

Mandates of the Working Group on Arbitrary Detention, the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence ; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on the promotion and protection of human rights while countering terrorism

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Excellency,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention; Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and Special Rapporteur on the promotion and protection of human rights while countering terrorism, pursuant to Human Rights Council resolutions 33/30, 27/1, 27/3, 25/2, 24/5, 25/13 and 31/3.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **"Policy and Legal Framework of the proposed Counter Terrorism Act of Sri Lanka"**, insofar as its compatibility with international norms and standards on human rights, particularly as set forth in the International Covenant on Civil and Political Rights, is concerned.

According to the information received:

In its Comprehensive Report on Sri Lanka (A/HRC/30/61), the Office of the UN High Commissioner for Human Rights recommended that the Government "Initiate a high-level review of the Prevention of Terrorism Act and its regulations and the Public Security Ordinance Act with a view to their repeal and the formulation of a new national security framework fully compliant with international law" (A/HRC/30/61, para. 91.2(j)).

In its resolution 30/1 adopted without a vote on 1 October 2015, the UN Human Rights Council welcomed "the commitment of the Government of Sri Lanka to review the Public Security Ordinance Act and to review and repeal the Prevention of Terrorism Act, and to replace it with anti-terrorism legislation in accordance with contemporary international best practices" (A/HRC/RES/30/1, OP 12).

In its country visit report presented to the UN Human Rights Council in September 2016, the Working Group on Enforced or Involuntary Disappearances also recommended the Government of Sri Lanka to "immediately repeal the

Prevention of Terrorism Act and replace it by legislation that is in conformity with the international obligations of the State”(A/HRC/33/51/Add.2).

At the end of his joint country visit, the Special Rapporteur torture and other cruel, inhuman and degrading treatment or punishment also called on the government to repeal the Prevention of Terrorism Act. He further stated that: “[i]n the context of any replacing legislation, if at all necessary, a robust and transparent national debate should take place that provides for full participation of civil society.” Moreover, he noted that any statutes on national security, surveillance and intelligence services “should include protections against arbitrary arrest, absolute prohibitions of torture or cruel, inhuman or degrading treatment, provisions for access to legal counsel from the moment of deprivation of liberty, strong judicial controls over law enforcement or security agencies, and protections for the privacy rights of citizens.” (see Preliminary observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, 7 May 2016, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=19943&LangID=E>).

According to reports, in early October 2016 Prime Minister Wickremesinghe announced that a draft of the new law to replace the Prevention of Terrorism Act would be made available for discussion. A “Cabinet version” of the Draft “Policy and Legal Framework of the Proposed Counter Terrorism Act of Sri Lanka” (hereinafter “Draft Framework”) currently is under consideration.

In connection with the Draft Framework, concerns have been expressed that a number of provisions appear inconsistent with international law, including international human rights law. These include, but are not limited to, the following:

1. Scope and definition of “Offences”

Section III of the Draft Framework includes a very broad definition of terrorism, and introduces a wide range of additional offences including “terrorism-related offences”, “associated offences” as well as “espionage”. The definition of terrorism categorizes eleven acts including those that cause serious damage to the environment and the economy, not only of Sri Lanka but also ‘any other sovereign nation’. An exception is foreseen where a person acts in good-faith in the lawful exercise of a fundamental right or following a lawful order or a judicial order.

The Draft Framework also includes as an offence “illegally or unlawfully” compelling the Government to “reverse, vary or change a policy decision” or to do or abstain from doing any act relating to the defence, national security, territorial integrity and sovereignty of Sri Lanka and the protection of the people. The same prohibition applies in relation to the government of any other sovereign nation.

It also includes “illegally” causing a change of the Government of Sri Lanka or of any other sovereign nation, as well as “committing any act of violent extremism towards achieving ideological domination.” The inclusion of an offence of ‘espionage’ in regard to the gathering and providing of ‘confidential information’ relating to the listed offences equally is of concern, with an extremely broad definition of what constitutes ‘confidential information.’

With regard to the scope of terrorism-related offences, the Draft Framework includes a wide range of crimes such as robbery, damage to religious or cultural property or heritage, causing serious damage to the economy, economic crimes, drug related crimes, environmental offences, criminal intimidation, abduction, extortion, theft of property of state, committing mischief of property of the government. Other offences (such as damage to a cultural property, participation in a strike, and causing damage to the economy) could also be constructed as “terrorism-related offences” under the draft framework. The draft retains a clause from the Prevention of Terrorism Act (“PTA”) which provides “causing harm to the peaceful coexistence of the people in Sri Lanka by words spoken or intended to be read” as a terrorism related offence, a provision which, in the past, has been used to arrest individuals who were openly critical of the Government.

Aspects of the definition of the offence of terrorism, and acts specified in Section III (ii) as falling within its ambit, appear overly-broad and may capture acts which, while criminal, could not on an objective assessment be regarded as amounting to terrorism. Section III also suggests that any individual may be a subject of this law if there are “reasonable grounds” to believe that such individual may be committing or attempted to commit crimes of terrorism. This law may be used as pretext, as has been the case under the PTA, to curtail fundamental rights guaranteed by the Sri Lankan Constitution and enshrined in the ICCPR and, in particular, to target minorities or political dissidents. Provisions listed under paragraphs (xvii) and (xviii) may impose unreasonable restrictions on freedom of expression and freedom of press guaranteed by the Sri Lankan Constitution. In addition, the proposed punishment for certain acts listed under Section III may be disproportionate, as the sentencing judge would have the possibility of imposing a penalty of "imprisonment for a period not exceeding twenty years" (even for attempts, and/or incitement or “exhortation”). The possibility of life imprisonment for certain offences under the Draft Framework also highlights the seriousness of due process-related concerns referred to below.

According to international law, the definition of terrorist-related offences in national law must comply with the principle of legality, as enshrined in article 15 of the ICCPR. This implies that the imposition of criminal liability is limited to clear and precise provisions, so as to respect the principle of certainty of the law and ensure that it is not subject to interpretation which would unduly broaden the scope of the proscribed conduct. In this regard, guidance is available from relevant articles in the 19 universal counter-terrorism instruments (notably article 2 of the 1999 International Convention for the Suppression of the Financing of Terrorism), as well as in the report of the UN Special Rapporteur on the

promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/16/51, paragraphs 26-28.

2. Powers of Arrest, Custody, Detention and Investigation

Section IV, as well as Section V and VI of the Draft Framework provide for extensive powers of security and law enforcement officials in relation to stopping and searching, as well as the arrest, custody, detention and investigation of individuals suspected of offences under the Draft Framework. Several of these provisions appear inconsistent with international human rights standards and norms, including the right to protection from arbitrary arrest and detention as guaranteed under articles 9 and 14 of the ICCPR and article 13 of the Sri Lankan Constitution.

For example, law enforcement officials would not be required to have ‘reasonable suspicion’ or ‘grounds to believe’ before officers are authorized to stop someone for initial questioning or before searching any premises or mode of transportation. Further, the Draft Framework provides for the power to arrest without warrant individuals suspected of being involved in terrorism and/or terrorism related offences. Such arrest may be carried out without warrant by any members of the security forces, including police, members of the armed forces (infantry, navy, air force) and coast guard officers, so long as the individual is informed of the reasons for arrest and identity of the officer.

Under Section IV, a suspect may be detained by the arresting official for 24 hours without supervision and may continue to remain in detention for 72 hours without any notification to judicial authorities. The Draft Framework includes provision for notification of the arrest and custody of an individual to the Human Rights Commission of Sri Lanka within 24 hours of the suspect being brought to a police station (section IV(xix)). Section IV(xxxi), however, provides for notification of detention to the Human Rights Commission not later than 72 hours from the commencement of detention, under terms of a “Detention Order”. Further, the Draft Framework appears to establish a parallel regime vis-à-vis remand imprisonment, insofar as a suspect may be kept in remand custody for one year without any “criminal proceedings” (it is not clear if this means without trial, or means without being charged with a criminal offence) with the possibility of extension for an additional year. This appears to be inconsistent with international human rights standards including the right not to be arbitrarily detained.

International human rights law requires that anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power (article 9(3), ICCPR). According to the UN Human Rights Committee, “48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances” (CCPR/C/GC/35, para. 33). Article 10 of the Declaration on the Protection of All Persons from Enforced Disappearance, also establishes that “any

person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention.

Further, the Human Rights Committee has noted that “[p]ersons who are not released pending trial must be tried as expeditiously as possible, to the extent consistent with their rights of defence. The reasonableness of any delay in bringing the case to trial has to be assessed in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused during the proceeding and the manner in which the matter was dealt with by the executive and judicial authorities” (CCPR/C/GC/35, para. 37).

The Draft Framework does not appear to provide the suspect with opportunity to challenge the legality of arrest and detention. Regarding judicial review, it is not clear for example, whether the accused could file a complaint in higher judicial bodies (e.g. the Supreme Court) invoking the fundamental rights chapter of the Constitution at any time after the arrest.

In addition, although the Draft Framework provides that a suspect who has been arrested shall be produced before a Magistrate within 72 hours, the Magistrate does not have the power to order the release of the suspect if there is a valid ‘detention order’. The Draft Framework suggests that a detention order could be issued by a Deputy Inspector General of Police, who would have the power to issue a detention order valid for 30 days and renewable up to 6 times, and that such a detention order would not need to be issued by the judiciary (judge/prosecutor).

Only a “Board of Review”, comprised of “the Secretary to the Ministry to which the Police Department has been assigned and two other persons appointed by the Minister” could review and order the release of a suspect who is detained in accordance with a detention order (section IV(xli)). Such a Board does not appear to meet the criteria set out in article 9(3) of the ICCPR, which requires a prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary (CCPR/C/GC/35, para. 15).

