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**EMERGENCY LAWS
AND INTERNATIONAL STANDARDS**

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EXECUTIVE SUMMARY

For several decades Sri Lanka has experienced a series of internal armed conflicts between successive governments and forces of the LTTE fighting for an independent Tamil homeland in the northeast of the country. During this time both sides have committed gross violations of human rights and humanitarian law, including massacres, extrajudicial killings, and enforced disappearances. The International Commission of Jurists ("ICJ") affirms that all such acts must be condemned in the strongest possible terms and addressed through appropriate laws, including emergency legislation if strictly necessary. However, the Sri Lankan legal system has rarely succeeded in holding perpetrators accountable for these violations. On the contrary, the complex and confusing emergency and anti-terrorism laws that have been put into place have frequently served to exacerbate rather than resolve the crisis by infringing on the rights of ordinary citizens, including human rights defenders, lawyers and journalists.

This briefing paper summarizes the main provisions of Sri Lanka's various emergency laws and assesses their compatibility with rule of law principles, international human rights law and humanitarian law. Whilst informed by reports of the prevailing security situation, the report does not assess how emergency laws have or have not been implemented in practice. Rather, it provides a baseline analysis of the overall legal framework and critiques those provisions that *prima facie* appear to breach accepted international standards.

At the outset, it is important to emphasize that the ICJ recognizes the right and duty of the Government of Sri Lanka to respond to security threats to the nation. International law not only permits but requires states to protect all its citizens, without discrimination, by responding effectively to security threats. Under the International Covenant on Civil and Political Rights, for example, states have the power, in times of genuine emergency, to limit or suspend certain rights.

The conditions for declaring an emergency and enacting emergency laws, however, are strictly and narrowly defined and limited to exceptional circumstances, with safeguards to ensure that the rights of the population in general are not abused under colour of law. These limits must be observed to ensure that emergency laws are an extension of the rule of law rather than an abrogation of it. The fact that international law enables states to adopt emergency measures under exceptional circumstances places a high burden on meeting international standards of rights protection during such emergencies. As affirmed in the ICJ's *Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, there is no contradiction between maintaining security and observing the rule of law; both are essential in ensuring a democratic and rights-based society even in situations of conflict and emergency.

Sri Lanka has been in an almost constant state of emergency since 1971. Too often, Governments have responded to various crises by enacting a series of overlapping, vague and overbroad emergency laws that fail to meet basic

human rights and criminal justice safeguards, and in some cases grant security forces immunity from prosecution. A wide variety of human rights organizations, including UN bodies, international non-governmental organisations and national groups, have criticized these laws for violating fundamental rights, enabling state repression of legitimate political activity, and exacerbating conflicts.

Recently the legal framework has grown even more complex and Byzantine, with the introduction of over 20 new emergency regulations in the past three years alone. These laws are open to arbitrary use and abuse, especially in the context of full-scale war and increased terrorism since the breakdown of the peace process in 2006. Today, due to the proliferation of these laws, it is arguably more difficult than ever for Sri Lankan citizens to know and understand the legal boundaries that affect their everyday lives, creating a chilling effect on the exercise of free speech and association. In this environment security forces may feel empowered to violate the rights of citizens. Human rights defenders in particular are placed under a dark cloud of suspicion and face heightened threats to their physical safety.

The foundation of Sri Lanka's emergency laws dates back to British rule – the Public Security Ordinance 1947 (“PSO”), enacted as the final law of the colonial era in an attempt to suppress and control political dissent. As one parliamentarian noted presciently at the time, “An unscrupulous Minister, and unscrupulous Prime Minister, could make use of this very law to detain innocent people”.¹ For over 60 years, the PSO has empowered successive Presidents to declare states of emergency and enact draconian emergency regulations. The second key piece of legislation is the Prevention of Terrorism (Temporary Provisions) Act of 1979 (“PTA”). As the name implies, it was adopted as a temporary measure to address a sudden upsurge in political violence. It has remained in force for almost 30 years. Sri Lankan and international human rights advocates have repeatedly urged the repeal or amendment of the PSO and the PTA for violating fundamental principles governing detention, due process, and other well-established rights of fair trial.

More recently, the Government of Sri Lanka, using powers derived from the PSO, enacted two new and far-reaching emergency laws in response to the assassination of Foreign Minister Lakshman Kadirgamar in August 2005 and the attempted assassination of the Secretary to the Ministry of Defence in December 2006. The Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2005 (“EMPPR 2005”) deals with powers of arrest and detention, powers of search and seizure, trial procedures, admissibility of confessions, bail, and other amendments to normal criminal procedure. The Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 of 2006 (“Emergency Regulations 2006”) define and criminalise “terrorism” and “acts of terrorism”, and create new offences, including engaging in transactions with a terrorist or terrorist group regardless of knowledge and intent. These regulations compound pre-existing problems with Sri Lanka's emergency law framework.

¹ Dr. A. P. de Zoysa, member of Colombo South, from Hansard of the State Council debate, 10 June 1947.

This report highlights the ICJ's main concerns with Sri Lanka's emergency laws: immunity clauses that encourage impunity, overly vague definitions of offences, sweeping powers delegated to the military, arbitrary grounds for arrest and detention, erosion of fair trial and due process rights, and the curtailing of fundamental freedoms, including freedom of expression, freedom of assembly, freedom of movement and the right to privacy. These issues are summarized below and analyzed in more detail in the body of the report.

- **Impunity.** Under international law, people whose rights are limited or infringed because of an emergency law should be able to challenge the legality of measures taken against them, and states are obliged to conduct prompt, effective, impartial and independent investigations and to bring to justice those responsible for violations. No official status justifies immunity from legal responsibility for human rights violations. However, the Emergency Regulations 2006 and other emergency laws attempt to severely limit the accountability of civilian and military authorities in the performance of their duties. This is likely to perpetuate the culture of impunity, deepen feelings of injustice and worsen the security crisis in Sri Lanka.
- **Vague definitions.** The *principle of legality* requires criminal offences to be clearly defined in unambiguous language. Many elements of Sri Lanka's emergency laws contravene this principle, as it is difficult to know with certainty what acts will be considered unlawful. The definition of "terrorism" under Emergency Regulations 2006 is too broad and confusing to be interpreted with any certainty or consistency by law enforcement officials, or to be properly understood by the general public. Similarly, the blanket prohibition on conducting transactions related in any way to terrorism could lead to the prosecution or restriction of peaceful protestors, humanitarian aid workers, human rights campaigners and journalists who have no intention of supporting acts of terrorism.
- **Sweeping powers.** The EMPPR 2005 and Presidential orders made under the PSO delegate sweeping powers to military personnel to perform functions usually carried out by law enforcement officials, including powers of investigation, search, arrest and detention. The use of military forces that are not sufficiently trained or accountable to carry out normal policing functions – especially if there are no clear limits on their powers – increases the risk of human rights violations.
- **Arrest and detention.** Administrative detention on security grounds is only permissible under exceptional circumstances or in the event of derogation from human rights treaty obligations. Even during a state of emergency, detention must be prescribed by law, in a way that people can understand, and be reasonable in all circumstances. Under the EMPPR 2005, persons "acting in any manner prejudicial to the national security or the maintenance of public order, or to the maintenance of essential services" may be arrested and held in detention for up to one year, without access to judicial review by an independent body. Persons may be similarly detained up to 18 months

under the PTA or indefinitely pending trial. There is also provision for automatic detention of a "surrenderer" up to two years for the purposes of "rehabilitation", even those seeking the protection of the state because of "fear of terrorist activities". Contrary to international standards, persons can be held in irregular and unpublicized places of detention, outside of a regular police station, recognised detention centre, penal institution or prison. Detainees can be moved from place to place during interrogation, and denied prompt access to a lawyer, family members or a judge or other competent authority to challenge the legitimacy of detention. The risk of severe human rights violations is significantly increased when detainees are held for long periods in irregular and unknown locations, without standard procedures and international safeguards.

- **Fair trial and due process rights.** Basic fair trial rights are guaranteed in international law and in the Constitution of Sri Lanka, and should be respected even during a state of emergency. However, emergency laws undermine the right against self-incrimination and the right to silence, by allowing the use of confessional evidence and creating a "duty" for persons to answer police questions. Provisions under the EMPPR 2005 also reverse the normal burden of proof, undermining the principle of the presumption of innocence. Other provisions contain a presumption that persons should not be released on bail. This contradicts international law provisions that bail should normally be granted except in limited circumstances of flight risk or danger to the community.
- **Freedom of expression.** International law protects a wide range of free speech, even in states of emergencies, and it is only in highly exceptional cases that a nation's security could be directly threatened by a person's exercise of the right to freedom of expression, such as where there is incitement to imminent violence. However, several emergency laws create broad criminal offences aimed at limiting the communication and possession of information or material "prejudicial to national security" or critical of the Government. Under such broadly defined offences, almost any comment relating to the conflict might be construed as prejudicial to national security, or likely to arouse, encourage or promote feelings against the Government. This creates the pre-conditions for self-censorship and has a chilling effect on free and open debate.
- **Freedom of assembly.** The EMPPR 2005 gives law enforcement officials wide-ranging powers and complete discretion to prohibit public processions and meetings, and to remove persons from public places. The law makes no distinction between legitimate, peaceful assemblies and those that incite violence or threaten national security or public order, as normally required by international law. Such sweeping provisions and unchecked powers could be used to restrict lawful demonstrations, in which people express controversial ideas or criticize the Government.

- **Freedom of movement.** Freedom of movement is a fundamental human right, recognised in international law and the Constitution of Sri Lanka; restrictions may only be imposed under narrow and limited circumstances. Since 2005, the President has made several emergency regulations empowering government officials to order curfews, to restrict travel outside Sri Lanka and to prohibit movement in particular areas, on grounds of national security, public order and maintenance of essential services. In effect, these officials have unfettered discretion to evacuate populations and prohibit the free movement of citizens without their decisions being subject to judicial review. Moreover, the emergency laws do not contain international safeguards for internally displaced persons, including the right to return, resettlement and reintegration.
- **Right to Privacy.** Several emergency provisions give the police and armed forces powers of search and seizure without the need for a court warrant. Others contain special powers to take possession of buildings and evict residents based on broad and vaguely defined offences, and without the possibility of judicial review for residents who are not the owners of the property. These powers could lead to arbitrary or unlawful interference with the right to privacy, including the rights to family, home, and private correspondence.

The ICJ has conducted research and analysis of emergency laws in countries throughout the world for over 50 years, including multiple missions to Sri Lanka since the 1970s. Based on this experience, the ICJ is convinced that the roots of security crises can only be addressed through a principled adherence to the rule of law, and that excessive use of emergency powers in violation of human rights only serves to deepen conflicts and undermine legitimate governance.

The Government of Sri Lanka is justified in enacting emergency regulations to address a complex and challenging security situation that includes serious incidents of terrorism. However, such laws must be narrowly tailored to address the crisis without criminalizing lawful conduct and free expression. The ICJ is deeply concerned that the approach taken by Sri Lanka over several decades, and especially in recent years, has resulted in a confusing, overbroad and all-pervasive emergency law framework that fails to protect the rights of its citizens, encourages a culture of impunity for serious violations, and exacerbates ethnic tensions and political divisions.

In line with recommendations from its previous reports and reports of UN bodies and national and international human rights groups, the ICJ calls upon the Government of Sri Lanka to initiate a wholesale review of the existing emergency law and counter-terrorism law framework. This process should be undertaken by an independent expert body, with full consultation of relevant stakeholders, and with responsibility to the security needs of the entire country. Furthermore, the ICJ recommends the immediate repeal or amendment of those laws and provisions identified in this briefing paper as incompatible with Sri Lanka's domestic and international obligations.

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INTRODUCTION

This briefing paper summarises some of the main provisions in Sri Lanka's emergency laws and assesses their compatibility with rule of law principles and international human rights law. The intention is to provide baseline knowledge of Sri Lanka's emergency law framework for those working on rule of law and human rights issues in Sri Lanka, given the numerous, complex, and sometimes confusing array of laws. Whilst its content is informed by reports of the security situation in Sri Lanka, this report does not seek to provide an assessment of how emergency laws have or have not been implemented in practice.

Sri Lanka has been in an almost constant state of emergency since 1971. In the past the Government assumed emergency powers to respond to the internal conflict in a way that breached its international obligations.¹ The ICJ carried out missions to Sri Lanka in 1981, 1984 and 1997 that documented and analyzed the effect of far-reaching emergency powers on the rule of law.² Sri Lanka has made some advances in human rights since the 1980's, such as ratifying international human rights treaties, establishing the Human Rights Commission (1996), and creating a range of democratic checks and balances in the Constitution. However, concerns raised by Sri Lankans³ and international NGOs⁴ about the scope and content of existing emergency powers have never been adequately addressed.

In mid-August 2005, after the assassination of Foreign Minister Lakshman Kadirgamar, President Chandrika Kumaratunga enacted the Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2005 ('EMPPR 2005'). Then, on 6 December 2006, after an attack on the Secretary to the Ministry of Defence, President Mahinda Rajapakse enacted the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 of 2006 ('Emergency Regulations 2006'). The EMPPR 2005 and the Emergency Regulations 2006 expand upon existing emergency regulations and counter-terrorism laws in Sri Lanka. (A brief summary of Sri Lanka's main emergency laws is contained in the box on page 3).

The ICJ recognizes the security threat the Government faces in Sri Lanka, in the North and East in particular, where the Liberation Tigers of Tamil Eelam (LTTE) and the Karuna Faction⁵ have been responsible for serious human rights abuses and breaches of international humanitarian law. The ICJ unequivocally condemns all such violations by non-state actors in Sri Lanka. The ICJ also affirms that any just solution to the conflict in Sri Lanka must be founded on respect for human rights and the rule of law by all sides.

Sri Lanka has the right and the duty to protect the security of all those under its jurisdiction.⁶ However, the ICJ believes that the legitimacy and impact of government policy is best secured by ensuring that security measures respect human rights and the rule of law. Human rights law allows states to respond to security threats effectively, including the right to limit and suspend certain rights in a state of emergency, but it also requires the maintenance of the rule of law. A state of emergency should be an extension of the rule of law in difficult circumstance, and not an abrogation of it. The *ICJ Berlin Declaration on*

Upholding Human Rights and the Rule of Law in Combating Terrorism ('ICJ Berlin Declaration')⁷ affirms that states must take measures to protect persons within their jurisdiction while maintaining the obligation to respect and ensure the fundamental rights and freedoms. It also affirms that there is no conflict between the duty of states to protect human rights and their responsibility to ensure security.

This report renews the ICJ's historic concerns about the legality of Sri Lanka's emergency law framework, particularly certain provisions in the EMPPR 2005, the Emergency Regulations 2006 and other recent emergency regulations creating high security zones.

Sri Lanka's emergency law framework

The backbone of the Sri Lankan criminal justice system is the Criminal Procedure Code, the Evidence Ordinance and the Penal Code, together with the Constitution of Sri Lanka.

The Constitution of Sri Lanka contains provisions allowing for emergency powers and limitation of certain rights in a state of emergency. The Public Security Ordinance (PSO), enacted in 1947 just before independence, enables the President to declare a state of emergency and to make such emergency regulations under Section 5 as appear necessary or expedient "in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community".

Under Section 5 of the PSO, the President made the EMPPR 2005, the Emergency Regulations 2006 and other emergency regulations creating prohibited zones in certain areas in Sri Lanka. These emergency regulations are only valid for one month at a time and require monthly parliamentary approval to remain valid. The President also has special powers under Section 12 (power to call out the armed forces), Section 16 (power to order curfews) and Section 17 (power to declare essential services), whether or not a state of emergency has been declared.

Whilst not an emergency law *per se* the Prevention of Terrorism (Temporary Provisions) Act ('PTA') is relevant to the emergency laws in Sri Lanka. Adopted in 1979 as a temporary measure in response to growing political violence in the North, it contains broad security-related offences, and wide powers of search, arrest and detention. Shortly after the introduction of the PTA, the ICJ concluded that it "violates norms of the International Covenant on Civil and Political Rights ratified by Sri Lanka, as well as other generally accepted international standards of criminal procedure, by permitting prolonged detention on administrative order without access to lawyers and the use of evidence possibly obtained under duress." (ICJ Mission report 1981, p75). It has also been strongly criticized by UN bodies, such as the Human Rights Committee (Concluding observations of the Human Rights Committee, CCPR/CO/79/LKA, 1 December 2003, para. 13.)

Under the terms of the Ceasefire Agreement of February 2002 ('the CFA') the Government of Sri Lanka agreed not to exercise certain provisions of the PTA. However, the EMPPR 2005 and the Emergency Regulations 2006 both refer to specific provisions of the PTA. This caused some confusion as to whether the PTA was in force or not. The CFA did not in fact provide for the suspension of the PTA as a whole, rather it stated that search operations and arrests under the PTA would not take place, and that arrests would be conducted in accordance with the Criminal Procedure Code (Article 2.12). The PTA was therefore still in force, save for those suspended parts dealing with search and arrests. The Government revoked the CFA in January 2008.

APPLICABLE INTERNATIONAL LAW

International human rights law in states of emergency

International human rights law applies to Sri Lanka, as a party to core UN human rights treaties,⁸ being bound by customary international law, and guided by non-binding but authoritative UN legal instruments.⁹ International human rights law, as well as the Constitution of Sri Lanka, envisages that the Government may sometimes have to take exceptional measures and suspend (or derogate from) some rights when facing an emergency that threatens the life of the nation. Indeed, as reflected in the *ICJ Berlin Declaration*, states have the right and duty under international law to protect the security of people under their control.

However, international law also sets clear limits and constraints on the measures a government can take to respond to an emergency. The limitations are not designed to unduly hamper the operational needs of a swift response to a crisis. Rather, they reflect that a state of emergency is an extension of the rule of law and not the end of the rule of law. The box below describes the international legal framework in more detail.

International law on states of emergencies

The United Nations Human Rights Committee has explained how a state must respect the rule of law in a state of emergency. This guidance is contained in decisions on individual cases, conclusions after the experts consider a state report on implementation and in General Comment 29, which is the key reference for the assessment of emergency measures.

Under Article 4, ICCPR, a state may declare a temporary state of emergency and suspend certain rights only if the emergency “threatens the life of the nation”. Not every disturbance or violent act creates this level of seriousness. The situation must be of such imminent and actual threat and magnitude that it threatens the physical integrity of the population, the political independence or the territorial integrity of the state, or the existence or basic functioning of institutions indispensable to protect and ensure rights recognized in the ICCPR. Local and isolated law and order disturbances or the commission of grave crimes alone are not enough. States do have a certain margin of appreciation in deciding whether a threat justifies declaring a state of emergency. In order to be valid, a state of emergency must also be publicly proclaimed and the United Nations must be notified.

Even in an emergency certain rights can never be suspended - under any circumstances - such as the right not to be tortured, or suffer cruel, inhuman or degrading treatment or punishment, the right not to be arbitrarily deprived of life and the right to freedom of thought, conscience and religion or fundamental principles of justice, including the presumption of innocence. Not even war or dire threat to the nation can justify ignoring these most basic rights.

During properly declared emergencies some rights can be temporarily suspended if necessary. There is a heavy burden on the state to justify that each and every suspension of a right is strictly required by the exigencies of the situation; that is it must be temporary, necessary and proportionate to meet the security threat. The state must also show that no lesser measures are adequate to meet the threat. During an emergency a state must continue to protect against abuse, in particular that people have a right to challenge the legality of emergency measures taken.

A state is prohibited from taking emergency measures that discriminate solely on the grounds of race, colour, sex, language, religion, or social origin.

A state also cannot use the state of emergency to limit or escape from other obligations under international law, including international humanitarian law or international norms that must be applied at all times.

International human rights and humanitarian law in internal armed conflict

International human rights law and international humanitarian law complement each other in situations of armed conflict.¹⁰ In the context of Sri Lanka, the International Committee of the Red Cross (ICRC) has called on both parties to the conflict to respect their obligations under international humanitarian law,¹¹ in particular the rules contained in Article 3 common to the Geneva Conventions of 1949 (applicable to internal armed conflicts)¹² and customary international law. Under Article 3 all parties to the conflict must ensure that the civilian population and civilian objects are respected and protected. UN Security Council Resolution 1674 (2006), on the protection of civilians in armed conflict, reaffirmed that “parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of affected civilians.”¹³

International obligation to prevent and suppress terrorism

International law imposes a duty on states to protect against ‘acts of terrorism’ through the criminal law;¹⁴ an obligation which arises from international law relating to terrorism, but also from the positive obligation to protect under international human rights law.¹⁵

Regulation 5 of the Emergency Regulations 2006 refers to the Government’s obligation to “take meaningful measures to prevent and suppress terrorism” to give effect to Sri Lanka’s obligations in international legal instruments, in particular UN Security Council Resolution No. 1373 (2001). Whether specific acts of terrorism constitute the existence of an emergency situation, or an armed conflict, depends on a series of objective criteria established by international law. Terrorist acts can be perpetrated outside situations of emergency situation or armed conflict. Terrorist acts can take place during peacetime, states of emergency or wartime. International legal obligations to

suppress terrorism should not therefore be used as legal justification to create emergency laws; rather such measures should usually be taken through the normal criminal law.

Whilst numerous international agreements refer to states' obligations to prevent and suppress terrorism, such obligations also require states to do so whilst respecting the rule of law and international human rights law.¹⁶ UN Security Council Resolution 1373, for example, calls on states to cooperate to prevent terrorist attacks, but also reaffirms they must observe the principles of the UN Charter and norms of international law, including international humanitarian law.¹⁷

IMPUNITY AND LEGAL IMMUNITY

Section 19 of the Emergency Regulations 2006 provides specific immunity for actions taken under the Regulations:

“No action or suit shall lie against any Public Servant or any other person specifically authorized by the Government of Sri Lanka to take action in terms of these Regulations, provided that such person has acted in good faith and in the discharge of his official duties.”

Similar immunity provisions are contained in Regulation 73 of the EMPPR 2005, and the PSO (Sections 9 and 23) and the PTA (Section 26).

These provisions seek to severely limit the accountability of civilian and military authorities exercising emergency powers, provided that the action of the official took place in the course of discharging official duties. The fact that an official was “in the discharge of his official duties” can never be used as an excuse not to prosecute or to acquit. At most, a court can take into account all the circumstances surrounding the crime when it decides on the punishment of an accused found guilty. Exceptional circumstances such as political instability or public emergencies, do not justify exempting law enforcement or other officials from possible criminal or civil liability for violation of human rights during emergency operations.¹⁸

The ICCPR and other international standards require states to bring to trial and punish those guilty of human rights violations.¹⁹ The UN Human Rights Committee considers that amnesty laws, or other similar measures, help to create a climate of impunity for the perpetrators of human rights violations and undermine efforts to re-establish respect for human rights and the rule of law, in breach of the ICCPR.²⁰ It has stressed that states may not provide immunities or amnesties for human rights violations: “[a]mnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.”²¹

This is also reflected in international legal instruments, such as the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, which states: “In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.”²² States are required to adopt domestic laws and safeguards that prevent the use of legal rules in a way that shields from justice the perpetrators of serious human rights violations. Principle 22 of the UN Impunity Principles stipulates that states must prevent the use of rules relating to:

“prescription, amnesty,...non bis in idem, due obedience, official immunities, repentance, the jurisdiction of military tribunals...that fosters or contributes to impunity.”²³

Under international law states are obliged to conduct prompt, effective, impartial and independent investigation into human rights violations and to bring those responsible to justice. This is particularly the case for those violations recognized as criminal under either domestic or international law; such as torture and other cruel, inhuman and degrading treatment, summary and arbitrary executions and enforced disappearance.²⁴

Failure to investigate or to bring to justice perpetrators of human rights violations may in itself give rise to a breach of the ICCPR.²⁵ State Parties may not relieve perpetrators of human rights violations from personal responsibility, in particular, "no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility".²⁶

Over many years, various UN bodies and the ICJ have consistently reported on the problem of impunity in Sri Lanka.²⁷ The 2006 mission report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions reported "significant levels" of impunity in Sri Lanka.²⁸ Following the visit of the High Commissioner for Human Rights to the country in October 2007, she stated that, "... in the context of the armed conflict and of the emergency measures taken against terrorism, the weakness of the rule of law and prevalence of impunity is alarming." Experience from around the world shows that a culture of impunity does not improve the security situation, but increases political and social tensions and can deepen the security crisis. Indeed, the UN Security Council 1674 (2006), on the protection of civilians in armed conflict, states: "ending impunity is essential if a society in conflict or recovering from conflict is to come to terms with past abuses committed against civilians affected by armed conflict and to prevent future such abuses."²⁹

VAGUE DEFINITIONS AND SWEEPING POWERS

Vague definition of terrorism and related offences

The Emergency Regulations 2006 create the offence of engaging in “terrorism” or “acts of terrorism” (Regulations 6 and 20) and criminalize certain activities, transactions and communications with persons or groups committing terrorist offences (Regulations 7, 8 and 9) [see Annex 1]. The ICJ is concerned that the definition is too broad and confusing to be interpreted with any certainty or consistency by law enforcement officials, or to be properly understood by the general public.

The principle of legality of offences (*nullum crimen sine lege*) means that in order to be a criminal offence a specific type of conduct needs to be established in law as a crime and the criminal offence should be clearly defined; described in precise and unambiguous language.³⁰ This allows individuals to know what acts can lead to a criminal offence and which will not. It is a fundamental principle of criminal law³¹ and a principle of international human rights law³² that must be respected; even in times of armed conflict and states of emergencies.³³

Definitions that are vague, ambiguous and imprecise contravene international human rights law.³⁴ The UN Human Rights Committee has stressed that vague, imprecise and ambiguous definitions of the offence of terrorism in domestic legislation are in breach of the principle of legality of offences, and has urged States to adopt precise definitions of such offences.³⁵ According to the Inter-American Court of Human Rights: “Ambiguity in describing crimes creates doubts and the opportunity for abuse of power [...]”.³⁶

“Terrorism” and “act of terrorism”

Regulation 6 of the Emergency Regulations 2006 prohibits “terrorism” or “specified terrorist activity”,³⁷ or any act in furtherance thereof. Regulation 20 defines “terrorism” to mean “any unlawful conduct”, which, *inter alia*, “involves the use of violence”, “threatens or endangers national security”, “intimidates a civilian population or group thereof”, “disrupts or threatens public order”, “causing destruction or damage to property” - if such conduct is aimed at, *inter alia*, “threatening or endangering the sovereignty or territorial integrity” of Sri Lanka or “any other political or governmental change”.

This definition of terrorism is extremely broad and vague, meaning it is difficult to know with precision exactly what acts will amount to the offence. While unlawful and violent acts, such as vandalism or riots, are offences under the criminal law, not every violent act should constitute an act of terrorism, even if it is motivated by a desire for political or governmental change. The UN Human Rights Committee has expressed concern about “the potentially overbroad reach of the definitions of terrorism under domestic law, [...] which seem to extend to conduct, e.g. in the context of political dissent, which, although unlawful, should not be understood as constituting

terrorism".³⁸ Similarly, the Inter-American Commission on Human Rights has stated that:

*"certain domestic anti-terrorism laws violate the principle of legality because, for example, those laws have attempted to prescribe a comprehensive definition of terrorism that is inexorably overbroad and imprecise, or have legislated variations on the crime of 'treason' that denaturalizes the meaning of that offence and creates imprecision and ambiguities in distinguishing between these various offences".*³⁹

Activities and transactions related to terrorism

Regulations 7 and 8 of the Emergency Regulations 2006 criminalise certain activities and transactions in relation to terrorism (as defined in Regulation 6).

Regulation 7 criminalises specified activities connected with persons or groups engaged in terrorism, such as wearing the symbols of, or participating in meetings of, or advising, or being a member of a terrorist group.⁴⁰ Under Regulation 7, a person who gives advice to any person or group who engage in "terrorism" would commit an offence punishable by up to 10 years imprisonment.⁴¹ Section 7 does not refer to the need to establish intention (*mens rea*) to give advice to assist the act of terrorism, as would normally be required to establish a criminal offence.⁴²

Regulation 7 (c) also makes it unlawful to "obtain membership or join" any group or person engaged in "terrorist" offences (as defined in Regulation 6).⁴³ International law does not provide for individuals to be criminally responsible merely for belonging to a criminal group, it requires members to be involved voluntarily and in full knowledge of the criminal purposes of the group.⁴⁴ The principle of individual criminal responsibility is one of the fundamental tenets of criminal law and has been expressly recognized in numerous international instruments.⁴⁵ It is a universally accepted principle that "no one may be punished for an act he has not personally committed".⁴⁶

Regulation 8 prohibits engagement in "any transaction in any manner whatsoever", including, "contributing, providing, donating, selling, buying, hiring, leasing, receiving, making available, funding, distributing or lending materially or otherwise", to a person or group engaged in terrorist activities (as defined in Regulation 6), or a person carrying out the activities in Regulation 7. This is an extraordinarily broad provision. For example, a person who engaged in "any transaction" with a person or group engaged in terrorist activities would appear to be guilty of an offence punishable by up to 10 years imprisonment, even though they did not know the person or group was engaged in terrorism.

Regulation 8 contains an exclusion for transactions of a broadly humanitarian nature, such as, "facilitating the development of a peaceful solution", "maintenance of supplies and services essential to the life of the community", "conducting developmental activities", or "any other lawful purpose". Such transactions, called "approved transactions", may be engaged in with prior written approval from the "Competent Authority". Emergency medical treatment or medical assistance does not require such approval.

The ICJ is concerned that Regulation 8 gives broad discretionary power to the Competent Authority as to who is or is not allowed to carry out such transactions. The Competent Authority is given no clear guidelines or objective criteria, and there is no provision for independent review of the decision. A large number of civilians in the North and East depend for their survival on humanitarian assistance. Under international humanitarian law all parties to a conflict must ensure freedom of movement for humanitarian personnel: authorization cannot be arbitrarily denied and movements may only be temporarily restricted by reason of military necessity.⁴⁷

The ICJ is concerned that the vagueness and breadth of Regulations 7 and 8, in conjunction with the similarly vague and broad Regulations 6 and 20, could lead to the prosecution of or restrictions on peaceful demonstrators, humanitarian aid workers, human rights workers and journalists who have no intention of supporting acts of terrorism. Anyone who has dealings in the North or East of the country, or any areas of conflict, or who is even remotely connected with a person suspected of terrorism, could find themselves a terrorist suspect. Such overly broad and vague offences, makes it difficult for individuals to know what activity is lawful and what is not. As already stated, security laws should strictly comply with the principle of legality: meaning people must know clearly whether their actions would amount to a criminal act.

Undefined authority

Regulation 15 of the Emergency Regulations 2006 allows the President to appoint a person to be the "Competent Authority" for the purpose of exempting certain groups or individuals from engaging in otherwise prohibited transactions.⁴⁸ There are no guidelines or safeguards to ensure the independence and expertise of the Competent Authority. The appointment is at the discretion of the President, who has already appointed the Additional Secretary to the President as the Competent Authority.⁴⁹

A law on emergencies should not only prescribe the scope of special powers, but also set out sufficiently clearly who may exercise such powers. The Competent Authority lacks independence from the office of the President and there is no adequate check and balance on the exercise of his authority. The Competent Authority's decisions can be appealed to an Appeals Tribunal.⁵⁰ However, the members of the Appeals Tribunal are the Secretaries to the Ministries of Defence, Finance, Nation Building, Plan Implementation and Justice. Its membership is therefore made up entirely of executive appointees, meaning there will be no independent monitoring of the decisions taken by the Competent Authority. International standards require that any appeal process must be carried out by an independent and impartial judicial body using transparent and fair procedures established by law.

The ICJ is also concerned at provisions of the EMPPR 2005 that allow unspecified persons to exercise police powers. Regulation 52 (2) provides that police powers under any emergency regulation may be exercised by "any person authorized by the President". Regulation 20 (1) enables "Any Public

officer” or “any other person authorized by the President” to search, detain, or arrest without warrant. There is no guidance to prevent highly intrusive and sweeping police powers - such as the powers of arrest and detention, search and seizure - being given to persons or authorities that are not sufficiently accountable, trained, experienced or otherwise qualified.

Militarization of policing

Several emergency laws in Sri Lanka allow military personnel to perform functions usually carried out by normal law enforcement officials. Regulations 19 and 20 of the EMPPR 2005 give the armed forces powers of: search and seizure, and arrest and detention without warrant;⁵¹ police powers in dealing with prisoners;⁵² the powers of a police officer under any emergency regulation;⁵³ and the power to question a person in detention.⁵⁴ Section 12 (1) of the PSO also gives the President the special power to call out the armed forces to maintain public order where he believes circumstances endangering public security have arisen in any area, or is imminent, and he believes the police are inadequate to deal with the situation. Where such an order is made, and published in the Gazette, the armed forces have the same powers as the police, and this expressly includes powers of search and arrest.⁵⁵ A Section 12 (1) order was made by the President on 6 February 2009.⁵⁶ This is a continuation of a monthly order made since mid-2001.

The use of military forces to carry out normal policing functions, in particular, if there are no clear limits, gravely increases the risk of human rights violations, as the armed forces are not trained to act as an investigating body, or as law enforcers, or prison officials. The UN Human Rights Committee has consistently expressed serious concern about measures to combat terrorism and serious crime that authorize armed forces to discharge judicial police functions, and has recommended States take action to ensure the police are answerable to the judiciary.⁵⁷ The Inter American Commission on Human Rights has taken a similar view and expressed concern about the granting of judicial police powers to the military, even in times of emergency.⁵⁸

ARREST, DETENTION AND DUE PROCESS

Under Regulation 19 of the EMPPR 2005 the Secretary to the Ministry of Defence may order the arrest and detention of a person for up to one year. An "Advisory Committee", consisting of persons appointed by the President, is able to receive objections from a person affected by such an order.⁵⁹ The ordinary courts are expressly excluded from questioning the making of a Regulation 19 order.⁶⁰

Normally law enforcement officials should only arrest people because they are suspected of having committed a criminal offence. They should be charged and tried before an ordinary criminal court or released. Regulation 19 allows the police or armed forces to arrest and detain people as a preventive measure, even if they are not suspected of having committed an offence under the ordinary criminal law. This is known as administrative or preventive detention.

The UN Human Rights Committee has previously expressed concerns about the Secretary of the Ministry of Defence in Sri Lanka having the power to order detention.⁶¹ Administrative detention on security grounds is an extraordinary measure, only permissible under exceptional circumstances or in the event of derogation from human rights treaty obligations.⁶² The UN Human Rights Committee considers it should be confined to very limited and exceptional cases⁶³ and limited in time, for a short period of time, and should not be indefinite.⁶⁴ Experience from around the world shows that administrative detention often results in abuses, such as torture, cruel, inhuman and degrading treatment, and enforced disappearance, because it does not provide the usual legal safeguards to protect detainees.

Effective legal and practical safeguards must be in place to protect administrative detainees. The UN Human Rights Committee has stated that if administrative detention is used, for reasons of public security, it must be controlled by the same provisions governing detention while under arrest or awaiting trial. Meaning, it must not be arbitrary, and must be based on grounds and procedures established by law (Article 9 (1), ICCPR), information of the reasons must be given (Article 9(2), ICCPR) and court control of the detention must be available (Article 9(4), ICCPR) as well as compensation in the case of a breach (Article 9(5), ICCPR). If, in addition, criminal charges are brought in such cases, the full protection of Article 9 (2) and (3), as well as Article 14, must also be granted⁶⁵

According to international jurisprudence and doctrine,⁶⁶ States must provide the following safeguards when they use administrative detention for security reasons in the context of fighting terrorism:

- Detainees have the right to: be informed of the reasons for their detention; to have prompt access to legal counsel (within 24 hours), family, and, where necessary or applicable, medical and consular assistance; to receive humane treatment; to have access to *habeas corpus* and the right of appeal to a competent court.

- There must be legal guarantees against prolonged incommunicado and indefinite detention.
- Detainees must be held in official places of detention and the authorities must keep a record of their identity.
- The grounds and procedures for detention must be prescribed by law and reasonable time limits set on the length of preventive detention.
- Any such detention must continue only as long as the situation necessitates and appropriate judicial bodies and proceedings should review detentions on a regular basis when detention is prolonged or extended.

Grounds for arrest and detention

Even during a state of emergency a government cannot arbitrarily detain people; meaning detention must be prescribed by law and be reasonable in all the circumstances. The law must state the permissible grounds for any detention clearly enough so people are aware of what acts could lead to detention.

National security

Regulation 19 (1) and (1C) of the EMPPR 2005 defines the grounds of detention as follows:⁶⁷

“19. (1) Where the Secretary to the Ministry of Defence is of opinion [sic] with respect to any person that with a view to preventing such person –

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

it is necessary so to do, the Secretary may order that such person be taken into custody and detained in custody.”

“(1C) Any person detained in pursuance of the provisions of paragraph (1) for a period of one year reckoned from the date of his arrest, may upon the expiration of such period, be detained by the Secretary for a further period of six months, if it appears that the release of such person would be detrimental to the interests of national security;”⁶⁸

The ICJ is concerned that these grounds are formulated in broad and vague terms, in particular that national security is not defined and there are no guidelines to assist in knowing what kind of action would be considered “prejudicial to national security” or in “the interests of national security”. These grounds could result in arrest and detention up to 18 months of persons only remotely connected to the immediate security threat.⁶⁹

An amendment in August 2008 to Regulation 21 allows the Secretary of Defence to make a "further detention order" under Regulation 19 (1) in the "interest of national security".⁷⁰ It is not clear whether this is intended to allow the Secretary of Defence to extend custody beyond the maximum 18 month period of detention specified in Regulation 19 (1): the ICJ would be deeply concerned if this was the case.

"Rehabilitation"

Regulation 22 of the EMPPR 2005 provides for the automatic detention of a "surrende" in a Protective Accommodation and Rehabilitation Centre for an initial period up to 12 months, with possible three month extensions up to 24 months in total.⁷¹ This repeats similar provisions in earlier emergency regulations that provided for detention for the purposes of "rehabilitation".⁷²

A "surrende" is defined as any person who surrenders to the authorities in connection with a wide range of offences, including firearms and explosives offences, offences under the PTA, certain offences under the Penal Code, or "under any emergency regulation", or "through fear of terrorist activities".⁷³

Detention of a "surrende" is not preventive detention of a person to prevent possible crime being committed. If a person is giving themselves up because they have committed an offence, then they should be dealt with like a criminal suspect from the moment of surrender. Regulation 22 (10) envisages that after a period of three months the police may investigate the involvement of the "surrende" in criminal offences with a view to prosecution. This allows for detention for the purposes of investigation, outside the normal criminal procedure, with no provision for the application of fundamental rights such as access to a legal representative. Moreover, a period of three months is far too long; if a person is suspected of committing an offence, they should be treated immediately as a criminal suspect. In other words, they should be charged and tried under the criminal law, and only detained if the accused would abscond, destroy or interfere with evidence, influence witnesses, or to prevent commission of further offences.⁷⁴

If a "surrende" is going to the authorities because of "fear of terrorist activities", then they are seeking the protection of the State. Individuals have the right to "liberty and security";⁷⁵ it is a subversion of the meaning of this fundamental right to equate detention of an individual with ensuring their security from terrorist activities.

If a "surrende" is to undergo some form of rehabilitation, then this must be truly voluntary. The ICJ's experience in other parts of the world is that the notion of voluntariness, which might be implied by the use of the term "surrende", may not be realized in practice. In a conflict situation, in particular, individuals may feel obliged to surrender, or be forced to surrender, or be transferred from police or military custody. If rehabilitation is not voluntary, then it can only be imposed as part of a sentence for a criminal offence after a fair trial.⁷⁶

Even if an individual surrendered voluntarily, it does not follow they also intended to voluntarily submit to "rehabilitation". Indeed, under Regulation

22 detention of a "surrendered" is automatic on surrender, there is no provision for the "surrendered" to volunteer or give consent to "rehabilitation". Article 9 (1) ICCPR provides that no one shall be arbitrarily detained; meaning, detention must be prescribed by law and be reasonable in all the circumstances.⁷⁷ The UN Human Rights Committee considers that this applies to all deprivations of liberty, including where detention is for "educational purposes",⁷⁸ which would include vocational, technical or other training as envisaged by Regulation 22.⁷⁹ The ICJ considers that detention based solely on the surrender of an individual to be inappropriate and unjust, and amounting to arbitrary detention.

The "Commissioner General of Rehabilitation", together with an "Advisory Committee" appointed by the President,⁸⁰ recommends to the Secretary to the Minister of Defence whether a detainee should or should not be released. The President has appointed the Secretary of the Ministry of Justice to perform the Commissioner's role.⁸¹ This means that the decision to detain is made entirely by the executive. Under international law, a person detained for whatever reason is entitled to take proceedings before a court to decide without delay on the lawfulness of detention.⁸² The lack of any independent check and balance on the use of such detention powers, or provision for review by the courts, significantly increases the risk of abuse.

Judicial supervision and *habeas corpus*

A person held in administrative detention, under Regulation 19, is to be physically produced before a magistrate "within a reasonable time, having regard to the circumstances of each case, and in any event not later than thirty days from the date of such detention".⁸³ Sections under the Criminal Procedure Code, which would normally allow for production before a Magistrate within 24 hours of arrest, are expressly excluded.⁸⁴ This limits the right of a detainee to be brought promptly before a judge or an officer exercising judicial authority, as required by Article 9 (3) ICCPR.⁸⁵

Prompt judicial scrutiny helps to ensure that the detention is lawful and necessary, and provides a vital safeguard against torture or other ill treatment and enforced disappearance. It allows the judge to physically see the detainee and any noticeable signs of ill-treatment, or hear allegations made by the detainee. Only in the most extreme situation, when it is physically impossible to access a court, such as when the judiciary collapses because of an emergency, could it ever be justified not to bring detainees before a judge without delay. This is not the situation in Sri Lanka, where the courts are functioning and active. In any event, any suspension of this important right beyond 48 hours would be hard to justify.⁸⁶

Court scrutiny and discretion to overturn an order made under Regulation 19 (1) is in fact expressly excluded.⁸⁷ The emergency regulations provide that where the Secretary to the Ministry of Defence has ordered detention under Regulation 19 or 21, the court "shall order" continued detention.⁸⁸ The Court's role in reviewing the lawfulness of detention is therefore removed and reduced to a rubber-stamping exercise.⁸⁹ A person "aggrieved" of an order made against him may only make objections to an "Advisory Committee",

consisting of persons appointed by the President,⁹⁰ or the President himself.⁹¹ After considering the objections, the Advisory Committee reports to the Secretary of the Ministry of Defence who may revoke a Regulation 19 (1) order, except where the person is a member of a proscribed organization.⁹²

Article 9 (4) of the ICCPR provides that any detained person is entitled to take proceedings before a "court", in order for the court to decide without delay on the lawfulness of detention. An Advisory Committee consisting of persons appointed by the President does not satisfy Article 9 (4), nor does production before a competent court if that court is compelled to order detention, as required by Regulation 19 (1).

Article 141 of the Constitution of Sri Lanka recognises the right to grant and issue the writ of *habeas corpus*. The UN Human Rights Committee and other international human rights bodies have consistently stated that *habeas corpus* must be provided even in times of a public emergency threatening the life of a nation.⁹³ The effectiveness of the remedy of *habeas corpus* requires that it be possible to invoke it without limitation or restriction.⁹⁴ The UN Human Rights Committee considers the suspension of *habeas corpus* to be a violation of Article 9 (4) of the ICCPR.⁹⁵ Prolonged or delayed *habeas corpus* proceedings are also incompatible with Article 9 of the ICCPR.⁹⁶

This court remedy not only serves to maintain the principle of legality, but also constitutes another indispensable safeguard to protect detainees from grave human rights violations, such as torture and enforced disappearance,⁹⁷ incommunicado detention⁹⁸ and other grave violations of human rights. For this remedy to be effective the detainee must be brought before the Court promptly, have access to a lawyer of their choice, to consult their lawyer in private and be represented in court by that lawyer.⁹⁹ The UN Committee against Torture emphasized this in its Concluding Observations on Sri Lanka.¹⁰⁰

Place of detention and access to the outside world

Provisions under the EMPPR 2005 and the PTA allow for persons to be detained in irregular places of detention; that is, persons are not required to be held in a regular police station, detention centre, penal institution or prison, as would normally be the case:

- Regulation 19 (3) of the EMPPR 2005 provides that detained persons shall be detained "in such place as may be authorized by the Inspector-General of Police and in accordance with instructions issued by him" for a period up to 18 months (Regulation 19 (1) and 19(1)(C), as amended).
- Regulation 21 of the EMPPR 2005 (as amended) provides that the Secretary of Defence may order the moving of a person from fiscal custody, ordered under Regulation 19, to a place "to be specified in such detention order" and that the court "shall order that such person be detained in terms of the detention order in the place specified in such order".¹⁰¹

- Regulation 49 (a) (i) of the EMPPR 2005 enables a police officer or other duly authorized person the right to question any person, including those detained under an emergency regulation, and “to take such person from place to place for the purpose of such investigation during the period of such questioning”.
- Regulation 68 (2) of the EMPPR 2005 provides that for the purposes of questioning, any officer “may remove such person from any place of detention and keep him in the temporary custody of such officer for a period not exceeding seven days at a time”.
- Section 7 (3) (a) of the PTA permits a police officer conducting an investigation to “take such person during reasonable hours to any place for the purpose of interrogation and from place to place for the purposes of investigation”.
- Section 9 (1) of the PTA enables the Minister of Defence to order a person be detained for up to 18 months “in such place and subject to such conditions as may be determined by the Minister”.
- Section 15 (A) (1) of the PTA enables the Secretary to the Minister of Defence to order that persons held on remand, after indicted or pending appeal, should be “kept in the custody of any authority, in such place and subject to such conditions as may be determined by him” having regard to national security or public order.

Unlike some emergency regulations in the past, the EMPPR 2005 does not require the publication of a list of authorised places of detention. The risk of severe human rights violations is significantly increased when detainees are held in locations that are not recognised places of detention, without regularised procedures and safeguards to protect detainees. Detainees must be held in official places of detention and the authorities must keep a record of their identities.¹⁰² International human rights bodies have stressed the fundamental role these safeguards play in protecting the detainee and preventing enforced disappearances, unacknowledged detention and torture.¹⁰³

The UN Working Group on Enforced or Involuntary Disappearances has stated that for places of detention to be ‘officially recognised’, “requires that such places must be official - whether they are police, military or other premises - and in all cases clearly identifiable and recognised as such. Under no circumstances, including states of war or public emergency, can any State interests be invoked to justify or legitimise secret centres or places of detention which, by definition, would violate the Declaration [for the protection of all persons from enforced disappearances], without exception”.¹⁰⁴ International humanitarian law provides similar safeguards.

The EMPPR 2005 provides some express safeguards against abuse in detention, such as the possibility to apply certain rules under the Prisons Ordinance; although this only applies where persons are detained in prison.¹⁰⁵ Whilst the Inspector-General of Police may permit visits to and

correspondence with a detained person, Part IX of the Prisons Ordinance is excluded, which would normally allow for visits from, and communications with, relatives and others wishing to visit prisoners.¹⁰⁶ However, the Inspector-General of Police also has discretion not to afford legal rights under the Prisons Ordinance at all.¹⁰⁷ Moreover, neither the EMPPR 2005 nor the PTA expressly reaffirm that detainees will enjoy other important rights and safeguards usually provide under Sri Lankan law; such as, a written record of arrest and detention to be submitted to the court and accessible to family, the right to be notified of the reasons for arrest, and the right against self-incrimination.

The ICJ is concerned that persons may be detained in irregular places of detention for up to 18 months under both the EMPPR 2005 and the PTA, or indefinitely pending trial, and that emergency laws expressly allow for detainees to be moved from place to place during questioning, without provision for having contact with the outside world. International law prohibits prolonged *incommunicado* detention (detention without access to the outside world)¹⁰⁸ and secret detention.¹⁰⁹ According to the UN Special Rapporteur on torture, *incommunicado* detention is the most important determining factor as to whether an individual is at risk of torture.¹¹⁰ UN treaty bodies have recommended that states should make provisions against *incommunicado* detention and prohibit this practice by law.¹¹¹

Persons held under administrative detention are also entitled to the same protections as those under arrest or waiting trial.¹¹² Accordingly, emergency laws should contain express provision for detainees to have prompt access to a judge, a lawyer, family and medical care,¹¹³ as reaffirmed by the UN Committee against Torture in its Concluding Observations on Sri Lanka.¹¹⁴ Access to legal counsel should be expressly given within 24 hours of arrest¹¹⁵ and regularly thereafter.¹¹⁶ In exceptional circumstances, where prompt contact with a detainee's lawyer might raise legitimate security concerns, it should at least be possible for a detainee to meet with an independent lawyer in private, such as one recommended by a bar association,¹¹⁷ and access should not be denied to the detainee's lawyer of choice for more than a few days. The ICJ considers that these minimum safeguards should be specifically provided for in emergency legislation.

Presidential Directions on arrest and detention

On 7 July 2006, the President issued directions to the Heads of the Armed Forces and the Police Force to enable the Human Rights Commission of Sri Lanka to "exercise and perform its powers, functions and the duties [sic] and for the purpose of ensuring that fundamental rights of persons arrested and detained are respected and such persons are treated humanely" ('Presidential Directions'). These Directions are near identical to Presidential Directions issued by former President Chandrika Bandaranaike Kumaratunga of 18 July 1995.

The Presidential Directions reaffirm that the police and armed forces shall assist and facilitate the work of the Human Rights Commission (HRC) in the exercise of its powers and duties to ensure the fundamental rights of those arrested and detained. The ICJ welcomes the reaffirmation of the right of the HRC to be “permitted to enter at any time, any place of detention, police station or any other place” which a person is being detained under the PTA or emergency regulations (paragraph 6 (i)).

The Presidential Directions also reiterate some rights of detainees that are already contained in Sri Lanka law, such as the duty of an arresting officer to identify himself to the arrested person and the right to be informed of the reason for arrest. The ICJ is, however, concerned at certain provisions. For example:

- Paragraph 3 (iii) provides that a document containing details of the arrest shall be made available to the detained person’s family, but the Presidential Directions allow this to be avoided where “it is not possible to issue a document”. The arresting officer is not required to give any reason why it is not possible.
- Whilst paragraph 3 (iv) reaffirms that right of an arrested person to communicate with a relative or friend, there is no reaffirmation of the right to communicate in private with legal counsel.

Moreover, the Presidential Directions are guidelines only and their exact legal status is unclear.

Other fair trial and due process rights

Several provisions in the EMPPR 2005 and the PTA undermine other basic fair trial and due process rights; fundamental rights that are guaranteed in Article 13 (3) of the Constitution of Sri Lanka. The UN Human Rights Committee considers that “the principles of legality and the rule of law require that fundamental requirements of a fair trial must be respected during a state of emergency”.¹¹⁸

Right against self-incrimination

Regulation 41 (4) of the EMPPR 2005 allows the use of confessional evidence and reverses the burden of proof against the maker of the statement; the burden is on the maker of the statement to attempt to “reduce or minimize” the weight to be attached to it.¹¹⁹ This is similar to Section 16 of the PTA, which puts the burden on the maker of a statement to prove that the statement is “irrelevant”. The normal rule in Sri Lanka is that confessions to police officers are not admissible. In *Nallaratnam Singarasa v. Sri Lanka*,¹²⁰ the UN Human Rights Committee held that the application of Section 16 (2) of the

PTA violated Article 14 (3) (g) of the ICCPR (no one shall be compelled to testify against himself or confess guilt).

The ICJ is also concerned about Regulation 68 (1) of the EMPPR 2005 that makes it the "duty" of a person questioned by the police "to answer the question addressed to him". Similarly, Regulation 49 (b) provides that a person detained for questioning "shall truthfully answer all questions put to him". These provisions undermine the right against self-incrimination.

Presumption of innocence and burden of proof

Two provisions under the EMPPR 2005 reverse the normal burden of proof. Regulation 48 of the EMPPR 2005 provides that any documents found in the possession, custody or control of a person suspected of an offence under any emergency regulation "shall be submitted in evidence against such person without proof thereof". A similar provision in Section 18 (1) (b) of the PTA provides that the contents of such documents "shall be evidence of the facts stated therein".

Further, Regulation 65 of the EMPPR 2005 provides that a "certificate purporting to be under the hand of the Government Analyst, Deputy Government Analyst or Assistant Government Analyst [...] in regard to the identity, composition or character of any thing or matter submitted to him for examination or analysis, shall be conclusive proof of the truth of the statements contained in such certificate without such person being called to testify in such proceedings". Contrary to the normal rules of evidence, a Government Analyst is not required to give witness evidence in court and be subject to cross-examination of his/her expert testimony. Most extraordinarily, where the officer (analyst) concerned considers that it is not safe or practicable to preserve the evidence, then, after completion of examination, the officer may "cause such thing or matter to be disposed of or destroyed".¹²¹ This authorises an act that would prevent an independent expert from having the opportunity to examine first hand evidence, which would normally be the right of a person accused of an offence.

The UN Human Rights Committee has consistently affirmed that the burden of proof should always be on the prosecution, based on the principle of the presumption of innocence.¹²² The Inter-American Court of Human Rights has held that a state of emergency does not allow a state to ignore the presumption of innocence.¹²³

Bail

Regulations 19 (1) (A) and 62 (2) of the EMPPR 2005 provide that persons shall not be released on bail except with the consent of the Attorney-General. Similarly, Section 19 (a) of the PTA provides that those convicted of an offence and pending appeal shall be kept on remand until determination of the appeal.

Article 9 (3) ICCPR provides that, "It shall not be the general rule that persons awaiting trial shall be detained in custody [...]" The UN Human Rights Committee has held that pre-trial detention should be the exception and that

bail should be granted except where the accused would abscond, destroy or interfere with evidence, influence witnesses, or prevent commission of further offences.¹²⁴ In its Concluding Observations on Sri Lanka in 2003, the UN Human Rights Committee criticised the PTA provisions on bail as incompatible with the ICCPR.¹²⁵

FREEDOM OF EXPRESSION, ASSEMBLY AND ASSOCIATION

The EMPPR 2005, the Emergency Regulations 2006 and the PTA enable the Government to make regulations restricting the rights to freedom of expression, assembly and association.¹²⁶

Freedom of expression

The emergency regulations contain a number of provisions restricting freedom of expression, such as the prohibition of possessing or distributing information “prejudicial to national security”, powers of prior censorship and the criminalization of incitement to overthrow the Government.

Although the right to freedom of expression can be limited to some extent for reasons of national security, and could be suspended in a state of emergency, any such restriction must be strictly required and proportionate to the threat. The presumption must be that the right to freedom of expression continues, unless there is a direct causal link between the words spoken, or written, and the legitimate security concern, and that no other means short of restricting the right are adequate.

Any restrictions cannot be introduced in an arbitrary way, but must be done in accordance with international law.¹²⁷ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (‘Johannesburg Principles’) provide useful guidance on the status of freedom of expression during states of emergencies and the relationship of freedom of expression to national security.¹²⁸

In a state of emergency, which threatens the life of the nation and is officially and lawfully proclaimed, a state may impose restrictions on freedom of expression and information. However, it may do so only to the extent strictly required by the exigencies of the situation, and only when and for so long as they are not inconsistent with the government's other obligations under international law.¹²⁹ Outside of a state of emergency, restrictions on the right to freedom of expression on the ground of national security, as contained in Article 19 (3) ICCPR, must be: provided by law; necessary in a democratic society to protect a legitimate national security interest; the least restrictive means possible to protect that interest; and, compatible with democratic principles.¹³⁰

Such vaguely worded powers, as contained in the EMPPR 2005 and the Emergency Regulations 2006, undermine legitimate political and social dissent and media discussion. Critical debate and controversial perspectives about an emergency or conflict situation do not threaten national security and should be considered necessary and legitimate in a democratic society. Emergency measures must distinguish between information that could threaten national security and the legitimate expression of controversial ideas. The media and individual expression should not be suppressed because of perceived dangers that are abstract, remote or hypothetical.¹³¹ Even in times of

crisis, freedom of expression, and of the media, are vital to allow critical reflection about an emergency situation.

The UN Special Rapporteur on freedom of opinion and expression has commented that “the exercise of the right to freedom of opinion and expression is a significant indicator of the level of protection and respect of all other human rights in a given society”.¹³² Civil society and the media must be able to inquire into and speak about possible abuse of power by the authorities. International human rights bodies have persistently upheld the great importance in a democratic society of bringing to light abuses of public officials, even when a state is actively protecting national security.¹³³ The protection of freedom of expression must encompass not only favourable information or ideas, but also those that “offend, shock or disturb”, because “[s]uch are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”¹³⁴ The Sri Lankan courts have consistently affirmed these principles.¹³⁵

Information prejudicial to national security

Several emergency laws create broad criminal offences aimed at limiting the communication and possession of information or material prejudicial to national security or critical of the Government:

- Regulation 9 of the Emergency Regulations 2006 makes it a criminal offence, punishable by up to 10 years imprisonment, to “provide any information which is detrimental or prejudicial to national security” to anyone engaged in “terrorism” (as defined in Regulation 6).
- Regulation 18 (1) (vi) of the EMPPR 2005 enables the Secretary to the Minister of Defence to make an order imposing upon a person restrictions on association or communication, and in relation to “dissemination of news or the propagation of opinions”, to prevent that person acting “in any manner prejudicial” to national security, public order or the maintenance of essential services.
- Regulation 27 of the EMPPR 2005 makes it an offence to distribute leaflets that are “prejudicial” to public security, public order or essential services.
- Regulation 28 of the EMPPR 2005 states: “No person shall, by words of mouth or by another other means whatsoever, communicate or sprad [sic] any rumour or false statement which is likely to cause public alarm or public disorder.”
- Regulation 29 of the EMPPR 2005 makes it an offence to print, publish or comment on any pictorial, photographic or cinematograph film of the activities of any proscribed organization, any matters relating to Government investigations of a terrorist movement, any matter relating to national security, or “any matter likely, directly or indirectly to create communal tension”.

- Regulation 33 of the EMPPR 2005 makes it an offence to possess “any book, document or paper containing any writing or representation which is likely to be prejudicial to the interests of national security or to the preservation of public order or which is likely to arouse, encourage or promote feelings of hatred or contempt to the Government, or which is likely to incite [sic] any person directly or indirectly to take any step towards the overthrowing of the Government [...]”

These offences are extraordinarily broad and so vague that almost any comment, whether orally or in writing, relating to the conflict in Sri Lanka, might be construed as prejudicial to national security, or likely to arouse, encourage, or promote feelings against the Government.

Principle 5 of the Johannesburg Principles provides:

“Subject to [...], expression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;*
- (b) it is likely to incite such violence; and*
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.”*

Only in highly exceptional cases could a nation's security be directly threatened by a person's exercise of the right to freedom of expression. Such a threat would require, at the very least, clearly establishing that the person was able and intended to take actions that directly threaten national security, in particular by inciting the use of violence.¹³⁶

The Inter-American Commission on Human Rights has stated that although some limitations on freedom of expression may be justified to protect public order or national security in the fight against terrorism, “it must be foreseeable to the communicator that a particular expression may give rise to legal liability [...] An overly broad or vague provision may not fulfill the requirement of foreseeability”.¹³⁷ The Inter-American Commission on Human Rights has recommended that States “impose subsequent penalties for the dissemination of opinions or information only through laws that have legitimate aims, that are clear and foreseeable and not overly broad or vague, and that ensure that any penalties are proportionate to the type of harm they are designed to prevent”.¹³⁸

The fundamental importance of freedom of expression is one of the essential foundations of a democratic society. Dissemination of political ideas not in conformity with the ‘establishment’ (such as separatism, restoration of the monarchy, change to the legal and constitutional structures) are not incompatible themselves with the principles of democracy, and they cannot be considered themselves as jeopardizing the integrity or national security of a country.

These emergency regulations are so broadly defined that it is difficult for a person to know whether or not they are committing an offence. This creates the pre-conditions for self-censorship and a chilling affect on free and open

debate. Where self-censorship exists, it limits the dissemination of important information and debate in the community on matters relating to government policy. Limiting this right by means of arbitrary interference therefore affects not only the individual's right to impart information and express ideas, but also the right of the community as a whole to receive all types of information and opinions.¹³⁹

Prior censorship

Regulation 15 (1) EMPPR 2005 provides that a "competent authority" may "take such measures and give such direction" as necessary to prevent and restrict publications in and transmission outside Sri Lanka, of matters which "might be prejudicial" to the interests of national security, public order or essential services, or of matters "inciting or encouraging" persons to "mutiny, riot or civil commotion", or to "commit breach of any law", which may be prejudicial to public order or essential services.

The competent authority may, if he considers it "necessary or expedient", issue supplementary directions, including that publications should be submitted to the competent authority before publication. It is envisaged that this would include "documents, pictorial representations, photographs, cinematograph films, teleprinter, telegraph, television, transmission of matters relating to the operations of security forces including news reports, editorials, articles, letters to the editors, cartoons and comments".¹⁴⁰ Previous emergency regulations have contained similar provisions¹⁴¹ and Section 14 of the PTA also enables the Minister of Defence to order the prohibition of certain publications.

Expression should not normally be subject to prior censorship in the interests of protecting national security.¹⁴² An exception to this is during states of emergencies,¹⁴³ but only "to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law."¹⁴⁴ The Johannesburg Principles provide useful guidance on the kind of protected expression that does not constitute a threat to national security and therefore cannot be restricted. Principle 7 (a) provides:

"Expression which shall not constitute a threat to national security includes, but is not limited to, expression that:

- (i) advocates non-violent change of government policy or the government itself;*
- (ii) constitutes criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agencies or public officials;*
- (iii) constitutes objection, or advocacy of objection, on grounds of religion, conscience or belief, to military conscription or service, a particular conflict, or the threat or use of force to settle international disputes;*

- (iv) *is directed at communicating information about alleged violations of international human rights standards or international humanitarian law.*"

International law protects a wide range of free speech even in states of emergencies, and it will only be in exceptional cases that national security could justify prior censorship of publications. The broad and vaguely worded powers in Regulation 15 could be invoked to curtail legitimate political and social dissent and media discussion, if, in the view of the authorities, it is factually wrong or misleading. Critical debate, controversial perspectives about an emergency situation, including wrong or misleading factual statements or assessments, do not threaten national security. Experience from around the world shows that such laws are likely to have a dampening or chilling effect on free speech.

Freedom of assembly and association

Several provisions in the EMPPR 2005 impact on the right to freedom of assembly and association:¹⁴⁵

- Regulation 13 (1) of the EMPPR 2005 enables the President, by order, to "prohibit the holding of public processions or public meetings" in any area of Sri Lanka for such period as he sees fit. On 27 April 2006, the President made such an order, prohibiting the holding of public processions and meetings, without permission from the Inspector General of Police in the Western Province, for as long as the order is in force.¹⁴⁶
- Regulation 13 (2) of the EMPPR 2005 also enables the President to "give directions prohibiting the holding of any procession or meeting in any area of Sri Lanka" if he considers it "likely to cause a disturbance of public order or promote disaffection".
- Regulation 67 (1) (b) of the EMPPR 2005 enables any police officer or member of the armed forces, above certain ranks, to order any person in a public place to "remove himself" from that place.
- Regulation 71 (1) of the EMPPR 2005 allows the President to make an order that an organization is a proscribed organization if he considers that its purposes are prejudicial to national security, the maintenance of public order or the maintenance of essential services. Similarly, the President can declare an organization to be a proscribed organization where it interferes with an "essential service",¹⁴⁷ such as encouraging or preventing a person from attending work.¹⁴⁸ It is illegal, among other things, to "summon or attend" any meeting of a proscribed organization or of any of its members.¹⁴⁹

The permissible restrictions on the rights to freedom of assembly and association in an emergency are similar to the restrictions on the right to freedom of expression.¹⁵⁰ A clear distinction has to be drawn between legitimate, peaceful assemblies, and organizations, and those that could incite

violence or threaten national security. It would be difficult, for example, to justify a general ban on peaceful, public demonstrations or organisations in which people express controversial ideas or criticize the government.

The ICJ is concerned that there are no guidelines as to the use of these powers, nor any need for the President to justify orders, nor provision for independent review. Law enforcement officials are given complete discretion to prohibit public processions and meetings, and to remove persons from public places without the need to justify the removal as being necessary in the interests of national security or public order, as required by Article 21 ICCPR. Such sweeping language and unchecked powers could be used to restrict lawful conduct, such as organising or participating in peaceful demonstrations.

FREEDOM OF MOVEMENT

Since 2005, the President has made several emergency regulations that restrict, or have potential to restrict, freedom of movement on grounds of national security, public order and maintenance of essential services;¹⁵¹ this is in addition to restrictions already contained in the PTA.¹⁵² Emergency laws allow for government officials to order curfews, to restrict travel outside of Sri Lanka and to prohibit movement in particular areas (zones). Considerable power is given to the Secretary to the Ministry of Defence¹⁵³ and the "Competent Authority"¹⁵⁴ to restrict or authorise movement.

The right to freedom of movement is a fundamental freedom¹⁵⁵ and recognised by Article 14 (1) (h) of the Constitution of Sri Lanka. Restrictions on freedom of movement affect the enjoyment of other civil and political rights, as well as economic, social and cultural rights, such as the right of access to education, health services, housing and livelihoods.

Under the ICCPR, the right to freedom of movement can only be restricted in exceptional circumstances, if provided by law, and any restriction must comply with the permissible restrictions in Article 12 (3) ICCPR. Any restriction must be based on clear legal grounds and be necessary and proportionate in a democratic society for the protection of national security, public order, public health or morals, and the rights and freedoms of others, and must also be consistent with the other rights contained in the ICCPR.¹⁵⁶ The UN Human Rights Committee has added that restrictions must be appropriate to achieve their purpose, the least intrusive instrument among the available options, and proportionate to the interest to be protected.¹⁵⁷ Under international humanitarian law applicable to non-international armed conflicts, as in Sri Lanka, parties to the conflict may not displace the civilian population, in whole or in part, for reasons relating to the conflict, unless the security of civilians or imperative military reasons so demand.¹⁵⁸

There is therefore a heavy burden on the Government (in this case, the Secretary to the Ministry of Defence and the Competent Authority) to justify limitations on freedom of movement, or the displacement of the civilian population, by imminent and pertinent security considerations, and there should be effective ways to challenge such decisions.

Moreover, the UN Human Rights Committee has stated that laws authorising restrictions should use "precise criteria and may not confer unfettered discretion on those charged with their execution."¹⁵⁹ The ICJ is concerned that the powers given to the Secretary of the Ministry of Defence and the Competent Authority, under the emergency regulations, give unfettered discretion and wide ranging powers to restrict freedom of movement, and that their decisions are not subject to judicial review or appeal.

Evacuation of population

As noted above, emergency regulations have established “Prohibited Zones”, “Restricted Zones” and “High Security Zones” prohibiting people, vehicles and vessels from entering particular areas of land or coast line seas without written authority from the Competent Authority.¹⁶⁰

In an internal armed conflict, States may not order the displacement of civilians for reasons related to the conflict, unless it is necessary for the security of civilians or for imperative military reasons.¹⁶¹ A state may evacuate persons from particular areas because, for example, of a bomb threat or to clear a combat zone.¹⁶² The evacuation or relocation of persons in a particular area or village must not be for other, perhaps political, reasons. However, any evacuation must be strictly limited in time, based on the need to protect civilians, and persons must be transferred back to their homes as soon as the hostilities in that area have ceased.¹⁶³ The UN Guiding Principles on Internal Displacement provide that “displacement shall last no longer than required by the circumstances.”¹⁶⁴ Moreover, evacuation or relocation must not lead to “forced transfer” or “forced internal displacement” of a population from one part of the country to another in violation of international law.¹⁶⁵

The ICJ is concerned that none of the emergency provisions creating prohibited zones contain any safeguards or provisions on the rights of those who may be internally displaced. The UN Guiding Principles on Internal Displacement reaffirm that the Government has the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons (IDPs).¹⁶⁶ Following his visit to Sri Lanka in December 2007, the Special Representative of the United Nations Secretary-General on the human rights of internally displaced persons stated that: “At present, information about housing and land in high security zones and areas under exclusive control of the security forces, as well as compensation for their loss or limitation, is lacking.”

Prior to any decision requiring the displacement of persons, the authorities are required to ensure that all feasible alternatives are explored in order to avoid displacement altogether.¹⁶⁷ Where there are no alternatives, “all measures shall be taken to minimize displacement and its adverse effects”.¹⁶⁸ Special provision is required for the most vulnerable IDPs, such as children, expectant mothers and mothers of young children, persons with disabilities and the elderly.¹⁶⁹ Family unity¹⁷⁰ and property rights¹⁷¹ should also be respected.

All IDPs are entitled to the protection of their human rights, including those in the ICCPR, during and after displacement,¹⁷² and, importantly, relating to return, resettlement and reintegration.¹⁷³ Under both international human rights law and international humanitarian law IDPs must not be subjected to discrimination or distinction based on race, colour, sex, language, religion, political or opinion, national or social origin, property or other status.¹⁷⁴ For example, evacuation of people should not be directed at one particular part of the population based on grounds such as race, social origin or political opinion.

The ICJ considers that laws and regulations that will necessarily lead to the displacement of people should detail the obligations of the Government and the rights of IDPs, consistent with international human rights law and international humanitarian law, as reflected in the UN Guiding Principles in Internal Displacement.

To ensure that measures taken are strictly necessary and proportionate, there should also be an effective remedy to challenge movement of people and denial of access to areas. On 18 July 2007, the Supreme Court rejected a fundamental rights petition by the Centre for Policy Alternatives, which challenged the creation of a high security zone in Sampur on grounds of discrimination and freedom of movement.

Curfews

Regulation 14 (1) of the EMPPR 2005 enables the President to restrict access to specified public places during certain periods and Regulation 18 (1) (iii) enables the Secretary to the Minister of Defence to make an order prohibiting a person from leaving his residence without prior permission. Most extraordinarily, there appears to be no time limit on the use of Regulation 18 (1) (iii), meaning that a person could be confined to his/her residence indefinitely. Similar powers are also contained in the PTA¹⁷⁵ and the PSO.¹⁷⁶

As with other restrictions on freedom of movement, there will be a heavy burden on the Government to justify that stopping or placing restrictions on a person from leaving home is strictly necessary and proportionate for security reasons. The longer such a restriction is in place, the harder it will be to justify, and an indefinite curfew would never be permissible. Moreover, any decision to impose a curfew should be subject to judicial review or appeal. No such safeguards are contained in the emergency regulations or the PTA.

Prohibition to leave one's country

Regulation 18 (1) (iv) of the EMPPR 2005 enables the Secretary to the Minister of Defence to prevent a Sri Lankan citizen from traveling outside of Sri Lanka. Section 11 of the PTA contains a similar provision, allowing travel restrictions for an initial period of three months, with the possibility of being extended for three months at a time up to a maximum of 18 months.¹⁷⁷

Article 12 (2) ICCPR guarantees everyone the right to leave their own country. The UN Human Rights Committee considers that this includes the right to the necessary travel documents, such as a passport.¹⁷⁸ There will be a heavy burden on the Government to justify withholding travel documents on the ground of imminent security considerations and any such decision should be subject to judicial review or appeal. No such safeguards are contained in the emergency regulations or the PTA.

PRIVACY

Regulations 8, 20 and 47 of the EMPPR 2005 contain special powers to take possession of buildings or premises and evict residents, and powers of search and seizure without warrant.¹⁷⁹ Some of the powers are highly intrusive interferences with the right to privacy, including family, home or correspondence contained in Article 17 ICCPR. The UN Human Rights Committee has emphasised that individuals must be able to protect themselves against attacks on privacy and have an effective remedy against unlawful attacks.¹⁸⁰

Evictions

Regulation 8 of the EMPPR 2005 enables the police to take possession of a building or premises and “evict any person found therein or ordinarily resident therein”, where the building or premises is alleged to have been used in or in connection with the commission of any offence under the EMPPR 2005 or the PTA. Any person “claiming ownership” may apply to court for the release of the property, if it was used for or in connection with the commission of an offence without knowledge or contrary to instructions.

The UN Human Rights Committee has stated that: “In cases where eviction is considered to be justified, it should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality.”¹⁸¹ Interference with a person’s home can only take place “in cases envisaged by the law”. The law “should be in accordance with the provisions, aims and objectives of the Covenant and should, in any event, be reasonable in the particular circumstances”. The “relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted”.¹⁸²

The ICJ is concerned that Regulation 8 permits eviction based on the broad and vaguely defined offences contained in the EMPPR 2005 and the PTA, without prior judicial authority, and without the possibility of judicial review for residents who are not the owners of the property (e.g. paying tenants). Nor are there safeguards against arbitrary interference with privacy and home. For example, Regulation 8 allows for the eviction of “any person found therein or ordinarily resident” whether or not that person committed or was connected with an offence. Where a person is not connected with an offence, this would amount to an arbitrary interference with privacy and home, from which all individuals have the right to the protection of the law.¹⁸³

Search and seizure

Several provisions in the EMPPR 2005 and the PTA give the police and armed forces powers of search and seizure without the need for a court warrant:

- Regulation 20 of the EMPPR 2005 enables any public officer, any member of the armed forces or any person authorised by the President to search any person, without the need for a warrant, and to detain that person for the purposes of the search. Regulation 20 also contains the power to search and seize, remove or detain any vehicle, vessel, article, substance or thing used in or connection with the commission of the offence.
- Regulation 47 (c), (d), (e) of the EMPPR 2005 enables any police officer investigating an offence under any emergency regulation to search that person or their house or place of work, or enter and search any building associated with the offence, and to take possession of any moveable property whatsoever.
- Regulation 69 (1) of the EMPPR 2005 enables a competent authority to order the production of personal information or articles (including books, accounts or documents), if considered necessary or expedient in the interests of national security, public order, or for the purposes of any emergency regulation.
- Section 6 (1) (b), (c) and (d) of the PTA enables any police officer of a specified rank¹⁸⁴ without a warrant to enter and search any premises, stop and search any individual or vehicle, and to seize any document or thing connected or suspected of being connected with any unlawful activity.

The UN Human Rights Committee has emphasised that: "Searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment".¹⁸⁵ The ICJ welcomes safeguards such as the requirement in Regulation 20 (11) to issue a receipt for property seized or detained,¹⁸⁶ and that searches of females shall be made by another female.¹⁸⁷ However, the ICJ is concerned that on the whole these provisions lack adequate safeguards against arbitrary or unlawful interference with privacy; in particular, the exercise of search and seizure powers do not require judicial authorisation and are not subject to judicial review.¹⁸⁸

Annex I

Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 of 2006

6 December 2006

[...]

6. No person or groups of persons either incorporated or unincorporated including an organization, shall either individually or as a group or groups or through other persons engage in

- (a) terrorism or,
- (b) any specified terrorist activity, or
- (c) any other activity in furtherance of any act of terrorism or specified terrorist activity committed by any person, group or groups of persons.

7. No person shall:

- (i) wear, display, hoist or possess the uniform, dress, symbol, emblem, or flag of,
- (ii) summon, convene, conduct or take part in a meeting of,
- (iii) obtain membership or join,
- (iv) harbour, conceal, assist a member, cadre or any other associate of,
- (v) promote, encourage, support, advice, assist, act on behalf of, or
- (vi) organize or take part in any activity or event of, any person, group, groups of persons or an organization which acts in contravention of Regulation 6 of these Regulations.

8. No person shall engage in any transaction in any manner whatsoever, including contributing, providing, donating, selling, buying, hiring, leasing, receiving, making available, funding, distributing or lending materially or otherwise, to any person, group or groups of persons either incorporated or unincorporated, or with a member, cadre or associate of such a person, group or groups of persons, which acts in contravention of Regulations 6 and 7 of these Regulations.

Provided however, for the purposes of facilitation the development of a peaceful political solution, termination of terrorism or specified terrorist activity maintenance of supplies and services essential to the life of the community, conducting development activities, or for any other lawful purpose, it shall be lawful for any person including a national or international governmental or non governmental organization, to in good faith and with the written approval of the Competent Authority appointed in terms of these Regulation, engage in any approved transaction, with a person or group or

groups of persons who are acting in contravention of Regulations 6 or 7 hereof.

Provided further, it shall not be necessary to obtain such approval of the competent Authority in order to provide emergency medical treatment or medical assistance to any person who may be acting in contravention of Regulations 6 and 7 hereof.

9. No person shall provide any information which is detrimental or prejudicial to national security to any person, group, groups of persons or an organization which acts in contravention of Regulation 6 of these Regulations.

[...]

20. In these Regulations, the following terms shall have the meanings stipulated herein.

(i) 'terrorism' means any unlawful conduct which:

- (a) involves the use of violence, force, coercion, intimidation, threats, duress, or
- (b) threatens or endangers national security, or
- (c) intimidates a civilian population or a group thereof, or
- (d) disrupts or threatens public order, the maintenance of supplies and services essential to the life of the community, or
- (e) causing destruction or damage to property, or
- (f) endangering a person's life, other than that of the person committing the act, or
- (g) creating a serious risk to the health or safety of the public or a section of the public or,
- (h) is designed to interfere with or disrupt an electronic system, and

which unlawful conduct is aimed at or is committed with the object of threatening or endangering the sovereignty or territorial integrity of the Democratic Socialist Republic of Sri Lanka or that of any other recognized sovereign State, or [of] compelling the government of the Democratic Socialist Republic of Sri Lanka to do or abstain from doing any act, and includes any other unlawful activity which advocates or propagates such unlawful conduct. *[Amended by Gazette Extraordinary No. 1518/8 of 8 October 2007]*

(ii) 'specified terrorist activity' means, offences specified in the Prevention of Terrorism Act, offences under the Public Security Ordinance No. 25 of 1947 and Regulations made thereunder, offence under section 3 of the Prevention of Money Laundering Act No. 5 of 2006, offence under section 3 of the Convention on the Suppression of Terrorist Financing Act No. 25 of 2005, and offences under sections 114, 115, 116, 117, 121, 122, 128, 129 of the Penal Code.

END NOTES

¹ See e.g. UN Human Rights Committee, Concluding Observations on Sri Lanka, CCPR/C/79/Add.56, 27 July 1995, para. 13: “[...] concerned that the derogation of rights under the various emergency laws and regulations may not be in full compliance with the requirements of the provisions of article 4, paragraph 2, of the Covenant [...] The Committee emphasizes that the obligations assumed by Sri Lanka as a State Party to the various international instruments must be respected even in times of States of emergency.”

