COUNTERING TERRORISM AT THE EXPENSE OF HUMAN RIGHTS

CONCERNS WITH SRI LANKA'S COUNTER TERRORISM BILL

AMNESTY INTERNATIONAL

SRI LANKA: COUNTERING TERRORISM AT THE EXPENSE OF HUMAN RIGHTS

BACKGROUND

When the government of the time lifted the State of Emergency in August 2011, the Emergency Regulations that had paved the way for prolonged detention of suspects without charge under the Public Security Ordinance also lapsed. However, the Prevention of Terrorism Act (PTA), intended as a temporary piece of legislation in 1979 that contained provisions similar to the Emergency Regulations, was retained to become a permanent feature of Sri Lanka's criminal justice system. It allowed for extended periods of detention without charge. It was intended to prevent "elements or groups of persons or associations that advocate the use of force or the commission of a crime as a means of, or as an aid in, accomplishing governmental change within Sri Lanka."[1]

The legislation is well known for its draconian provisions[2] including:

- For suspects to be held without charge for up to 18 months.
- For arbitrary orders to be made by the Minister of Defence restricting freedom of expression and association, with no right of appeal in courts.
- For special rules of evidence allowing for confessions to be admissible in court.
- For the onus to be placed on a suspect to prove to a court that a statement was made under duress.

In a 2012 report, Amnesty International found that, "since armed conflict with the LTTE [Liberation Tigers of Tamil Eelam] erupted in 1983, tens of thousands of Tamils suspected of links to the LTTE have been arrested and detained under the Prevention of Terrorism Act (PTA)."[3] The PTA is also used as a tool to quell dissent against government. Exiled journalist J.S. Tissainayagam was convicted under the Act in 2009 for criticizing the Sri Lankan military's treatment of civilians. The evidence against him was based on a "confession" he told the court he had made under duress.[4] Although he was pardoned in June 2010, the conviction led to widespread domestic and international calls to repeal the PTA.

> **"…the PTA had been used to commit some of the worst human rights violations, including widespread torture and arbitrary detention, in the run-up to and during the conflict, particularly to target minorities and suppress dissent"**
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> Former UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, Ben Emmerson

Following his mission to Sri Lanka in 2017, the then UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, noted that "the PTA had been used to commit some of the worst

[1] Preamble, Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.
[2] Amnesty International, *Locked away: Sri Lanka's security detainees*, 2012, https://www.amnesty.org/download/Documents/20000/asa370032012en.pdf
[3] Amnesty International, *Locked away: Sri Lanka's security detainees*, 2012, https://www.amnesty.org/download/Documents/20000/asa370032012en.pdf
[4] Amnesty International, *Sri Lanka jails journalist for 20 years for exercising his right to freedom of expression* (News story, 1 September 2009), https://www.amnesty.org/en/latest/news/2009/09/sri-lanka-condena-periodista-20-anos-prision-ejercer-libertad-expresion-20090901/

human rights violations, including widespread torture and arbitrary detention, in the run-up to and during the conflict, particularly to target minorities and suppress dissent."[5]

In its 2015 Resolution 30/1, the Human Rights Council welcomed "the commitment of the Government of Sri Lanka to review and repeal" the PTA, "and to replace it with anti-terrorism legislation in accordance with contemporary international best practices."[6] Close to 40 years since its enactment as a temporary measure, the PTA remains on the statute books.

> **"…individuals with various real or imputed links or association to the LTTE have been detained for years without charge or trial, without any judicial review of their detention, and with almost no possibility of release"**
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In his post-mission Report in July 2018, the then Special Rapporteur on counter-terrorism revealed that "the Office of the Attorney General provided figures from which it is apparent that out of 81 prisoners at the time in the judicial phase of their pre-trial detention, 70 had been in detention without trial for over five years and 12 had been in detention without trial for over ten years."[7] The Special Rapporteur was also informed that "at least until his visit, the Attorney General almost inevitably refused to grant consent to bail applications. As a result, individuals with various real or imputed links or association to the LTTE have been detained for years without charge or trial, without any judicial review of their detention, and with almost no possibility of release."[8] In his preliminary findings in July 2017, the then Special Rapporteur was "extremely concerned to learn that eighty per cent of those most recently arrested under the PTA in late 2016 complained of torture and physical ill-treatment following their arrest, in cases which were later dealt with under ordinary criminal law."[9]

The Human Rights Commission of Sri Lanka (HRCSL) in its 2016 submission to the UN Committee against Torture also highlighted the blatant use of torture within the Sri Lankan context. They noted that according to complaints received by the Commission, "torture is routinely used in all parts of the country regardless of the nature of the suspected offence for which the person is arrested." Furthermore, the HRCSL submission stated:

