

Mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

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Excellency,

Following from my letter of 8 November 2017, I am pleased to continue the open and productive dialogue following the positive and welcome commitment of your Excellency's Government to remain engaged with the mandate of the Special Rapporteur on the protection and promotion of human rights and fundamental freedoms while countering terrorism.

I am particularly pleased to provide constructive support to your Excellency's Government as it brings forward legislation to repeal and replace the Prevention of Terrorism Act of 1978 (PTA). Your Excellency's Government has made me aware that significant progress is being made with respect to replace and repeal. This includes a consultative process (initiated in April 2016) from which a draft framework has emerged (PLFCTA), and most recently a new draft law published in the Gazette dated 17 September 2018. I welcome the prioritization of this legislative work by the Government.

I understand that the draft Bill was approved by the Cabinet of Ministers on 11 September 2018, and there may still be ongoing amendment and review before final adoption of legislation. Having reviewed the newly published draft law, I offer my views which I hope will be of assistance to your Excellency's Government and support the stated goal of implementing a Counter Terrorism Act that will be in conformity with international law, in particular Sri Lanka's human rights obligations under the treaties the State has ratified.

I commend your Excellency's Government for producing a draft law which advances a much better balance between the liberty of the individual and the powers of the State. The inclusion of several important checks and balances in the current draft Law brings the Counter Terrorism Act into greater compliance with the relevant international standards. I welcome, in particular, the removal of the admissibility of confessions and those provisions of the previous legislation which were clearly detrimental to the full protection of freedom of expression in Sri Lanka. I also welcome the inclusion of a "good faith" exception which excludes acts taken in pursuance of a lawful fundamental right or lawful order. Furthermore, the provisions, which also improve access to legal counsel for detainees, the wider role of the Human Rights Commission, and the establishment of stronger judicial safeguards on powers of arrest and detention and important, are significant and in line with Sri Lanka's international human rights treaty obligations.

As your Excellency's Government moves to advance legislation, I would highlight a number of remaining concerns, and urge attention be paid to them in the final stages of legislative adoption. I note that the definition of 'terrorism' and 'other acts'

contained in sections 3, 7, 8, 9 & 10 have been narrowed from the Prevention of Terrorism Act, and this is a welcome revision. For example, I commend the improvements made to narrow the definition of “acts” within categories. Specifically, “abetting terrorism” in the April 2017 draft included “words either spoken or intended to be . . . understood . . . [that] instigates the committing of acts of violence or ethnic, religious, racial or communal disharmony, or feeling of ill will or hostility between different communities . . .” The current CTA bill has omitted this language, and that is a positive development.

Yet, the definition includes many minor offenses that would customarily be dealt with under ordinary criminal law, such as “endangering the life of any person,” “[causing] a serious risk to the health and safety of the public[,]” and the “obstruction of essential services and supplies[.]” I encourage consideration of the necessity of maintaining these offences within counter-terrorism legislation rather than in the ordinary law.

Moreover, some phrases within the definition remain overly broad, including “intimidating a population, “wrongfully or unlawfully compelling the Government of Sri Lanka, or any government, or an international organization, to do or to abstain from doing any act”, “adversely affecting the territorial integrity of Sri Lanka”, and dissemination of material with the intent to incite terrorism, “notwithstanding that such conduct does not expressly advocate such offence”.

I am equally concerned of the inclusion of the language of “mischief” and theft”, which seems ill-placed in counter-terrorism legislation. I also note that the offence of possessing or using firearms without lawful authority, is overly broad. Similar concerns are triggered by the offence of information distribution including the ‘fear of such offence being committed, notwithstanding that such conduct does not expressly advocate such offence [.]’. I urge the Government to take every opportunity in the concluding legislative process to tighten and narrow the legislation to ensure that it is not overly broad. Where offences can and should be contained within the ordinary law, I strongly encourage the Government to rely upon regular criminal process.

