OHCHR preliminary comments on Sri Lanka's draft Anti-Terrorism Bill

3 May 2023

I. Introduction and overall assessment

The present document contains some preliminary comments by OHCHR on elements of the draft Anti-Terrorism Bill (ATA), and their relationship with the obligations incumbent on Sri Lanka under international human rights law. It is not intended to constitute an exhaustive analysis or enumeration of concerns but is offered as the basis for further technical exchanges and to inform public debate. OHCHR understands that the draft bill will undergo further review and stand ready to provide further comments and inputs in line with international standards.

These comments should be read in conjunction with previous comments by OHCHR, the UN human rights treaty bodies and UN Special Procedures mandate holders on the current Prevention of Terrorism Act (PTA), previous amendments and drafts of new counter-terrorism laws. For instance, in December 2021, seven UN Special Procedures mandates identified five key benchmarks in their communication to the Government, which they consider as "necessary prerequisites" to ensure the PTA is amended to be compliant with international law obligations.[1] They include providing an appropriate definition of terrorism, ensuring precision and legal certainty, provisions to prevent arbitrary detention, measures that adhere to the absolute prohibition on torture, and due process and fair trial guarantees including judicial oversight. In particular, we note the concluding observations of the UN Human Rights Committee on the sixth periodic report of Sri Lanka on 24 March 2023:

The State party should take concrete measures to:

> *(a) Repeal the Prevention of Terrorism Act and replace it with legislation that narrows the definition of terrorism and is compatible with the Covenant and the principles of legal certainty, predictability and proportionality;*
>
> *(b) Ensure that the legislative process for enacting a new anti-terrorism or national security law is inclusive and transparent and facilitates the free, open and meaningful participation of a wide range of stakeholders, including the Human Rights Commission of Sri Lanka, civil society and the public;*
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> *(c) Ensure that individuals suspected of, or charged with, terrorist acts or related crimes are provided, in law and in practice, with all appropriate legal safeguards, particularly the right to be informed of the charges against them, to be promptly brought before a judge, and to have access to legal counsel, in line with article 9 of the Covenant and the Committee's general comment No. 35 (2014) on liberty and security of person;*
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> *(d) Facilitate independent, effective and regular monitoring of all places of detention without prior notice and on an unsupervised basis, including by the Human Rights Commission, to carry out inspections of the situation of individuals detained under the Prevention of Terrorism Act.*

OHCHR welcomes the Government's intention to repeal and replace the Prevention of Terrorism Act to comply with international human rights norms and standards as recommended by UN Human Rights mechanisms. The draft bill contains some improvements, including the removal of a provision which allows confession made to a police officer while in custody as admissible as evidence; visit by the Magistrate to a place of detention once a week and without advance notice, the requirement for the arresting officer to issue a document notifying the arrest to the next of kin of the accused immediately

[1] OL LKA (7.2021).

or no later than 24 hours from the arrest, and arrest/question and search of women to be conducted by women police officers.

However, there are several aspects of the draft bill that are likely to be contrary to the State's obligations under international human rights law. It also introduces offences that, in their implementation, are likely to result in human rights violations and restrictions to civic space. The detention powers under the draft bill are likely to lead to arbitrary deprivations of liberty, due to the length and the lack of judicial and other guarantees, including oversight. Lastly, the draft bill introduces broad exceptional powers to the executive, which may result in human rights violations.

OHCHR notes that the PTA will continue to apply to all ongoing cases pursuant to the PTA and reiterates its appeal for a moratorium on the use of that law and the expeditious review of all remaining cases of persons detained or convicted under that law.

OHCHR notes the numerous public submissions being made by civil society representatives in Sri Lanka and encourages the Government to hold further public consultations with all stakeholders in the further revision and finalisation of the law. Regular review of the compliance of counter-terrorism laws and practices with international human rights standards is critical to ensure that counter-terrorism measures comply with the principles of legality, proportionality, non-discrimination, and necessity. As a good practice, OHCHR encourages the Government to carry out and publish a comprehensive assessment of the human rights compatibility of elements contained in the draft bill, to inform the legislative process.