"Thirteen persons arrested under the PTA since April 2016 have complained of ill-treatment and torture, either at the time of arrest and/or during initial interrogation following arrest. Methods of ill-treatment and torture reported to the Commission include beating with hands, plastic pipes and sticks, being asked to strip and genitals being squeezed using plastic pipes, forced to bend and beaten on the spine with elbows, being strung upside down on a hook/fan and beaten on the soles of the feet, being pushed to the ground and kicked and stepped on, inserting pins on genitals, burning parts of the body with heated plastic pipes, handcuffing one hand behind the back and the other over the shoulder, inserting a stick between the handcuffs and pulling the hands apart. Detainees also stated they were handcuffed and blindfolded when transported to detention facilities and during this period, which could amount to at least six to eight hours, were not allowed to use sanitation facilities."[10]

Addressing the UN Committee against Torture in 2016, the government claimed to adopt a "zero tolerance policy" towards torture.[11] Following a spate of arrests under the PTA in April 2016, the HRCSL issued Directives on Arrest and Detention under the PTA.[12] The President as Commander-in-Chief of the Armed Forces and Minister of Defence has instructed the police and security forces of the new directives.[13]

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[5] Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, July 2018, https://www.ohchr.org/Documents/Countries/LK/Sri_LankaReportJuly2018.PDF
[6] UNHRC Resolution 30/1 (A/HRC/RES/30/1), https://www.mfa.gov.lk/wp-content/uploads/2018/03/RES-30-1.pdf
[7] Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, July 2018, https://www.ohchr.org/Documents/Countries/LK/Sri_LankaReportJuly2018.PDF
[8] Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, July 2018, https://www.ohchr.org/Documents/Countries/LK/Sri_LankaReportJuly2018.PDF
[9] OHCHR, *UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to Sri Lanka Preliminary findings of the visit to Sri Lanka*, July 2017, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21883&LangID=E
[10] Report of the Human Rights Commission to the CAT Review of the 5th Periodic Report of Sri Lanka, October 2016, http://hrcsl.lk/english/wp-content/uploads/2016/11/Report-to-CAT-Committee-.pdf
[11] "Lanka committed to zero tolerance policy on torture: AG", *Daily News*, 16 November 2016, http://www.dailynews.lk/2016/11/16/local/99275
[12] Directives issued by the Human Rights Commission of Sri Lanka on Arrest and Detention under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, http://hrcsl.lk/english/wp-content/uploads/2016/05/Directives-on-Arrest-Detention-by-HRCSL-E-.pdf
[13] "Sri Lankan President issues new directives for arrests under PTA", *Business Standard*, 20 June 2016, https://www.business-standard.com/article/international/sri-lankan-president-issues-new-directives-for-arrests-under-pta-116062000525_1.html

"…torture is routinely used in all parts of the country regardless of the nature of the suspected offence for which the person is arrested"

Human Rights Commission of Sri Lanka

The "Policy and legal framework of the proposed Counter-Terrorism Act of Sri Lanka,"[14] which was approved by the Cabinet in April 2017, came under heavy criticism by civil society and the international community alike for not being in accordance with international law. As noted by the Special Rapporteur on counter-terrorism, the framework did not offer adequate protection against arbitrary arrest, detention, torture and other cruel, inhuman or degrading treatment or punishment (other ill-treatment), since it maintained the admissibility into court of "confessions" made to a police officer in custody without adequate safeguards, provided for a broad definition of terrorism and granted significant powers of arrest and detention to authorities amounting to powers of arbitrary arrest and detention.[15]

The present Bill[16] was approved by the Cabinet on 11 September 2018 and issued by gazette on 17 September 2018. The Bill was presented in Parliament on 9 October 2018, despite the concerns already raised by some quarters of civil society, including some even questioning the need for counter-terrorism legislation[17] when there is already adequate legislation to tackle extraordinary or emergency situations.

At the pre-enactment judicial review stage of the Bill, petitioners challenged many provisions of the Bill in the Supreme Court of Sri Lanka. In November 2018, the Supreme Court determination[18] was presented to the Parliament by the Speaker where it noted sections of the Bill that violate Sri Lanka's Constitution. The Court held that the Bill could only become law with a two thirds majority in Parliament and approved by the people at a referendum. However, the Court also noted that the inconsistencies would cease if the sections are amended as per the determination of the Court.

Amnesty International takes this opportunity to note many concerns about the potential for human rights violations under the Bill. Given Sri Lanka's experience of abusive counter-terrorism and emergency laws and regulations, and the tendency of consecutive governments to retain legislation that provides sweeping powers to law enforcement, Amnesty International believes that the legislation must be rectified at this stage and brought into line with international human rights law and standards as well as contemporary best practices. Given the opaque drafting process and the lack of consultations around the Bill, Amnesty International wishes to take the drafters, the Government and Members of Parliament through our most salient concerns, while also offering recommendations to amend the Bill to bring it in line with international law and standards.

Amnesty International also notes with concern the potential for new amendments to be made during the Committee Stage debates in Parliament, which would introduce additional powers. Introducing new powers in this manner would deprive the legislation of pre-enactment public scrutiny and judicial review.

[14] Leaked paper available here: http://www.sundaytimes.lk/161016/Cabinet%20Version%20-%20CT%20Poliyc%20and%20Bill.pdf
[15] Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, July 2018, https://www.ohchr.org/Documents/Countries/LK/Sri_LankaReportJuly2018.PDF
[16] Proposed Counter Terrorism Bill issued by gazette, 17 September 2018, http://documents.gov.lk/files/bill/2018/9/528-2018_E.pdf
[17] "The terror of counter-terror laws", *Sunday Observer*, 21 October 2018, http://www.sundayobserver.lk/2018/10/21/opinion/terror-counter-terror-laws
[18] Supreme Court determination available here: https://www.parliament.lk/uploads/bills/gbills/scdet/6123.pdf

INTRODUCTION

Far from being a break with the past, according to analysis by Amnesty International the new Counter Terrorism Bill proposed by Sri Lanka would require substantial amendment to be brought in line with international law. The draft law, which permits detention without charge for up to one year, contains ambiguity on critical definitions of what constitutes an offence of terrorism, and would permit detention for up to 14 days without access to a court of law. Although the Bill improves on some aspects of the draconian measures in the Prevention of Terrorism Act (PTA), there are many provisions in the current Bill which give cause for alarm.

Amnesty acknowledges two key changes in the Bill from its predecessor. The proposed Counter Terrorism Act provides better safeguards against admitting coerced confessions as evidence against suspects. Furthermore, in contrast to the PTA, the proposed legislation shifts the burden of proving that any confession was made voluntarily from the suspect to the prosecuting authority.

Sri Lanka promised to repeal the PTA when it co-sponsored UN Human Rights Council Resolution 30/1 in October 2015 and to replace it with anti-terrorism legislation which would be in accordance with contemporary international best practice. Repealing the PTA has been delayed by three years and the proposed legislation is a far cry from what the government promised.

Sri Lanka is a state party to the International Covenant on Civil and Political Rights (ICCPR), as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In both these international treaties, Sri Lanka has committed to protecting several rights which are not permitted limitation under international law, including the right to life, and the right to be free from torture and ill treatment. International law is clear that no restrictions are permitted to be placed on these rights, nor are derogations from them permitted in a declared state of emergency which threatens the life of the nation. Article 4(1) of the ICCPR states that even in such a declared state of emergency, where states may derogate from certain other rights, such derogation must be temporary and only what is strictly required by the exigencies of the emergency. And more generally, any restriction on a right must be only what is demonstrably necessary and proportionate to achieve a legitimate aim which is prescribed by law. If the Counter Terrorism Bill is to become law, it will violate several of these human rights obligations.

THE OFFENCE OF TERRORISM

The way the offence of terrorism is defined in section 3 is deeply worrying. The intention element (*mens rea*), for example, is vague. The intention of "intimidating a population" (section 3(1)(a)) could be applied in a way that defines legitimate peaceful protests as having criminal intent.

"Compelling the government of Sri Lanka" under section 3(1)(b) is also an element of the offence if it is wrongful or unlawful. Just as in the previous example, the term "wrongful" may be interpreted to include acts such as legitimate trade union actions, and strikes or protests by civil society.

Section 3(3) tempers the effect of this definition by stating that actions taken in "good faith" in the "lawful exercise of a fundamental right" shall not amount to an offence; but since "good faith" remains undefined, the definition remains subjective and does not offer an effective safeguard against abuse.

The actions that constitute an offence of terrorism listed under section 3(2), if perpetrated with the requisite intention, are dangerously broad. Amongst many, of concern are: "committing the offence of robbery, extortion or theft, in respect of State or private property" (section 3(2)(e)); "causing destruction or damage to religious or cultural property or heritage" (section 3(2)(i)); and "causing obstruction or damage to, or interference with, any electronic or automated or computerized system or network or cyber environment of domains assigned to, or websites registered with such domains assigned to Sri Lanka" (section 3(2)(g)). These offences should be tried as ordinary criminal offences rather than through counter-terrorism charges.

Vaguely worded section 3 lends itself to abuse, especially in the context of previous abuse of the PTA by law enforcement authorities in Sri Lanka. This is only compounded by the heavy penalty of 20 years in prison and a fine of up to 1 million Sri Lankan rupees for those convicted of the offence of terrorism (section 4(1)(c).[19]

All counter-terrorism laws must be consistent with international human rights law and standards. One element of this is that they must comply with the principle of legality.[20] They must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and must be made accessible to the public. Laws must not confer unfettered discretion on authorities, but rather provide sufficient guidance to those charged with their application to enable them to ascertain the sort of conduct that falls within their scope. With regard to criminalization, the principle of legality requires that the law must classify and describe offences in precise and unambiguous language that narrowly defines the punishable behaviour.

[19] For offences under section 3 other than the offences referred to in paragraph (a) and (b).

[20] The principle of legality under international law provides for guarantees against the state's arbitrary exercise of its powers, and therefore any restriction on human rights must be provided" or "prescribed" by law. See Articles 12, 17, 18, 19, 21 and 22 of the ICCPR.

Amend section 3 of the Bill that defines the intention element as well as terrorism-related acts so that the definition for what constitutes such an offence is not overly broad, vague or subjective.

OTHER OFFENCES ASSOCIATED WITH TERRORISM

According to section 6 of the Bill, anyone who "under a common purpose or a member of a proscribed terrorist organization who commits jointly or severally" a terrorism-related act, or one of the additionally listed offences, with the intention of "adversely affecting the territorial integrity, national security and defence of Sri Lanka" or intimidating a civilian population, is committing an offence associated with terrorism. Committing robbery, extortion, theft or mischief or other damage to property of the State (section 7(c)); committing any offence under the Poisons, Opium and Dangerous Drugs Ordinance (section 8(g)); and a broad range of financial crimes (section 8) are amongst many acts that constitute an offence associated with terrorism if carried out in such a way that is deemed to harm national security or intimidate the civilian population. The breadth of acts that fall into this section is concerning, not least because "national security" is not defined in the Bill.

The Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR provides some guidance on defining "national security". It states:

"National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse.

The systematic violation of human rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population."[21]

Section 10(g) of the Bill criminalizes certain expression even where it does not expressly advocate the commission of an offence. The conduct can still be deemed an offence if (a) there is intentional and unlawful distribution of information to the public, (b) with intent to incite commission of an act of terrorism, and (c) cause the fear of such an offence being committed. The meaning of this provision is difficult to decipher and it appears that even if there is no express advocacy to commit an offence, if the intention to incite commission of an act is deemed to be present, then sharing of information would be an offence. Such a vaguely worded provision may be subject to abuse, and it carries a severe penalty of up to 15 years' imprisonment for the commission of such a crime. This provision therefore raises deep concerns about potential violations of the right to freedom of expression. This offence also lacks any requirement that the principal offence is actually at risk of being carried out.

In terms of Article 19 of the ICCPR, the right to freedom of expression includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".[22] These rights may only be restricted on specific grounds that are set out in Article 19(3); (a) respect of the rights or reputation of others (b) for the protection of public order, national security or public health or morals. Moreover, any restriction must be necessary and proportionate and must be provided by law. Amnesty International is concerned that in its present formulation, section 10(g) lends itself to abuse, and may result in violation of the right to freedom of expression.

Amend section 6 of the Bill that defines the intention element for other offences associated with terrorism so that it is no longer overly broad, vague or subjective.

Amend sections 7 and 8 of the Bill that list "Specified Terrorist acts" and "Aggravated criminal acts associated with terrorism", so that the Bill does not attempt to link penal offences as terrorist acts.

Amend section 10(g) of the Bill, which in its present form is too vague.

[21] Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Principles 29-32, https://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/SiracusaPrinciples.pdf
[22] ICCPR Article 19(2).

INFORMATION TO BE PROVIDED AT THE TIME OF ARREST

Under section 21(2) and (3) of the proposed legislation, only "every reasonable measure shall be taken to convey such information in Sinhala, Tamil or English languages, whichever language understood by the suspect" and where it is not practicable to do so at the time of arrest, "such information shall be conveyed in a language understood by him, as soon as practicable". Without a time-bound requirement to relay such critical information to the suspect at the time of arrest or soon after, the vague provisions of the Bill can be misused.