² *Ethnic Conflict and Violence in Sri Lanka*, Report of a Mission to Sri Lanka in July-August 1981 on behalf of the International Commission of Jurists, by Professor Virginia A. Leary; *Sri Lanka: A Mounting Tragedy of Errors*, Report of a Mission to Sri Lanka in January 1984 on behalf of the International Commission of Jurists, by Paul Sieghart, March 1984; *Judicial Independence in Sri Lanka, Report of a Mission 14-23 September 1997*, by Lord William Goodhart Q.C., Justice P. N. Bhagwati and Attorney Phineas M. Mojapelo.

³ See e.g. Centre for Policy Alternatives, *Statement on the introduction of the Emergency (Prevention and Prohibition of Terrorism) Regulations 2006* (undated); the Ceylon Mercantile, Industrial and General Workers' Union (CMU), letter to President Mahinda Rajapakse, *The Rising Cost of Living and Repression of Human and Democratic Rights under Emergency Regulations*, 12 March 2007.

⁴ See e.g. Human Rights Watch, *Return to War: Human Rights under Siege*, August 2007, Chapter VII; International Crisis Group, *Sri Lanka's Human Rights Crisis*, Asia Report No. 135, 14 June 2007, pp13-14.

⁵ The “Karuna Faction” is a Tamil armed group led by V. Muralitharan that split from the LTTE in 2004 and now cooperates with Sri Lankan security forces.

⁶ See Article 2 (1) ICCPR and UN Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 8. See also Inter-American Court of Human Rights, Judgment of 29 July 1988, *Velázquez Rodríguez Case*.

⁷ The ICJ Berlin Declaration was adopted on 28 August 2004 by a gathering of 160 jurists, from all regions of the world, convened by the ICJ at its Biennial Conference.

⁸ International Covenant on Civil and Political Rights (11 September 1980) and its First Optional Protocol (3 January 1998, International Covenant on Economic, Social and Cultural Rights (11 September 1980), Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (2 February 1994), Convention on the Elimination of all Forms of Racial Discrimination (20 March 1982), Convention on the Elimination of All Forms of Discrimination against Women (17 July 1980) and its Optional Protocol (15 January 2003), Convention on the Rights of the Child (26 January 1990), Optional Protocol on the involvement of children in armed conflict (21 August 2000).

⁹ E.g. Standard Minimum Rules for the Treatment of Prisoners; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions; Basic Principles on the Use of Force and Firearms; the Declaration on the Protection of All Persons from Enforced Disappearance; Guiding Principles on Internal Displacement.

¹⁰ See e.g. International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion of 9 July 2004, para. 106: “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the International Covenant on Civil and Political Rights”; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1986, para. 25. General Assembly Resolution 2675 of 1970, on *Basic principles of civilian population in armed conflicts* and Security Council resolutions, including Resolution 1577 (2004) on *The situation in Burundi*; Resolution 1574 (2004) on *Reports of the Secretary-General on the Sudan*; Resolution 1572 (2004) on *The situation in Côte d'Ivoire* and Resolution 1565 (2004) on *The situation concerning the Democratic Republic of the Congo*. UN Human Rights Committee - General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, HRI/GEN/1/Rev.7, para. 11: “[...] the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.” Report of the Independent Expert, Robert K. Goldman, on the Protection of human rights and fundamental freedoms while countering terrorism, UN Doc. E/CN.4/2005/103, 7 February 2005, para. 23: “Human Rights Law does not cease to apply when the struggle against terrorism involves armed conflict. Rather, it applies cumulatively with International Humanitarian Law. [...] [W]hen an armed conflict constitutes a genuine emergency, a State may restrict and even derogate from certain human rights. But it can never suspend rights that are non-derogable under human rights law even when

the emergency is due to armed conflict. Despite their different origins, International Human Rights Law and International Humanitarian Law share a common purpose of upholding human life and dignity”.

¹¹ See e.g. ICRC Press Release 06/138, *Sri Lanka: ICRC depllores civilian casualties in Kallar*, 8 December 2006 and ICRC Press Release 07/100, *Sri Lanka: ICRC temporarily withdraws from Uyilankulam crossing point but boosts aid*, 7 September 2007.

¹² Sri Lanka ratified the four Geneva Conventions of 1949 in 1959. Sri Lanka has not, however, ratified or signed Protocol II Additional to the Geneva Conventions of 1949, relating to the Protection of Victims of Non International Armed Conflicts.

¹³ United Nations Security Council, Resolution 1674 (2006), S/RES/1674, 28 April 2006.

¹⁴ See e.g. UN Security Council Resolution 1373 (2001), UN Security Council Resolution 1624 (2005), Paragraph 1; Convention on the Prevention of Terrorism of the Council of Europe; the European Union Framework Decision on Combating Terrorism.

¹⁵ See e.g. article 2 and 5 of the ICCPR; articles 1 of the American Convention on Human Rights; articles 1 and 17 of the European Convention on Human Rights; and articles 1 and 27 (2) of the African Charter on Human and Peoples' Rights. UN Human Rights Committee, General Comment No. 31 “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, para 8; European Court of Human Rights, judgments: *Ergi v Turkey* (1998), *Tanrikulu v Turkey* (1999), *Demiray v Turkey* (2000), *X and Y v. Netherlands* (1985), *Osman v. UK* (1988) and *A v. UK* (1998); Inter-American Court of Human Rights 27, Judgment of 29 July 1988, *Velásquez-Rodríguez v. Honduras*; Inter-American Commission on Human Rights, Report 42/00 of 13 April 2000, Case N° 11.103, *Pedro Peredo Valderrama* (Mexico) and Report No. 54/01 of 16 April 2001, Case 12.051, *Maria Da Penha Maia Fernandes* (Brazil); African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Communication 155/96, paras 57, 61 (30th Ordinary Session, Oct. 2001).

¹⁶ See e.g. *A & Ors v. Secretary of State* [2005] UKHL 71, Lord Bingham at paras. 41-42.

¹⁷ UN Security Council Resolution 1373, 28 September 2001. See also UN Security Council Resolution 1566 of 8 October 2004, preamble: “UN Security Council Resolution 1566 called on states to cooperate fully in combating terrorism, but also specifically reminded states “that they must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, and in particular international human rights, refugee and humanitarian law.”

¹⁸ See e.g. UN Human Rights Committee, General Comment No. 29, para. 14; the ICJ Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism, 28 August 2004, para. 9; Siracusa Principles, paras. 59 and 60; CCPR/CO/Rus, para. 13; UN Basic Principles on the Use of Force and Firearms, Principle 8: “Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.”

¹⁹ Decision dated 13 November 1995, Communication N° 563/1993, *Nydia Erika Bautista* (Colombia), CCPR/C/55/D/563/1993, paragraph 8.6. See also the Decision dated 29 July 1997, Communication N° 612/1995, *José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres* (Colombia), United Nations document CCPR/C/60/D/612/1995, paragraph 8.8; *Maria Fanny Suarez de Guerrero v. Colombia*, Communication 45/1979, para 13.3, UN Doc. CCPR/C/15/D/45/1979 of 31 March 1982). See also Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, para. 60.

²⁰ See e.g. UN Human Rights Committee: Preliminary Conclusions - *Peru*, CCPR/C/79/Add.67, paragraph 10.

²¹ See e.g. UN Human Rights Committee, General Comment No. 20 (on the prohibition of torture and cruel, inhuman or degrading treatment or punishment), para. 15, 13 March 1992, para. 15.

²² Principle 19, UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65, 24 May 1989.

²³ Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, 8 February 2005, Principle 22.

²⁴ UN Human Rights Committee, General Comment No. 31 (The Nature of the General Legal Obligation Imposed on States Parties), 21 May 2004, CCPR/C/74/CRP.4/Rev.6, para 18 (references omitted).

²⁵ *Ibid.*

²⁶ Ibid.

²⁷ See e.g. UN Committee against Torture Conclusions and recommendations on the second periodic report of *Sri Lanka*, CAT/C/LKA/CO/2, 15 December 2005, para. 12; UN Human Rights Committee, Concluding Observations on the fourth and fifth periodic reports of *Sri Lanka*, CCPR/CO/79/LKA, 1 December 2003, para. 10; UN Human Rights Committee, Concluding Observations on Sri Lanka, CCPR/C/79/Add.56, 27 July 1995, para. 15; *ICJ Report of a Mission 14-23 September 1997*, by Lord William Goodhart Q.C., Justice P. N. Bhagwati and Attorney Phineas M. Mojapelo, at p88.

²⁸ Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to Sri Lanka, 28 November to 6 December 2006, E/CN.4/2006/53/Add.5, para. 50. "Today, too many police officers are accustomed to "investigating" by forcibly extracting confessions and to operating without meaningful disciplinary procedures or judicial review." (para. 50), and, "The failure to effectively prosecute government violence is a deeply-felt problem in Sri Lanka." (para. 59).

²⁹ United Nations Security Council Resolution 1674 (2006), S/RES/1674, 28 April 2006, para. 7.

³⁰ See e.g. UN Human Rights Committee: General Comment N° 29, States of emergency (art. 4), para. 7, UN document CCPR/C/21/Rev.1/Add.11, 31 August 2001; the Concluding Observations of the Human Rights Committee on: *Democratic People's Republic of Korea*, CCPR/CO/72/PRK, 27 August 2001, para. 14; *Belgium*, CCPR/CO/81/BEL, 12 August 2004, para. 24; *Iceland*, CCPR/CO/83/ISL, 25 April 2005, para. 10; *Estonia*, CCPR/CO/77/EST, 15 April 2003, para. 8; *Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 12; and *Morocco*, CCPR/CO/82/MAR, 1 December 2004, para. 20; European Court of Human Rights: Judgment of 25 May 1993, *Kokkinakis vs. Greece*, Series A, N° 260-A, p.22, para. 52; and Judgment of 22 June 2000, *Cöeme vs. Belgium*, para. 11; Inter-American Court of Human Rights: Judgment of 30 May 1999, Case of *Castillo Petruzzi et al vs. Peru*, paras. 119, 120 and 121; and Inter-American Commission on Human Rights: Second report on the situation of human rights in *Peru*, op. cit. 8, para. 80, and Report on Terrorism and Human Rights, op. cit. 6, "Recommendations", N° 10 (a).

³¹ See, for example, the Rome Statute of the International Criminal Court (art. 22) and the reports of the International Law Commission to the UN General Assembly, 1993 (Supplement N° 10 (A/48/10), p.81) and 1994 (Supplement N° 10 (A/49/10), p.321).

³² The International Covenant on Civil and Political Rights (ICCPR) (art. 15), the European Convention on Human Rights (art. 7), the African Charter on Human and Peoples' Rights (art. 7.2), the Arab Charter on Human Rights (art. 15) and the American Convention on Human Rights (art. 9).

³³ See e.g. Article 4 (2), ICCPR; European Convention on Human Rights (art. 15); Arab Charter on Human Rights (art. 4(b)), and the American Convention on Human Rights (art. 27). See also: UN Human Rights Committee, General Comment N° 29, States of emergency (art. 4), para. 7; Concluding Observations of the Human Rights Committee: *Estonia*, CCPR/CO/77/EST, 15 April 2003, para. 8; Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. vs. Peru*, para. 119 *et seq.*; and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS document OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 218

³⁴ UN Special Rapporteur on the Independence of Judges and Lawyers, UN document E/CN.4/1998/39/Add.1, para. 129. See also the Concluding Observations of the Human Rights Committee - *Portugal* (Macau), UN document CCPR/C/79/Add.115, 4 November 1999, para. 12; the Observations and recommendations of the Human Rights Committee on *Algeria*, CCPR/C/79/Add.95, 18 August 1998, para. 11; *Egypt*, CCPR/C/79/Add.23, 9 August 1993, para. 8; and *Peru*, CCPR/C/79/Add.67, 25 July 1996, para. 12; and the Concluding Observations of the Human Rights Committee on: *Democratic People's Republic of Korea*, CCPR/CO/72/PRK, 27 August 2001, para. 14; *Belgium*, CCPR/CO/81/BEL, 12 August 2004, para. 24; *Iceland*, CCPR/CO/83/ISL, 25 April 2005, para. 10; *Estonia*, CCPR/CO/77/EST, 15 April 2003, para. 8; and *Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 12. See also the Inter-American Commission on Human Rights, Annual Report of the Inter-American Commission on Human Rights, 1983-1984, p.85, para. 7, and the *Second report on the situation of human rights in Peru*, op. cit. 8, para. 80.

³⁵ Concluding Observations of the Human Rights Committee on: *Belgium*, CCPR/CO/81/BEL, 12 August 2004, para. 24; *Israel*, CCPR/CO/78/ISR, 21 August 2003, para. 14; *Iceland*, CCPR/CO/83/ISL, 25 April 2005, para. 10; *Estonia*, CCPR/CO/77/EST, 15 April 2003; *Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 12; *Philippines*, CCPR/CO/79/PHL, 1 December 2003, para. 9; *Uzbekistan*, CCPR/CO/83/UZB, 6 April 2005, para. 18; and Observations and recommendations of the Human Rights Committee on: *Algeria*, CCPR/C/79/Add.95, 18 August 1998, para. 11; *Egypt*, CCPR/C/79/Add.23, 9 August 1993, para. 8; and *Peru*, CCPR/C/79/Add.67, 25 July 1996, para. 12. See also the Inter-American Commission on Human Rights, *Second report on the situation of human rights in Peru*, para. 80: "[t]he definition of the crime of terrorism set forth in the [Peruvian anti-terrorist] decree is abstract and vague, and thereby violates the basic principle of legality, which is a basic tenet of the criminal law,

whose ultimate objective is the juridical security the individual needs to know precisely what acts and omissions may trigger his or her criminal liability". Inter-American Commission, Report on Terrorism and Human Rights, "Recommendations", N° 10 (a): "ensure that crimes relating to terrorism are classified and described in precise and unambiguous language that narrowly defines the punishable offence, by providing a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviours that are either not punishable offences or are punishable by other penalties".

³⁶ Judgment of 30 May 1999, Case of *Castillo Petruzzi et al vs. Peru*, para. 121.

³⁷ This term is defined as: "an offence specified in the Prevention of Terrorism Act, No. 48 of 1979, an offence under the Public Security Ordinance (Chapter 40), an offence under section 3 of the Prevention of Money Laundering Act, No. 5 of 2006, an offence under section 3 of the Convention on the Suppression of Terrorist Financing Act, No. 25 of 2005, and any offence committed under sections 114, 115, 116, 117, 121, 128, 129 of the Penal Code (Chapter 19)".

³⁸ Concluding Observations of the UN Human Rights Committee: United States of America, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 11 (references omitted).

³⁹ Inter-American Commission on Human Rights, *Report on terrorism and human rights*, op. cit. 6, para. 226, and *Second report on the situation of human rights in Peru*, para. 80.

⁴⁰ Similar provisions can also be found in Regulation 3 of the Emergency (Proscription of Tamil Rehabilitation Organization) Regulations, No. 9 of 2007, Gazette Extraordinary No. 1529/13 of 26 December 2007.

⁴¹ Section 11, Emergency Regulation 2006.

⁴² By way of contrast, Regulation 14 of the Emergency Regulations 2006 that deals with offences committed by a "body of persons" expressly provides a defence if the offence was committed "without his knowledge", which implies there must be intention to commit the offence.

⁴³ Similar provisions are also contained in Regulation 3 (a), (b) and (c) of the Emergency (Proscription of Tamil Rehabilitation Organization) Regulations, No. 9 of 2007, Gazette Extraordinary No. 1529/13 of 26 December 2007.