II. Definition of offences

a) Definition of terrorism

The draft bill provides a definition of terrorism in section 3 that covers a broad range of alternative intent and conduct requirements, many of which rely on broad and ambiguous criteria that go beyond Security Council resolution 1566 (2004) and the model definition of terrorism recommended by the UN Special Rapporteur on Counter Terrorism and Human Rights.[2] This makes the definition of terrorism in the draft bill exceptionally broad; covering both so-called genuine acts of terrorism, but potentially also the legitimate exercise of human rights, including the right of peaceful assembly (see further below). Given its broad scope, the definition is likely to be contrary to the obligations under international human rights law with respect to the formulation of laws,: first, the principle of legality in criminal law,[3] and second, the requirement that restrictions to qualified rights be provided by law.[4] As noted by the UN Human Rights Committee with respect to the latter: "a norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly."[5]

As noted by the UN Special Rapporteur on Counter-Terrorism and Human Rights, the adoption of overly broad definitions of terrorism carries the potential for deliberate misuse of the term as well as the arbitrary application of the law.[6] This risk appears clearly expressed in the potential consequences of the definition in section 3 for the exercise of the right of peaceful assembly and expression. As noted by the Human Rights Committee "while acts of terrorism must be criminalized in conformity with international law, the definition of such crimes must not be overbroad or discriminatory and must not be applied so as to curtail or discourage the exercise of the right of peaceful assembly. The mere act of

[2] A/HRC/16/51 para. 28
[3] See ICCPR art. 15.
[4] See e.g. ICCPR art. 19 and 21.
[5] CCPR, General Comment no. 34 (2011) para. 25.
[6] A/HRC/16/51 para. 26.

organizing or participating in a peaceful assembly cannot be criminalized under counter-terrorism laws."[7]

There are several concerns with the relationship between section 3 of the draft bill and article 21 of the International Covenant on Civil and Political Rights (ICCPR), to which Sri Lanka is a State Party. The first relates to the **requirement of intent**. In the draft bill, the requirement of intent includes "wrongfully or unlawfully compelling the Government of Sri Lanka, or any other Government, or an international organization, to do or to abstain from doing any act", and "unlawfully preventing any such government from functioning". As noted by the UN Human Rights Committee, the right of peaceful assembly "constitutes the very foundation of a system of participatory governance based on democracy, human rights, the rule of law and pluralism."[8] It will thus often be inherent in assemblies with a political message to pressure the Government to do or abstain from conduct. Moreover, as noted by the Human Rights Committee, peaceful assemblies protected under the covenant can be disruptive.[9] Some degree of disruption would therefore not necessarily remove protection from the assembly. Under the draft bill, it would thus appear that where an assembly is declared "unlawful" under domestic law, the intent requirement could be interpreted to be met, raising the question of the circumstances for declaring an assembly unlawful under domestic law. Under international human rights law, a State is precluded from declaring an assembly unlawful for failing to meet procedural requirements with respect to notification.[10] Moreover, while violent assemblies fall outside the scope of protection under ICCPR art. 21, not any act of violence qualifies. As noted by the Human Rights Committee, violence could entail "use by participants of physical force against others that is likely to result in injury or death, or serious damage to property."[11] Isolated acts of violence should not be attributed to the assembly as such.[12] Only when the violence is manifestly widespread within the assembly is the assembly as such non-peaceful.[13]

The second concern relates to the **conduct requirement**, which is ambiguous and excessively broad on several important aspects. The objective elements in section 3 include for example, being a member of a so-called unlawful assembly for the commission of any act or illegal omission set out in paragraphs (a) to (k). It appears that the conduct requirement could be satisfied by mere participation in an assembly declared unlawful, where either the purpose of the assembly is to commit conduct specified in paragraphs (a) to (k), or where participants in the assembly carried out conduct specified in paragraphs (a) to (k). This would appear to be tantamount to attributing purpose or conduct by some participants to all participants. As noted by the Human Rights Committee, isolated acts of violence by some participants should not be attributed to others, to the organizers or to the assembly as such.[14] Where criminal or administrative sanctions are imposed on organizers of or participants in a peaceful assembly for *their* unlawful conduct, such sanctions must be proportionate, non-discriminatory in nature and must not be based on ambiguous or overbroadly defined offences, or suppress conduct protected under the Covenant.[15] With respect to organisers, they can be held accountable for damage or injuries for which they were not directly responsible only where they could reasonably have foreseen and prevented the damage or injuries.[16]

b) Consequences for other offences relying on the definition of terrorism in section 3

[7] CCPR, General Comment no 37 (2020) para. 68.
[8] *Ibid, para. 1.*
[9] *Ibid. para. 7.*
[10] *Ibid. Para. 71.*
[11] *Ibid. Para. 15*
[12] *Ibid. Para. 17.*
[13] *Ibid. Para. 19.*
[14] *Ibid. para. 17.*
[15] *Ibid. para. 67.*
[16] *Ibid. para. 65.*

As a result of concerns with respect to the definition of terrorism, offences referring to, or relying on, the definition of terrorism in section 3 of the draft bill are also problematic, including the criminalisation of attempts to commit the offence of terrorism (section 5), and the offences of association with proscribed terrorist organizations and movements (section 6), aggravated criminal acts associated with terrorism (section 8), terrorism associated acts (section 9), and the speech related offences addressed in the next bullet-point (sections 9 – 11), and training for terrorism (draft section 12).

c) Speech-related offences

In addition to the general concerns with the definition of terrorism, the draft bill also includes provisions that would be tantamount to restrictions to the right to freedom of expression. These restrictions are very likely to fail to meet the requirements that restrictions be provided by law and be necessary and proportionate,[17] and the principle of legality in criminal law,[18] in part because several of them rely on the definitions of terrorism provided in section 3. The provisions in question include the following:

Section 9 (terrorism associated acts) criminalises the gathering or the supply of confidential information and provides for permissible defences. While those defences are welcome, they are narrowly tailored, and would appear not to guarantee against the criminalisation of a wide range of protected conduct, including by journalists, human rights defenders and others.

Section 10 (encouragement of terrorism) criminalises so called encouragement of terrorism. It criminalises speech which is "likely to be understood by some or all of the members of the public as a direct or indirect encouragement or inducement" to "commit, prepare or instigate the offence of terrorism". Section 10 para. 3 criminalises any statement which "glorifies the commission of the offence of terrorism or preparation for the offence of terrorism" and "from which the public may reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances". These provisions are broad and rely on the excessively broad definition of terrorism in section 3. It is therefore likely to restrict a broad range of speech, in a manner contrary to ICCPR art. 19 (3). As noted by the Human Rights Committee, offences such as the "encouragement" or "glorification" of terrorism, must be clearly defined in order not to constitute an unnecessary and disproportionate interference with the freedom of expression.[19]

Section 11 (disseminating terrorist publications) criminalises so called terrorist publications in terms that are highly vague and easily amenable to abuse. It covers, for example content that is "useful in the commission of, or preparation for, the offence of terrorism". Moreover, the provision appears to reverse the burden of proof to the accused (section 11 paragraph 6), with ambiguous requirements.

d) Penalties for offences

The ATA provides for the imposition of the death penalty for acts of terrorism and harsh penalties for other of the crimes covered by section 3. While Sri Lanka has implemented a moratorium on the execution of death penalty since 1976, it has not abolished it. However, the right to life entails that States which have not abolished the death penalty and which are not parties to the Second Optional Protocol to the ICCPR or other treaties providing for the abolition of the death penalty can only apply the death penalty in a non-arbitrary manner, with regard to the most serious crimes and subject to a number of strict conditions.[20] The provision will lead to the arbitrary application of the death penalty contrary to the right to life, given that the draft bill does not prescribe for alternative penalties upon conviction by the High Court for terrorism by murder (section 4). As noted by the Human Rights Committee, "mandatory death sentences that leave domestic courts with no discretion on whether or

[17] See ICCPR art. 19 (3).
[18] ICCPR art. 15.
[19] CCPR, General Comment no. 34, para. 46.
[20] CCPR, General Comment no. 36 (2018), para. 10.

not to designate the offence as a crime entailing the death penalty, and on whether or not to issue the death sentence in the particular circumstances of the offender, are arbitrary in nature".[21]

e) Suspension and deferment of indictment

Section 71 of the draft bill introduces competencies for the Attorney General to suspend and defer the institution of criminal proceedings for a period not exceeding 20 years. Where an indictment is suspended or deferred, the High Court, on application from the Attorney General, is competent to impose conditions for its implementation, including that the individual under indictment publicly express remorse and apology, provide reparation to victims, participate in rehabilitation programmes, and/or undertake community or social service. These provisions risk undermining several of the minimum fair trial guarantees granted everyone charged with a criminal offense, including the principle of presumption of innocence and the right not to be compelled to testify against himself or to confess guilt, reflected in ICCPR art. 14 paragraphs 2 and 3.

III. Law enforcement powers and deprivation of liberty

The draft bill grants the police and the military broad powers to stop, question and search, and arrest and detain, largely dependent on whether the suspected conduct qualifies as offences under the act. Because several of the offences under the act are likely to be contrary to the requirements under international human rights law, the exercise of law enforcement powers in such cases will likely lead to arbitrary deprivation of liberty or arbitrary interferences with privacy, contrary to articles 9 and 17 of the ICCPR.

