

Adayaalam Centre for Policy Research (ACPR)

Issue Brief No. 3

**Tamil Political Prisoners:
Suggestions for a Comprehensive Legal Policy Approach**¹

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I. Introduction

Mr. Satchithanantham Ananthasuthakaran, sentenced to life under the *Prevention of Terrorism Act (PTA)* in 2017,² was given three hours on the 18th of March 2018 to take part in his wife's funeral at their residence in Maruthanagar, Kilinochchi.³ After the funeral when Ananthasuthakaran was being led back to the prison vehicle, his young daughter also attempted to alight the vehicle, unaware that he was being taken back to the prison. The photos of the child attempting to alight the prison vehicle holding tight to her father's hand engulfed vast sections of the Tamil community in emotional distress and anger. This has snow balled into a signature movement calling on President Sirisena to pardon Ananthasuthakaran.⁴ The two young children also met President Sirisena who reportedly promised to act on their request for release before the April New Year celebrations.⁵ However, to date, the President seems not to have taken any follow up action to pardon Ananthasuthakaran and recent news reports suggest that he does not plan to.⁶

This brief seeks to provide a policy prescription on dealing with the issue of Tamil political prisoners. Too many like Ananthasuthakaran have suffered for too long under the draconian framework of the *PTA* which both perpetuates human rights and due process abuses systemically against political prisoners, and also does not provide a suitable framework for prosecuting international crimes.⁷ This policy brief details an alternative legal policy approach using the international humanitarian law concept of 'combatant immunity', that the Sri Lankan Government can take to comprehensively and justly resolve the political prisoner issue without affecting the search for accountability and justice for serious violations of international humanitarian law and other international crimes committed

¹ Authored by Kumaravadevel Guruparan with inputs from Dharsha Jegatheeswaran.

² Ananthasuthakaran was sentenced to life on 08.11.2017 by the Colombo High Court for his alleged involvement in the bombing of a commuter bus in Piliyandala in 2008. See: <http://www.dailynews.lk/2017/11/09/law-order/133961/piliyandala-bomb-blast-ltte-suspect-sentenced-life?page=31>.

³ Uthayan, 'Three hours granted to attend funeral' 18 March 2018, <https://newuthayan.com/story/77157.html>.

⁴ IBC Tamil News, 27 March 2018, <https://news.ibctamil.com/ta/internal-affairs/mercy-petition-issued-release-Ananda-Sudhakaran->.

⁵ Tamilwin.com, 'President shows mercy to Ananthasuthakaran's children', 30 March 2018 <http://www.tamilwin.com/lifestyle/01/178496>.

⁶ In response to a letter from the Northern province Chief Minister seeking a pardon for Anandasuthakaran, the CM received a response from the President stating that he has asked for more details about the matter from the Commissioner General of Prisons. 'President takes action on CM's request' Tamilwin.com, March 31, 2018 <http://www.tamilwin.com/politics/01/178577>.

⁷ The definition of 'international crimes' used here is adopted from Isabelle Lassez & Eleanor Vermunt, 'Fitting the Bill': *Incorporating International Crimes into International Law* (SACLS, 2016). International crimes refer "to offences that have been included under the jurisdiction of the international and hybrid tribunals, and the International Criminal Court. They comprise genocide, crimes against humanity and war crimes. These crimes are labelled as the "most serious crimes of concern to the international community" and as those that "deeply shock the conscience of humanity".

during the war. This brief does not deal with the issue of Presidential pardons which are a separate legal issue subject to political will, but rather tries to consider a holistic and sustainable strategy for handling Tamil political prisoners that would promote lasting peace, meaningful reconciliation, and accountability and justice. ACPR however fully supports the call for a Presidential pardon for Ananthasuthakaran in the interim.