I would also bring your Excellency’s Government’s attention to those provisions of the draft law permitting law enforcement and military personnel to make arrests without a warrant. The draft legislation permits a police officer or member of the armed forces to make an arrest without a warrant if they have “reasonable grounds to believe” the person has committed an offense outlined in the CTA. Arrests without warrants can also occur if they “receive[] information or a complaint which [they] believe[] to be reliable that a person has committed or concerned in committing an offence under this Act[.]” I would strongly recommend including language within this section that limits warrantless arrests to instances of necessity. My office remains concerned that despite positive augmentations to judicial oversight this particular power does not sufficiently engage judicial oversight. Such judicial oversight protects the police, the armed forces and the person arrested, and would constitute an example of good practice by your Excellency’s Government.

I commend your Government for preserving the language from earlier drafts requiring, that upon arrest, the suspects be provided with the identity of the arresting officer, the allegations against them, and that they have a right to an attorney. I am also very pleased with the requirement that “[e]very reasonable measure shall be taken to convey such information in Sinhala, Tamil or English languages, whichever language [is] understood by the suspect.” I have encouraged governments to proactively ensure that such information is being meaningfully shared with persons arrested and detained. This provision is also a marker of good practice, one that I would encourage other States to follow. I further recognize the very positive measures in terms of gendered approaches to counter-terrorism contained in aspects of this legislation. The draft legislation requires that “[e]very possible measure shall be taken to ensure that the questioning of any female is carried out by a female arresting officer or in the presence of a female officer.” In regards to the searching of a female suspect, the April 2017 draft uses the same phrase “every possible measure.” However, the current CTA has been strengthened and states “[t]he search of a female, shall necessarily be conducted by a female officer.” This is a very welcome development.

The draft legislation caps the total period of remand custody at 12 months—6 months from the date of the arrest with a possibility of a 6-month extension by “an order of a judge of the High Court, on an application made by the Attorney General[.]” After the 12-month period expires, a magistrate is required to release the suspect on bail. However, bail is impermissible before the 12-month period of remand “except under the authority of an Order made by a Judge of the High Court, on exceptional grounds.” That is arguably a high bar to meet, and therefore affirming most arrestees without timely proceedings will be in pre-trial detention without possibility of bail for 12 months. I would encourage the Government to revisit this section with a view to a more enabling set of bail conditions, making the bar of judicial order easier to meet. One of the benefits, besides upholding the rights of arrested persons, may include less over pressure on prisons conditions and capacity.

I acknowledge that the provisions of the new legislation pertaining to detention are a clear improvement on the previous legislation. The draft legislation provides that “[d]uring the pendency of a Detention Order, the suspect shall be produced before a Magistrate once in every fourteen days.” This is a valuable improvement from the April 2017 draft, which required production before a magistrate every 30 days. Once a detention order is issued, I note it must be served on the suspect as well as their next of kin. I underscore however, that the detention periods are still comparatively long (now 8 weeks as compared to 18 months), and triggered by the Deputy General of Police (not a magistrate). I encourage the Government to reflect on the narrowing of this detention period, so that as much as possible it parallels detention practices in the ordinary law.

I also positively acknowledge that the draft legislation stipulated that at all times of detention, a magistrate and an officer of the Human Rights Commission are entitled, “without giving any advance notice[.]” the right to visit places of detention. There is robust protection for right of access to legal counsel. The improvement of access to

medical examination, the provisions concerning humane treatment in places of detention, and the clear burdens to demonstrate that confessions are voluntary are positive and very welcome developments. These measures demonstrate a clear commitment to ensuring the safety and security of detained persons, and provided a good institutional protection against torture, inhuman and degrading treatment. I particularly commend the augmented role for the Human Rights Commission, and would note that for the Commission to be effective in its enhanced role the appropriate resources (financial and staffing) will be necessary.

I finally welcome the inclusion in the legislation of cross-references to the Code of Criminal Procedure Act (CCP Act) by providing arrestees and detainees of terrorism legislation the same access to legal representation as provided by the CCP Act.

Excellency, the positive revisions to the counter-terrorism draft legislation shows the commitment of the Government to robust and human rights-compliant counter-terrorism norms. Sri Lanka has a significant opportunity to demonstrate positive, human rights and rule of law compliant approaches to the adoption of counter-terrorism law, and I commend your work to date. A human rights-compliant anti-terrorist legislation would set a positive example for Sri Lanka, but also for the region, and the world.

I have offered further views on some aspects that might deserve further consideration in that regard. I continue to offer my support and any technical assistance which is of use in this endeavor.

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

Fionnuala Ní Aoláin
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism