the conditions of the camps. Additional Protocol II to the Geneva Conventions, which Sri Lanka has not ratified but which has been so widely accepted that some of its provisions could be viewed as customary law, requires that people who are no longer actively participating in the hostilities be treated humanely.⁸⁸ It also requires that detained persons be provided with food and water to the same extent that these are available to the local civilian population, and that safeguards be put in place for health and hygiene.⁸⁹ Collective punishment and humiliating or degrading treatment are prohibited, and those in detention should be given medical examinations and allowed to send and receive letters.⁹⁰ Models for treatment and camp conditions can also be drawn from the Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), which applies to internment of civilians in international armed conflicts.⁹¹ Geneva Convention IV gives detailed instructions about the shelter conditions (including adequate light, spacious sleeping quarters, suitable bedding), necessities (including food and clothing rations, access to safe drinking water, and an allowance to purchase other goods), and the placement of infirmaries on site and unrestricted access to hospitals.⁹² Furthermore, the Convention gives internees the right to present authorities with any petition about conditions of internment,⁹³ the right to receive visitors, especially

⁸⁸ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, Art. 4, 8 June 1977, 1125 UNTS 609, available at <http://www.unhcr.org/refworld/docid/3ae6b37f40.html> [hereinafter Additional Protocol II]. This also supported by Principle 1 of the Body of Principles. *Body of Principles*, *supra* note 27.

⁸⁹ Additional Protocol II, *supra* note 88, Art. 5.

⁹⁰ *Id.*, Art. 4.

⁹¹ Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287.

⁹² *Id.*

⁹³ *Id.*, Art. 101.

relatives, at regular intervals and as frequently as possible,⁹⁴ and the right to visit home in cases of death or serious illness.⁹⁵ The Convention also states that any punishment, including punishments for escape, must be confined to fines, loss of privileges or confinement – beatings or other physical punishment are not allowed.⁹⁶

The conditions of internment for the displaced Tamil civilians in Sri Lanka fell outside of nearly all of these standards. Residents of the camps reported that they were not allowed to leave for funerals, to receive visitors in the camp, or to leave the country.⁹⁷ Their living and sleeping quarters were reportedly below the levels set by the Convention, and people complained about access to adequate food, water, and sanitation facilities.⁹⁸ No allowance was given in the camps, and since people were unable to leave the camp for work, it was difficult to purchase needed goods.⁹⁹ Interviewees also reported difficulties in obtaining permission to go to the hospitals.¹⁰⁰ Most troubling, the interviewees reported physical punishment for offenses such as going to other sectors of the camp to visit family or for trying to escape.¹⁰¹ In particular, interviewees said that the camp managers were known to cut off the drinking water for five days as punishment for speaking with NGOs about living conditions.¹⁰² This is a form of collective punishment, which is prohibited by the Convention, and violates the Body of Principles on Detention's maxim that detainees receive humane treatment.

⁹⁴ *Id.*, Art. 116

⁹⁵ *Id.*

⁹⁶ *Id.*, Art. 119.

⁹⁷ Interview 9, with seven IDP camp residents, Sri Lanka (Jan. 8, 2012).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Interview 8, with two ex-detainees and one former IDP camp resident, Sri Lanka (Jan. 8, 2012) (F42).

¹⁰² Interview 9, with seven IDP camp residents, Sri Lanka (Jan. 8, 2012) (F1).

c. The Requirements of Necessity and Proportionality Were Not Met

As stated earlier, the Government of Sri Lanka claimed the strict conditions of internment were necessary to screen for potential LTTE affiliations. After nearly thirty years of war, it is understandable that the Government would be cautious about a resurgence of the LTTE, but choosing this path which alienated such a large segment of the Tamil population was not an effective method of preventing the LTTE from resurrecting the in long term. Even if the government's motives were sincere, therefore, screening was still not a necessary or wise course of action. First of all, there is little evidence linking those in the IDP camps to the LTTE. The initial screening was completed in a matter of a few days and most people associated with the LTTE were sent to rehabilitation almost immediately. Rehabilitation, which will be explored in more detail later in this paper, was a "program" for ex-cadres that essentially involved two years of detention with frequent interrogations and threat of transfer to prison. The government's standard for association justifying rehabilitation was very liberal – even one minute of any association with the LTTE was grounds for rehabilitation. That meant that after the initial screening, those in the camps had already been classified as no association whatsoever with the LTTE. Yet everyone except the very elderly were kept in the IDP camps for six months, including small children, grandmothers, and preteen girls. Even if some people were still considered credible threats and needed to be kept for additional questioning, surely large sections of this population, including these low risk categories, could have been released to relatives.

It is also difficult to see why these families needed to be held for repeated questioning after passing the initial screening, especially when other alternatives such as a parole system could have been created. The Government has never given an explanation of why people could not go stay with relatives as long as they remained at that known address. Moreover, there is

evidence that many of the individuals who posed the highest security threat were able to bribe their way out of the camps.¹⁰³ A system that leaves gaps for the rich or those with connections to escape while trapping everyone else is certainly not the most effective way to track down terrorist associations. Instead, the internment system simply alienated many innocent Tamil civilians who were already wary of the Government and continues even now to hinder reconciliation, a price that is far too high for the hope of a few more leads on LTTE associations.

One possible defense the Government could raise is that they were simply unprepared for the overwhelming number of IDPs that came out of the LTTE areas. While this may be understandable to some extent, this defense is undercut by the fact that the internment process has been used repeatedly by the Sri Lankan government against Tamil civilians, even in situations where there was not nearly such a rapid influx of IDPs. In March and July 2008, two camps for displaced Tamils were set up at Kallimodдай and Sirukandal. As of December 2008, these camps only housed about 806 people, most of whom were fleeing the war in Vanni region.¹⁰⁴ Residents of those camps reported many of the same problems, including prolonged detention under armed guard, inadequate living conditions, interrogations, and physical punishments.¹⁰⁵ Advocates also charged that these families were not receiving proper screening for determining legitimate security threats, and that all Tamils leaving the conflict region were

¹⁰³ U.S. DEPT. OF STATE, *2009 Human Rights Report: Sri Lanka*, Mar. 11, 2010, <http://www.state.gov/j/drl/rls/hrrpt/2009/sca/136093.htm> (“NGOs and international sources reported that paramilitaries abducted civilians from the IDP camps. Verification of such incidents was complicated by reports that large numbers of persons paid bribes to officials and others to escape the camps. Estimates on the number of persons who escaped the camps in this manner varied widely, but most observers suggested it was at least 10,000.”). Other reports allege that LTTE members paid upwards of one million rupees to be released from the camps, although these reports are difficult to verify. *See e.g., A Prominent Australian LTTE Front Organization Activist Files War Crimes Indictment*, Oct. 25, 2011, <http://www.theepori.com/newsfull.php?newsid=12241>.

¹⁰⁴ *Besieged, Displaced, and Detained*, HUMAN RIGHTS WATCH, 11 (2008), available at <http://www.hrw.org/sites/default/files/reports/srilanka1208webwcover.pdf>.

¹⁰⁵ *Id.*

held as persons of interest in the camp.¹⁰⁶ Despite international pressure to release people from the camps, between April 2008 and December 2008, only 65 people were released.¹⁰⁷ All of this happened at a time when there was no massive rush of IDPs, and where the Government was arguably much less overwhelmed or surprised.

The allegations of inappropriate detention and inadequate camp conditions were brought to the attention of the Sri Lankan government in reports by activists who had managed to sneak into the camps to collect testimony.¹⁰⁸ Between the initial detentions at Kallimoddi and Sirukandal and the end of the war, nearly fourteen months had passed, which should have been enough time for the Sri Lankan government to respond to these allegations and develop some sort of plan for preventing them in the future. Yet it appears that no significant changes were made in the way the camps were managed. The lack of response to previous allegations, combined with the fact that many of the complaints, such as physical punishments, would not have been caused or exacerbated by a lack of preparation or having a larger IDP population than expected, discredits attempts to justify the process and the poor conditions of internment based on the large number of IDPs.

V. Rehabilitation

Out of the larger IDP population, some individuals were separated out for special “rehabilitation.” Although the Government had reported that the LTTE intended all of its cadres to die in a mass suicide at the end of the war, interviewees reported that in actuality the LTTE told people with low involvement, including forced recruits, to return to their families when it

¹⁰⁶ See Rev. Fr. Jeyabalan de Croos, Deanne Uyangoda and Ruki Fernando, *Threats, Harassments and Restrictions on Former Detainees and Their Families in Vanni*, May 12, 2011, <http://transcurrents.com/news-views/archives/424>.

¹⁰⁷ *Besieged, Displaced, and Detained*, *supra* note 104, at 12.

¹⁰⁸ Interview 5, Vanni activists, Sri Lanka (Jan. 6, 2012).

became clear that the LTTE had no hope of winning.¹⁰⁹ This meant that when the war ended, many people who had been involved with the LTTE were entering the IDP camps with the other civilians. To facilitate separating LTTE cadres from civilians, the Government made loudspeaker announcements in the camp that those associated with the LTTE should turn themselves in.¹¹⁰ The standard for association was incredibly liberal – the camp residents were told if they had had spent “even one minute” working with the LTTE they should turn themselves in immediately.¹¹¹ They were told if they did not surrender themselves, they would receive even harsher treatment when they were caught later.¹¹² Those who chose to surrender at that time explained in later interviews that they were afraid of government retaliation against their families if they did not surrender,¹¹³ and they also feared being turned in by other members of the community,¹¹⁴ which would lead to the harsher punishment that the Government had threatened. In total, 11,951 Tamils, including 594 children, either surrendered under this process.¹¹⁵ These surrenderees, or “beneficiaries” as they are called by the Sri Lankan government, were then separated into categories designated by the letters A through G based on their level of involvement, ranging from “Senior LTTE leaders” (category A) to “Members forcibly used by the LTTE” (category G),¹¹⁶ and sent to one of the twenty-four Protective Accommodation and Rehabilitation Centres (PARCs). The vast majority of surrenderees were in the lower categories, with over two-thirds

¹⁰⁹ Interview 10, with ten ex-detainees, Sri Lanka (Jan. 9, 2012).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Rehabilitation of Ex-Combatants*, *supra* note 82, at 13, 19. Reports on the total number are conflicting (this source even lists different figures in different places), but estimates around 12,000 seem to be relatively consistent.

¹¹⁴ Interview 10, with ten ex-detainees, Sri Lanka (Jan. 9, 2012).

¹¹⁵ Interview 1, in Colombo, Sri Lanka (Jan. 4, 2012). The figures of how many of these came as a result of the loudspeaker call are unclear, as the psychologist was under the impression that only 5,000 responded to the call and the rest were discovered during initial screenings or turned in by other members in the camp. *Id.* If it is true that only 5,000 appeared of their own choice and the rest were “found,” the claims of surrender being voluntary are even less credible. All ex-detainees I spoke with, however, responded to the perceived threat of the loudspeaker call, and most government sources as well focused on that call as the primary method of becoming a surrenderee.

¹¹⁶ Email from Kelum Maddumage, Assistant at the Ministry of Defense, (Jan. 16, 2012) (on file with author).

(8,306 individuals) classified as forced recruits or members who never took part in any operations or attacks.¹¹⁷

a. Conditions in Rehabilitation as Reported by Interviewees Are Inconsistent with Government Descriptions

The rehabilitation program has been the darling of the Sri Lankan government, receiving steady attention in government press releases as a sign of the Sri Lankan government's goodness and mercy.¹¹⁸ Rehabilitation was necessary, government officials repeated, to undo the brainwashing that had occurred during the LTTE's reign in the North.¹¹⁹ Stories are presented of those in rehabilitation, termed by the Government as "beneficiaries," proudly completing job training, writing patriotic letters renouncing all their former beliefs about the pursuit of Tamil Eelam, or celebrating marriage ceremonies.¹²⁰ During interviews, the Commissioner General for Rehabilitation and other government employees proudly announced how much the beneficiaries had enjoyed their time in rehabilitation – that they had all chosen to come voluntarily, and that the biggest problem in rehabilitation is that people did not want to leave when the program was

¹¹⁷ *Id.* As provided by the Ministry of Defense, the classifications used for the surrenderees were:

A - Senior LTTE Leaders - Legal actions to be taken

B - Other LTTE Leaders - Legal actions to be taken

C - LTTE members extensively took part in operations / attacks - Legal actions to be taken

Combined total: 1,351 individuals (889 currently held, but not yet charged, in formal detention)

D - General LTTE members (military wing) - Long term rehabilitation

E - General LTTE members (not military wing) - Long term rehabilitation

Combined total: 2,325 individuals (about 678 of these are still in rehabilitation under court order, but have not been charged with any crimes)

F - Members underwent military training, but did not take part in any operations / attacks - Short term rehabilitation
Total: 6,090 individuals (this "short-term" rehabilitation appears to have been typically one to two years, with many serving the maximum time allowed without a court order (May 2009-October 2011)).

G - Other members forcibly used by the LTTE – to be immediately released

Total: 2,216 individuals. Id. [hereinafter *Statistics*]. Note that it seems that "immediate" was at least one year in rehabilitation, as the first groups of beneficiaries reported for release was not until October 2010. See *Turning Former LTTE into Sri Lankan Citizens*, GROUNDVIEWS.ORG, Oct. 28, 2011, n. xx, http://groundviews.org/2011/10/28/turning-former-ltte-personnel-into-sri-lankan-citizens/#_edn20.

¹¹⁸ See e.g., *A Day of Fun and Joy*, BUREAU OF THE COMMISSIONER GENERAL OF REHABILITATION, APR. 23, 2012, <http://bcgr.gov.lk/news.php?id=172>; *Photo Gallery*, BUREAU OF THE COMMISSIONER GENERAL OF REHABILITATION, <http://bcgr.gov.lk/photo.php>.

¹¹⁹ *A Day of Fun and Joy*, *supra* note 118 (quoting one youth as saying, "the terrorists brainwashed me").

¹²⁰ *Press Releases*, BUREAU OF THE COMMISSIONER GENERAL OF REHABILITATION, <http://bcgr.gov.lk/archives.php>.

finished.¹²¹ Such a happy experience, the Government explained, is why legal trappings were not necessary, as there was no point in having a legal process to challenge one's time in rehabilitation if everyone wanted to be there.¹²²

The surrenderees reported a very different experience from the picture painted by the government. In interviews conducted in Northern Sri Lanka with Tamils who had been through the rehabilitation process, the surrenderees reported that after turning themselves in, they were placed in a group holding facility surrounded by barbed wire and interrogated for several days.¹²³ During this time they were not allowed to interact with anyone else in the camp. After the interrogation period, they were given five minutes to gather their belongings before being taken to rehabilitation facilities.¹²⁴ The lack of communication with families during interrogation and the rushed departure led to confusion, as many families did not know where their loved ones were being taken or what would happen to them. The surrenderees themselves were also anxious and confused, as many reported that they were sure that they were being taken away to be killed.¹²⁵

Once they arrived at the rehabilitation centers, where many would spend the next two and a half years, the surrenderees reported that the repressive atmosphere continued. While the Government reported that beneficiaries spent most of their time in vocational training and counseling, in actuality most of their time was spent waiting, watching TV, or doing manual

¹²¹The director of the Poonottam Center claimed that the only complaints he received from those in rehabilitation is that they did not want to leave when the program was over. Interview Lt. Col. Manjula Gunasinghe, Supervisor of Poonottom Rehabilitation Center, in Vavuniya, Sri Lanka (Jan. 10, 2012).

¹²² When asked how situations were handled where people in rehabilitation wanted to challenge their confinement or claimed innocence, the psychologist involved in the program replied, "We did not have that issue." Interview 1, in Colombo, Sri Lanka (Jan. 4, 2012).

¹²³ Interview 10, with ten ex-detainees, Sri Lanka (Jan. 9, 2012).

¹²⁴ *Id.*

¹²⁵ *Id.*

labor such as fieldwork.¹²⁶ Some surrenderees who were interviewed reported that they had not completed a single vocational training course, and the majority had only completed one.¹²⁷ The Government figures corroborate this story, as reports of the numbers of trainings completed compared with the total number of surrenderees show that .85 trainings were completed for every beneficiary.¹²⁸ Given that government-issued reports also stated that many of these trainings lasted only a few weeks or months¹²⁹ and many surrenderees spent over two years in rehabilitation, having an average of less than one training per surrenderee leads to a lot of unaccounted for time.

Surrenderees' experiences differed from the Government's story in other ways as well. One group of surrenderees reported that they received counseling only on Saturdays.¹³⁰ They also reported that interrogations continued throughout the rehabilitation process, and that those who protested their confinement or in any other way acted out were beaten or removed to prison.¹³¹ Other small indignities were reported, such as having to sing the national anthem and say a morning loyalty pledge in Sinhala, a language associated with government control and not spoken by the majority of the surrenderees.¹³² The overwhelming opinion of the surrenderees

¹²⁶ *Id.* (reporting duties including cooking for large groups, clearing land, and planting vegetables to be sold to visitors by the PARC).

¹²⁷ See Interview 8, with two ex-detainees and one former IDP camp resident, Sri Lanka (Jan. 8, 2012) (M28, M25); Interview 10, with ten ex-detainees, Sri Lanka (Jan. 9, 2012). Of the group from Interview 10, only three of the ten had completed a full training. M25 from Interview 8 reported requesting some trainings, but was not given them, and M28 from Interview 8 reported receiving "a few days" of training in agriculture, but since he is from a coastal area with salt marshes, he felt such training was useless.

¹²⁸ *Rehabilitation of Ex-Combatants*, *supra* note 82, at 10, 13 (reporting 11,951 beneficiaries and only 10,154 trainings completed).

¹²⁹ Interview Lt. Col. Manjula Gunasinghe, Supervisor of Poontottom Rehabilitation Center, in Vavuniya, Sri Lanka (Jan. 10, 2012).

¹³⁰ Interview 10, with ten ex-detainees, Sri Lanka (Jan. 9, 2012).

¹³¹ *Id.*

¹³² *Id.* Due to the language barrier, some surrenderees reported that they did not even know what it was that they were saying in the mornings, but said they moved their lips to try to imitate the Sinhala words in order to avoid punishment. The Lt. Col. in charge of the Poontottam PARC countered these statements, saying that surrenderees were allowed to say the loyalty oath in Tamil, but when asked for a copy of the oath he said it was only available in Sinhala. Lt. Col. Manjula Gunasinghe, Supervisor of Poontottom Rehabilitation Center, in Vavuniya, Sri Lanka

interviewed was that rehabilitation was either a painful process, with some still fearing the Government and struggling with separation from their families, or that it was simply a waste of time – time they could have been using to rebuild their lives or earn money for their families.¹³³

b. People Released from Rehabilitation Face Continuing Harassment and Economic Hardship

Interviewees also reported that their troubles did not end when they were released from rehabilitation. When they were released they were given exit forms in Sinhala, which most cannot read, and told to register with the Criminal Investigation Department (CID) and Army Intelligence officers in their area.¹³⁴ The registration included copies of their release documents, identity documents, and photographs.¹³⁵ This process has created essentially a parole system and has been linked to military surveillance. Some surrenderees, or ex-detainees as they have been called by advocates, have reported being interrogated repeatedly since their release, often on the same topics that arose during rehabilitation questioning, such as who else is with the LTTE, where are weapons, and what is the LTTE planning.¹³⁶ Since many of the ex-detainees were forced recruits with no voluntary LTTE association, this interrogation is often a futile, but frightening experience. Physical abuse was also reported during these interrogation sessions.¹³⁷ Ex-detainees who have completed the full rehabilitation requirements and have been released also have not received any guarantee that they will not be re-arrested on the same charges of LTTE association and either put through rehabilitation again or sent to a prison.

(Jan. 10, 2012). The content of the oath appears to have been a promise to abide by the rules and regulations of the PARC and live “in peace and harmony.” *Id.*

¹³³ Interview 10, with ten ex-detainees, Sri Lanka (Jan. 9, 2012).

¹³⁴ De Croos, *supra* note 106.

¹³⁵ *Id.*

¹³⁶ Interview 10, with ten ex-detainees, Sri Lanka (Jan. 9, 2012).

¹³⁷ One interviewee explained how he was asked questions he didn’t know anything about, but if he said “I don’t know” they interrogators would beat him and accuse him of lying. *Id.* (M7).

The surveillance of those released from rehabilitation extends beyond interrogations. Ex-detainees said they must receive permission to travel, a restriction on their movement which hinders both employment opportunities and family reunification.¹³⁸ It was also reported that intelligence officers show up unexpectedly at their homes for questioning or re-registration.¹³⁹ This, many ex-detainees said, makes both their families and their neighbors uncomfortable, as many people are still afraid of the military.¹⁴⁰ As rumors of military rape and harassment circulate, some ex-detainees said they try to stay close to home so that the Army intelligence officers will not come and find their sisters or daughters home alone.¹⁴¹ Others reported threats made against their families or against families of ex-detainees who had fled Sri Lanka for safety reasons.¹⁴² The ex-detainees believe this close monitoring creates a stigma against them in the community and makes it more difficult to secure employment.¹⁴³ They believe that other members of the community, who are also afraid of the military, will not want to interact with them because it may lead to those community members also falling under government suspicion.¹⁴⁴ When a group of ex-detainees was asked what type of assistance they most needed to return their lives to normal, their top request for was the military's files on them to be destroyed so that the military and police could not harass them anymore.¹⁴⁵

Ex-detainees continue to face economic hardship due to the time lost in rehabilitation, the stigma now associated with them because of military harassment, and the limitations in job

¹³⁸ De Croos, *supra* note 106.

¹³⁹ *Id.*

¹⁴⁰ Interview 8, with two ex-detainees and one former IDP camp resident, Sri Lanka (Jan. 8, 2012) (M25 reporting that he is afraid when they come to interrogate him that they will take him back to rehabilitation; M28 reporting that he and his family fear violence from the military when they come to house).

¹⁴¹ De Croos, *supra* note 106.

¹⁴² *Id.*

¹⁴³ Interview 10, with ten ex-detainees, Sri Lanka (Jan. 9, 2012). Employment concerns are also heightened by the restrictions on movement. *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

options imposed by their travel restrictions. The most pressing remedy for abuses against the surrenderees, therefore, would be monetary compensation or assistance in securing employment. The limited vocational training provided in rehabilitation to some surrenderees has not been helpful to most in finding work. Although a few surrenderees interviewed had received certificates in a field,¹⁴⁶ none had obtained jobs as a result of the certificate.¹⁴⁷ The surrenderees reported that they have been unable to continue their training since coming home, as the skills provided were too elementary to actually lead to a job.¹⁴⁸ They also reported that they lack either the materials or opportunity to continue practicing and growing in whatever skills they had learned.¹⁴⁹ Although the Government has released new stories touting programs to give surrenderees sewing machines or other tools, reports circulated that these were simply publicity stunts, and that the gifts left when the cameras did.¹⁵⁰ One surrenderee, who had achieved a certificate in sewing, said the Government promised to send them all sewing machines when she left rehabilitation in October 2010, but she has not received one.¹⁵¹ Others reported that the training was not linked to realistic career opportunities, such as the agricultural training that was given to a young man from a northwest coastal village where farming is not possible due to poor soil.¹⁵² Sri Lankan Member of Parliament Rajiva Wijesinha confirmed that unemployment was a problem for the surrenderees released from rehabilitation, saying that the vocational training is not leading to jobs and that trainees from rehabilitation are not considered competent enough in

¹⁴⁶ Out of the twelve surrenderees interviewed, three had certificates. Interview 10, with ten ex-detainees, Sri Lanka (Jan. 9, 2012). The areas of certificate were sewing, beauty culture, and masonry. *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Interview 5, Vanni activists, Sri Lanka (Jan. 6, 2012) (retelling a story about sewing machines and computers that were brought for photos, but then taken away after the press left).

¹⁵¹ Interview 10, with ten ex-detainees, Sri Lanka (Jan. 9, 2012) (F2).

¹⁵² Interview 8, with two ex-detainees and one former IDP camp resident, Sri Lanka (Jan. 8, 2012) (M28).

the skills they learned to actually be hired.¹⁵³ When asked what could bring about reconciliation between the surrenderees and the government, many surrenderees responded that job opportunities would be the best way to help them move past their time with the LTTE.¹⁵⁴

c. The Government Has Not Submitted a Valid Legal Basis for Rehabilitation

The exact legal basis for rehabilitation has never been clearly pinpointed, but the Government seems to promote two theories. The first is that rehabilitation is a preventive detention based on a security threat, with the authorizing legislation being the Prevention of Terrorism Act (PTA) and Emergency Regulation 22. The Emergency Regulations lapsed when the state of emergency expired in September 2011, but the substantive portions relating to rehabilitation and detention were re-codified immediately as part of the PTA.¹⁵⁵ As stated by the Attorney General, it was very clear that “the removal of emergency regulations will not result in the release of some 6,000 persons detained under the emergency regulations.”¹⁵⁶ The second prong in the Government rationale for rehabilitation was that the entry into rehabilitation was entirely voluntary, and so no further legal basis was needed. This rationale is similar to the reasoning behind mental health patients who admit themselves – no grounds to subsequently hold that person are necessary because of their original consent.

Under Emergency Regulation 22, and its recodification in the PTA through Gazette 1721/5, any person who surrendered in connection with any offense under the PTA, Emergency Regulations, or numerous sections of the Penal Code and weapons acts shall be handed over to

¹⁵³ Interview with Prof. Rajiva Wijesinha, MP, in Colombo, Sri Lanka (Jan. 5, 2012).

¹⁵⁴ Interview 8, with two ex-detainees and one former IDP camp resident, Sri Lanka (Jan. 8, 2012) (M25); Interview 10, with ten ex-detainees, Sri Lanka (Jan. 9, 2012).

¹⁵⁵ PTA 1721/5 (Aug. 29, 2011).

¹⁵⁶ Former Attorney General of Sri Lanka, Mohan Peiris, NEWS.LK, Sept 1 2011 (quoted in Immigration and Refugee Board of Canada, *Sri Lanka: Changes to the emergency regulations and the Prevention of Terrorism Act (August-September 2011)*, Sept. 29 2011, LKA103837.E, available at <http://www.unhcr.org/refworld/docid/4f4f31eb2.html>).

the Commissioner-General of Rehabilitation and assigned to a PARC.¹⁵⁷ The Regulation required each surrenderee to give a written statement to the effect that the surrender is voluntary.¹⁵⁸ Given the reports from surrenderees, however, it appears that many surrenderees either did not understand the legal consequences of surrendering or did not think they had any other viable options. Since the option of appearing before a judge for trial based on the merits of their involvement was not presented to them, and given that many surrenderees were under the impression that they or their families would be killed if they did not surrender, it is questionable how “voluntary” any of the surrenders actually were. Furthermore, surrenderees said they did not sign anything before going into rehabilitation and claimed that they had never made such a written confession.¹⁵⁹

It is also unclear exactly what the surrenderees would have been confessing to, since the language of the regulations is so broad. Any person having any “connection” to offenses was included in these regulations – that includes not just people who committed the offenses, but also people who had any association with those who committed offenses. This was reflected by the government’s broad call in the camp for anyone who had been with the LTTE “for even one minute,” but using this as a standard for who deserved punishment or should be considered a security threat is simply too broad. The regulations provided, therefore, for the rehabilitation not only of hardened LTTE members, who may have actually benefited from some form of counseling or rehabilitation, but also for those who had insignificant involvement and would not benefit from any of the programs of rehabilitation. This overbreadth, coupled with the lack of screening to determine whether rehabilitation would actually be beneficial for a given individual or needed as preventative measure, pushes the regulation into the realm of arbitrary detention.

¹⁵⁷ Emergency Regulation 22, ELG Notice 1426/8 (Sept. 12, 2006), §22(2), 22(4).

¹⁵⁸ *Id.*

¹⁵⁹ Interview 10, with ten ex-detainees, Sri Lanka (Jan. 9, 2012).

Since the rehabilitation does not appear to have been truly voluntary, the same international standards that govern internment apply--namely that rehabilitation could be permissible as an administrative detention, but only if it was necessary and proportional to the threat. Here the rehabilitation pretense fails. While the surrenderees were divided into categories based on their involvement, rehabilitation seems to have been intended primarily for those with *lower* levels of involvement. The Government stated that surrenderees in the three categories with the highest LTTE involvement, ranging from senior leaders to LTTE members who took part in operations, will have legal action taken against them.¹⁶⁰ The higher categories were transferred out of rehabilitation and into the prisons. It is the lower categories, ranging from general LTTE members to forced recruits, that were designated for either “long-term rehabilitation” or “short-term rehabilitation.”¹⁶¹ Therefore, even those with the most minimal involvement were given some length of time in rehabilitation. Despite the classification of “short-term”, the time served by the lowest categories was not insignificant. Reports that the first group of surrenderees was released in October 2010 would mean that the minimum length of time served in rehabilitation was sixteen months.¹⁶² By the government’s own admission, many of those designated for “long-term rehabilitation” are still held in rehabilitation centers today based on court order, long after the stated maximum of two years.¹⁶³ Furthermore, a psychologist involved in administering the program reported during our interview that there was no substantive difference in the treatment received based on level of involvement.¹⁶⁴ If the purpose of rehabilitation was truly for the benefit of the surrenderees, it seems strange that individuals

¹⁶⁰ Of the 1,351 individuals classified in categories A, B, and C, 889 have been transferred to formal detention centers. *Statistics, supra* note 117.

¹⁶¹ *Id.*

¹⁶² See *Turning Former LTTE, supra* note 117.

¹⁶³ Of the 2,325 individuals classified as general LTTE members and accordingly assigned long-term rehabilitation, 678 were still in rehabilitation as of January 2012. *Statistics, supra* note 117.

¹⁶⁴ Interview 1, in Colombo, Sri Lanka (Jan. 4, 2012).

who spent three weeks digging bunkers would be housed with and treated the same as individuals who had spent the past ten years in the field fighting.

d. The Rehabilitation System Lacks Legal Protections and Uniformity

Activists have charged that rehabilitation has sidelined ordinary criminal proceedings and fair trial rights. As an administrative detention on grounds of preventative security, the surrenderees should have been informed of the precise reason for their detention and the criteria for their release as required by Article 9 of the ICCPR. This should have included a process for surrenderees to prove their innocence or level of LTTE involvement, including the ability to have independent judicial review of the proportionality between the level of involvement and the length of rehabilitation. Transparent explanations of what constitutes grounds for rehabilitation, beyond the vague “in connection with” standard should also have been provided.¹⁶⁵ Although some surrenderees interviewed said they learned of a possible path to be heard by a judge while in rehabilitation, they said they could not afford the process and did not trust that it would be independent. The details provided to surrenderees were cloudy, mostly coming through rumors from other surrenderees, but when interviewed the surrenderees were under the impression that judicial review, if it had really been possible, would have cost between one and two lakhs (about \$8,700 USD).¹⁶⁶

The Government did not provide any direct information on how a surrenderee could have challenged their rehabilitation once it had started, instead insisting that all of the rehabilitations were voluntary so no such process was necessary.¹⁶⁷ This has been confirmed by Amnesty

¹⁶⁵ *Id.*

¹⁶⁶ Interview 10, with ten ex-detainees, Sri Lanka (Jan. 9, 2012).

¹⁶⁷ All interviews with government officials contained references to “the voluntary surrenderees.” The director of the Poontottam Center claimed that the only complaints he received from those in rehabilitation is that they did not want to leave when the program was over. Interview Lt. Col. Manjula Gunasinghe, Supervisor of Poontottom Rehabilitation Center, in Vavuniya, Sri Lanka (Jan. 10, 2012). When asked how situations were handled where

International, which reports a similar attitude, saying, “The Sri Lankan authorities have continued to maintain that incarceration for ‘rehabilitation’ is not detention and that surrenders to the army were ‘voluntary.’ The courts overseeing transfers of detainees engage in a bit of play acting, requiring detainees . . . to affirm that the move to rehabilitation is ‘voluntary.’”¹⁶⁸

It is unclear, therefore, whether such a process to challenge rehabilitation actually was available to the surrenderees or if the rumors floating around the rehabilitation centers were unfounded. Habeas corpus applications have been dismissed by the Sri Lankan courts on the grounds that the person is in rehabilitation and not formal detention, with courts refusing to question whether such rehabilitation is actually appropriate in cases where the person has not been found guilty of criminal activity.¹⁶⁹ Even if some judicial review apart from habeas was available, no cases have been reported of anyone ever being released from rehabilitation through the judicial process. It is not surprising that surrenderees viewed any talk of judicial review as simply a way of extorting money from the families of surrenderees in the form of court costs and attorneys’ fees.¹⁷⁰

Systematic judicial review, presented openly and clearly by the Government and made available to everyone without extravagant fees, not only would have aided in the determination of which surrenderees actually needed rehabilitation, but it also could have helped to impose some consistency on the lengths of rehabilitation. Interviews revealed a lack of correlation between time spent with the LTTE and the time assigned to rehabilitation. The interviewees’ testimony included several accounts of people who had had no field participation or training, yet

people in rehabilitation wanted to challenge their confinement or claimed innocence, the psychologist involved in the program replied, “We did not have that issue.” Interview 1, in Colombo, Sri Lanka (Jan. 4, 2012).

¹⁶⁸ *Locked Away*, AMNESTY INTERNATIONAL, 12 (Mar. 2012).

¹⁶⁹ KISHALI PINTO-JAYAWARDENA & JAYANTHA DE ALMEIDA GUNERATNE, HABEAS CORPUS IN SRI LANKA: THEORY AND PRACTICE OF THE GREAT WRIT IN EXTRAORDINARY TIMES 193 (2011).

¹⁷⁰ Interview 10, with ten ex-detainees, Sri Lanka (Jan. 9, 2012).

spent years in rehabilitation. One man had been forcibly recruited and acted as a watchman for ten days for the LTTE in 2007 before bargaining for his release, and yet he was in rehabilitation from May 2009 to August 2011.¹⁷¹ Another man was forced to do just twenty days of labor for the LTTE at the very end of the war, and yet he was confined in rehabilitation from May 2009 until July 2011.¹⁷² A young man was forced to serve as a cook for three months from February 2009 until May 2009, and he was given the maximum rehabilitation sentence of two years.¹⁷³ Others interviewed had spent time fighting but received much shorter sentences: one man who was with the LTTE for eighteen years was only in rehabilitation from May 2009 until June 2010.¹⁷⁴

Furthermore, some of the top LTTE leadership never spent any time in rehabilitation centers at all, instead making bargains with the Government that allowed them to maintain their freedom. For example, Vinayagamoorthy Muralitharan (known as “Karuna”), a former commander for the LTTE implicated in the massacre hundreds of people and the disappearances of civilians in Jaffna, became a Member of Parliament in 2008. Sivanesathurai Chandrakandan (known as “Pillayan”), another top LTTE leader associated with Karuna, is now the Chief Minister Eastern Province, and Selvarasa Pathmanathan (known as “KP”), the former arms securer for the LTTE who was declared as the new leader of the LTTE in 2009 after the death of Prabhakaran,¹⁷⁵ is now collaborating with the Government on NGO projects involving development in the North.¹⁷⁶ While the Government should not be faulted for choosing to

¹⁷¹ Interview 8, with two ex-detainees and one former IDP camp resident, Sri Lanka (Jan. 8, 2012) (M28).

¹⁷² Interview 10, with ten ex-detainees, Sri Lanka (Jan. 9, 2012) (M7).

¹⁷³ *Id.* (M8).

¹⁷⁴ *Id.* (M5)

¹⁷⁵ *New Political Formation of LTTE Claimed*, TAMILNET, July 21, 2009, <http://www.tamilnet.com/art.html?catid=13&artid=29822>.

¹⁷⁶ *KP's NERDO registered*, DAILY MIRROR, Feb. 23, 2011, <http://www.dailymirror.lk/news/9969-kps-nerd-registered.html>; D.B.S. Jeyaraj, *Ex-LTTE Chief “KP”: The Tiger Who Changed His Stripes*, July 9, 2010, <http://dbsjeyaraj.com/dbsj/archives/1479>. KP's NGO was also repeatedly brought up in interviews with officials

“forgive and forget” with these LTTE leaders, such forgiveness seems hypocritical when many other low-level LTTE members were given long rehabilitation stays or remain in detention. If amnesty and full reintegration without criminal proceedings or detention in rehabilitation centers was possible for these three men, who were among the most active leaders of the LTTE, it should be possible for all former LTTE members. On the other hand, if the Government is seeking reconciliation with the Tamil community, criminal punishment of LTTE leaders who committed crimes against humanity, including those responsible for ordering forced recruitment and the killing of civilians, might be welcomed by Tamils who were victims of these crimes. What is not useful is to treat low-level members severely, including long stays for people with limited involvement, while releasing more quickly those with significant authority.

The lack of criteria for release or notice of why low-level surrenderees were held has contributed to confusion and resentment in the Tamil community. When the length of rehabilitation begins to seem arbitrary, especially when families see high level LTTE members set free while forced recruits spend years in rehabilitation, it is a short jump for many in the Tamil community to feel that this is another instance of government discrimination and bias. A clear and well-communicated standard for detention in rehabilitation and release, as well as notice of the exact grounds for suspicion, would have helped to manage the expectations of surrenderees and their families and lessened the anxiety and confusion that many felt during this process.

The period allotted for rehabilitation has also not been strictly followed, as several loopholes have emerged which allow the Government to keep people indefinitely in rehabilitation. According to the regulations, after an initial assignment of no more than twelve

from the Ministry of Defense as an example of reconciliation between the Government and former Tigers. Interview with Major General Kapila Hendawitharne, National Intelligence Chief, and Suresh Sallay, Coordinator of Foreign Intelligence, Sri Lanka Ministry of Defense, in Colombo, Sri Lanka (Jan. 4, 2012 and Jan. 16, 2012).

months, the rehabilitation can then be extended for up to another twelve months, totaling twenty-four months.¹⁷⁷ The regulations also allow, however, for surrenderees to be investigated by the military or other intelligence agencies while in rehabilitation, and provide for trials based on the evidence gathered from this investigation.¹⁷⁸ At the end of the trial, the surrenderee may be sentenced to further rehabilitation or imprisonment.¹⁷⁹ Although the twenty-four month mark has passed for every surrenderee, as of January 2012, 689 people were still detained in rehabilitation.¹⁸⁰ These people were being held under “court-order,” which seems to indicate an investigation and trial. Yet when asked what offenses merited a sentence of rehabilitation, it was revealed by the Lieutenant Colonel directing the Poontottam PARC that the individuals currently there had still never been charged with a crime.¹⁸¹ Instead it appears that individuals were simply brought before a judge, without a charge or trial, who then exercised his own discretion about whether that person should remain in rehabilitation. The Government has not released any information concerning the criteria used by such judges, and there are also no indications about when or if formal charges will actually be brought against those still in rehabilitation.

Furthermore, all of the surrenderees were subject to an initial waiting period of five months during which they were held at the rehabilitation centers, but which did not count toward their 24 month maximum sentence. This is evidenced by the large number of releases in October 2011, as the Government calculated the start date of rehabilitation as October 2009 even though nearly all of surrenderees had been held since the end of the war in May 2009. In an interview, the Lieutenant Colonel in charge of the Poontottam PARC evaded questions regarding why the

¹⁷⁷ Emergency Regulation 22, ELG Notice 1426/8 (Sept. 12, 2006), §22(9), 22(10)(b).

¹⁷⁸ *Id.* §22(12).

¹⁷⁹ *Id.* §22(13).

¹⁸⁰ *Statistics, supra* note 117.

¹⁸¹ Interview Lt. Col. Manjula Gunasinghe, Supervisor of Poontottom Rehabilitation Center, in Vavuniya, Sri Lanka (Jan. 10, 2012).

time between May 2009 and October 2009 did not count as rehabilitation, saying that although the surrenderees were in the PARCs for that period, it was a time dedicated to administrative preparation for the rehabilitation program.¹⁸² The Government has not provided a thorough explanation of the legal grounds for holding the surrenderees for this five month period. If, as the Lieutenant Colonel suggests, it was not part of the rehabilitation program, it would not be covered by those sections the Emergency Regulations allowing detention for rehabilitation.

e. Interrogations and the Possibility of Re-Arrest Are Inconsistent with Rehabilitation

The ability to continuously investigate the surrenderees and bring criminal charges against them while they are in rehabilitation also flies in the face of the stated humanitarian nature of rehabilitation. Statistics from the Ministry of Defense reveal that as of January 2012, 889 surrenderees had been transferred from rehabilitation to the intelligence agencies and formal detention.¹⁸³ The Government has reasoned that surrenderees chose to go to rehabilitation in order to escape a more severe punishment by the justice system, almost like an amnesty provision. But if this is the case, then the surrenderees were lured to rehabilitation under false pretenses, because going into rehabilitation gives absolutely no guarantee that the individual will not later be charged and sentenced through the criminal justice system. In fact such charges are perhaps more likely against those who went to rehabilitation, since in rehabilitation the intelligence agencies had essentially an unlimited ability to interrogate the surrenderees.¹⁸⁴

Surrenderees were also told that they had a duty to tell the truth during the interrogations and in their counseling sessions,¹⁸⁵ but they were not given any assurances that information revealed during counseling or other parts of the rehabilitation would not later be used against

¹⁸² *Id.*

¹⁸³ *Statistics, supra* note 117.

¹⁸⁴ Subject to approval from the Ministry of Defense. No evidence has been given that the MoD used its power to grant interrogations sparingly, as all surrenderees interviewed reported being interrogated while in rehabilitation.

¹⁸⁵ Interview 1, in Colombo, Sri Lanka (Jan. 4, 2012).

them in a criminal trial. Blurring criminal investigation with a rehabilitative environment, including vagueness about which environments were protected by psychologist-client confidentiality and which activities were therapeutic as opposed to investigative, led to an atmosphere of quiet distrust. Most surrenderees reported that they said and did what they thought was expected of them, often limiting discussion of their true opinions or experiences due to fear that this information would be used in criminal charges or to prolong the stay in detention.¹⁸⁶ If the government's purposes were truly to rehabilitate the surrenderees and help them cope with their experiences, guarantees should have been made about confidentiality and self-incrimination. Without these assurances, any possible benefit of counseling or the other activities would have been limited by distrust and self-censorship.

f. The Rehabilitation Program Has Been Hindered by a Lack of Accountability

The lack of transparency regarding the role of investigation in the rehabilitation process and the absence of accountability measures, such as a public registry of the surrenderees' identities and locations, has opened the surrenderees up to a host of other abuses. In its 2010 report, the International Commission of Jurists termed Sri Lanka's rehabilitation process a "legal black hole" that served as a gateway into the rest of the detention system.¹⁸⁷ Torture and extrajudicial killings have been reported, and the lack of accountability has also led to disappearances of surrenderees who were last seen in government custody. One case reported during interviews was that of Ramokili Kirthika, or "Dusha."¹⁸⁸ Dusha was fifteen in April 2009 when her family planned to leave the LTTE controlled-areas and seek refuge with the government. Hoping that the family would not leave without their daughter, the LTTE kidnapped Dusha the day before the family's planned escape and put her with the other forced conscripts. In

¹⁸⁶ Interview 10, with ten ex-detainees, Sri Lanka (Jan. 9, 2012).

¹⁸⁷ *Beyond Lawful Constraints*, INTERNATIONAL COMMISSION OF JURISTS, 6 (Sept. 2010).

¹⁸⁸ Interview 11, with family member of missing girl and last witness to see Dusha, Sri Lanka (Jan. 9, 2012).

May 2009, after the war ended, one of Dusha's classmates spoke with her in Zone 4 of Menik Farm, where she told him that she had been labeled a surrenderee for her time with the LTTE. She asked the classmate for information about her family and told him that she was being kept with the other surrenderees.

A few days later the surrenderees were all brought to rehabilitation centers, but Dusha did not arrive with them. Her family, having received the message from her classmate, tried to track her down, but they were told by the Government that there was no record of her. Attempts to track down information led to implausible excuses, such as being told by a bureau in Omanthai that information on surrenderees could not be given because the list was torn. Despite continuing requests both from Dusha's family and international activists, no information on Dusha has ever been revealed, and public access to databases that might contain record of her, such as the Zone 4 registry of Menik Farm or the full list of surrenderees, has been denied.¹⁸⁹ Other families have reported similar situations in which loved ones turned themselves in as surrenderees, but have not been heard from since.¹⁹⁰

VI. Surrenderees in the Prison System

Surrenderees have been at risk of transfer into the prison system through PTA detention orders since the rehabilitation program started. The treatment they have received there, including the special exceptions created in Sri Lankan law to subvert the normal justice process in cases related to surrenderees, is troubling. Article 13(1) of the Sri Lankan Constitution guarantees the right of detainees to be informed of the charges against them and arrested according to

¹⁸⁹ Interview 11, with family member of missing girl and last witness to see her, Sri Lanka (Jan. 9, 2012).

¹⁹⁰ Interview 9, with seven IDP camp residents, Sri Lanka (Jan. 8, 2012).

procedure.¹⁹¹ The Constitution also prescribes that every detained person be brought before a judge and receive a fair trial.¹⁹²

a. The Prevention Against Terrorism Act Conflicts with the Fundamental Rights of Surrenderees

In cases involving surrenderees, however, these constitutional provisions are in tension with the Prevention against Terrorism Act. The PTA allows any police officer of a certain rank, without a warrant to “arrest any person; enter and search any premises; stop and search any individual or any vehicle . . .; and seize any document or thing,” as long as it is connected with, concerned in, or reasonably suspected of being connected with or concerned in any unlawful activity.¹⁹³ This use of “connected with” is a very broad standard, with no requirements for mens rea or actual involvement. The PTA goes on to say that “[w]here the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity,” the Minister may order such person to be detained for up to eighteen months, renewed in three month increments.¹⁹⁴ Such detention orders, again issued on the incredibly broad standard of “believed to be connected with,” are declared final by the PTA and “shall not be called in question in any court or tribunal by way of writ or otherwise.”¹⁹⁵ Although the State has apparently conceded that this cannot apply to habeas corpus cases,¹⁹⁶ this provision is still an impermissible attempt to limit the detainees’ rights to be brought before a judge or have a fair trial, and it shifts the balance of power from the judicial branch to the executive. Sri Lankan courts should authoritatively strike down this attempt to replace judicial review, as mandated by

¹⁹¹ 1978 Constitution, Art. 13.

¹⁹² *Id.*

¹⁹³ Prevention of Terrorism Act, No. 48 of 1979, §6(1) (1979) [hereinafter PTA].

¹⁹⁴ *Id.* §9(1).

¹⁹⁵ *Id.* §10.

¹⁹⁶ This concession occurred in the Section 22 Amendment. PINTO-JAYAWARDENA, *supra* note 169, at 67.

the Sri Lankan constitution, with executive discretion, but instead the courts have primarily chosen to ignore or avoid it.¹⁹⁷

The precise reasons for the arrest and detention (or transfer of surrenderees) also do not need to be disclosed, as they are shielded by the broad “in connection with” standard. By not clarifying the level of connection required, the provisions of the PTA become so broad that any Sri Lankan could probably be detained under them if the police so desired. Furthermore, informing a detainee that they are held on the grounds that the Minister “has reason to believe or suspect” they have are “connected with” unlawful activity is not a detailed enough charge for the detainee to be able to mount a rebuttal. Sri Lankan courts have held that although detention orders on the charge of “terrorist activity” lack particularity, orders that track the language of the PTA (“had reason to believe...”) are per se a specified offense and valid *ex facie* (on the face of it).¹⁹⁸ Furthermore, the PTA does not seem to leave space for such a rebuttal anyway, as the orders are final, foreclosing the possibility of judicial bail or release, and other remedies such as habeas corpus applications have tended to be unsuccessful, as the courts have generally not questioned the removal of their jurisdiction by the PTA detention order.¹⁹⁹ A recent study of 880 habeas cases in Sri Lanka showed that almost all of them have been rejected.²⁰⁰

b. Fundamental Rights Petitions by Surrenderees Have Been Ineffective

Apart from habeas applications, detainees can also make a fundamental rights petition under Article 126 of the Constitution to claim infringement of a fundamental right by executive action, including arbitrary arrest or detention without charge. These petitions, however, have

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*, at 65 (citing the *Senthil* case).

¹⁹⁹ *Id.*, at 60 (examining habeas decisions from 1981-2002 and concluding that there has been a “generally strict response by the Court where the habeas corpus applications were in respect of detainees under the PTA or Emergency Regulations.”).

²⁰⁰ *Alternative Report to the Committee Against Torture*, REDRESS TRUST, ¶25 (Sept. 2011) (citing PINTO-JAYAWARDENA K., & ALMELDA GUNERATNO, *LIBERTY RIGHTS AT STAKE* (2010)).

been found to be either ineffective or counterproductive. The primary charge in most fundamental rights petitions is that surrenderees have been held without charge for periods exceeding the eighteen months allotted by the PTA detention order.²⁰¹ The unintended, and in many cases counterproductive, result of a fundamental rights petition, therefore, can be that the Government simply rushes ahead with charges and a trial, thereby rendering the fundamental rights petition moot. Attorneys in Colombo stated that in most cases filing a fundamental rights petition has resulted in the petitioner quickly being charged and found guilty, often with the sentences being as severe as life in prison or the death penalty.²⁰² The attorneys also said that of the fifteen cases they have worked on where fundamental rights petitions led to rushed charges and quick sentencing, all defendants have received life sentences.²⁰³ These charges and convictions can include evidence not normally admissible in the Sri Lankan justice system, including confessions made during custody.²⁰⁴ Some attorneys also believe that many judges, especially in the southern part of Sri Lanka, are not impartial when it comes to cases involving LTTE surrenderees because of their personal belief that all surrenderees are terrorists.²⁰⁵ The possibility of a fundamental rights petition leading to a rushed trial that is possibly unfair makes many surrenderees hesitant to use these petitions.

Witness intimidation also stalls or derails many potential fundamental rights petitions. Fundamental rights petitions can be filed by a family member or attorney, and the family must consent to such a petition. Attorneys explained that fundamental rights petitions are won or lost

²⁰¹ Interview 13, Attorneys, Colombo, Sri Lanka (Jan. 12, 2012).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Under ordinary evidence laws in Sri Lanka, confessions made to a police officer or while in custody are not admissible as dispositive evidence, unless made in the presence of a magistrate. These confessions are allowed under the PTA, a troubling addition given the number of torture allegations coming from detainees. While confessions are still inadmissible if proven that they were induced or made under threats, the PTA reverses the burden of proof, placing it on the victims to prove that there was duress. *Locked Away*, *supra* note 168, at 13.

²⁰⁵ Interview 13, Attorneys, Colombo, Sri Lanka (Jan. 12, 2012).

based on the strength of testimony, including testimony of the family or others who were witnesses to the arrest or had contact during the detention, and that if witnesses refuse to appear, there is almost no hope of success.²⁰⁶ Yet many witnesses refuse to appear in court due to widespread intimidation and disappearances: according to a 2010 estimate, witnesses do not appear in up to 85% of Sri Lankan criminal cases.²⁰⁷ In the case of *Rajapakse v. Sri Lanka*, heard by the Human Rights Committee under the ICCPR, the petitioner began receiving threats from police officers soon after filing his fundamental rights petition.²⁰⁸ The Human Rights Committee ruled that the state failed to take adequate action to protect the petitioner in light of these threats, a ruling that has been echoed in several other cases against Sri Lanka.²⁰⁹ Witnesses in Sri Lanka have been subjected to threats, violence, abductions and assassination, often under circumstances that implicate the Sri Lankan police.²¹⁰

c. The Detention System Lacks Transparency and Accountability

The detention system, especially when relating to surrenderees, also lacks transparency and accountability. The number and locations of detention centers and the number of detainees have not been made public. This makes it difficult for attorneys and families to locate detainees, especially when the Government frequently fails to give notification of transfers. Sri Lankan attorneys recounted corresponding with a client in Boosa prison, one of the highest security prisons where many surrenderees are held, only to have letters returned suddenly with a message that no detainee by that name is in the Boosa system.²¹¹ No information was given about where

²⁰⁶ *Id.*

²⁰⁷ *Sri Lanka Rule of Law Assessment Report 2010*, USAID, 5 (Mar. 2010).

²⁰⁸ U.N. Human Rights Committee, *Rajapakse v. Sri Lanka*, UN Doc. CCPR/C/87/D/1250/2004 ¶9.7 (2004)

²⁰⁹ *Id.* See also Human Rights Council, *Report of the UNHCHR on the Right to Truth*, UN Doc. A/HRC/15/33, ¶14 (July 28, 2010).

²¹⁰ See Rebecca Buckwalter-Poza, *Without Witness and Victim Protection, No Hope for Justice in Sri Lanka*, TRUMAN NATIONAL SECURITY PROJECT, Jan. 20, 2011, <http://trumanproject.org/posts/2011/01/without-witness-and-victim-protection-no-hope-justice-sri-lanka>.

²¹¹ Interview 13, Attorneys, Colombo, Sri Lanka (Jan. 12, 2012).

that detainee was transferred, and further inquiries resulted in government officials denying that that person was ever in government custody at all.²¹² Without a public registry of detainees, attorneys have difficulty proving that someone was last seen in government custody, which in turn makes detainees vulnerable to disappearances while in custody.

One woman described her frustration in dealing with the Government while searching for her husband, a former driver for the LTTE who became a surrenderee.²¹³ The woman received a letter from a man in a Vavuniya rehabilitation center informing her that her husband had been in rehabilitation, but he had recently been transferred by the Criminal Investigation Department (CID) of the Sri Lanka police. Her attempts to work with the Government to locate him have been completely fruitless, however, as the CID and other agencies deny having any record of him. Inquiries to the Government by the International Committee of the Red Cross, who has been given a copy of the original letter from rehabilitation, have not produced any information either. Furthermore, she is unable to create an official missing persons entry or file a habeas petition as both of these require witnesses, and the witnesses in this case, including the man who wrote the letter from rehabilitation, are too afraid to testify.²¹⁴ Advocates confirm that disappearances such as this are common, and since the disappearances occur in government custody, officers are suspected of being directly responsible for ordering or covering up the disappearances.²¹⁵

In addition to transfers without notice and disappearances, families and attorneys are also restricted in their access to the surrenderees in prison. Lawyers are required to seek pre-approval through a complicated process before visiting their clients, and this approval is frequently

²¹² Interview 13, Attorneys, Colombo, Sri Lanka (Jan. 12, 2012).

²¹³ Interview 8, with two ex-detainees and one former IDP camp resident, Sri Lanka (Jan. 8, 2012) (F42).

²¹⁴ *Id.*

²¹⁵ I was given a list of 28 known disappearances from one community, most of these disappeared after surrendering or while in government custody.

denied. One advocacy group reported that in an average week they request eight to ten visits, and permission is typically granted for only five or six.²¹⁶ The denials often do not come with a justification, leaving attorneys with little recourse to challenge the refusal.²¹⁷ The process for families to visit is also complex,²¹⁸ and many times families will travel ten hours from northern Sri Lanka to Boosa Prison, only to be turned away at the gate.²¹⁹ Even if the families are allowed in, advocates report that the families are only allowed twenty minutes to visit.²²⁰ Detainees are also not allowed to send letters to their families from Boosa, a condition that violates UN guidance on prison conditions.²²¹

Visits with families and attorneys are also not private, as an inquiry officer is present at all meetings.²²² This makes most detainees too intimidated to speak openly with attorneys, even when the attorneys are from the Tamil community.²²³ It has also been reported that prisoners are threatened while in Boosa, and told that if they speak with attorneys about their cases or the prison conditions that they will be punished later.²²⁴ These threats are not empty, as many cases of torture while in government custody have surfaced in Sri Lanka, and even routine interrogations have resulted in memory loss and mental trauma.²²⁵ The U.S. State Department

²¹⁶ Interview 13, Attorneys, Colombo, Sri Lanka (Jan. 12, 2012).

²¹⁷ *Id.*

²¹⁸ The procedure apparently involves getting a letter from the local government to confirm that the parties are related. *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Interview 13, Attorneys, Colombo, Sri Lanka (Jan. 12, 2012). See United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, ¶37, Aug. 30, 1955, available at <http://www2.ohchr.org/english/law/treatmentprisoners.htm> (“Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.”).

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

and Amnesty International have documented several of these torture cases,²²⁶ and the UN Special Rapporteur on Torture stated in 2007 that “numerous consistent and credible allegations” have led him to conclude that torture is widely practiced in Sri Lanka.²²⁷

VII. Consequences of the Detention Policy and Recommendations for the Future

The treatment of the Tamil civilians and surrenderees is clearly fraught with problems, but the Government continues to defend its policies on the grounds that the LTTE is a legitimate threat to the nation’s security. The current models of detention, however, are not actually in the Sri Lankan government’s best interests and will not lead to further dismantling of the LTTE. Instead, the alienation of the Tamil community through unfair detention practices, exclusion from the judicial system and rule of law, and violation of human rights norms will only contribute to radicalization and interfere with assimilation. The risk of alienation, radicalization, and increases in terrorist activity due to deprivation of liberty without charges, trials or convictions was noted by Fiona de Londras in her piece on counter-terrorist internment.²²⁸ Examining the United States’ system of counter-terrorism internment, de Londras recommended internment only in situations where a factual case could be built that an emergency threatened the life of the nation.²²⁹ Even in these situations, such internment should still be subjected to political and judicial scrutiny, with an emphasis on non-discrimination policies, meaningful review of individual cases, and an effective temporal limitation.²³⁰ While security interests may at times necessitate the infringement of some individual liberties, the risk of that tactic backfiring and actually increasing the threat is high enough that such infringement should only be resorted

²²⁶ 2010 Human Rights Report: Sri Lanka, U.S. DEPT. OF STATE, Apr. 8, 2011,

<http://www.state.gov/j/drl/rls/hrrpt/2010/sca/154486.htm>; *Locked Away*, *supra* note 168.

²²⁷ UN human rights expert reports on allegations of torture in Sri Lanka, UN NEWS CENTRE, Oct. 29, 2007, <http://www.un.org/apps/news/story.asp?NewsID=24457>.

²²⁸ Fiona de Londra, *Can Counter-Terrorist Internment Ever be Legitimate?* 33 HUM. RTS. Q. 593 (2011).

²²⁹ *Id.*

²³⁰ *Id.*, at 619.

to in the most extreme and necessary cases. Given the large numbers of detainees at the height of the detention, including 380,000 in the IDP camps and nearly 12,000 in rehabilitation and prison, it is clear that this “last resort” approach was not utilized by the Sri Lankan government.

It must be remembered that the LTTE movement for a separate state began with perceived discrimination against Tamils. If Tamils, especially LTTE surrenderees, feel that they are being treated unfairly by the government, they are more likely to hold onto the goal of creating a separate Tamil state. Interviewees also repeatedly expressed that unfair detention practices continue to harm reconciliation efforts, as they demand compensation for the periods of arbitrary detention, return of their missing relatives or explanations of their deaths, and honesty from the Government about the state of the detention system in Sri Lanka both domestically and internationally. Without these concessions, the Government may find it difficult to convince Tamils in the North to simply “forgive and forget.” Economic promises for development in the North are not enough, as recent elections in the North showed only about 26 % voting for President Rajapaksa,²³¹ despite his relentless promises to pour money into the North’s economy.²³² It seems that people in the North do not want money; they want fair and equal treatment, protection in the legal system by honoring human rights norms, and honest and transparent communication about the purposes, conditions, and effects of internment, rehabilitation and the imprisonment of surrenderees.

Furthermore, the inordinate focus on monitoring and interrogating the surrenderees hinders the government’s ability to focus on legitimate problems in the country. It is estimated

²³¹ See Final District Results for Vanni and Jaffna, with Vanni and Jaffna districts polling 27.3% and 24.7% respectively in support for Rajapaksa. *Presidential Elections*, SRI LANKA DEPT. OF ELECTIONS, <http://www.slelections.gov.lk/presidential2010/04.html>. Nationwide support for Rajapaksa was 58%, but notably he polled the weakest in districts most affected by the war and redevelopment. *Id.*

²³² See *Sinhala development model, western money but no political solution*, TAMIL GUARDIAN, Sept. 16, 2009, <http://www.tamilguardian.com/article.asp?articleid=2467>.

that in 2012, twenty percent of Sri Lanka's national spending is budgeted for defense, a seven percent increase from 2011.²³³ This increasing militarization is contradictory to the government's claim that it is moving to a post-conflict mode of operation. In particular, using this increased military to systematically monitor, harass, and detain low-level former LTTE associates, including many forced-recruits who never had any voluntary association, seems excessive. While the Government asks the Tamil community to trust it and forget the past, the systematic detention of Tamils has not shown that the Government is willing to extend the same trust.

The international community should also develop enhanced standards regarding internment and administrative detention in internal conflict settings. In an age where terrorism has in many ways replaced traditional warfare, it must be recognized that States may now feel the biggest threats to their security lie within their own borders. Binding standards should be developed to hold states to measures that strike an appropriate balance between investigation for security and harassment of citizens. In particular, derogations of citizens' right to a fair trial before a judge should be severely limited and there must be some process for showing that a person is a legitimate security threat before any form of detention is permitted. This process, along with the conditions of detention, must be transparent and uniform in order to keep States accountable both to their own people and the international community.

In cases of violation of detention standards, those affected should be compensated in accordance with Article 9 of the ICCPR. This should include assistance in the form of job placement or job creation, rather than the nominal job training received in rehabilitation, as many interviewees listed employment as one of their most pressing current needs. The Sri Lankan

²³³ See Saman Gunadasa, *Sri Lankan government boosts military spending*, WORLD SOCIALIST WEB SITE, Nov. 2, 2011, <http://www.wsws.org/articles/2011/nov2011/slec-n02.shtml>; Tisaranee Gunasekara, *Militarisation Economic Health and Popular Wellbeing*, SRI LANKA GUARDIAN, Feb. 26, 2012, <http://www.srilankaguardian.org/2012/02/militarisation-economic-health-and.html>.

government should also ratify Additional Protocol II, revise the Prevention of Terrorism Act to restore judicial oversight in all cases of detention and narrow the overly broad phrasing of “in connection with” terrorist activities. Sri Lanka should reopen its border to international monitoring, particularly with regards to the treatment of surrenderees who are currently detained or have been recently released. A political amnesty should also be considered for all surrenderees, protecting them from future detentions and charges because of the same activities that they already served time in rehabilitation for. The usefulness of amnesties in restoring harmony between co-existing populations, especially in a war as long and consuming as the one in Sri Lanka, is noted by Additional Protocol II, which states that “authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”²³⁴ Similar amnesties have been used successfully in other internal post-conflict settings, including South Africa, Spain and Tajikistan.²³⁵ Advocates in Sri Lanka have offered the possibility of amnesty coupled with a parole system as a means of balancing security with reconciliation.²³⁶

VIII. Conclusion

Transitioning to a peaceful post-conflict society after a civil war is not an easy task. Although the logic behind the detention policies in Sri Lanka often appears convoluted, there is also a legitimate fear that the LTTE will regain strength and resume its attacks on the Government and its citizens. Such fear, however, does not justify stepping outside the rule of law. Legitimate investigations can be conducted without improper procedures such as mass

²³⁴ Additional Protocol II, *supra* note 88, Art. 6(5).

²³⁵ See Louise Mallinder, *The Role of Amnesties in Conflict Transformation*, in *THE EFFECTIVENESS OF INTERNATIONAL CRIMINAL JUSTICE* (Cedric Ryngaert, ed., 2009).

²³⁶ Interview 13, Attorneys, Colombo, Sri Lanka (Jan. 12, 2012).

internment, rehabilitation without a legal process to challenge, and detention without charge.

Until the Government ceases these practices, reconciliation with the Tamil community will be a very difficult journey. Moreover, the Sri Lankan community as a whole must recognize the experiences of Tamil civilians and speak out for their protection. Until the constitution's protections, including the freedom from arbitrary arrest and detention in Article 13, are extended to everyone, Sri Lanka cannot be a truly united country.