Amend section 21(2) and (3) to reflect a time-bound requirement to convey critical information to the suspect at the time of arrest or soon after, as the vague provisions of the Bill can be misused.

ACCESS TO COUNSEL DURING INTERROGATION

Although section 54(3)(a) stipulates that the suspect "if he so wishes, be entitled to have access to, or communicate with, an Attorney-at-Law of his choice and obtain legal advice prior to such interview", the Bill does not permit for a counsel to be present at the time the statement is being made. The UN Human Rights Committee held[23] that Article 14(3)(d) of the ICCPR requires the accused to have access to a lawyer at all stages of criminal proceedings, including the initial period of police detention, questioning and investigation.

Amend section 54(3)(a) to permit access to counsel at the time the statement is being made during the interview.

PROCEDURE FOLLOWING ARREST

Post-arrest procedures outlined in the Bill are also concerning. According to section 18 of the Bill, where the arresting officer is not a member of the police,[24] the arresting officer is afforded 24 hours to present the suspect to the nearest police station or police officer – a dangerously long time where the suspect may be exposed to torture and other ill-treatment.

Additionally, the Bill does not envisage a presumption in favour of bail when an application for such is made following the suspect being produced before a magistrate. According to section 27(2)(b), the only statutory reason a suspect would be released on bail is if the grounds for detaining them are not "reasonable".

Under criminal law, remand in custody should be the exception and not the rule. The UN Human Rights Committee has stated that pre-trial detention should be the exception, and bail should be granted, and the only exception to this is where either "the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party".[25]

Under the Bill, a suspect can be remanded in custody for a period of up to six months, which can be extended by a further six months. As such, a person can be detained for a total of one year before the case against them is initiated. One year of pre-charge detention is not in keeping with the right to liberty – and so violates Sri Lanka's international legal obligations.[26] According to the UN Human Rights Committee, even if detention is in terms of the law, it may still be arbitrary. Assessment of arbitrariness is made after considering "inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality".[27]

Suspects released from remand custody or detention under section 43(1), after being produced before a magistrate, may still be "subject to any condition that the Magistrate may impose", meaning restrictions on suspects' rights continue without them having been convicted or even charged with any crime. While conditions of bail may include guarantees to appear for trial,[28] the fact that the

[23] General Comment 32, Article 14, Right to equality before courts and tribunals and to fair trial.
[24] Section 20 of the Bill empowers a member of any armed force or a coastguard officer to make arrests.
[25] See for example, Human Rights Committee, Communication No. 526/1993, *M. and B. Hill v. Spain* (Views adopted on 2 April 1997), UN Doc. GAOR, A/52/40 (vol. II), p. 17, para. 12.3, cited in OHCHR, http://www.un.org/en/ga/search/view_doc.asp?symbol=CCPR/C/59/D/526/1993
[26] See for example, Article 9(1), (2) and (4) of the ICCPR, and in particular 9(3) which states 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 and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."
[27] UN Human Rights Committee General Comment 35, para. 12.
[28] ICCPR Article 9(3).

provision allows for "any condition that the Magistrate may impose," opens this power to the potential of being interpreted more broadly that what is permissible under international human rights law.

The Bill paves the way for officers or members of the armed forces or a coastguard officer to be able to make arrests without warrant (section 17) and gives them broad powers of stop-and-search, to question any person, enter and search any premises or land and seize items. In addition, the Bill does not mention the need to first obtain a warrant for this. Keeping in mind the breadth of acts with the overly broad intention element that together constitutes a terrorist offence, giving officers other than the police these broad powers to stop-and-search and carry out these other actions, is worrying and leaves room for abuse. This concern is exacerbated by the failure in the Bill to require that they can exercise such powers only with a warrant.

In terms of Article 9 of the ICCPR, arrest and deprivation of liberty should only be according to procedure set out by law. According to the UN Human Rights Committee, "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".[29] The ability of officers outside of the police service, including coastguard, to arrest anyone without warrant, on suspicion of a crime committed under this Bill, is a cause for anxiety. The lack of precision noted in many of the sections dealing with offences under this Bill exacerbates the possibility of abuse of this section.

> **"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"**
>
> Article 9 of the ICCPR

Amend post-arrest procedures outlined in the Bill which allow for excessively long time periods for arresting officers to transport suspects to the nearest police station (section 18(1)); make no presumption in favour of bail and provide for suspects to be held on remand for up to one year before the case against them is initiated (section 27(2)(b)).

Amend section 43(1) of the Bill so that subjective restrictions may not be imposed by the magistrate on suspects' rights.

Amend section 17 of the Bill that paves the way for officers or members of the armed forces or a coastguard officer to be able to make arrests without warrant.

SANCTIONS THAT PRECEDE A CRIMINAL TRIAL

Section 72 of the proposed law in effect subverts the right to a fair trial, by giving the Attorney General the power to defer the institution of criminal proceedings against a suspect for five to 10 years. This is in cases where death or grievous bodily injury has not been caused, and the security of the state and the people of Sri Lanka has not been seriously compromised or affected. This is triggered following an application to the High Court to impose conditions on the suspect including "to publicly express remorse and apology before the High Court, using a text issued by the Attorney General"; "to provide reparation to victims of the offence, as specified by the Attorney General"; "to participate in a specified programme of rehabilitation" and "to engage in specified community or social service". In the instance that the suspect fails to comply with these conditions imposed on them, they can be tried for the original offence.

The provisions in this section are problematic for two key reasons. Firstly, the drafters provide for the High Court to impose sanctions on an individual at the behest of the Attorney General without a full and fair trial. No guilt has been established at this stage of proceedings and the accused should therefore be presumed innocent.[30] In effect, these provisions could be used to impose a sanction on someone who has not been convicted, while at the same time leaving the potential of a criminal trial hanging over their head for a period of up to 10 years.

[29] UN Human Rights Committee General Comment 35, Human Rights Committee, para. 22.
[30] ICCPR Article 14(2).

Secondly, these provisions by their very nature demonstrate the worrying degree of both judicial and prosecutorial discretion provided by the Bill. Either a crime is of a significant enough gravity to be the subject of a 20-year sentence, or it is sufficiently minor to be subject to a formal apology and community service. The granting of what amounts to a great deal of discretion to the Attorney General may be subject to abuse, which is especially disturbing given that some of the offences to which this provision applies carry severe sentences of up to 20 years' imprisonment.

Remove section 72 of the proposed Bill, which gives prosecutorial and judicial discretion to impose sanctions on an individual prior to holding a full and fair trial, flouting the suspect's presumption of innocence.

DETENTION ORDERS

According to the Bill, a person can be detained for up to eight weeks based on the suspicion of a senior police officer with "reasonable grounds to believe that the suspect has committed or is concerned in committing an offence under" the Bill (section 31(1)(b) read with section 37). Although section 36 stipulates that detention of over two weeks requires the consent of a magistrate, the officer in charge of the relevant police station "shall file a confidential report in the Magistrate Court" to obtain approval for continued detention of up to eight weeks (sections 36(1) and 37). In such an instance, however, the suspect's attorney is only "entitled to obtain such information that may be necessary to object to the extension of the period of detention" (section 36(3)). ``

Amnesty International is concerned that eight weeks is an excessive period for such a course of detention. Further, no material should be considered by the magistrate without disclosure to the suspect's legal team. In addition, the use of confidential or secret documents based on which detention shall be extended, would seriously prejudice the ability of the accused to defend her/himself and to object to the extension of detention. Even if information is provided to the defence that "may be necessary to object to the extension of the period of detention", the fact that secret documents are submitted to court, which are not fully accessible to the defence, may fatally prejudice the ability of the accused to defend her/himself.

For appeals from a Detention Order made under section 31 (that is, the original Detention Order), there is a separate appeals process to a non-judicial body. Section 41 creates a Board of Review to hear appeals against Detention Orders, constituted of a member of the Ministry of Interior and two members appointed by the Ministry. This Board plainly lacks the judicial independence guaranteed by fair trial safeguards. It is worrying that a non-judicial body would review the original Detention Order.

Review and amend the detention period under section 37 of the Bill.

Amend section 36(3) to make any confidential reports filed in the magistrate court to extend the period of detention available in full to the suspect's attorney.

Review the composition of the non-judicial Board of Review that hears appeals against Detention Orders to make it effective and independent.

PUBLIC PROTECTION ORDERS

Section 62 provides the power for senior police officers to issue directives to the public for the purpose of protecting persons from harm, where they receive information that an offence under the Bill has been committed or is likely to be committed. Such a directive may include, among other things, "not to hold a particular meeting, rally or procession", and of even more concern "not to engage in any specified activity". This "any specified activity", referred to in section 62(1)(m), is not specified. The power to issue such directives requires the approval of a magistrate, who must satisfy her/himself of the necessity of issuing such a directive before giving approval. The Human Rights Commission must also be informed if such a directive is issued, although no time limit has been imposed for doing so.

Amnesty International is concerned that given the broad offences contained in the Bill, there is scope for this power to be misused. A requirement that the power be used only where the measure to be imposed is both necessary to alleviate the harm and proportionate to the harm to be alleviated could help to lessen this risk. While the requirement to obtain the approval of the magistrate, as well as the

requirement to inform the Human Rights Commission of such a directive restricting freedom of movement, assembly and association are welcome safeguards, the fact that some parts of this provision are vague is a cause for concern.

Amend section 62 of the Bill which allows senior police officers to make restrictions on movement and prohibitions on leaving or entering a specific area when an offence under the Bill has been committed or is likely to be committed.

FREEZING BANK ACCOUNTS

Section 66(1)(f) empowers a magistrate to freeze bank accounts of suspects where an application is made by the police in good faith to assist with their investigation, provided that "the Magistrate may on his own motion or on an application made in that behalf, vary such order, or permit the use in good faith of the funds in such accounts by the holder of any such account, for any legitimate purpose". While there is a right to appeal the order, there is no time limit, additional safeguards or a standard of proof specified.

Amnesty International is concerned that in practice, this may mean that any application made purportedly in "good faith" by the police, can result in an account being frozen. Freezing bank accounts, without a mandatory assessment of the proportionality of the measure, is problematic, since it may lead to abuse of the provision. Although the magistrate is mandated to consider whether the application is made in good faith, and the necessity of the request made by the police, the fact that no appeal is available against such an order deepens the possibility of restrictions that violate international human rights law.

Amend section 66 of the Bill to provide for additional safeguards and a time limit to the power to freeze the bank accounts of a suspect.

INTERCEPTING DATA

Section 67 of the Bill provides that upon the application of a senior police officer, a "Magistrate shall, if he is satisfied that the application is made in good faith and the making of such an order is reasonably necessary for conducting investigations" order,

"(a) to direct any person who provides locking or encryption services pertaining to any communication or storage services or equipment of, any data or information or other thing, to unlock or unencrypt the service or equipment and provide information contained therein to such police officer;
(b) to intercept, read, listen or record any postal message or electronic mail or any telephone, voice, internet, or video conversation, or conference or any communication through any other medium;
(c) to access any analogue or digital data or information; exchange or transfer system"[31]

This can be for several purposes including ascertaining, (a) the identity, (b) location of a person who has committed an offence under the law, (c) to facilitate the investigation of, or (f) to take measures to prevent the commission of an offence under the Bill.

In practice, this section provides dangerously broad powers opening the potential for the bulk interception of data. Analysing all electronic data emanating from the territory of Sri Lanka could be claimed to be justified as a measure to prevent the commission of an offence under the Bill. This is exacerbated because the Bill contains such a broad range of offences with a low threshold for an offence to be considered a terrorism-related offence. While there is a necessity test ("reasonably necessary"), this is insufficient and too lenient without a proportionality test in addition.

The Office of the UN High Commissioner for Human Rights in Fact Sheet No. 32 on *Human Rights, Terrorism and Counter Terrorism* states that:

"Any act which has an impact on a person's privacy must be lawful, i.e., it must be prescribed by law. This means that any search, surveillance or collection of data about a person must be authorized by law. The extent to which this occurs must not be arbitrary, which in turn requires that the legislation must not be unjust, unpredictable or unreasonable. The law authorizing interference with privacy must specify in detail the precise circumstances in which the interference is permitted and must not be implemented in a discriminatory manner. This does not mean, however, that States enjoy an unlimited discretion to interfere with privacy, since any limitation on rights must be necessary to achieve legitimate purposes and be proportionate to those purposes."[32]

[31] Section 67(1)(a-c) of the proposed CTA Bill.
[32] OHCHR, Fact Sheet No. 32, *Human Rights, Terrorism and Counter-terrorism*, https://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf

International standards dictate that surveillance must be based on reasonable suspicion and any decision authorizing such surveillance must be sufficiently targeted. According to the Report of the UN High Commissioner for Human Rights on the right to privacy in the digital age, the competences to conduct surveillance and access the product of surveillance must be strictly assigned to specified authorities.[33] Those who have been the subject of surveillance should be notified and have explained to them the interference with their right to privacy. There must be rigorous rules for using and storing the data obtained and the circumstances in which the data collected and stored must be erased need to be clearly defined, based on strict necessity and proportionality.[34] Crucially surveillance is to be conducted only when judicially authorized and where a reasonable suspicion threshold has been met. Safeguards to ensure conformity with these standards are absent from the present Bill.

The provision in its present formulation lacks precision, and may be applied in a manner that abuses the right to freedom of expression. The right to privacy may also be violated, in the absence of specific and precise definition of the circumstances in which such interception of data may occur, and only when justified for the prevention or investigation of the most serious crimes or threats.