3. Other issues of due process, including right to fair trial:

Under international law, persons charged with criminal offences, including terrorism-related crimes, are entitled to guarantees including: equality of all persons before the courts and tribunals; the right to be presumed innocent; the right to a hearing with due process guarantees, including the right to be tried within a reasonable time and by a competent, independent and impartial court or tribunal; and the right to have a conviction and sentence reviewed by a higher court or tribunal in conformity with international human rights law. Ensuring the right to a fair trial in the context of counterterrorism necessarily includes the protection of a number of other human rights, such as the absolute prohibition of torture, or cruel, inhuman or degrading treatment or punishment. Prompt access to

legal counsel also is recognised as a measure to prevent torture and other ill-treatment. Effective oversight and monitoring mechanisms, including through ratification and implementation of the Optional Protocol to the Convention against Torture, are critical to the prevention of torture and ill-treatment, with measures such as routine medical examinations upon entering and leaving detention also recognised as critical safeguards.

In this regard, the Draft Framework contains a number of provisions of serious concern. The Draft Framework permits confessions to be given to a police officer above the rank of a Superintendent of Police, a practice which is known to increase the risk of torture and other ill-treatment. It provides for access to legal counsel for the accused only "following the recording of the arrestee's first statement by the police". This provision suggests that a suspect would only have access to lawyer after his or her statement has been recorded by a police investigator. While the Draft Framework provides for the right against self-incrimination and right to remain silent, the provision allowing access to lawyer only after his or her statement is recorded is inconsistent with Section V article (viii) of the Draft Framework, and falls short of the standards required under international human rights law including articles 9 and 14 of the ICCPR. This is of concern equally as Section IX (Evidence-Admissibility) (ii) suggests that a first statement before a police officer of a certain rank [even if it contains a confession] is "always admissible" "notwithstanding anything contrary in the Evidence Ordinance". In this regard, the shift of the *onus probandi* back to the prosecution re "voluntariness" of the statement seems insufficient to ensure that non-voluntary confessions are not deemed automatically admissible, or impossible to challenge (see (iv)).

4. "Miscellaneous Provisions"

Provisions under Section XI of the Draft Framework include those related to the "(a) proscription of terrorist organizations", "(b) prohibition and restriction orders", "(c) curfew", "(d) prohibited places", "(e) armed forces to perform police functions", "(f) seizure, confiscation and forfeiture of property" and a number of other issues which may have important implications under international human rights law.

For example, the Draft Framework introduces provisions in section XI(a) for the listing of an organization as terrorist by the Minister, on recommendation by the Inspector General of Police or by request to the Government by a foreign State, with "prohibition and restriction orders" listed under section XI(b). A person or organisation aggrieved by such decision may appeal to the Minister, who will provide a hearing, with the possibility to appeal the decision of the Minister to the Court of Appeal. The Minister is to review the list once annually.

While proscription measures can serve as an important tool for the prevention of terrorist acts, they may also have serious repercussions for the human rights of those affected, thus highlighting the importance of procedural safeguards and oversight.

National legislation that fails to define “membership” or to require a link between the membership and the prohibited status or activity would be contrary to the principle of legality, in particular where such membership leads to targeted sanctions or criminal penalties, such as imprisonment. Any sanction imposed by proscription should be a result of a clear indication, based on reasonable grounds, that the individual or entity has knowingly carried out, participated in or facilitated a terrorist act. International human rights law provides guidance in relation to these and other issues of relevance.

Provisions related to “prohibition and restriction orders, curfews, prohibited places” also raise questions as to the compatibility of such provisions with international human rights standards, given that these are preventative in nature and, without adequate checks and balances, may be open to abuse. These provisions also contain potentially disproportionate penalties for those who do not abide by the restrictions imposed under such orders.

In connection with the above alleged facts and concerns, the International Covenant on Civil and Political Rights (ICCPR) includes relevant provisions notably in articles 7, 9, 10, 12, 13, 14, 15, 17, 18, 19, 21, 22 and 27. We would also draw your attention to the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism entitled “Ten areas of best practices in counter-terrorism” (A/HRC/16/51), which provides guidance for the effective countering of terrorism in compliance with international law, including international human rights law and as applicable, international humanitarian law and international refugee law. This includes international best practice guidance related to the legislative process, which should provide for review of counter-terrorism laws and practices that enables public consultation.

It is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. We would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment you may have on the above-mentioned allegations.
2. Please provide any information that may help to explain to what extent the above-mentioned Draft Framework, including the specific provisions referred to, is consistent with international norms and standards on human rights, particularly as set forth in the International Covenant on Civil and Political Rights.

We would appreciate receiving a response within 60 days.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We intend to publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

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First Vice-Chair on behalf of the Working Group on Arbitrary Detention

Houria Es-Slami
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