II. The PTA is not the appropriate framework with which to deal with Tamil political prisoners

At various points in time during and after the armed conflict, up to as many as 800 have been detained under the draconian PTA, most without charge and under arbitrary arrest.⁸

In July 2017, the United Nations Special Rapporteur on Counter-Terrorism and Human Rights, Ben Emmerson, was told by the Sri Lankan government that 81 prisoners were currently in the judicial phase of their pre-trial detention, out of which 70 had been in detention without trial for over five years and 12 had been in detention without trial for over 10 years.⁹ Speaking at an adjournment motion in Parliament a few months later on 19 October 2017, moved by the Tamil National Alliance (TNA), then Minister of Law and Order Sagala Ratnayake, stated that 74 people continued to be held in detention under the PTA. The breakdown of those by year of arrest as provided by the Minister were: 2 in 1997; 2 in 2005; 7 in 2006; 2 in 2007; 14 in 2008; 23 in 2009; 5 in 2010; 7 in 2011; 4 in 2012; 3 in 2014; 4 in 2015; and 1 in 2016.¹⁰ However, Tamil legal and activist circles put the number of political prisoners including those against whom trial is underway currently at 90, and those who have been convicted and are in detention currently as between 30 - 40.¹¹ An even larger number has been stated more recently by Commissioner General of Prisons, Rohana Pushpakumara, who this month told the *Sunday Leader*, “there are altogether 216 prisoners” imprisoned for “various offences relating to aiding and abetting the activities of the LTTE” with “48 convicted prisoners, 116 cases in the High Court, and 52 cases in the Magistrate’s Court.”¹²

In response to persistent advocacy from the Tamil community for the release of Tamil political prisoners,¹³ the ‘Yahapalanaya’ Government has taken feeble steps including, as

⁸ HRW, ‘Locked without evidence abuses under Sri Lanka’s PTA’ (January 2018) available here: <https://www.hrw.org/report/2018/01/29/locked-without-evidence/abuses-under-sri-lankas-prevention-terrorism-act>.

⁹ Full Statement by Ben Emmerson, UN Special Rapporteur on human rights and counter-terrorism, at the conclusion of his official visit, 14 July 2017 <https://lk.one.un.org/news/full-statement-by-ben-emmerson-un-special-rapporteur-on-human-rights-and-counter-terrorism-at-the-conclusion-of-his-official-visit/>.

¹⁰ Hansard 17 October 2017, Column 1128. Available here: <http://parliament.lk/uploads/documents/hansard/1508497848008959.pdf>.

¹¹ Interview with lawyers and activists, March 2018.

¹² “The Issue of political prisoners continues” (7 May 2018) *Sunday Leader*, accessed here: <http://www.thesundayleader.lk/2015/11/01/the-issue-of-political-prisoners-continue/>.

¹³ Adayalam adopts the use of the term political prisoners for similar reason to those found in this Tamil Civil Society Forum communique dated 15 October 2015:

‘TCSF adopts the definition of political prisoners that Amnesty International uses in its work on the same. Accordingly it is our opinion that our brethren who took up arms for the sake of the liberation of the Tamil people and those who supported it, despite being criminalized by Sri Lankan laws, did so for a political reason and hence belong to the category of political prisoners. It has been 6 years since the end of the war and it is our opinion that if the Sri Lankan Government is interested in genuine reconciliation that they should immediately release all political prisoners languishing in its prisons’.

Full statement available here: <http://tamilguardian.com/content/tamil-civil-society-forum-extends-support-hunger-striking-tamil-political-prisoners>

reported to then UN Special Rapporteur Emmerson, ‘making executive decisions to consent to bail, to divert individuals into rehabilitation programmes, or to reduce or drop criminal charges where appropriate.’¹⁴

However, the option of diverting individuals to rehabilitation programmes is itself deeply problematic. The OHCHR Investigation on Sri Lanka (‘OISL’) for example, found the rehabilitation programme to be replete with widespread instances of torture.¹⁵ The law relating to rehabilitation is also substantively very vague and problematic. Detainees are given the option to sign up to ‘rehabilitation’ programmes that can extend from 12 – 24 months¹⁶ or face longer times in pre-trial detention.¹⁷ These regulations were put in place to allow those who ‘surrendered’ at the last phase of the war to be assigned for rehabilitation. The *PTA* regulations enacted in 2011 allow for a person who has surrendered in relation to any offence under the *PTA* and related laws to be assigned for rehabilitation.¹⁸ In the case of most of these political prisoners, they are not ‘surrendeers’, they were arrested and detained.¹⁹ The legality of ‘diverting prisoners to rehabilitation programmes’ as the government presented as a positive step to Emerson, is hence very suspect. The assignment to rehabilitation is usually recorded as being on the request of the detainee but a majority of those who opted for rehabilitation report doing so out of fear of longer periods of detention.²⁰ On the other hand a number of political prisoners also feared that signing up for rehabilitation programmes would be tantamount to accepting the charges made against them,²¹ whereas in reality they were being asked to accept rehabilitation because the Attorney General’s department had no real evidence against them.²² This raises serious questions about whether prisoners are being permitted to make informed choices without coercion. Even those who were released on bail, were later during trial in the High Court asked to take the option of rehabilitation in trade for dropping charges against them.²³