Amend section 67 so that it can no longer be used for the bulk interception and decryption of electronic communication.

PROSCRIPTION OF AN ORGANIZATION

Section 81 enables the minister assigned the portfolio of Law and Order to make a Proscription Order banning an organization based on reasonable grounds for believing that the organization is engaged in any act amounting to an offence under the Bill. That the minister only requires "reasonable grounds" means that, in practice, the threshold to be met for proscription is very low. The wide range of terrorism-related offences in the Bill means that its implementation is ripe for abuse, and could be used against the activities of, for example, civil society, non-governmental organizations and media organizations.

Once an organization has been proscribed, significant restrictions can be placed on its activities, severely obstructing or even preventing it from functioning. Further, a Proscription Order made under this section can be initially issued for a period of one year, but it can be extendable by further periods not exceeding one year at a time "taking into account, the contemporary and reliable information and security needs" (section 81(7)).

While there is recourse to appeal the Proscription Order by way of the Court of Appeal, this will be hard to utilize given that "functioning or serving as a leader, member or a cadre of a proscribed terrorist organization" is criminalized under the Bill.[35]

Amend section 81 of the Bill, which empowers a minister to make a Proscription Order banning an organization on the low threshold of "reasonable grounds" to believe that the organization is engaged in an offence under the Bill.

CURFEW ORDER

The Bill permits the President to issue a Curfew Order in accordance with section 83. While most of the rationale for such an order is stated to be the prevention of systematic and widespread terrorism-related offences, it is worrying that an alternative purpose provided for is "the protection of national or public security from terrorism and other offences under this Act." As noted above, national security is not defined within the Bill, and is a concept prone to broad interpretation, and accordingly in this context, abuse. This is only further compounded by the lack of a proportionality test attached to issuing an Order, which in practice would permit the President to issue Curfew Orders based on offences that lack the seriousness necessary to justify such an order

Amend section 83 of the Bill which empowers the President to make a Curfew Order "for the protection of national or public security from terrorism and other offences under this Act," without defining what constitutes "national security" and without the need to apply a necessity or proportionality test.

[33] UNHCR, *The right to privacy in the digital age*, 3 August 2018, https://www.ohchr.org/Documents/Issues/DigitalAge/ReportPrivacyinDigitalAge/A_HRC_39_29_EN.pdf
[34] UNHCR, *The right to privacy in the digital age*, 3 August 2018, https://www.ohchr.org/Documents/Issues/DigitalAge/ReportPrivacyinDigitalAge/A_HRC_39_29_EN.pdf
[35] See Other Offences Associated with Terrorism and Terrorism Associated Acts (sections 6 and 9).

CONCLUDING RECOMMENDATIONS

The Counter Terrorism Bill that has been gazetted in Sri Lanka raises serious cause for concern on many fronts. The vaguely worded offences, the ability to intercept data with minimal judicial oversight, and the detention of persons for up to one year without charge, all require amendment to bring the Bill in line with international law.

Any measures to counter terrorism must be within the standards of international human rights law.[36] Amnesty International urges the competent authorities to:

1. Repeal the PTA and end its use immediately while changes are made to the Counter Terrorism Bill.
2. Establish an independent review mechanism to regularly review counter-terrorism legislation and its implementation[37] and assess its necessity and compliance with international law and standards.
3. Sri Lanka must ensure that any legislation proposed to counter terrorism must meet its obligations under international human rights law.
4. There should be specific legal provisions to immediately respond to any allegations of human rights violations carried out under such counter-terrorism laws, including effective remedies and reparations.[38]

COVER PHOTO: A Tamil protester holds a placard demanding the release of activists being held under tough anti-terror laws in the Sri Lankan capital Colombo on October 14, 2015. Hundreds of Tamils are said to be held in detention without trial for years despite the end of the islands drawn out Tamil separatist war in May 2009. Ishara S.KODIKARA/AFP/Getty Images.

[36] See for example, the Global Counter-Terrorism Strategy Plan of Action, "…international cooperation and any measures that we undertake to prevent and combat terrorism must comply with our obligations under international law…"
[37] OHCHR, *Conformity of national counter-terrorism legislation with international human rights law*, October 2014, https://www.ohchr.org/EN/newyork/Documents/CounterTerrorismLegislation.pdf
[38] OHCHR, *Conformity of national counter-terrorism legislation with international human rights law*, October 2014, https://www.ohchr.org/EN/newyork/Documents/CounterTerrorismLegislation.pdf

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