

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

REFERENCE:  
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26 February 2019

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolution 31/3.

I am pleased to continue the dialogue opened with your Excellency's Government on the matters concerning adoption of national legislation to repeal and replace the Prevention of Terrorism Act of 1978. In my letter (OL LKA 5/2018), dated 26 October 2018, I transmitted my observations on the legislative proposals being advanced by your Excellency's Government and on some provisions of the new draft Counter Terrorism Act (CTA), published in the Gazette dated 17 September 2018.

I understand that after being approved by the Cabinet of Ministers on 11 September 2018, the draft CTA has undergone a number of consultations, including most recently between Government and civil society representatives in Colombo on 6 and 11 February 2019. Meanwhile, I was informed about the possibility of further amendment and review of the draft CTA before its final adoption. In addition, in October 2018, the Supreme Court of Sri Lanka considered several petitions challenging the constitutionality of Clauses 2(1)(c), 2(1)(d), 4(1)(a), 4(1)(b), 5(1), 24(1), 27(1); 27(2)(a), 36, 68(5), 62(1), 72, 77, 81 and 93(3) of the draft CTA. After consideration of those petitions, the Supreme Court declared Clauses 4(a), 4(b), 68(5) and 93(3) unconstitutional and suggested them to be passed by a two-third majority and approved by the people at a referendum. The Supreme Court further proposed a number of amendments in order to remove the wording which it had found unconstitutional.

I have positively noted the significant steps that your Excellency's government have taken to repeal the Prevention of Terrorism Act (PTA) and to advance new legislation which contains express and important protections when using counter-terrorism powers in national law. These include significant safeguards to prevent torture inhuman and degrading treatment in custody, increased judicial oversight, and the extended role of the Human Rights Commission in overseeing detention.

Having received further information about the process, the Supreme Court's decision and consultations held, I offer my additional views and recommendations on inclusion of several further important checks and balances, which would better ensure that counter-terrorism powers are exercised in compliance with basic human rights and fundamental freedoms. I believe such additions would further bring the draft CTA in a greater conformity with international law, in particular Sri Lanka's human rights

obligations, and confirm valuable leadership by your Excellency's Government in the counter-terrorism sphere.

**Definition of terrorism and scope of the offences:**

As your Excellency's Government moves to advance legislation, I acknowledge that Clauses 3, 7, 8, 9 & 10 have been definitionally narrowed from the Prevention of Terrorism Act, and this is a welcome revision. Nevertheless, I take this opportunity to underscore several elements first addressed in my letter of 26 October 2018, concerning the remaining broad range of acts and omissions that are included in the definition of terrorism under the draft CTA. The legislation is highly detailed, listing numerous offences including "offence of terrorism" (Clause 3 lists ten different offences); "other offences associated with terrorism" (Clause 6 lists four sets of offences), including "specified terrorist acts" (Clause 7 lists four offences), "aggravated criminal acts associated with terrorism" (Clause 8 lists at least thirty offences with cross reference to eight other counter-terrorism related laws), "terrorism associated acts" (Clause 9 lists two offences), "acts of abetting terrorism" (Clause 10 lists thirteen offences); "failure to provide information" (Clause 13 lists two offences); and "disobeying lawful orders" (Clause 14 lists five offences).

The list appears to include many minor offenses that would customarily be dealt with under ordinary penal 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 reiterate my earlier recommendations to your Excellency's Government to further narrow the legislation to ensure that it is not overly broad. I am very concerned that under the draft CTA, the police, coastguard and military appear to be allowed a wide power to brand, associate and prosecute a large range of activities construed as terrorism. Because the definition is also the trigger for the use of extraordinary procedural powers discussed below, it may allow the police and military to subject any person suspected of association, even indirect association, with proscribed "terrorist organizations", to arrest without warrant, detention, interrogation and lower standards of due process and fair trial guarantees.

In this regard, I underscore that the legislative definition should be confined to acts that are 'genuinely' terrorist in nature. This is the only way to ensure that the principles of legality, necessity and proportionality under international human rights law are complied with in assessing the permissibility of any restriction on human rights. I stress that Sri Lanka should ensure that national counter-terrorism legislation is limited to the countering of terrorism as properly and precisely defined on the basis of the provisions of international counter-terrorism instruments and is strictly guided by the principles of legality, necessity and proportionality. The definition of terrorism in national legislation should be guided by the model definition proposed in Security Council resolution 1566 (2004), and by the Declaration on Measures to Eliminate International Terrorism and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, which were approved by the General Assembly. I also bring to your Excellency's Government's attention the model definition

of terrorism provided by the mandate of the Special Rapporteur (E/CN.4/2006/98 and paragraph 28 of A/HRC/16/51).

### **Supreme Court ruling on the death penalty:**

I note with concern that in its decision the Supreme Court declared Clauses 4(a) and 4(b) of the draft CTA unconstitutional because they do not prescribe the death penalty. The Supreme Court considers that if a person, while committing any act of terrorism enlisted in Clause 3 of the draft CPA, causes death, s/he must face the death penalty in the same manner as in Section 296 of the Penal Code, in order to comply with the constitutional article 12(1) that requires equality before the law and equal protection of law. Given the procedural and substantive concerns advanced concerning the definition of terrorism, I encourage your Excellency's Government to be mindful of the potential violations of the right to life and due process that may be engaged by the application of the death penalty to the offences contained in this legislation.

Although the death penalty is not prohibited under international law, it has long been regarded as an extreme exception to the fundamental right to life. As such, it must be interpreted in the most restrictive manner and can be imposed only for the most serious crimes and subject to a number of strict conditions, notably respect for the fair trial guarantees provided for in article 14 ICCPR. In this regard, I would like to recall that the Human Rights Committee has pointed out that the expression 'most serious crimes' must be read restrictively (HRC, paragraphs 16, 34, 35 and 37 of the General Comment 36 (2018)).<sup>1</sup>

### **Arrest and detention powers of police and military and limited judicial oversight:**

I would also draw your Excellency's Government's attention to those provisions of the draft law permitting law enforcement, the coastguard and military personnel to make arrests without a warrant. Clause 15 of the draft CTA stipulates that any offence under the draft CTA shall be deemed to be a cognizable offence, which means an offence for which police or military personnel may arrest without a warrant. This applies to a number of offences, which are clearly not terrorist in nature, in particular the offences of disobeying lawful orders prescribed under Clause 14.

While arrests without warrant are not prohibited by the international human rights law, all arrests must not be arbitrary and comply with articles 9(1) and 9(3) of ICCPR. Article 9(1) of ICCPR requires that any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application. In my letter dated 26 October 2018, I strongly recommended including within Clause 15 language limiting warrantless arrests to instances of necessity. Given the concerns about an overly broad definition of

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<sup>1</sup> See [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1\\_Global/CCPR\\_C\\_GC\\_36\\_8785\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf)

terrorism under draft CTA, it appears that any deprivation of liberty, especially without warrant, may not be in compliance with Sri Lanka's obligations under ICCPR.

I welcome the requirement included in the draft CTA whereby under clause 27(1) a suspect must be produced before a magistrate within 48 hours of arrest. This provision would be substantially strengthened if Magistrates were empowered to release or bail a person without explicit request (Clause 27(2)(b)(ii) and (iii)). I encourage the full range of powers of release and bail to be granted explicitly to Magistrates.

In this context, I note my concerns that the Magistrate appears to be restricted to exercise full judicial control over the legality, necessity and proportionality of the detention of a terrorist suspect during the initial two weeks duration of the Detention Order issued by the Deputy Inspector General. The prescription of Clause 36(5) that allows the Magistrate to order the extension of the period of detention or refuse such extension is limited by prescription in Clause 39(2) that the Magistrate shall comply with the provisions of Clause 27 upon the suspect being produced before the Magistrate, who is not allowed to release or bail a person without explicit request or no objection to bail of the officer in charge of the relevant police station (Clause 27(2)(b)(ii) and (iii)). Similarly, the High Court is limited in its powers to bail or release a suspect while revising the Magistrate order of extension of the duration of the Detention Order.

I note with concern that Clause 37 allows for a maximum an period of detention under Detention Orders of eight weeks, before the criminal proceedings are initiated by the Attorney General. In those cases, where the police is not able to complete the investigation during those eight weeks, Clause 39(4) prescribes the Magistrate to place the suspect in remand after the maximum duration of the Detention Order has expired. The draft CTA does not explicitly provide the Magistrate with the power to release or bail the person, unless the Board of Review grants administrative relief and rules to allow to produce the suspect before a Magistrate, so that bail can be granted in accordance with Clause 41(5)(c). In this regard, I am very concerned that, based on the findings above, the Sri Lankan judiciary will not have full control over the legality, necessity and proportionality of the detention of a terrorist suspect during the entire duration of the Detention Order issued by the Deputy Inspector General.

The draft CTA fails to create an effective mechanism of remedy from arbitrary application of the Detention Order despite its efforts to establish through its Clause 41 a Board of Review for granting administrative relief for appeals against Detention Orders issued by the Deputy Inspector General. The new Board of Review cannot be considered as independent and impartial as it is composed of the representatives of the Ministry,<sup>2</sup> who are, being officials of the executive branch of the Government, clearly not authorized to exercise judicial powers.

### **Total period of remand custody and bail:**

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<sup>2</sup> According to Clause 99, Minister means the Minister assigned the subject of Law and Order. Therefore, the term Ministry referred in Clause 41 was understood as the Ministry of assigned the subject of Law and Order.

The draft CTA provides that the total period of remand custody is twelve months, pending conclusion of investigation and institution of criminal proceedings by the Attorney General (Clause 30(2)), including six 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” (Clause 30). After the 12-month period expires and the investigation is not completed, a magistrate is required to release the suspect on bail. In case the investigation is completed and the Attorney General agreed to institute criminal proceedings, the remand in custody can be extended further up to 12 months pending conclusion of trial from the moment of indictment (Clause 78). However, bail is impermissible before each 12-month periods of remand, pending pre-trial investigation and conclusion of the trial “except under the authority of an Order made by a Judge of the High Court, on exceptional grounds” (Clause 29). That is arguably a high bar to meet, and may result in many detainees being in pre-trial deprivation of liberty without possibility of bail for 24 months if the process is not timely. I am very concerned that Clause 45 of the draft CTA provides that the requirement of due diligence prescribed in Sections 115(2) and 120 of the Sri Lankan Criminal Procedure Law is not applicable to suspects under the draft CTA, and therefore to the over broadly defined terrorism related offences. I recommend introducing the requirement of due diligence and bringing the draft CTA in compliance with the due process guarantees of articles 9 and 14 of ICCPR.

In this regard I would like to draw the attention of your Excellency’s Government to paragraph 35 of General Comment 32 and paragraph 37 of General Comment 35, in which the Human Rights Committee stresses that the right of the accused to be tried without undue delay, provided for by articles 9(3) and 14(3)(c) ICCPR, is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice.

**Deprivation of liberty upon suspension, deferment and withdrawal of indictment by the Attorney General as part of the rehabilitation programme:**

According to Clauses 72(1) and 77(1) of the draft CTA, the Attorney General may suspend and defer the institution of criminal proceedings against an accused, or withdraw the indictment at any time during the trial at the High Court before it reaches its judgement, for a period not less than five years and not exceeding ten years. Such suspension of criminal proceedings can be initiated with full discretion of the Attorney General, who shall pay due regard to the representations that may be made by the accused person or, on his behalf by his defence lawyer. I am concerned that notwithstanding such decision of the Attorney General must be sanctioned by the High Court, an up-to ten-year rehabilitation programme, which may envisage deprivation of liberty (Clause 94(2)(e)), can be imposed on the accused without establishing proof of guilt (Clauses 72(3)&(4) and 77(2)&(3)). Even in the event that participation in a rehabilitation programme is offered as a ‘plea bargain’ or voluntarily, this practice would appear to be coercive, as an accused

would have to choose between a circumscribed period of rehabilitation or the prospect of prolonged deprivation of liberty before trial and during lengthy trial processes without any requirement of due diligence prescribed by law.

Furthermore, Clauses 72(5) and 77(5) stipulate that if the accused fails without valid excuse to comply with any of the imposed conditions of suspension, deferment and withdrawal of the indictment, the Attorney General may file a fresh indictment against the accused on the same charges in the original indictment and proceed to prosecute the accused. after the lapse of up to ten-year period given for the accused to fulfil such conditions. I am gravely concerned that such power of the Attorney General without judicial oversight leaves those indicted in prolonged uncertainty under law. Furthermore, filing a fresh indictment after a person has spent up to five or ten-years in the rehabilitation programme, appears to be in violation of the prohibition of double jeopardy prescribed in article 14(7) of ICCPR, in particular, when the indictment is withdrawn by the Attorney General during the trial and/or the rehabilitation programme envisages the deprivation of liberty.

#### **Access to counsel and habeas corpus:**

I acknowledge that Clause 39(1) pertaining to detention provides that “[d]uring the pendency of a Detention Order, the suspect shall be produced before a Magistrate once in every fourteen days.” However, once the detention order reaches its maximum duration (up to eight weeks) and the suspect is moved to remand custody pending trial, I note with concern that the new legislation does not envisage the right of the suspect or his defence lawyer to appeal the decision of the Magistrate to be placed on remand and be brought to court. This is not consistent with Sri Lankan obligations under article 9(4) of ICCPR to ensure habeas corpus.

Furthermore, Clause 44 allows defence lawyers to have the right to access to his/her client in police custody, and to make representations, as provided for in written law. However, the right to access to the defence lawyer is limited by Clause 48(1), which stipulates that the place of detention or remand of the suspect, detained or remanded, shall be accessible to his defence lawyer only after prior permission is obtained from the officer in charge of such place of detention or prison.

In this regard, I would like to refer your Excellency’s Government’s attention to principles 9, 10 and 11 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37), which, *inter alia*, stipulate that persons deprived of their liberty shall have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension. Assistance by legal counsel in the proceedings shall be at no cost for a detained person without adequate means or for the individual bringing proceedings before a court on the detainee’s behalf. In such cases, effective legal aid shall be provided promptly at all stages of the deprivation of liberty; this includes, but is not limited to, the detainee’s unhindered access to legal counsel provided by the legal aid regime.

Procedures shall allow anyone to bring proceedings before a court to challenge the arbitrariness and lawfulness of the deprivation of liberty and to obtain without delay appropriate and accessible remedies, including the detainee, his or her legal representative, family members or other interested parties, whether or not they have proof of the consent of the detainee. No restrictions may be imposed on the detainee's ability to contact his or her legal representative, family members or other interested parties. The court should guarantee the physical presence of the detainee before it, especially for the first hearing of the challenge to the arbitrariness and lawfulness of the deprivation of liberty and every time that the person deprived of liberty requests to appear physically before the court.

**Confidential reports violate the right to fair trial and due process standards:**

I am concerned that Clause 36 prescribes filing by police a confidential report to the Magistrate. This confidential report, which will include the allegations against the suspect, the findings of investigation, and the reasons which require further detention, must be kept confidentially by the Magistrate and the suspect or his lawyer will only be able to access the information "necessary to object to extension of the detention". If the confidential reports are accepted into Magistrate's practice, there will be no means by which the suspect can evaluate and challenge the basis on which they are being detained. Even the limited scope permitted for suspects to access 'information necessary' in order to object to the extension of their detention will be constrained by the judgement, interest and competence of the police officer or Magistrate who will decide what information is made available to the suspect or his lawyer for this purpose. Furthermore, such practice will undermine the principles of equality of arms and adversarial proceedings. The failure to ensure that all information relevant to the suspect's detention, which is submitted by police to the court, including the nature and description of the offence will severely restrict the right of the suspect to be heard and prepare his/her defence. This is contrary to the obligations of Sri Lanka enshrined in articles 9 and 14 of ICCPR.

**Overbroad discretionary emergency like powers of the Minister to declare any location as a prohibited place without judicial supervision and to issue proscription and restriction orders:**

In accordance with Clause 84, through publication in the Gazette, the Minister<sup>3</sup> may declare through publication in Gazette any public place or any other location a "prohibited place", where unauthorized people are not allowed to enter, take photographs and make video recording. I am concerned that this power extends to private locations. The draft CTA also does not provide for a clear purpose and exigency of such decision, nor for its duration. Furthermore, unlike other new powers given to the Minister by the draft CTA, including the proscription and restriction orders, the decision to declare a prohibited place is not subject to any appeal to or oversight by the judiciary. While I

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<sup>3</sup> According to Clause 99, Minister means the Minister assigned the subject of Law and Order.

acknowledge that judicial review is permitted by Clause 96, a broader judicial oversight is necessary for the exercise of such a wide power. I am concerned that this new power, which may result in substantial restrictions of freedoms of movement and expression, including access to and collection of the information, does not comply with the principles of legality, necessity and proportionality. Furthermore, it appears that this new emergency like power will be available to the Minister at any time – “from time to time” without clear limits on its duration (Clause 84(1)).

In this regard, I would like to draw attention of your Excellency’s Government to my report (A/HRC/37/52) on the human rights challenge of states of emergency in the context of countering terrorism. In its paragraphs 58 and 59, I underline that international law does not allow the permanent use of emergency powers that implicate indefinite imposition of larger restrictions or suspension of human rights and fundamental freedoms. The indefinite use of emergency powers through counter-terrorism legislation and administrative practice invariably “infects” the totality of the ordinary legal system.

In this context, I am very concerned about possible encroachment on human rights of new emergency like powers given to the Minister in Clauses 81 and 82 – notably, to issue proscription and restriction orders, which can be based on a ‘reasonable belief’ that any one of the broadly defined offences in the CTA is being committed, or for any reason the Minister believes that an organization or a person is acting in a manner prejudicial to national security. It appears that an extremely broad range of organisations and/or individuals might be subjected to regulation under this provision, and that the proscription order regime goes beyond the proposed CTA’s specified offences. I am deeply concerned that proscription orders can be issued based on the requests of other countries. I am highly concerned that proscription orders can be issued indefinitely. The right of the affected individual or organization to challenge the decision in the Court of Appeal appears limited, because of the vague and broad definition of terrorism and overly broad scope of the offences, which was already raised above.

**Overbroad discretionary emergency like powers of senior police officers to issue orders restricting freedom of movement:**

I am concerned by new overbroad discretionary emergency like powers of senior police officers to issue orders restricting freedom of movement without stipulating a requirement of due consideration of the exigency of the situation and limitation of such orders to secure the crime scene. Clause 62 (1)(a) to (h) empowers a police officer not below the rank of Senior Superintendent of Police to issue directives to the public without judicial authorization or oversight, *inter alia*, not to enter any specified area/premises; not to leave a specified area/premises; to remain within a specified area; not to travel on any road; and not to transport anything or anybody. Such directions could potentially be used to prevent a person from exercising their right of freedom of movement, freedom of assembly, prevent journalists from entering a place to cover any event, prevent persons from protesting at particular sites or marching along any road.

**Overbroad discretionary emergency like powers of the President to declare curfews to facilitate investigations.**

I note with concern that notwithstanding the powers provided under the Public Security Ordinance, Clause 83 of the draft CTA will allow the President on his/her own or on recommendation of the Minister to declare a curfew for a specified period either to the entirety or part of Sri Lanka including its territorial waters and air space for the purpose of (a) controlling, detecting or investigating the occurrence of systematic and widespread committing of terrorism and other offences under this Act; (b) for the protection of national or public security from terrorism and other offences under this Act; or (c) to prevent the systematic and widespread committing of offences under this Act. A Curfew Order may be for a maximum period of 24 hours at a time and there shall be a ten-hour break between two Curfew Orders.

In accordance with Section 16 of the Public Security Ordinance, the President of Sri Lanka, for the maintenance of public order, has the power to make orders that no person in a specified area during a specified time shall be on any public road, railway, park, recreation ground or public ground or seashore. While this existing power is in itself considerably wide and may be exercised for a maximum of one month, the proposed CTA does not include the threshold of there being an actual public order concern to justify declaring curfew. I am concerned that the new threshold would be simply the purpose of investigating an occurrence of terrorism or other offence under the draft CTA. Even though the curfew would be for a short period of 24 hours at a time, it can potentially be continually extended with only a 10 hour interval between each extension.

In this regard, I would like to remind your Excellency's Government the requirement of article 12(3) of ICCPR to ensure that the right to liberty of movement may be restricted in exceptional circumstances. Article 12 of ICCPR authorizes State to restrict this right only to protect national security, public order (ordre public), public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes, and must be consistent with all other rights recognized in ICCPR (paragraph 11 of Human Rights Committee's General Comment 27).

**Central Database for arrests and detention, and concerns relating to privacy:**

Clause 26(1) of the draft CTA states that the Inspector General of Police shall establish and maintain a Central Data Base and Register, which contains information with regard to each arrest, detention, remanding, grant of bail, discharge, prosecution, conviction or acquittal and punishment of persons arrested under this Act. I am concerned that there are real and consequential risks of such information about individuals being shared between state institutions and international agencies, and potential impact on those persons merely suspected, detained or charged, and not yet convicted with regard to

reputation, freedom of movement, and exercise of rights relating to property and employment. The proposed law contains no adequate safeguard against these risks.

Excellency, your Government is well-placed and has shown significant commitment to the reform of counter-terrorism law and practice. Sri Lanka has a significant opportunity to demonstrate positive, human rights and rule of law compliant approaches to the adoption of counter-terrorism law. I underscore that a human rights-compliant anti-terrorist legislation would set a positive example for Sri Lanka, but also for the region, and the world.

The current draft affords significant power to the police and military, which might result in a pre-disposition towards continued detention rather than protect a suspect from unjust or unfair deprivation of liberty, even in the absence of reasonable cause. Therefore, I urged your Excellency's Government to consider my findings and recommendations in your efforts to address the challenges identified in the PTA, and to ensure accountability and meaningful oversight in the exercise of counter-terrorism powers in Sri Lanka.

I may offer 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.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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