Sadly, even opting for rehabilitation is no guarantee against prosecution. Lawyers told ACPR that it’s the Magistrate’s Court that awards the rehabilitation whereas it is in the High Court that formal charges are filed.²⁴ There is no guarantee that charge sheets will not be filed by the High Court against those who have accepted rehabilitation in the lower court (Magistrate’s Court) or those who ‘surrendered’ to the armed forces during the final days of the war and were sent for rehabilitation. For example, in May 2017, the Vavuniya High Court

TNA Leader Hon. R. Sampanthan also referred to ‘the political nature’ of the prisoners in his speech moving an adjournment motion in Parliament on 17 October 2017:

‘these cases have a certain political dimension and cannot be addressed on a purely legal basis. It can be justifiably stated that if Sri Lanka’s national question had been reasonably addressed in time, many of the persons in custody would not have been in their present position and would have been useful citizens. This circumstance makes it obligatory that you address this issue politically too’. (Hansard 17 October 2017, Column 1123)

¹⁴ As noted in the statement by Ben Emmerson, *ibid*. The Government in October 2017 claimed that when they took over office in January 2015 that there were 108 detainees in custody under the *PTA*. Of those 108, 40 have been granted bail; 11 are in remand; 2 released 25 have been sent to rehabilitation; four have been passed on guilty verdicts and one had died of a heart attack while he was in prison custody.

¹⁵ OHCHR, Report of the OHCHR Investigation on Sri Lanka, pp. 77-78, 112, 222.

¹⁶ Regulation 8, Prevention of Terrorism (Surrendeers Care and Rehabilitation) Regulations No. 5 of 2011, No. 1721/5 – 29.08.2011.

¹⁷ Interview with lawyers and activists, March 2018.

¹⁸ Regulation 3, *PTA* Regulations No 5 of 2011, *op cit*.

¹⁹ Interview with lawyers and activists, March 2018.

²⁰ Interview with Lawyers representing *PTA* detainees, March 2018.

²¹ Interview with lawyers and activists, March 2018.

²² Interview with lawyers and activists, March 2018.

²³ Interview by S. Ratnavale, Attorney at Law to IBC Tamil News, Feb 10, 2016
<https://www.youtube.com/watch?v=FtTLJ9xvBhg>

²⁴ Interview with lawyers and activists, March 2018.

sentenced S. Kannathasan, an instructor in music attached to the University of Jaffna and formerly a member of the LTTE, to life imprisonment.²⁵ Mr. Kannathasan had previously undergone rehabilitation. The Vavuniya High Court did not accept the challenge to the court's jurisdiction on the basis that he underwent the rehabilitation process and he was found guilty for conscripting a girl child to the LTTE.²⁶ The matter is now under appeal.²⁷ Mr. Kannathasan's conviction has led to fear among those who have been released after rehabilitation.²⁸ The uncertainty that Kannathasan's conviction has rendered must be clarified. If 'rehabilitation' is being offered by the Sri Lankan Government as an alternative to criminal prosecution under the *PTA* then the Sri Lankan Government must take up the position and clearly communicate that those political prisoners who opt for rehabilitation will not be later charge sheeted under the *PTA*. Otherwise the 'option' of rehabilitation as presented is deceptive and not being opted for with informed consent.

The Attorney General's [AG's] Department also continues to further the practice of transferring difficult cases out of the North-East, against the interests of Tamil detainees and witnesses. Transfer of cases usually means the court proceedings will be in Sinhala instead of Tamil, and the distance will make it harder for detainees to retain lawyers who speak their language.²⁹ An attempt by the AG's Department to transfer a case against three Tamil political prisoners³⁰ from Vavuniya to Anuradhapura in October 2017 was resisted by the prisoners who launched a hunger strike which further prompted massive protests in support of the prisoners across the North-East.³¹ As a result of intense political pressure, the case was reverted back to Vavuniya on an order by the Court of Appeal in February 2018.³²

Special Rapporteur Emmerson at the conclusion of his trip in 2017 called the numbers of people in detention under the *PTA* 'staggering figures' and 'a stain on Sri Lanka's international reputation'.³³ He called for the 'release of these individuals on bail immediately, or to bring them to trial within weeks or months, not years or decades'. As is typical with the Sri Lankan Government that came into office in 2015, they claimed Ben Emmerson's visit as evidence of 'advancement made in the protection and promotion of human rights' and as evidence of engagement with UN mechanisms³⁴ but in reality have done very little to give heed to his recommendations. The Government also continues to drag its feet on their voluntarily undertaken obligation under the UN Human Rights Council Resolution 30/1 of October 2015 to repeal the *PTA*.³⁵

²⁵ Judgment in file with the researchers.

²⁶ Interview with Mr. Kannathasan's lawyers.

²⁷ Interview with Mr. Kannathasan's lawyers.

²⁸ Interview with lawyers and ex—LTTE cadres.

²⁹ Kumarapuram report, Kishali.

³⁰ Vavuniya High Court Case No. HCV 2491/13.

³¹ Among other protests a hartal was organised on 13 October 2017 bring the whole of the North to a stand still. Virakesari, 'Hartal seeking release of political prisoners' (Virakesari, 11 October 2017)

<http://www.virakesari.lk/article/25577>.

³² 'Political Prisoners case Retrferred to Vavuniya', (02 Feb 2018) <http://globaltamilnews.net/2018/64870/>.

³³ Full Statement by Ben Emmerson, UN Special Rapporteur on human rights and counter-terrorism, at the conclusion of his official visit, 14 July 2017

<https://lk.one.un.org/news/full-statement-by-ben-emmerson-un-special-rapporteur-on-human-rights-and-counter-terrorism-at-the-conclusion-of-his-official-visit/>.

³⁴ Text of speech by Sri Lanka's Foreign Minister to the 37th session of the UN Human Rights Council, (21 March 2018) available here: <http://www.mfa.gov.lk/statement-by-foreign-minister-tilak-marapana-at-37th-session-of-the-un-human-rights-council-21-march-2018-2/>.

³⁵ UNHRC Resolution 30/1, Operative Paragraph 12.

a. The PTA is not the appropriate vehicle to deal with international crimes committed during the war due to the abuses of human rights and due process it perpetuates

There are a number of instances where former LTTE cadres have been indicted under the PTA in relation to possible instances of a war crime or a crime against humanity.³⁶ A piece of legislation dealing with ‘crimes of terrorism’ is inappropriate as the vehicle for an inquiry into violations of international humanitarian law. The offences in the PTA are loosely defined and the PTA is universally acknowledged to militate against all notions of fair trial.³⁷ The PTA, as has been extensively documented, contains several problematic provisions relating to arrest, investigation and detention. The extent of abuses under the PTA was recently highlighted by Human Rights Watch in a report released in January 2018. The report documents, “serious human rights violations under the PTA including severe torture and sexual abuse, as well as systematic denials of due process.”³⁸

In response to pressure from the international community, civil society and Tamil politicians, the Government committed to repealing the PTA in the October 2015 UNHRC Resolution 30/1, but continuously actively uses it to charge sheet political prisoners.³⁹ The Sri Lankan Government cannot claim that they have in principle in-operationalised the PTA by putting an end to any new arrests under the law. They must also stop charge sheeting political prisoners under the PTA. If Sri Lanka is serious about a credible hybrid process for judicial prosecutions for international crimes committed in war it must enact a separate piece of legislation in line with international legal standards for this purpose.

b. The PTA results in discriminatory prosecution of international crimes committed during the war and targets only the ‘trigger pullers’

The Attorney General’s Department is prosecuting former LTTE cadres for both taking up arms against the state (for example attacking military targets) and for violations of international humanitarian law (for example attacking civilian targets).⁴⁰ Beyond the concern about the fundamental unsuitability of the PTA as the framework for prosecuting international crimes committed during the war (as well as for the crime of taking up arms against the state), to prosecute only the LTTE and not Sri Lankan military personnel involved in these crimes is discriminatory. The PTA framework enables this as it is a “counter-terrorism” framework, as opposed to a framework to address international crimes committed during war.

Further, international humanitarian and criminal law demands that those occupying the higher end of the command responsibility chain be prosecuted. The rationale is that those responsible for the design and prosecution of international crimes be held to account as opposed to those merely executing them.⁴¹ As Isabelle Lassez & Eleanor Vermunt argue, ‘any prosecutions—if conducted under existing Sri Lankan law—would likely focus on those lower down the chain of command and on ‘trigger pullers’ who carried out orders received

³⁶ Interview with lawyers, March and April 2018.

³⁷ See Bertram Bastiambillai et al, ‘Sri Lanka: Prevention of Terrorism Act: A Critical Analysis’ (CHRD, 2009).

³⁸ HRW, ‘Locked without evidence abuses under Sri Lanka’s PTA’ (January 2018)

<https://www.hrw.org/report/2018/01/29/locked-without-evidence/abuses-under-sri-lankas-prevention-terrorism-act>.

³⁹ Interview with lawyers and activists, March and April 2018.

⁴⁰ Interview with lawyers and activists, March and April 2018.

⁴¹ For an overview of the concept of ‘command responsibility’ in international criminal law see: Case Matrix Network, ‘Command Responsibility’, available here: <https://www.legal-tools.org/doc/7441a2/pdf/>.

from their superiors'⁴². The *PTA* is not designed to prosecute the most responsible, but rather, the 'trigger pullers'.

III. Alternative Frameworks for dealing with political prisoners and former LTTE combatants more broadly: 'Combatant Immunity' Status

International humanitarian law grants 'combatant' status to those taking part in hostilities in international armed conflicts.⁴³ What this means is that in an international armed conflict: (a) a combatant cannot be prosecuted for the mere act of taking part in hostilities also known as 'combatant immunity'; and (b) a combatant that is captured is treated with Prisoner of War status (PoW) and must be released at the end of hostilities.⁴⁴

Conversely, in a non-international armed conflict, the non-state group engaging in active hostilities with an armed actor is not granted combatant status.⁴⁵ Despite abundant development in the law relating to non-international armed conflict, this is a position that states vigorously protect.⁴⁶ Attempts in 1949 and 1977 to grant combatant status to non-state armed actors failed,⁴⁷ though Article 6(5) of Protocol II of 1977 does encourage states to 'endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.'⁴⁸ Sri Lanka is not a party to Protocol II however.⁴⁹ As international law scholar Sandesh Sivakumaran argues, 'at the level of customary international law, this is one of the few areas of real difference between international and non-international armed conflicts and among commentators there is near unanimity that this [the granting of combatant status and PoW status] is the exclusive domain of the law of international armed conflict.'⁵⁰ This gap in the legal protections afforded non-state armed forces in a non-international armed conflict is a perpetual reminder of the state-centric nature of the international law.

The reluctance on the part of states to grant combatant status to the non-state armed actor is explained by their concern that granting such status would lead to legitimising the non-state armed group as an actor in international law and legal relations.⁵¹ This reluctance is rooted in the notion that the state must have monopoly over violence within its territory and will not recognise anyone who usurps its authority to legitimacy to deploy violence.⁵²

⁴² Isabelle Lassez & Eleanor Vermunt, 'Fitting the Bill': *Incorporating International Crimes into International Law* (SACLS, 2016).

⁴³ Article 43 (2) of Additional Protocol I to the Geneva Conventions

⁴⁴ Sandesh Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict', (2011) 22 (1) *The European Journal of International Law*, p 244-245.

⁴⁵ *Ibid* at p 244.

