

香 港 人 權 監 察
HONG KONG HUMAN RIGHTS MONITOR

Submissions to the Legislative Council

Panel on Security

On Fugitive Offenders (Sri Lanka) Order

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Introduction

The Monitor believes whilst the Hong Kong SAR has the international obligation to eliminate impunity and it is beneficial to us to work hand in hand with neighbouring countries in combating criminal offences, it should not be done at the expense of protection of basic human rights.

Fair trial

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) provides:

- "1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law....
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality."

The guarantee of a fair trial is the prerequisite for concluding any agreement on surrender of fugitive offenders with another jurisdiction. The fundamental assumptions of entering into an extradition agreement or putting such an agreement into force are that, subjectively, all parties (in this case, HKSAR and Government of Sri Lanka) would act in good faith and, objectively, the situation of the requesting jurisdiction ensures that a surrendered fugitive will be guaranteed fair trial.

The Hong Kong Government is also of view that, in practice, fair trial is a prerequisite in our extradition system. The SAR Government has highlighted that after the entering into an agreement with another jurisdiction, only in exceptional cases would refusal of surrender of a person occur. It is "when there is clear evidence of a flagrant denial of the right to fair trial in the territory of the requesting," says the Government. It states, "if the situation warrants, the bilateral agreement on the surrender of fugitive offenders would be terminated."¹

Article 3(f) of United Nations Model Treaty on Extradition (UNMTE) provides the following grounds for mandatory refusal of extradition:

"if the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14."²

¹ Administration's response to the submissions received [CB(2)1309/01-02(01)] (19 March 2002)

² United Nations Model Treaty on Extradition, 14 December 1990 (A/RES/45/116. 45/116.)

In "Response from the Administration"³, the Administration takes the view that Article 14 of ICCPR "does not directly address" the issue of "if the person sought would not receive a fair trial in the territory of the requesting Party". The Administration also comments that Article 14 of ICCPR "makes no reference to extradition and is directed towards imposing obligations on the jurisdiction where the trial is in fact being conducted.

Even if the Government's interpretation of article 14 of ICCPR is correct, that is, the right to fair trial only arises in a criminal trial but not in an extradition proceedings, it means that we cannot rely on article 39 of the Basic Law to provide for the required legislative framework to implement article 3(f) of UNMTE and an amendment to the FOO to implement it is necessary if we are to take the right to fair trial in the context of extradition seriously.

Article 3(f) of UNMTE makes it imperative for parties to an extradition agreement to examine whether the right to fair trial in the actual or the subsequent criminal trial of a person sought has been or will be jeopardized and to refuse to surrender her/him if his right to fair trial has been or will be violated. Any arrangements which will result in the court refraining from considering such an issue are incompatible with article 3(f) of UNMTE.

In many common law jurisdictions, including Hong Kong, which fail to include the fair trial requirement provision (article 3(f)) in the UNMTE in their parent legislation and their extradition agreements, the courts do not enquire into the issue whether a fugitive surrendered will get a fair trial or not. The consequential adoption of such a rule of non-inquiry by the judiciary means that the responsibility to prevent denying the subsequent denial of fair trial to any fugitive offenders rests in the legislature and the executive until the legal framework is rectified.

It is therefore imperative for the SAR Government and the Legislative Council at this moment to examine whether the situations in the Democratic Socialist Republic of Sri Lanka would meet such requirements before legislating to implement the agreement on surrendering fugitives offenders.

Some preliminary investigations of Sri Lanka's situations have revealed its years of civil war, prolonged state of emergency, numerous arbitrary arrests, widespread torture, rampant extra-judicial killings, continuing involuntary disappearances of civilians and poor track record of human rights violations. It is extremely doubtful if a surrendered fugitive would receive a fair trial in Sri Lanka in the near future.

A copy of our findings based on United Nations, NGO and other sources in these areas is attached for Member's reference (Enclosure I). The findings are consistent with the observations by our observers invited to Sri Lanka to observe its elections in recent years.

³ Response from the Administration, LC Paper No. CB(2) 380/01-02 (01)

The Monitor sees fundamental problems for the SAR Government to negotiate and to conclude any agreement with Sri Lanka for the surrender of fugitive offenders and for the SAR legislature to endorse and domesticate such an agreement into our local law.

Before we domesticate any agreement, it is necessary to give the Sri Lankan authorities more time to address various problems in its country and to improve its legal system and practices to ensure fair trials. At the very least, the agreement should be improved to ensure that all possible safeguards should be built into it. Furthermore, a system of monitoring the development in Sri Lanka and the implementation of the agreement should be put in place.

A safeguard would be the inclusion of article 3(f) of UNMTE to the original agreement and the current draft Fugitive Offenders (Sri Lanka) Order. In theory, Sri Lanka, as a signatory party of the ICCPR, should have subscribed to the respect and the guarantee of fair trial in all criminal trials and should not object the inclusion of such a requirement per se as a matter of principle.

A more essential reform to the whole system is to amend the parent legislation, the Fugitive Offenders Ordinance (CAP. 503) ("FOO"), to include the fair trial requirement provision proposed by article 3(f) of the UN Model Treaty on Extradition. The amendment will make it explicit that a fair trial in another jurisdiction is a pre-requisite to concluding any agreement by Hong Kong authorities on extradition with that jurisdiction.

The Government has been trying to convince the Bills Committee that it believes that fair trial is an essential prerequisite for an extradition arrangement and a crucial factor in exercising executive discretion in agreeing to or refusing to surrender fugitives and terminating of extradition agreements. There is no justification for Hong Kong to depart from the international standards set out in UNMTE except to follow the substandard practice of the United Kingdom and the United States. The Government should demonstrate its commitment to fair trial by undertaking to introduce such an amendment.

The amendment will make the current requirement explicit and formalise the current practice (if the Government is telling the truth) but will also enable and mandate the court to enquire into whether a fugitive will secure free trial for the basic protection of the fugitive involved.

While we appreciate the Government take up fair trial voluntarily as the essential factor in the making of extradition related decisions, it is totally unsatisfactory that the Government at the same time concludes that a fugitive has no legal right to have her/his right to fair trial after surrendering to the requesting jurisdiction considered and protected in extradition proceedings in a Hong Kong court.

The Legislative Council should express concern on this lack of express requirement of fair trial (save with some exceptions – see below) in the legal framework to guide the exercise of the power to order and carry out an extradition and urge the Government to undertake to introduce such an amendment.

The Administration takes the view that "grounds of refusal in section 5 of Fugitive Offenders Ordinance (CAP 503) are relevant to the question of whether a fugitive will receive a fair trial".⁴ These paragraphs protect fugitives from being prejudiced (section 5(1)(d)), or from trials motivated (section 5(1)(d)), by reason of his race, religion, nationality of political opinion.

The Monitor agrees that these provisions of course have serious bearings on the right to fair trial, but they are in no way provide for substitute for all the minimum guarantees of criminal proceedings of a "fair trial" set out in Article 14 of ICCPR. As an illustration of this, it fails to include the rights to have adequate time and facilities for the preparation of his defence, to have legal assistance of his own choosing, to call and examine witnesses, to refrain from testifying against himself, etc. At the very least the protection of fugitives from prejudice or trial by reason of his race, religion, nationality of political opinion is no substitute for equality before the court and the requirement of "a fair and public hearing by a competent, independent and impartial tribunal established by law" as laid down in Article 14 of the ICCPR which are in no way limited to criminal trials only. Amendments are necessary to fully protect the right to fair trial of any person sought.

Lastly, the Legislative Council should pay attention to the fact that Hong Kong Government has stated its policy that only in exceptional cases would refusal of surrender of a person occur and it is "when there is clear evidence of a flagrant denial of the right to fair trial in the territory of the requesting." The Monitor expresses concern about this may be a unduly high threshold to trigger a refusal and urges various related panels in the Legislative Council to follow up such an issue to clarify the standards to be used.

Offences not to be regarded as of Political Character

We also believe the committee should pay special attention to additional qualifications for "offences not regarded as of a political character" in the Fugitive Offenders (Sri Lanka) Order (previously only in Fugitive Offenders (India) Order).

The Monitor expresses concern on Article 6(2) of the Order which sets out the broad exceptions not to be considered as of "political character" without cogent justifications:

- Item 1. "murder or manslaughter, including causing death by criminal negligence; culpable homicide; assault with intent to commit murder";
- Item 20. "any offence against the laws relating to explosives"; and
- Item 43. "any offence within the scope of any convention which is binding on both Parties and which obligates the Parties to prosecute or grant surrender for such offence".

While considering what offence constitutes a "political character", of the twelve states that have already signed bilateral agreements on surrender of fugitive offenders with

⁴ Response from the Administration, LC Paper No. CB(2) 380/01-02 (01)

Hong Kong SAR:

- four excludes “murder or other wilful crime against head of state”;
- seven give no qualifications on “political offences”.

The Fugitive Offenders (Sri Lanka) Order is the only one which excludes “offences against laws relating to explosives” and “murder or manslaughter” generally from “political offences”, and a general exclusion by referring to obligations to extradite in any convention which is binding on both Parties.

This submission will address these three unique exclusions one by one in the order above.

Terrorist Bombing

Article 2(1) of the Convention defines “terrorist bombing offences”:

“Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:

- With the intent to cause death or serious bodily injury; or
- With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.”

The definition limits the offences in terms of places, target, intent and seriousness of injury, damage or economic loss.

The rest of Article 2 extends the “terrorist bombing offences” listed above to cover attempt, accomplice, etc..

Article 9(1) of the Convention makes “terrorist bombing offences” extraditable:

“The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.”

Article 11 of the Convention provides for exclusion of those offences set out in article 2 from the definition of “political offence” and “politically motivated offences”

“None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.”

Article 12 of the Convention retains the ground to refuse extradition with respect to such

offences if the request “has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.”

We find it troubling when the Hong Kong Government refer to the International Convention for the Suppression of Terrorist Bombing to justify the exclusion of "offences against laws relating to explosives" from the definition of “political offences” because the offences set out in the Convention are much more limited than "offences against laws relating to explosives" in the laws of Hong Kong, in terms of the elements in the crimes which serve to limit the offences to some serious criminal acts mentioned above.

“Offences against laws relating to explosives” in the laws of Hong Kong includes a wide ranges of offences found, for example, in the Dangerous Goods Ordinance and the Crimes Ordinance. Such offences are in no way restricted to those “terrorist bombing offences” defined in the Convention.

Such “terrorist bombing offences” are further restricted by the qualifications of “explosive” to that which is “designed, or has the capability, to cause death, serious bodily injury or substantial material damage”. In contrast, Section 2 of the Dangerous Goods Ordinance provides that "explosive" “includes any substance used or manufactured with a view to producing a practical effect by explosion or a pyrotechnic effect”. Presumably a trampling-cracker will produce a “pyrotechnic effect” and is caught by the Ordinance. The definition in the Ordinance is much broader than that envisaged in the Convention.