⁴⁴ This issue was considered by the second post-world war Nuremberg Statute. Articles 9 and 10 of the Statute targeted members of the Gestapo, the S.D. and the S.S. The Nuremberg Tribunal declared them to be criminal organizations. Nevertheless, members of the above-mentioned groups were not found guilty simply because they belonged to them. The Tribunal stated that for a member of these groups to have been found guilty, he had to have been involved voluntarily and in full knowledge of the criminal purposes of the group, or to have actually participated in the commission of war crimes, crimes against peace or crimes against humanity.

⁴⁵ See e.g. the IV Geneva Convention (art. 33), the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (art. 75.4(b)), the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (art. 6.2(b)), the Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict (arts. 15 and 16), the Statute of the International Criminal Tribunal for the Former Yugoslavia (art. 7), the Statute for the International Criminal Tribunal for Rwanda (art. 6), the Rome Statute (art. 25) and the Statute of the Special Tribunal for Sierra Leone (art. 6). Article 5 (3) of the American Convention on Human Rights states that "[p]unishment shall not be extended to any person other than the criminal".

⁴⁶ Commentary of the ICRC on Article 75 of the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, para. 3098. See also Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), presented 3 May 1993 (S/25704), para. 51; European Court of Human Rights, Judgment of 6 November 1980, *Gizzardi vs. Italy*, Series A No. 39, para. 102.

⁴⁷ ICRC, Customary International Humanitarian Law, rule 56.

⁴⁸ Section 6 of the PSO enables the President to make emergency regulations "empowering such authorities or persons as may be specified in the regulations to make orders and rules for any purposes".

⁴⁹ Gazette Extraordinary No. 1475/13 of 13 December 2006, Appointment of Competent Authority under regulation 15 of the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulation, No. 7 (sic) of 2006, appointing Mr Gamini Sederath, Additional Secretary to the President.

⁵⁰ Regulation 17, Emergency Regulations 2006.

⁵¹ Regulations 19 (2) and 20 (1), EMPPR 2005.

⁵² Regulation 24, EMPPR 2005.

⁵³ Regulation 52 (1), EMPPR 2005.

⁵⁴ Regulation 68 (1), EMPPR 2005

⁵⁵ Section 12 (2), PSO. The armed forces are not given the powers under Chapter XI of the Criminal Procedure Code (Sections 108 to 125 relate to information of an offence, committal of an cognizable offence examination of witness by police officer or inquirer, powers of search, production before a magistrate and ordering of detention) and the powers under Section 14 (1) of the PSO (the power to remove any offensive weapon or substance) can only be exercised by members of the armed forces below the rank of Sergeant or Petty Officer.

⁵⁶ Gazette No 1587/15, 6 February 2009.

⁵⁷ See the Concluding Observations of the Human Rights Committee on: *France*, CCPR/C/79/Add.80, 4 August 1997, para. 16ff; *Bolivia*, CCPR/C/79/Add. 74, 1 May 1997, paras. 17 and 34; and *Colombia*, CCPR/C/79/Add.76, 3 May 1997, para. 19. See also the Inter American Commission on Human Rights: *Report on the Situation of Human Rights in Mexico*, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, 24 September 1998, para. 35; *Report on the Situation of Human Rights in Brazil*, 1997, para. 86; *Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.83, Doc. 31, 12 March 1993, para. 24; *Second Report on the Situation of Human Rights in Peru*, op. cit. 12, para. 210; *Fifth Report on the Situation of Human Rights in Guatemala*, OEA/Ser.L/V/II.111, Doc. 21, rev., 6 April 2001, para. 31; and the *Second Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II.84, Doc. 39 rev., 14 October 1993. *Fifth Report on the Situation of Human Rights in Guatemala*, Organization of American States document OEA/Ser.L/V/II.111, Doc. 21 rev., 6 April 2001, paras. 31, 33 and 63 (2).

⁵⁸ *Second Report on the Situation of Human Rights in Colombia*, Organization of American States document OEA/Ser.L/V/II.84, Doc. 39 rev., 14 October 1993, Chapter III, "The Political and Legal System in Colombia", letter F ("States of emergency under the existing legal system"): "The Commission was particularly disturbed by the fact that members of the military were to be allowed to perform functions ordinarily performed by the criminal investigations police in investigations conducted by prosecutors into cases involving civilians. When prosecutors use military personnel as criminal investigators, citizens' rights can be violated, evidence can be faked or even concealed when it is incriminating to the armed forces, which is frequently accused of alleged human rights violations." See also IACHR Third Report on the Situation of Human Rights in Colombia, Organization of American States document OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, paragraph 75.

⁵⁹ Regulation 19 (4), EMPPR 2005.

⁶⁰ Regulation 19 (10), EMPPR 2005.

⁶¹ UN Human Rights Committee, Concluding Observations on *Sri Lanka*, CCPR/C/79/Add.56, 27 July 1995, para. 19.

⁶² See e.g. *Study on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, UN document E/CN.4/826/Rev.1, paras. 783-787; the European Court of Human Rights, Judgment of 1 July 1961, *Lawless vs. Ireland* (paras. 13, 15 and 20), Judgment of 18 January 1978, *Ireland vs. The United Kingdom* (para. 214), and Judgment of 26 May 1993, *Brannigan and McBride vs. The United Kingdom*; the Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, op. cit. 13, para. 138; the Concluding Observations of the Human Rights Committee on: *Jordan*, UN document CCPR/C/79/Add.35, A/49/40, paras. 226-244, and *Morocco*, UN document CCPR/C/79/Add.44, para. 21.

⁶³ Concluding Observations of the Human Rights Committee on: *Jordan*, CCPR/C/79/Add.35, A/49/40, paras. 226-244, and *Morocco*, CCPR/C/79/Add.44, para. 21

⁶⁴ Concluding observations of the Human Rights Committee: *Zambia*, CCPR/C/79/Add.62, para. 14.

⁶⁵ UN Human Rights Committee, General Comment 8 - Right to liberty and security of persons (article 9), 30 June 1982, para. 4.

⁶⁶ See the International Commission of Jurists, *International Legal Framework on Administrative Detention and Counter-Terrorism*, Geneva, March 2006 (<http://www.icj.org>).

⁶⁷ Section 5 (2) (a) of the PSO enables the President to make emergency regulations to authorize and provide for the detention of persons, where he considers it necessary and expedient on public security grounds.

⁶⁸ Regulation 19(1)(C) of EMPPR 2005, as amended by Gazette Extraordinary No.1561/11 of 5 August 2008.

⁶⁹ See Regulation 19(1) of EMPPR 2005 and Regulation 19(1) (C) EMPPR 2005, as amended by Gazette Extraordinary No.1561/11 of 5 August 2008.

⁷⁰ Regulation 21, EMPPR 2005, as amended by Gazette Extraordinary No.1561/11 of 5 August 2008.

⁷¹ Regulation 22 (9) and (10) EMPPR 2005, as amended Gazette Extraordinary No. 1462/8 of 12 September 2006: The Commissioner-General of Rehabilitation together with the Secretary to the Minister of Defence are required to detain a "surrendee", without charge or trial, for up to 12 months. The Commissioner-General may then recommend and the Secretary authorize an extended period of detention of up to a further 12 months, without the need for any judicial scrutiny of the lawfulness of detention.

⁷² See e.g. Emergency (Miscellaneous Provisions and Powers) Regulations No. 4 of 1994, Regulations 20, 21 and 22, as amended by Gazette Extraordinary 938/13 of 27 August 1996.

⁷³ Regulation 22 (2) EMPPR 2005 as amended.

⁷⁴ UN Human Rights Committee, cases of *Hill v. Spain* (CCPR 526/99) and *W. B. E. v. The Netherlands* (CCPR 432/90)

⁷⁵ Article 9 (1), ICCPR. See also UN Human Right Committee, cases of *Delgado Páez v. Colombia* (CCPR 195/85), *Dias v. Angola* (CCPR 711/96) and *Jayawardena v. Sri Lanka* (CCPR 916/00).

⁷⁶ See e.g. Article 10 (3), ICCPR.

⁷⁷ See e.g. UN Human Rights Committee, *van Alphen v. The Netherlands* (CCPR 305/88): "The drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances."

⁷⁸ See UN Human Rights Committee, General Comment 8, para. 1.

⁷⁹ Regulation 22 (4), EMPPR 2005, as amended, the Commissioner General of Rehabilitation shall "endeavour to provide the surrendee with appropriate vocational, technical or other training".

⁸⁰ Regulation 22 (10) (b), EMPPR 2005, as amended. This is the same Advisory Committee as under Regulation 19 (4) EMPPR 2005.

⁸¹ Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2005, Appointment of the Commissioner General of Rehabilitation, 12 September 2006.

⁸² Article 9 (4), ICCPR.

⁸³ Regulation 19 (1) (A) EMPPR 2005, as amended Gazette Extraordinary 1561/11 of 5 August 2008. There is also provision for detained persons to be physically produced before a Magistrate every sixty days if being held for over one year, see Regulation 19 (1)(C), EMPPR 2005, as amended Gazette Extraordinary 1561/11 of 5 August 2008.

⁸⁴ Regulation 19 (1) (A), EMPPR 2005, as amended Gazette Extraordinary 1561/11 of 5 August 2008, states that Sections 36, 37 and 38 of the Code of Criminal Procedure Act No. 15 of 1979 shall not apply.

⁸⁵ Similar provisions, limiting the right to be brought promptly before a judge, are also contained in the PTA. According to the terms of the CFA, these provisions are currently suspended: Section 6 (1) (a) of the PTA provides for arrest without warrant for the purposes of investigation of offences, but requires the person to be brought before a Magistrate within 72 hours (Section 7 (1), PTA). However, the Magistrate's powers to freely scrutinize the lawfulness of detention are restricted by Section 7 (2), which provides "such court shall order the remand of such person until the conclusion of trial". Section 9 (1) of the PTA, which enables the Minister of Defence (the President) to preventatively detain a person up to a maximum of 18 months, expressly excludes the possibility of court review of the decision to detain (Section 10, PTA).

⁸⁶ See e.g. *Aksoy v Turkey*, European Court of Human Rights, Judgment of 18 December 1996, 23 EHHR 417, and Concluding Observations of the UN Human Rights Committee on *Thailand*, CCPR/CO/84/THA (13), 28 July 2005 (Advanced Unedited Version).

⁸⁷ Regulation 19 (10), EMPPR 2005: "An order under paragraph (1) of this regulation shall not be called in question in any court on any ground whatsoever"; and, Regulation 19 (1) (A), as amended Gazette Extraordinary

1561/11 of 5 August 2008: “the court shall order that such person continue to be detained”; and Regulation 19 (1) (B), as amended Gazette Extraordinary 1561/11 of 5 August 2008: “The production of any person in conformity with the provisions of paragraph 1 (A) shall not affect the detention of such person [...]”. However, such clauses in the past have not prevented the Supreme Court from exercising jurisdiction under the Constitution to protect fundamental rights when affected by emergency regulations. See e.g. *Perera v AG* (1992) 1 SLR 199 *Wickramabandu v Herath* [1990] 2 SLR 348 (cannot oust Supreme Court jurisdiction), *Karunatileke v Dissanayake*, [1999] 1 SLR 157, 177.

⁸⁸ Regulation 19 (1) (A) and (B), and Regulation 21, as amended Gazette Extraordinary 1561/11 of 5 August 2008.

⁸⁹ Until recently, somewhat confusingly, and contrary to what was implied by Regulation 19 (1), under Regulation 21 (2) a person was to be produced before a court of competent jurisdiction within 90 days, or otherwise released. Even in this case, where the detainee was produced before such a court, Regulation 21 (3) provided that the court “shall order” their detention in prison. However, the old Regulation 21 has now been revoked and replaced by a new Regulation 21; see Gazette Extraordinary 1561/11 of 5 August 2008.

⁹⁰ Regulations 19 (4) – (9), EMPPR 2005.

⁹¹ Regulation 19 (5), EMPPR 2005.

⁹² Regulation 19 (8) – (9), EMPPR 2005.

⁹³ See e.g. UN Human Rights Committee, General Comment No. 29, paras. 14 and 16.

⁹⁴ Concluding Observations of the Human Rights Committee: *Japan*, CCPR/C/79/Add.102, 19 November 1998, para. 24.

⁹⁵ See, among others, the Concluding Observations of the Human Rights Committee: Nigeria, CCPR/C/79/Add.64, para. 7; Views of 26 October 1979, Communication No. 9/1977, *Edgardo Dante Santullo Valcada vs. Uruguay*, CCPR/C/8/D/9/1977; Views of 29 July 1980, Communication No. 6/1977, *Miguel A. Millan Sequeira vs. Uruguay*, CCPR/C/10/D/6/1977; and Views of 27 March 1981, Communication No. 37/1978, *Esther Soriano de Bouton vs. Uruguay*, CCPR/C/12/D/37/1978.

⁹⁶ Concluding Observations of the Human Rights Committee: Dominican Republic, CCPR/CO/71/DOM, 26 March 2001.

⁹⁷ See e.g. UN Human Rights Committee, General Comment No. 29, para. 15; Special Rapporteur on torture (E/CN.4/2004/56, para. 39); E/CN.4/2003/68, para. 26 (i); Inter-American Court on Human Rights (Advisory Opinion OC-9/87 of 6 October 1987, Judicial Guarantees in States of Emergency (Articles 27 (2), 25 and (8) American Convention on Human Rights), para. 38; UN Working Group on Enforced or Involuntary Disappearances (E/CN.4/1983/14, para. 141; E/CN.4/1986/18/Add.1, paras. 55-58; E/CN.4/1989/18/Add.1, para. 136; E/CN.4/1990/13, para. 346; E/CN.4/1991/20/Add.1, para. 167; E/CN.4/1991/20, para. 409; E/CN.4/1992/18, paras. 368-370; and E/CN.4/1993/25, para. 514); and the UN independent expert in charge of studying the legal and human rights framework for the protection of all persons against enforced or involuntary disappearances (E/CN.4/2002/71).

⁹⁸ See, among others, the European Court of Human Rights, *Brannigan and McBride v. the United Kingdom*, 26 May 1993, paras. 62-63, and *Öcalan v. Turkey*, 12 March 2003, para. 86.

⁹⁹ See e.g. Article 14 (3) (b) and (c) ICCPR, and Principles 17 and 18, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988.

¹⁰⁰ UN Committee against Torture, Concluding Observations on Sri Lanka, CAT/C/LKA/CO/2, 15 December 2005, para. 8: “The Committee is concerned about allegations that fundamental legal safeguards for persons detained by the police, including habeas corpus rights, are not being observed. [...] The State party should take effective measures to ensure that the fundamental legal safeguards for persons detained by the police are respected, including the right to habeas corpus, the right to inform a relative, access to a lawyer and a doctor of their own choice, and the right to receive information about their rights.” See Comments by the Government of Sri Lanka to the conclusions and recommendations of the Committee against Torture (CAT/C/LKA/CO/2), CAT/C/LKA/CO/2/Add.1, 20 February 2007, para. 19: “[...] a person detained by police has many rights guarantees by the Constitution itself such remedies include petitioning the Supreme Court by way of a fundamental rights application, writ applications, Habeas Corpus applications and a reference to the Human Rights Commission.”

¹⁰¹ Regulation 21, EMPPR 2005, as amended Gazette Extraordinary 1561/11 of 5 August 2008.

¹⁰² Article 10.1 of the Declaration on the Protection of All Persons from Enforced Disappearances, article 17 of International Convention for the Protection of All Persons from Enforced Disappearance, Rule 7 of the Standard Minimum Rules for the Treatment of Prisoners, Principles 20 and 29 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 6 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution, article XI of the Inter-American Convention on Forced Disappearance of Persons, Rules 7 and 8 of the European Prison Rules, and Principle M(6) of the Principles and guidelines on the right to a fair trial and legal assistance in Africa.