⁴⁶ Ben Saul, "Defending 'Terrorism': Justifications and Excuses for Terrorism in International Criminal Law" (2006) 25 *Australian Year Book of International Law* 177.

⁴⁷ Sandesh Sivakumaran, 'Lessons for the law of armed conflict from commitments of armed groups: identification of legitimate targets and prisoners of war', (2011) 93 (882) *International Review of the Red Cross*, p 15.

⁴⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

⁴⁹ International Committee of the Red Cross, 'Treaties, State Parties and Commentaries: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977', accessed on 02 May 2018 here: <<https://ihl-databases.icrc.org>>.

⁵⁰ Sandesh Sivakumaran, 'Lessons for the law of armed conflict from commitments of armed groups: identification of legitimate targets and prisoners of war', (2011) 93 (882) *International Review of the Red Cross*, p 477.

⁵¹ Ben Saul, "Defending 'Terrorism': Justifications and Excuses for Terrorism in International Criminal Law" (2006) 25 *Australian Year Book of International Law* 177.

⁵² *Ibid*.

While many scholars and practitioners have critiqued this approach,⁵³ the resulting unfortunate position in international law hence is that members of the LTTE can be prosecuted for taking up arms against the state. However, the lawfulness of participation in hostilities in non-international armed conflict can be governed differently by national law. and in practice, some states have taken a different approach. Sandesh Sivakumaran, following an exhaustive review of the practice of states on the subject writes that, 'in practice, in certain large-scale non-international armed conflicts, captured fighters have indeed been treated as prisoners of wars or have benefitted from some form of combatant immunity.'⁵⁴ Examples include: the 1992 agreement between representatives of the President of the Republic of Bosnia-Herzegovina, the President of the Serbian Democratic Party, the President of the Party of Democratic Action, and the President of the Croatian Democratic Community to grant combatant status to those who took part in active hostilities; the Nigerian State's treatment of fighters as combatants in the Biafra crisis; and more recently in 2010, Sudan's choice to release imprisoned members of the Justice and Equality Movement as part of a ceasefire agreement.⁵⁵ The United Kingdom has even stated in their Military Manual that '[w]herever possible, treatment equivalent to that accorded to prisoners of war should be given.'⁵⁶ Thus though international law has yet to develop to protect non-state armed actors in non-international armed conflict explicitly, the treatment by States of those actors has shown a willingness to offer combatant immunity and/or PoW status for the purposes of sustainable peace and increased human rights protections.

Sri Lanka however in practise has even after the cessation of hostilities continued to use the PTA, which enumerates a number of offences through which the mere act of taking up arms against the State could be prosecuted.⁵⁷ The Prevention of Terrorism (Proscription of the Liberation Tigers of Tamil Eelam) Regulations No. 1 of 2011⁵⁸ proscribes the LTTE and criminalises very broadly any association with it including 'espousing the cause' or 'engaging in any transaction'.⁵⁹ Our research shows that the AG's Department in general seeks to prosecute former LTTE combatants for merely taking part in hostilities – for attacking military targets, collecting intelligence, etc.⁶⁰ These are instances which we argue should be covered by combatant immunity. Our research also shows that where the AG's Department is unable to find satisfactory evidence of involvement in attacks against a military target or a war crime/ crime against humanity, they have resorted to prosecuting them for mere membership in the LTTE.⁶¹ As of recently, persons have even been indicted before High Courts on insubstantial reasons such as having business relationships with the LTTE.⁶² Speaking to the *Sunday Leader* this month, Commissioner General of Prisons, Rohana Pushpakumara, said the State has detained many "people who have been

⁵³ *Ibid*; Sandesh Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict', (2011) 22 (1) *The European Journal of International Law*.

⁵⁴ Sandesh Sivakumaran, 'Lessons for the law of armed conflict from commitments of armed groups: identification of legitimate targets and prisoners of war', (2011) 93 (882) *International Review of the Red Cross*, p 19.

⁵⁵ Sandesh Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict', (2011) 22 (1) *The European Journal of International Law*, p 247; Sandesh Sivakumaran, 'Lessons for the law of armed conflict from commitments of armed groups: identification of legitimate targets and prisoners of war', (2011) 93 (882) *International Review of the Red Cross*.

⁵⁶ Sandesh Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict', (2011) 22 (1) *The European Journal of International Law*, p 247, citing: UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004).

⁵⁷ Section 2 of the *Prevention of Terrorism Act*.

⁵⁸ Extra Ordinary Gazette Notification 1721/2 – 2011 dated 29.08.2011

⁵⁹ Regulation no 3 of the above.

⁶⁰ Interview with lawyers for PTA detainees, March 2018

⁶¹ Interview with lawyers for PTA detainees, April 2018

⁶² *Ibid*.

imprisoned for various offences related to aiding and abetting the activities of the LTTE.”⁶³ Minister of Rehabilitation and Resettlement, D.M. Swaminathan pointed out, “people like KP, Karuna Amman, and Pillayan are not in prisons but for instance the person who carried a glass of tea to Velupillai Prabhakaran is locked up in prisons for being a LTTE member.”⁶⁴

ACPR believes that the practise of detaining and/or charging former LTTE combatants for merely taking up arms and/or being a member of the LTTE is not appropriate for the context of the Sri Lankan armed conflict or for moving towards sustainable peace. **The Sri Lankan government should take note of the practice of other national governments dealing with protracted armed conflict and willingly recognise the ‘combatant’ status of LTTE cadres and not prosecute them for merely taking part in active hostilities. Providing combatant immunity status to LTTE cadres would be a significant symbolic acknowledgment of the oppressive circumstances which pushed Tamils to take up arms against the State. Such granting of combatant immunity would be a salutary expression of genuine reconciliation.**

Adopting a policy of granting ‘combatant immunity’ for former LTTE cadres and rejecting the use of the *PTA* to prosecute violations of international humanitarian law, would mean that most current detainees under the *PTA*, including Ananthasuthakaran, should immediately be released from detention. As will be explained below this does not mean that former LTTE cadres who stand accused of internationally recognized war crimes, crimes against humanity and/or grave international human rights and humanitarian law violations could not later be charged and prosecuted accordingly. However, such a process would have to be credible, with significant international involvement and according to international standards. Further, any time spent in detention as a result of the *PTA* would have to be counted against any sentences issued and principles of ‘double jeopardy’ and prosecuting those ‘most responsible’ would also have to be considered.

IV. Granting of combatant immunity status does not mean granting of amnesty.

International law does not by conferring combatant immunity status confer immunity over international crimes committed during war. Hence granting of combatant immunity does not grant amnesty to those who have been conferred such immunity.

International law slowly but firmly has gravitated towards treating amnesties as being unlawful where they preclude prosecution of international crimes.⁶⁵ Amnesties perpetuate impunity and hence are increasingly treated in transitional justice discourse as being not conducive for the goal of non-recurrence. The Office of the High Commissioner for Human Rights in a publication summarised the international law position on amnesties as below:

‘Under various sources of international law and under United Nations policy, amnesties are impermissible if they: (a) Prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights, including gender-specific violations; (b) Interfere with victims’ right to an effective remedy, including reparation; or (c) Restrict victims’ and

⁶³ “The Issue of political prisoners continues” (7 May 2018) Sunday Leader, accessed here: <http://www.thesundayleader.lk/2015/11/01/the-issue-of-political-prisoners-continue/>.

⁶⁴ *Ibid.*

⁶⁵ ICRC, Commentary on the First Geneva Convention, 2nd edition, 2016, para. 2845: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3ED0B7D33BF425F3C1257F7D00589C84>; ICRC, “Amnesties and International Humanitarian Law: Purpose and Scope”, *Advisory Service on International Humanitarian Law*.

societies' right to know the truth about violations of human rights and humanitarian law'.⁶⁶

Tamil politicians and activists have called for '*pothu manippu*' (roughly translated as general amnesty) for all Tamil political prisoners.⁶⁷ However, the term '*pothu manippu*' in Tamil does not carry the same implications as amnesty in law, and ACPR finds the discourse on '*pothu manippu*' in its substance is more compatible with the understanding of 'combatant immunity',⁶⁸ which ACPR is advocating through this issue paper. ACPR takes the position that it is impossible and unethical to call for accountability against only one of the warring parties. It is our position that to account for international crimes that may have been committed by the LTTE, does not diminish the righteousness of the decision to bear arms by the Tamil polity. The two issues are distinct and accordingly, the Sri Lankan government should also treat them so.⁶⁹ However, as stated above, any such process to investigate and prosecute any member of the LTTE for international crimes would have to be credible, with significant international involvement and according to international standards. Further, any time spent in detention as a result of the *PTA* would have to be counted against any sentences issued and principles of 'double jeopardy' and prosecuting those 'most responsible' would also have to be taken into account.

Hence the Tamil community and other stakeholders must continue, as they have, to call for full international investigation and accountability processes while also agitating for Tamil political prisoners to be given combatant immunity as opposed to blanket amnesty. Combatant immunity provides a just and fair solution to the issue of Tamil political prisoners that is in line with international law and also would provide immediate relief to those detained for years with abuse and unfairly under the *PTA*.

V. Conclusion and Recommendations

This brief has attempted to articulate an alternative legal policy option in relation to the issue of Tamil political prisoners. The policy options that ACPR has advocated in this brief are in line with the Tamil community's desire and commitment to an open and full process of accountability and justice for international crimes that took place during the 30-year civil war. It eschews amnesties but also argues against the use of draconian laws to selectively prosecute international crimes that were committed during the war. Adopting a policy of granting 'combatant immunity' for former LTTE cadres and rejecting the use of the *PTA* to prosecute international crimes, would mean that most current detainees under the *PTA*, including Ananthasuthakaran, would have to be immediately released from detention. However, as explained, this would not preclude charging and prosecuting former cadres for war crimes, crimes against humanity and grave international humanitarian and human rights law violations when a credible accountability process emerges, in line with principles of 'double jeopardy', prosecuting those 'most responsible' and considering time served. Our proposal stems from our interest in genuine peace, comprehensive and meaningful accountability, just reconciliation, and non-recurrence.

⁶⁶ UN (2010), "International law and United Nations policy on amnesties", in *Rule-of-law Tools for Post-conflict States: Amnesties*, United Nations, New York, <http://dx.doi.org/10.18356/12c5c910-en>.

⁶⁷ 'Families of political prisoners commemorate *deepavali* as a black day, seek 'pothu manippu' for political prisoners' (15 November 2015), accessed at: https://www.bbc.com/tamil/science/2015/11/151110_blackdeepavali.

⁶⁸ "The issue of political prisoners continues" (7 May 2018) Sunday Leader, accessed here: <http://www.thesundayleader.lk/2015/11/01/the-issue-of-political-prisoners-continue/>.

⁶⁹ See further: K. Guruparan, "The Difficulties and Probable Impossibility of a Coherent Conception of Transitional Justice in Sri Lanka" appearing in Bhavani Fonseka (ed), 'Transitional Justice in Sri Lanka' (CPA, 2017)

Recommendations:

1. The Government of Sri Lanka (GoSL) grant combatant status to members of the LTTE and thereby confer combatant immunity upon them. All political prisoners currently detained for charges that would be subject to combatant immunity should subsequently be immediately released.
2. The GoSL stop using the *Prevention of Terrorism Act* to selectively prosecute violations of international humanitarian law allegedly committed by the LTTE during war. All political prisoners currently detained under charges for such crimes should be immediately released. When and if the Sri Lankan government adopt a credible accountability process for international crimes committed during the war, any person whether he is a member of the armed forces or the LTTE can/should be subject to that process, while making suitable adjustments to honour the principle of 'double-jeopardy', prosecuting those 'most responsible', and time served.
3. The GoSL immediately repeal the *Prevention of Terrorism Act* and ensure that any replacement legislation should not be used to prosecute international crimes committed during the war if its ambit is to address counter-terrorism.
4. The GoSL abide without delay to its self-identified and accepted obligations in UNHRC Resolution 30/1 to provide for a hybrid accountability process and court or voluntarily agree to the International Criminal Court's jurisdiction to prosecute and try all international crimes committed during the war.
5. The International Community of States, the United Nations, the Tamil community, and civil society exert pressure on the GoSL in relation to the above.