The Government has also raised the European Convention on Extradition 1957 and its sequent amendments in Additional Protocol to the European Convention on Extradition 1975 to suggest a trend of exceptions to political offences. With respect, the exceptions included consists initially of only genocide, war crimes found in the Convention on the Prevention and Punishment of the Crime of Genocide 1948 and various Geneva Conventions and then of certain offences considered terrorist in the European Convention on the Suppression of Terrorism 1977. The 1977 European Convention exclude only “[o]ffence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons” from “political offences” but not ALL “offences against laws relating to explosives” irrespective of endangering persons or not.

Murder or Manslaughter

On the general exclusion of “murder or manslaughter”, it is possible that murder and manslaughter may be committed with political motives, for instance in guerilla warfare against an occupying regime like the French resistance forces in France and Chinese guerilla forces in Northeastern China, and forces fighting against an oppressive regime like the ANC forces associated with Nelson Mandela in South Africa are all examples.

The Convention on the Prevention and Punishment of Crimes against Internationally

Protected Persons, including Diplomatic Agents 1973 excludes the murder and attack of foreign head of states and foreign diplomats and members of their family from the definition of political offences. The murder of such persons, genocide and war crimes against the Vienna Conventions are excluded by European Convention on Extradition 1957 and its Additional Protocol 1975 but such exclusions have never been extended to murder and manslaughter of any person generally except in genocide, war crimes and similar offences. These conventions all restrict the exclusion to murder of the head of state and her/his family only. Murder or manslaughter of any person by bombing is caught by the Terrorism Bombing Convention, which focuses on the means rather than the victims. There is no basis for the Fugitive Offenders (Sri Lanka) Order to provide for the broad exclusion of “murder or manslaughter” generally without qualification. It is an arbitrary exclusion and may have serious consequence for further agreements.

Conventions obligating extradition

The Order provides for an exclusion from the definition of political offence of any “offence within the scope of any convention which is binding on both Parties and which obligates the Parties to prosecute or grant surrender for such offence”.

The Monitor is concerned that not all conventions are drafted and signed to uphold international human rights standards and international law. A pact by democracies may intentionally or inadvertently violate international standards and norms not to mention an unholy treaty by authoritarian regimes. Agreements, even at UN level, which are dictated by governments with inadequate meaningful independent expert and NGO involvement and support, have serious inadequacies.

Moreover, the power to enter into a treaty is vested in the Central Authorities and, in certain cases, the Chief Executive. Hong Kong has no control on the entering into treaties by the Central Authorities although in theory Hong Kong could arguably resist the application of those part of treaties which are on issues within its limit of autonomy. The process of consultation with the Hong Kong Government on whether a treaty is to apply to Hong Kong is a totally behind closed doors. There is absolutely very little information as to whether a consultation is taking place and the details of the consultation. In the recent consultation on whether the Shanghai Convention on Anti-terrorism, Separatism and Extremism should be extended to Hong Kong, the public were only informed of the consultation and the public and the Legislative Council had no access to the text of the Convention because the parties to the Convention do not want the text to be publicised.

The power to negotiate and conclude a treaty is part of the executive prerogative. Equally, the public have little information on what treaties are being negotiated and materials relating to such negotiation are presumably protected as official secrets. Only when it comes to domesticating a treaty will need the support of the Legislative Council.

The operation of the exclusion in respect of any new extradition obligations created by a new treaty apparently does not depend on the domestication of the treaty. So to allow

such a provision to be included in an Ordinance would amount to giving a blanket approval to the Hong Kong Government, and even the Central Authorities, and practically deprive all future legislative scrutiny and diminish the role of the legislature and involvement of the public.

The Legislative Council should ask the Government to provide a better arrangement to facilitate and enable future scrutiny and public involvement.

Military Offence Non-extraditable

Art. 3 (c) of UNMTE also gives mandatory refusal of surrender "if the offence for which extradition is requested is an offence under military law, which is not also an offence under ordinary criminal law".

Article 4 of the 1957 European Convention on Extradition states that 'extradition for offences under military law which are not offences under ordinary criminal law is excluded from the application of this Convention.'⁵

The Fugitive Offenders (Sri Lanka) Order is silent on such military offences widely considered to be non-extraditable.

It may be that the principle of dual criminality operates in the meantime to exclude such non-extraditable military offences making it unnecessary to rely on such a clause.

However, the principle of dual criminality may not operate this way all the time as there are possible circumstances that both the laws of Hong Kong and Sri Lanka may provide for such offences at the same time and the exclusion of non-extraditable military offences becomes important. Sri Lanka has been suffering civil war for years and it is still in a state of emergency. In respect of Hong Kong, article 18 of the Basic Law provides that national military laws regarding defence may be added to Annex III of the Basic Law by the Standing Committee of the National People Congress and applied to Hong Kong after certain local formality. National law, including military ones, may be applied directly to Hong Kong in the event that China is declared to be in a state of war or Hong Kong is declared to be in a state of emergency by the Standing Committee.

The Monitor believes it is a necessity to include provisions regarding the non-extractability of military offences which are included in both UNMTE and the 1957 European Convention on Extradition.

Chinese and non-Chinese Permanent Residents

When Sri Lanka reserves the right to refuse the surrender of its citizens – the basic

⁵ 1957 European Convention on Extradition, Art 4

component of its society, it is reasonable that an equivalent provision be added to the Order in respect of all the basic elements of Hong Kong -- permanent residents. But this is not the case.