¹⁰³ See e.g. UN Human Rights Committee (General Comments No. 20 - Art. 7 of the Covenant, para. 11, and No. 21 - Art. 10 of the Covenant, para. 6.; and Concluding Observations on: the Republic of *Kyrgyzstan*, CCPR/CO/69/KGZ, para. 7; *Tunisia*, CCPR/C/79/Add.43, para. 15; *Sudan*, CCPR/C/79/Add.85, para. 15; *Morocco*, CCPR/C/79/Add.113, para. 16; *Algeria*, CCPR/C/79/Add. 95, para. 12; *India*, CCPR/C/79/Add. 81, para. 24; *Cyprus*, CCPR/C/79/Add.88, para. 5; and *Peru*, CCPR/C/79/Add.67, para. 5); the Committee against Torture (*Bolivia*, CAT/C/XXVI/Concl.3/rev.1, para. 21; and Observations on: *Tunisia*, A/54/44 (para. 88-105); *Egypt*, A/54/44 (para. 197-216); and *Cameroon*, AT/C/XXV/Concl.5, para. 7); and the Working Group on Enforced or Involuntary Disappearances (General comments on Article 10 of the Declaration on the Protection of All Persons from Enforced Disappearance; UN document E/CN.4/1997/34, paras. 24 and 30; and E/CN.4/1992/18, para. 204). See also the Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, op. cit. 13.

¹⁰⁴ General comment on article 10 of the Declaration, WGEID Report 1996 (Excerpt of E/CN.4/1997/34 / 13 December 1996), para. 24.

¹⁰⁵ Regulations 19 (3) EMPPR 2005.

¹⁰⁶ Sections 71 and 72, Prisons Ordinance.

¹⁰⁷ Regulations 19 (3) and 21 (2), EMPPR 2005.

¹⁰⁸ Human Rights Committee, General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), para. 6; Committee against Torture (Reports A/54/44, paras. 121 and 146; A/53/44, para. 135; and A/55/44, para. 182). See also Inter-American Court of Human Rights, Judgment 29 July 1988, *Velasquez Rodriguez Case* (para. 156) and Judgment of 12 November 1997, *Suarez Rosero Case* (paras. 90-91) and Inter-American Commission on Human Rights (*Report on Terrorism and Human Rights*, paras. 211 and 213)

¹⁰⁹ *Ibidem*, para. 13 (b). See also the European Court on Human Rights, Judgment of 25 May 1998, *Kurt vs. Turkey*, paras. 123 and 124, Article 17 (1) of the International Convention for the Protection of All Persons from Enforced Disappearance, Concluding Observations of the Human Rights Committee: United States of America, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 12.

¹¹⁰ Report of the Special Rapporteur, E/CN.4/2004/56, para. 37, and Report of the Special Rapporteur, A/57/173, 2 July 2002, para. 16.

¹¹¹ See e.g. UN Human Rights Committee, General Comment No. 20, op. cit.; Report of the Human Rights Committee, A/54/40, Concluding Observations on *Chile* (para. 209); Report of the Human Rights Committee, A/53/40, Concluding Observations on *Tanzania* (para. 393) and *Uruguay* (242); Preliminary Observations on *Peru*, CCPR/C/79/Add.67, para. 23, and the Committee against Torture (Concluding observations on *Georgia* and *Ukraine*, in 1997; *Spain* (1998); *Libyan Arab Jamahiriya* (1999) and *Finland*, A/51/44, para.127).

¹¹² See e.g. UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: "These principles apply for the protection of all persons under any form of detention or imprisonment."; Rule 95 of the UN Standard Minimum Rules for the Treatment of Prisoners; and UN Human Rights Committee, General Comment No. 29, paragraph 16.

¹¹³ See e.g. Articles 9 (4) and 14 (3) ICCPR, and Principles 4, 11, 15, 16, 17, 18, 19 and 24 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

¹¹⁴ UN Committee against Torture, Concluding Observations on Sri Lanka, CAT/C/LKA/CO/2, 15 December 2005, para. 8.

¹¹⁵ See e.g. Report of the Special Rapporteur on torture, A/57/173, 2 July 2002, para. 18. See also: Report of the Special Rapporteur on Torture E/CN.4/2004/56, 23 December 2003, para. 32.

¹¹⁶ UN Human Rights Committee, General Comment No. 20, para 11.

¹¹⁷ Sir Nigel Rodly, UN Special Rapporteur on torture, UN Doc. A/56/156, 3 July 2001, para. 39 (f).

¹¹⁸ UN Human Rights Committee, General Comment No. 29, para. 16.

¹¹⁹ See also Regulation 63 (4) excluding Sections 25 and 26 of the Evidence Ordinance; section that were also excluded under Section 17 of the PTA. These are significant sections; 25 and 26 of the Evidence Ordinance declare inadmissible confessions made to a police officer, a forest officer or an excise officer and confessions made by any person while in the custody of the these three categories of officers, unless made in the immediate presence of a Magistrate. These precautionary provisions have been displaced by the emergency law regime for decades.

¹²⁰ *Sinharasa v Sri Lanka*, Case No. 1033/2004 Adoption of Views on 23 August 2004.

¹²¹ Regulation 65 (2) EMPFR 2005. *Sinharasa v Sri Lanka*, Case No. 1033/2004 Adoption of Views on 23 August 2004

¹²² UN Human Rights Committee General Comment 13, para. 7; UN Human Rights Committee views of 20 March 2007, *Rozik Ashurov on behalf of his son, Olimzhon Ashurov, v. Tajikistan*, communication 1348/2005; UN Human Rights Committee views of 21 July 2004, *Nallarathnam Singarasa v. Sri Lanka*, Communication N° 1033/2001, para 7.4

¹²³ Report N° 49/00, Case 11,182, *Rodolfo Gerbert, Ascencio Lindo et al. vs. Peru*, 13 April 2000, para. 86: “[i]n a constitutional and democratic state based on the rule of law, in which the separation of powers is respected, all punishments set forth in law must be imposed by the judiciary after the person’s guilt has been established with all due guarantees at a fair trial. The existence of a state of emergency does not authorize the state to ignore the presumption of innocence, nor does it empower the security forces to exert an arbitrary and uncontrolled ius puniendi”

¹²⁴ UN Human Rights Committee, cases of *Hill v. Spain* (CCPR 526/99) and *W. B. E. v. The Netherlands* (CCPR 432/90)

¹²⁵ Concluding observations of the Human Rights Committee, CCPR/CO/79/LKA, 1 December 2003, para. 13

¹²⁶ Articles 19, 21 and 22 ICCPR.

¹²⁷ UN Human Rights Committee, General Comment No. 10, *Freedom of expression*, para. 4: “the exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole. However, when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself”.

¹²⁸ Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Principles 2, 3 and 5, adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg.

¹²⁹ Principle 3, Johannesburg Principles.

¹³⁰ Principles 1 (d) and 1.3, Johannesburg Principles.

¹³¹ Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Principle 55.

¹³² Report of the Special Rapporteur, Ambeyi Ligabo, submitted in accordance with Commission on Human Rights resolution 2003/42, E/CN.4/2004/62, 12 December 2003, para. 79

¹³³ See e.g. *Surek v. Turkey* (No. 2), European Court of Human Rights, Judgment of 8 July 1999, Application 2452 22/94, para. 29.

¹³⁴ European Court of Human Rights, Judgment of 7 December 1976, *Handyside vs. United Kingdom*; Inter-American Court of Human Rights, Judgment of 5 February 2001, *Olmedo Bustos et. al vs. Chile* (“*Last Temptation of Christ*”); Inter-American Commission on Human Rights, *Annual Report on Human Rights 1994*, “Report on the Compatibility of *Desacato* Laws with the American Convention on Human Rights”, OEA/Ser.L/V/II.88., Doc. 9 rev (1995).

¹³⁵ See e.g. *Amaratunge v Sirimal & Others*, 1993 (1) SLR, at p264.

¹³⁶ See also Report of the Special Rapporteur on Freedom of Expression, E/CN.4/1995/32, 14 December 1995.

¹³⁷ Inter-American Commission, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 October 2002, para. 316.

¹³⁸ *Ibid*, Recommendation N° 11 (b).

¹³⁹ Inter-American Court of Human Rights, *Advisory Opinion OC-5/85*, paras. 30-32.

¹⁴⁰ Regulation 15 (2) – (7) gives the competent authority the necessary legal machinery to censor such publications in accordance with the grounds set out in Regulation 15 (1).

¹⁴¹ See e.g. Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2000, Gazette Extraordinary No: 1/130/8.

¹⁴² Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Principle 23.

¹⁴³ *Ibid*.

¹⁴⁴ *Ibid*, Principle 3.

¹⁴⁵ Articles 21 and 22, ICCPR.

¹⁴⁶ Gazette Extraordinary No. 1442/16 of 27 April 2006.

¹⁴⁷ Regulation 2 (1), EMPPR 2005: An “essential service” means “any service which is of public utility or essential for national security or preservation of public order or to the life of the community and includes any Department of Government or branch thereof and which is specified in the Schedule hereto [...]”. It includes services such as those of the Central Bank, healthcare, fuel and energy supply, telecommunications system, the work of all Government Departments, some commodities (e.g. rubber, tea and coconut), food and medicine.

¹⁴⁸ Regulation 40 (4) and 40 (3) EMPPR 2005, as amended by Gazette Extraordinary No. 1456/27 of 3 August 2006.

¹⁴⁹ Regulation 71 (3) (c) EMPPR 2005.

¹⁵⁰ See Articles 21 and 22 (2), ICCPR. See also UN Human Rights Committee, General Comment No. 29, para. 5: “In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (article 12) or freedom of assembly (article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.” See also *Jeong-Eun Lee v. Republic of Korea* (CCPR 1119/02): “[A]ny restriction on the right to freedom of association to be valid must cumulatively meet the following conditions: (a) it must be provided by law; (b) it may only be imposed for one of the purposes set out in paragraph 2; and (c) it must be “necessary in a democratic society” for achieving one of these purposes.

¹⁵¹ See e.g. Regulations 12(1) and 18 EMPPR 2005; Emergency (Establishment of a Prohibited Zone) Regulations No. 1 of 2006 (creates prohibited zones); Emergency (Colombo High Security Zone) Regulations, No. 3 of 2006 (allows special security arrangements in Colombo); Emergency (Port of Colombo) Regulations, No. 5 (sic) of 2006 (applies to ports of Colombo); Emergency (Restricted Zone) Regulations, No. 6 (sic) of 2006 (restricts movements on eastern seaboard); Emergency (Restricted use of Outboard Motors) Regulations, No. 8 (sic) of 2006 (no motors exceeding 10 horsepower).

¹⁵² Section 11 (1), PTA.

¹⁵³ Regulation 18 (1) (a) and (b), EMPPR 2005 gives the Secretary to the Minister of Defence discretion to use a wide array of powers to restrict freedom of movement to prevent a person “acting in any manner prejudicial to the national security or to the maintenance of public order, or to the maintenance of essential services”.

¹⁵⁴ Under various emergency regulations creating restricted zones, the Competent Authority is given power to authorize access into the specified zone. At the time of writing the Competent Authority is Maj. Gen. Parakrama Pannipitiya.

¹⁵⁵ Article 12 ICCPR.

¹⁵⁶ Article 12 (3) ICCPR. See also UN Human Rights Committee General Comment No. 27 (freedom of movement), paras. 11 – 18.

¹⁵⁷ UN Human Rights Committee General Comment No. 27 (freedom of movement), para. 14.

¹⁵⁸ Rule 129 B, *Customary International Humanitarian Law, Volume I: Rules*, Jean-Marie Henckaerts and Louise Doswald-Beck, ICRC, 2005, at 457. See Additional Protocol II, Article 17. See also Statute of the International Criminal Court, Article 8 (2) (e) (viii).

¹⁵⁹ UN Human Rights Committee, General Comment No. 27, para. 13.

¹⁶⁰ See e.g. Emergency (Establishment of a Prohibited Zone) Regulations No. 1 of 2006 (creates prohibited zones); Emergency (Colombo High Security Zone) Regulations, No. 3 of 2006 (allows special security arrangements in Colombo); Emergency (Port of Colombo) Regulations, No. 5 (sic) of 2006 (applies to ports of Colombo); Emergency (Restricted Zone) Regulations, No. 6 (sic) of 2006 (restricts movements on eastern seaboard); Emergency (Restricted use of Outboard Motors) Regulations, No. 8 (sic) of 2006 (no motors exceeding 10 horsepower); Emergency (Muttur (East)/Sampoor High Security Zone) Regulations No. 2 of 2007.

¹⁶¹ Rule 129 B, *Customary International Humanitarian Law, Volume I: Rules*, Jean-Marie Henckaerts and Louise Doswald-Beck, ICRC, 2005, at 457. See Additional Protocol II, Article 17.

¹⁶² Rule 129 B, *ICRC Customary International Humanitarian Law, Volume I* at 460. See Fourth Geneva Convention, Article 49, and Additional Protocol II, Article 17 (1).

¹⁶³ Rule 132, *ICRC Customary International Humanitarian Law, Volume I*, at 468. See Fourth Geneva Convention, Article 49 (2).

¹⁶⁴ Principle 6 (3), UN Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, dated 11 February 1998.

¹⁶⁵ See e.g. UN Human Rights Committee, General Comment No. 27, para. 7, and General Comment No. 29, para. 13 (d).

¹⁶⁶ Principle 3 (1), UN Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, dated 11 February 1998.

¹⁶⁷ Principle 7, UN Guiding Principles on Internal Displacement.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*, Principle 4 (2).

¹⁷⁰ Fourth Geneva Convention, Article 49 (3). See also *Customary International Humanitarian Law, Volume I: Rules*, Jean-Marie Henckaerts and Louise Doswald-Beck, ICRC, 2005, at 465-466.

¹⁷¹ *Ibid.*, Rule 133, *ICRC Customary International Humanitarian Law, Volume I*, at 472; and Principle 21 (3), UN Guiding Principles on Internal Displacement.

¹⁷² See e.g. Principles 10 – 23, UN Guiding Principles on Internal Displacement.

¹⁷³ *Ibid.*, Principles 28, 29 and 30.

¹⁷⁴ Article 2 (1) ICCPR and Article 3 common to Geneva Conventions of 1949.

¹⁷⁵ Section 11 of the PTA enables the Minister of Defence to order personal curfews. Such restrictions can be imposed for an initial period of three months and extended for three months at a time up to a maximum of 18 months.

¹⁷⁶ Section 16 (1) of the PSO enables the President to order curfews for the maintenance of public order, by way of Order published in the Gazette, in any area and for such hours as specified in the Order.

¹⁷⁷ Section 11 (3), PTA.

¹⁷⁸ UN Human Rights Committee, General Comment No. 27, para. 9.

¹⁷⁹ Section 5 (2) (c) of the PSO enables the President to make emergency regulations, for the purposes of public security, to authorize the entering and search of any premises. Section 5 (2) (b) (i) and (ii) of the PSO enables the

President to make emergency regulations, for the purposes of public security, for the taking of possession or control of any property, or acquisition of any property other than land.

¹⁸⁰ UN Human Rights Committee, General Comment No. 16, para. 11. See also Article 17 (2) ICCPR.

¹⁸¹ UN Human Rights Committee, General Comment No. 7, para. 14.

¹⁸² *Ibid* and General Comment No. 16.

¹⁸³ Article 17 (1) and (2) ICCPR. See also UN Human Rights Committee, General Comment No. 16: "In the Committee's view the expression "arbitrary interference" can also extend to interference provided for under the law", at para. 4.

¹⁸⁴ Any police officer not below the rank of Superintendent or any other police officer not below the rank of Sub-Inspector authorized in writing, Section 6 (1), PTA.

¹⁸⁵ UN Human Rights Committee, General Comment No. 16, para. 8.

¹⁸⁶ Regulation 20 (11) EMPPR 2005.

¹⁸⁷ Regulation 20 (7) EMPPR 2005. See UN Human Rights Committee General Comment No. 16, para. 8: Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex."

¹⁸⁸ See e.g. UN Human Rights Committee, General Comment No. 16, para. 6.