Art. 3 of the Order provides, "The Government of HKSAR reserves the rights to refuse surrender of nationals of the People's Republic of China." The Monitor has expressed its concern in its letter to the Bills Committee on 14 November 2001 about the absence of refusal of surrender of non-Chinese permanent residents of HKSAR while Chinese permanent residents are offered protection under the article. On the face of it, this arrangement is one discriminatory against non-Chinese permanent resident and it looks racist. It also violates Article 26 of the ICCPR which provide for equality before the law.

The Government's explanation was that "it has not been a feature of Hong Kong's extradition practice to refuse the surrender of its sovereign's nationals or of Hong Kong permanent residents"⁶ and the article only serves to give priority to request from China in surrendering Chinese nationals. Section 13(4) of the Fugitive Offenders Ordinance provides for the optional refusal of Chinese nationals.

The Administration's Response cannot explain why the agreements with the United Kingdom and Portugal respectively provide for reservations not to remove Hong Kong permanent residents. Applying the Government's logic will arrive at a conclusion that it gives priority to return Chinese and non-Chinese permanent residents to be tried in Mainland China. Why should nationals of a foreign country be extradited to Mainland China first? Anyway, the FOO does not provide for such a priority in respect of foreign nationals.

Even if the Government's intentions are genuine, the distinction is still discriminatory as a policy in this multicultural metropolitan. Although if it is the intention of the Hong Kong Government not to use this provision to refuse to surrender a Chinese national and to protect her/him in Hong Kong, it remains true that the Government has the option to refuse a request to surrender a Chinese permanent resident in the absence of a competing request from Mainland China as the legal framework allows it to do so. When an appropriate case arises the Government may need to rely on such a reservation. The option, however, is not available to protect a non-Chinese permanent resident.

Chinese and non-Chinese permanent residents should be treated equally in Hong Kong. Any differential treatments have to be cogently justified as been strictly necessary. The British Government may consider it justified to have priority to have its nationals extradited from its colony to the imperial sovereign state. Such an arrangement however should not be automatically inherited without thinking it over carefully first.

The Monitor worries that no reservation for the surrender of Hong Kong permanent residents would become a "usual practice" in future agreements. Protection, however unlikely, should be given to all Hong Kong permanent residents.

⁶ LC Paper No. CB(2)739/01-02 (03), 19 December 2001

Contingent Provisions to deal with possible development

Article 3(g) the UNMTE, requested party could also give mandatory refusal:

"if the judgement of the requesting State has been rendered in absentia, the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her Defence and he has not had or will not have the opportunity to have the case retried in his or her presence.

Although the article has been dealt with by section 5(1)(b), such a clause is missing in Fugitive Offenders (Sri Lanka) Order. It may well be the case that there is no need for such a safeguard at this moment if there is no trial in absentia in Sri Lanka and Hong Kong. The Monitor however, submits that similar provisions be added to the agreement and order just in case Sri Lanka (or Hong Kong) unexpectedly develops such a system.

Article 4(g) of UNMTE provides grounds for optional refusal of extradition:

"If the person whose extradition is requested has been sentenced or would be liable to be tried or sentenced in the requesting State by an extraordinary or ad hoc court or tribunal".

Such a clause is also missing in Fugitive Offenders (Sri Lanka) Order. The Monitor suggests that similar provisions be added to the order.

Situation in Sri Lanka

1. Background

The United Nations, foreign governments and the NGO community have for many years expressed concern about the rule of law and human rights problems in Sri Lanka. The situation in Sri Lanka is difficult. Fighting between Sri Lankan government forces and the separatist Liberation Tigers of Tamil Eelam (LTTE) overshadowed other developments and generated serious abuses.

According to Human Rights Watch, "an estimated 60,000 people have died, 200,000 children are war orphans" since the civil war began in 1983. In HRW's Report – Sri Lanka 2000, "intensified battles for control of key territory in the northern part of the island claimed scores of civilian lives and displaced some 250,000 people, bringing the estimated number of internally displaced persons (IDPs) nationwide to more than one million."⁷

In a statement to the United Nations' Secretary-General by non-governmental organizations (all in consultative status with UN) dated 15 April 1998, the International Commission of Jurists, International Federation of Human Rights Leagues, International League for Human Rights, Canadian Council of Churches and 43 other NGOs jointly expressed their grave concern about the war between Government forces and LTTE and "the increasingly genocidal dimension of that war". The war is characterised by "(a) targeting of the civilian population by the Sri Lankan forces; (b) the epidemic proportions of disappearances, torture, extra-judicial killings, rape, arbitrary arrest and indefinite detention of Tamil civilians; (c) a sweeping embargo in the north and east of subsistence food and essential medicine in contravention of humanitarian law; (d) the existence of more than 850,000 displaced persons living in appalling conditions at risk now of starvation and death."⁸

In the US Department of State Country Reports on Human Rights Practices –2000, Sri Lanka is characterized as "[t]he ongoing war with the LTTE continued to be accompanied by serious human rights abuses by both sides of the conflict. Security forces committed numerous extrajudicial killings...The military and police reportedly tortured detainees. In addition nine individuals reportedly disappeared from security force custody in Vavuniya and in the east... Torture remained a serious problem, and prison conditions remained poor... Arbitrary arrests (including short-term mass arrests and detentions) continued, often accompanied by failure of the security forces to comply with legal protections... Impunity for those responsible for human rights abuses also remained a serious problem. Little progress was made in resolving many cases of extrajudicial killing or disappearance. In most cases, there was no investigation or prosecution,

⁷ Human Rights Watch Report – Sri Lanka 2000

⁸ E/CN.4/1998/NGO/120, 21 April 1998, COMMISSION ON HUMAN RIGHTS, 54th session, UNHCHR

giving the appearance of impunity for those responsible for human rights violations."⁹

The new Emergency Regulations promulgated in 2000 also mentioned in the U.S. Department of State report were said to have "further eroded due process protections" while the Sri Lankan Government "infringed on citizens' privacy rights." Freedom of the press was also restricted.¹⁰

Human Rights Watch, in its most recent Country Report on Sri Lanka (2001), comments on the serious restrictions by the Government on freedom of movement "especially from Vavuniya to Colombo and the southern part of the country generally, Tamil civilians were often unable to reach work sites to earn a living, attend schools, or seek urgent medical care." Displaced persons and other Tamil civilians in the north and east also "faced arbitrary arrest, and custodial abuse at the hands of government forces." In eastern Sri Lanka, "army and police units continued to impose forced labor, demanding that IDPs and other civilians work without pay."¹¹

Discrimination against political opponents and religious minorities remain serious. "There are institutionalized ethnic discriminations against Tamils. There are discrimination and occasional violence against religious minorities. Violence and discrimination against women, and discrimination against the disabled continued to be problems."¹²

Women and children were victims of human trafficking "for the purpose of forced labor and prostitution...A significant number of male children [we]re trafficked into prostitution for foreign pedophiles."¹³

The LTTE held a number of political prisoners and prisoners of war, but access to detainees and details of confinement were unavailable. Four of these prisoners were released on February 28, 2000 after having been captives of LTTE for more than six years.¹⁴

In its Concluding Observations issued in 1995, the UN Human Rights Committee expressed its concerns on the rule of law and human rights abuses in Sri Lanka. It "considers that the domestic legal system of Sri Lanka contains neither all the rights set forth in the Covenant nor all the necessary safeguards to prevent their restriction beyond the limits established by the Covenant."¹⁵

⁹ US Department of State Country Reports on Human Rights Practices -2000 Sri Lanka, released by the Bureau of Democracy, Human Rights, and Labor, February 23, 2001

¹⁰ US Department of State Country Reports on Human Rights Practices -2000 Sri Lanka, released by the Bureau of Democracy, Human Rights, and Labor, February 23, 2001

¹¹ Human Rights Watch Report – Sri Lanka 2002

¹² US Department of State Country Reports on Human Rights Practices -2000 Sri Lanka, released by the Bureau of Democracy, Human Rights, and Labor, February 23, 2001

¹³ US Department of State Country Reports on Human Rights Practices -2000 Sri Lanka, Released by the Bureau of Democracy, Human Rights, and Labor, February 23, 2001.

¹⁴ Human Rights Watch Report – Sri Lanka 2001

¹⁵ Concluding Observations of the Human Rights Committee: Sri Lanka. 03/10/95.

"The Committee is seriously concerned about the information received of cases of loss of life of civilians, disappearances, torture, and summary executions and arbitrary detention caused by both parties in conflict. "¹⁶

2. Emergency Regulations

Since 1983 Sri Lanka has been governed by the Emergency Regulations and Prevention of Terrorism Act (PTA) (there was a seven month release from Jan. to Aug. 1989). These statutes remain in force throughout the country. The Country Report 2001 on Sri Lanka by Amnesty International concluded that the measures the new Emergency Regulations introduced in May 2000 had put the country on a "war footing".¹⁷ According to another Amnesty International report on New Emergency Regulations released in July 2000, these regulations "had considerably extended the security forces' (the police and armed forces) powers to detain and included provisions granting powers of arrest to 'any other authorized persons'".¹⁸ Under them, the security forces and police had been given wide powers for arbitrary arrest and prolonged detention without trial.

The July 1, 2000 Amnesty International report entitled "Sri Lanka: New Emergency Regulations - Erosion of Human Rights Protection" noted that even prior to their expansion in May 2000, the Emergency Regulations had already granted powers which considerably exceeded the limits permissible under the International Covenant on Civil and Political Rights (ICCPR), which Sri Lanka acceded to in 1980.¹⁹

Amnesty found that the introduction of the new regulations (Public Security Ordinance) in May 2000 "had been accompanied by an increase in reports of torture, and also in the severity of torture."²⁰

Human Right Watch Asia, in its Country Report – Sri Lanka 2000 also concluded that those emergency government powers had eroded freedom of association and had authorized media censorship.²¹

In 1995, the United Nations Human Rights Committee Concluding Observations of Sri Lanka had already expressed its concern that "the derogation of rights under the various emergency laws and regulations may not be in full compliance with the requirement of the provisions of article 4, paragraph 2 of the Covenant."

The Committee " is further concerned that courts do not have the power to examine the legality of the declaration of emergency and of the different measures taken during the

¹⁶ Ibid.

¹⁷ Country Report: Sri Lanka 2001, Amnesty International.

¹⁸ Country Report: Sri Lanka 2001, Amnesty International.

¹⁹ Amnesty International. Sri Lanka: New Emergency Regulations - Erosion of Human Rights Protection, 01/07/2000

²⁰ Amnesty International. Sri Lanka: New Emergency Regulations - Erosion of Human Rights Protection, 01/07/2000

²¹ Human Rights Watch Report – Sri Lanka 2000.

state of emergency." The Committee "emphasizes that the obligations assumed by Sri Lanka as a State party to various international instruments must be respected even in times of states of emergency."²²

The most recent Concluding Observations and Recommendation on state Report of Sri Lanka²³ drawn by the United Nation Committee on the Elimination of Racial Discrimination in 2001 urged Sri Lanka to lift the state of emergency. The Committee was concerned about the restrictions placed on civil and political rights under the Prevention of Terrorism Act and Emergency Regulations and its allegedly discriminatory application with regard to Tamils; concern was also expressed about the situation of civilians living in the north and east of the country, particularly persons who were internally displaced by the conflict.²⁴

3. Arbitrary Arrest, Detention without Trial and Torture

"Arbitrary arrests", as explained in US Department of State Report 2000, "continued, often accompanied by failure of the security forces to comply with legal protections."²⁵ According to Jesuit Refugee Service, in January 2000 over a fortnight period, "more than five thousand people were detained for questioning in search operations in Colombo neighborhoods."²⁶

Mass arrests of Tamils occurred after violent incidents attributed to the LTTE and were often accompanied by reports of "disappearances" and torture in custody.

AI reports that in 2000 in Sri Lanka, "torture remained common, both in the context of the armed conflict and during routine policing operations. There were frequent reports of torture involving the Security Coordinating Unit of the Vavuniya police and the army camps at Urelu and Atchelu in Jaffna."²⁷ In the same year, Jesuit Refugee Service, in a Sri Lanka Special Report tells how "innocent Tamil civilians are all too frequently arrested, particularly young men in the northern and eastern districts of the country, on mere suspicion of links with the rebel LTTE."²⁸ The story continues when these Tamil civilians were taken into custody, they were "tortured to extract a confession that they are LTTE members. The military and police reportedly tortured detainees, and there were reports of persons died in police custody."²⁹

The Judicial system does not seem to provide essential protection for these civilians in

²² Concluding Observations of the Human Rights Committee: Sri Lanka. 03/10/95.

²³ CERD59th Session, Aug 14, 2001, "Committee on Elimination of Racial Discrimination Adopts Concluding Observations On Report of Sri Lanka".

²⁴ CERD, 59th Session, Aug 14, 2001, "Committee on Elimination of Racial Discrimination Adopts Concluding Observations On Report of Sri Lanka".

²⁵ U.S. Department of State Country Reports on Human Rights Practices Sri Lanka, 2000 Released by the Bureau of Democracy, Human Rights, and Labor, February 23, 2001

²⁶ Reports by Jesuit Refugee Service 2000 'Arrest, Detention and "Disappearances" in Sri Lanka'

²⁷ Amnesty International Country Report 2000 – Sri Lanka.

²⁸ Reports by Jesuit Refugee Service 2000 'Arrest, Detention and "Disappearances" in Sri Lanka'

²⁹ Reports by Jesuit Refugee Service 2000 'Arrest, Detention and "Disappearances" in Sri Lanka'

the country. The Jesuit Refugee Service report reads, "[s]oon after arrest and investigation, the police bring the detainee before a Magistrate who remands him until the conclusion of the trial. There is no bail possible under PTA. Once he is put on remand, the detainee is forgotten. Some detainees have been on remand for more than two years without being formally charged. Once they are brought to court, the vast majority, an estimated 90 per cent, are released as there are no sustainable charges against them and they would have been forced to sign a confession under duress."³⁰

Prolonged detention and imprisonment without trial was also addressed in the UN Human Rights Committee Concluding Observation released in 1995. The Committee "[wa]s concerned that the undetermined detention which may be ordered by the Secretary of the Ministry of Defence violates the Covenant, particularly when such detention can be challenged only one year after detention. In view of this, the Committee remains concerned about the effectiveness of the habeas corpus remedy in respect of those arrested under the Prevention of Terrorism Act."³¹

The UN Human Rights Committee was also "concerned that the rights under article 10 of the Covenant of persons deprived of their liberty in prisons and other places of detention are not fully respected." The Committee "regrets that conditions in places of detention other than prisons are not regulated by law and that prisons and other places of detention are not regularly visited by magistrates or other independent bodies."

4. Involuntary Disappearances

The number of "involuntary disappearances" of civilians taken into custody by the armed forces and police is high.

Sri Lanka remains the country with the second highest number of non-clarified cases of disappearances worldwide, according to the Working Group on Enforced or Involuntary Disappearances of the United Nations Commission (WGEID). The Working Group's 1999 report recorded 12,113 cases of involuntary disappearance in Sri Lanka since 1980.³² The Sri Lankan Government accepts the figure of 16,000 disappearances in the north.

The Amnesty International 2001 Country Report on Sri Lanka confirms "disappearances" reported from Colombo, Batticaloa, Jaffna, Mannar and Trincomalee. "Naval personnel were held responsible for two 'disappearances' in Trincomalee. Eight displaced civilians, including a five-year-old boy, 'disappeared' after being arrested while visiting their homes on 19 December 2000. Their bodies were recovered from an illegal grave six days later. Thirteen soldiers were arrested in connection with their abduction and murder."³³

³⁰ Reports by Jesuit Refugee Service 2000 'Arrest, Detention and "Disappearances" in Sri Lanka'

³¹ Concluding Observations of the Human Rights Committee: Sri Lanka. 03/10/95

³² United Nation Press Release, WGEID, 61st Session, 21-25 August, 2000

³³ Amnesty International Country Report 2001 on Sri Lanka (AI Index: ASA 37/019/2000)

5. Extrajudicial Killing and Political Murders

Security forces committed numerous extrajudicial killings. The U.S. Department of State Report on Sri Lanka 1999 quotes "observers" who "found the number of prisoners taken under battlefield conditions to be low and concluded that many LTTE fighters apparently were killed rather than taken prisoner." Some of these "observers" believed that there was "an unwritten 'take-no-prisoners' policy."³⁴

Also in the US Department of State Report, "police, home guards, and army personnel committed extrajudicial killings in many places, including the eastern province, and army personnel also were responsible for killing a number of persons in the Vavuniya area and in Jaffna in the north."³⁵

According to the Report, "[i]n some cases, extrajudicial killings were reprisals against civilians for LTTE attacks in which members of the security forces or civilians were killed or injured. In most cases, the security forces claimed that the victims were members of the LTTE, but human rights monitors believe otherwise."³⁶

If the body of a person killed in custody had not "disappeared", according to the US report, "it is only given back to the family if they say the victim was a member of the LTTE, whether this is true or not."³⁷

The United Nations Committee Against Torture (CAT) was also "gravely concerned by information on serious violations of the Convention, particularly regarding torture linked with disappearances."³⁸

Also in the US State Report 1999, "a lot of the 'involuntary disappearances' reported might just be cases of extrajudicial killings. Some of these deaths unaccounted for might have been caused by extreme tortures. From April 1995 to the end of 1999, "at least 761 persons have been killed extrajudicially by the security forces or have disappeared after being taken into security force custody and are presumed dead."³⁹

On the other hand, the Report argues that "although the government continued to press for constitutional changes aimed at a political resolution to the conflict, it failed to secure necessary parliamentary support."⁴⁰

Elections, as shown in the Human Rights Watch Report – Sri Lanka 2000, brought about

³⁴ 1999 US Department of State Country Report – Sri Lanka 'Respect for Human Right'.

³⁵ 1999 US Department of State Country Report – Sri Lanka 'Respect for Human Right'.

³⁶ 1999 US Department of State Country Report – Sri Lanka 'Respect for Human Right'.

³⁷ 1999 US Department of State Country Report – Sri Lanka 'Respect for Human Right'.

³⁸ Concluding observations of the United Nations Committee against Torture: Sri Lanka. 19/05/1998.

³⁹ US Department of State Country Reports on Human Rights Practices -2000 Sri Lanka, Released by the Bureau of Democracy, Human Rights, and Labor, February 2000

⁴⁰ US Department of State Country Reports on Human Rights Practices -2000 Sri Lanka, Released by the Bureau of Democracy, Human Rights, and Labor, February 2000

"political violence outside the war-zones escalated in the weeks leading up to the parliamentary elections in October 2000." By 10 October 2000, the non-governmental Centre For Monitoring Election Violence (CMEV) had recorded "death of over seventy people, and numerous violations of the election laws."⁴¹

6. Impunity

Impunity remains a serious problem. A US Country Report[s] on Human Rights Practices – 2000 released by the Bureau of Democracy, Human Rights, and Labor, of United States in February 2001 shows that "[i]n most cases, there was no investigation or prosecution, giving the appearance of impunity for those responsible for human rights violations."⁴² AI Report (2001) reports that "[v]ictims who sought justice through the courts received death threats."⁴³

However, few security forces personnel were convicted by the courts. The US Country Report on Sri Lanka 2000, reported that, with a few exceptions, "no member of the security forces has been convicted for any of these crimes. In the vast majority of cases where military personnel may have committed human rights violations, the Government has not identified those responsible and brought them to justice."⁴⁴

The UN Human Rights Committee in 1995 expressed "particular concern" that "an effective system for the prevention and punishment of such violations does not appear to exist." In addition, concern is expressed that "violations and abuses allegedly committed by police officers have not been investigated by an independent body, and that frequently the perpetrators of such violations have not been punished. The Committee notes that this may contribute to an atmosphere of impunity among the perpetrators of human rights violations and constitute an impediment to the efforts being undertaken to promote respect for human rights."⁴⁵

The Committee specifically stated, "[w]ith respect to the functions of the three Presidential Commissions of Inquiry into Involuntary Removals and Disappearances, the Committee is concerned that the Commissions are not mandated to inquire into such human rights violations allegedly committed between 1984 and 1988 nor into summary executions."⁴⁶

In its Concluding Observations on Sri Lanka of 1998, the UN Committee Against Torture "expressed its regret that there were few, if any, prosecutions or disciplinary proceedings

⁴¹ "Election observers legitimate the illegal", Andrew Kendle, Center For Monitoring Election Violence (CMEV) October 31, 2000.

⁴² US Department of State Country Reports on Human Rights Practices -2000 Sri Lanka, Released by the Bureau of Democracy, Human Rights, and Labor, February 23, 2001

⁴³ Amnesty International Country Report 2001 on Sri Lanka (AI Index: ASA 37/019/2000)

⁴⁴ US Department of State Country Reports on Human Rights Practices - 2000 Sri Lanka, Released by the Bureau of Democracy, Human Rights, and Labor, February 23, 2001

⁴⁵ Concluding Observations of the Human Rights Committee: Sri Lanka. 03/10/95.

⁴⁶ Concluding Observations of the Human Rights Committee: Sri Lanka. 03/10/95.

despite continuous Supreme Court warnings and awards of damages to torture victims. The Committee notes the absence of independent and effective investigation of scores of allegations of disappearances linked with torture and the fact that for years in the past police officers appeared to be immune from prosecution."⁴⁷

7. Judicial Inadequacy

On the threat to the independence of the judiciary, the UN Human Rights Committee "expresses its concern about the procedure set forth under article 107 of the Constitution read with standing orders made by Parliament."⁴⁸

The United Nations Committee Against Torture (CAT) expressed concern in its Concluding Observations of 1998 on the question of the admissibility under the Emergency Regulation of confessions as well as the absence of strict legislation governing detention consistent with international norms.⁴⁹

Various reports on Sri Lanka's human rights violations show that there are discriminations on the ground of political affiliation, religious beliefs, sex and disability which might affect fair trial.

8. Death Sentence

With reference to article 6 of the Covenant, the Committee is concerned that under Sri Lankan law, "the death penalty may be imposed for crimes such as abetting suicide, drug-related offences, and certain offences against property. Some of these offences do not appear to be the most serious offences under article 6 of the Covenant."⁵⁰

⁴⁷ Concluding observations of the United Nations Committee against Torture: Sri Lanka. 19/05/1998.

⁴⁸ Concluding Observations of the Human Rights Committee: Sri Lanka. 03/10/95

⁴⁹ Concluding observations of the United Nations Committee against Torture: Sri Lanka. 19/05/1998.

⁵⁰ Concluding Observations of the Human Rights Committee: Sri Lanka. 03/10/95

The following is list of United Nations documents and other relevant document we have looked at when drafting this report.

- Concluding Observations of United Nation Committee on the Elimination of Racial Discrimination 2001;
- Concluding Observations of United Nations Committee against Torture: Sri Lanka. 1998.
- The Working Group on Enforced or Involuntary Disappearances of United Nations Commission on Human Rights' 1999 report;
- A joint written statement by a number of non-governmental organizations (NGOs) in general consultative status to the United Nations' Secretary-General in 15 April 1998;
- Amnesty International Country Reports (Sri Lanka) 1998, 1999, 2000, 2001;
- Human Rights Watch Report 2000, 2001
- Reports by Jesuit Refugee Service 2000 'Arrest, Detention and "Disappearances" in Sri Lanka'
- 1999 United Nations Department of State Country Report – Sri Lanka 'Respect for Human Right'.

Members please note: Sri Lanka was supposed to submit their state reports to different United Nations treaty bodies on the implementation of different International covenant and conventions. However, many submissions are long over-due (altogether six, two of them to UN Human Rights Committee in 1996 and 2001 respectively).

The following is a list of Sri Lanka's overdue reports to different UN treaty bodies:

- 1996 and 2001 International Covenant on Civil and Political Rights
 - 2001 International Convention on the Elimination of All Forms of Racial Discrimination
 - 2000 International Covenant on Economic, Social and Cultural Rights
 - 1999 Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment
 - 1998 Convention on the Elimination of All Forms of Discrimination against Women
-

The absence of United Nations' treaty bodies suggestions and recommendations to the government of Sri Lanka is filled with internationally acclaimed NGOs reports on the country.

This is a brief note on issues most closely related to whether the agreement on surrender of fugitive offenders (or any treaty) should be concluded with Sri Lanka. These include:

- State of emergency since August 1989
- Arbitrary arrest and Political Prisoners
- Torture / ill treatment

- Extra-judicial killings and deaths in custody
- Unaccounted for disappearances of Internally Displaced Persons (IDPs)
- Impunity
- Forced Labor
- Death Penalty

Members should also note that whereas reports have shown numerous human rights abuses in the country, this brief does not cover them all.

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- 3) *United Kingdom Extradition Act 1989* (c.33)
- 4) *United Kingdom Suppression of Terrorism Act 1978*
- 5) *United State Extradition Treaty with Sri Lanka*, [DOCID: f:td034.106], From the Treaty Documents Online via GPO Access [wais.access.gpo.gov]
- 6) *Ireland's Genocide Act of 18th December 1973*.
- 7) *World Report 2000, Sri Lanka*, Human Rights Watch
- 8) *Country Report, Sri Lanka, 1999, 2000, 2001*, Amnesty International
- 9) *Country Reports on Human Rights Practices -2000 Sri Lanka*, Department of State , Released by the Bureau of Democracy, Human Rights, and Labor, February 2001.
- 10) *Arrest, Detention and "Disappearances" in Sri Lanka*, Reports by Jesuit Refugee Service 2000
- 11) *Bilateral Agreements on Extradition, Judicial/Legal Assistance, Control of Narcotic Drugs, and Prisoner Transfer by country*, June 1996, U.N. Database
- 12) *Concluding Observations and Recommendations on Report of Sri Lanka*, CERD, 59th session, 14 August 2001
- 13) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Sri Lanka, 3 Jan 1994 accession
- 14) *Extradition Law and Practice*, 2nd Edition, Ivor Stanbrook and Clive Stanbrook, Oxford University Press, 2000
- 15) *Extradition, Politics, and Human Rights*, Christopher H. Pyle, Temple University Press, 2001, U.S.A.
- 16) *Aspects of Extradition Law*, International Studies in Human Rights Vol. 17, Geoff Gilbert, Martinus Mijhoff Publishers, 1991
- 17) *中港移交逃犯協定研究*, 周柏均, 林秉文, 2001年3月, 立法會秘書處資料研究及圖書館服務部及法律事務部
- 18) *The Hong Kong Bar Association's Submission on the Fugitive Offenders Bill Comments by the Administration*
- 19) *Minutes of the Second Meeting held 2 Dec, 1996*, Bills Committee on the Fugitive Offenders Bill, Legislative Council
- 20) *Concluding Observations of the United Nations Human Rights Committee : Sri Lanka.03/10/1995*
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- 21) *Concluding observations of the Committee against Torture : Sri Lanka*.
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- 22) *Model Treaty on Extradition Adopted by the Eighth Crime Congress, Havana, United Nations Crime and Justice Information Network 27 August-7 September 1990*
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- 23) *United Nations Model Treaty on Extradition*, 14 December 1990 (A/RES/45/116.45/116.) <http://www.un.org/documents/ga/res/45/a45r116.htm>
- 24) *Surrender of Fugitive Offenders (Sri Lanka) Order*