As noted, the draft bill grants broad powers to the armed forces to implement the law. While the use of the armed forces to carry out law enforcement tasks or to assist in ensuring public security may be necessary, such roles should be exceptional, and the forces in question should receive appropriate human rights training and comply with the same rules applicable to regular law enforcement officials.[22] In such circumstances, the military should be subordinate to the civilian and be held accountable under law applicable to regular law enforcement.[23]

In addition to these concerns, the draft bill provides for several restrictions to the guarantees for individuals deprived of their liberty, in a manner which is likely to result in arbitrary deprivations of liberty:

For example, the draft bill provides for deprivation of liberty subject to so called "detention orders", which can be issued by every Deputy Inspector General of the Police in Sri Lanka (section 31), and which can result in the deprivation of liberty for up to three months (section 31, subsection 1, paragraph c). Deprivation of liberty pursuant to the detention order can subsequently be extended to a total of 12 months upon approval by a Magistrate (section 36). It is not clear whether the provisions regulating deprivation of liberty under detention orders come in addition to pre-trial detention under section 30, which have a maximum duration of one year, but that can be prolonged for three-month periods beyond one year. With respect to administrative and security detention, UN Human Rights Committee has noted that such detention presents severe risks of arbitrary deprivation of liberty. States are under an obligation to show that such detention does not last longer than necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases. (CCPR, General Comment no. 35, para. 15).

[21] Ibid. Para. 37.
[22] See e.g. CCPR, General Comment no. 37, para. 80. See also OHCHR and UNODC, Resource book on the use of force and firearms in law enforcement (2017), pp. 3, 76, 122,
[23] OHCHR and UNODC, Resource book on the use of force and firearms in law enforcement (2017), p. 122.

With respect to pre-trial detention, the ICCPR art. 9 (3) grants the right to a trial within a reasonable time or to release. Persons who are not released pending trial must be tried as expeditiously as possible, to the extent consistent with their rights of defence. The Committee has expressed that extremely prolonged pretrial detention not only constitutes arbitrary deprivation of liberty, but "may also jeopardize the presumption of innocence (CCPR, General Comment no. 35 para. 37).

The scope of judicial guarantees appears to be severely limited. This is particularly the case with respect to challenging detention orders. Under article 9 of the ICCPR, anyone deprived of liberty by arrest or detention is "entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful". While the person subject of a detention order must be produced before a Magistrate, the draft bill appears not to provide for any competence of the Magistrate to review the lawfulness of the detention. The Magistrate appears to be required to 'make an order to give effect to the detention order presented by the respective police officer (section 28, subsection 2, paragraph a), and can only order the release of the individual, if the officer in charge of the relevant police station "so requests on any ground that the Magistrate is satisfied" (section 28, subsection 2, paragraph b).

The lawfulness of a detention order can be appealed to a Board of Review (section 40), the decision of which can be appealed to the so-called Review Panel (section 92). None of these bodies are likely to constitute "courts" within the meaning of article 9 (4) of the ICCPR: the Board of Review is a body consisting of the Secretary of the Ministry of Defence and two other persons appointed by the President (section 40); the Review Panel consists of members appointed by the President, and is tasked, *inter alia*, with oversight of the use of executive powers by law enforcement and the armed forces, and advisory functions to law enforcement and the armed forces, and to the President (sections 89 and 92). As noted by the Human Rights Committee, "courts" within the meaning of the ICCPR art. 9 (4) refers to the ordinary courts within the judiciary. Exceptionally, for some forms of detention, legislation may provide for proceedings before a specialized tribunal, which must be established by law and must either be independent of the executive and legislative branches or enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature.[24]

Section 33 (1) of the draft bill add a requirement to notify the Human Rights Commission of Sri Lanka (HRCSL) of PTA arrests within 72 hours from 'the commencement of the detention'; however, the HRCSL Act already includes a requirement that the HRCSL must be notified of the arrest within 48 hours 'from the time of such arrest or detention'.[25]

IV. Executive powers

The draft bill prescribes for powers by the executive which may lead to violations of international human rights law. These powers are granted with broad executive discretion to restrict rights with limited or no safeguards against abuse, and in part appear to constitute the granting of emergency powers to the executive in times of normalcy.

First, the President is granted the power to declare organisations as 'proscribed organisations' on the recommendation of the Inspector General of Police or the Government of any other foreign country (section 82), which lead to a series of restrictions constituting restrictions to the freedom of association, guaranteed under the ICCPR art. 22. The discretionary powers granted to the President are exceptionally broad. Proscription orders can be issued against organisations accused of an offence amounting to terrorism, or when the President 'has reasonable grounds' to believe an organisation is acting in a manner 'prejudicial to the national security of Sri Lanka, or any other country' (section 82). Orders under section 82 are valid for one year and appear to be renewable for an indefinite number of times.

[24] CCPR, General Comment no. 35, para. 45.
[25] https://www.hrcsl.lk/wp-content/uploads/2020/01/HRC-Act.pdf, para 28.

The combined effect of the scope of powers granted could entail significant restrictions to the freedom of association. There appear to be limited review of those orders or the use of the discretionary powers, except that the individual can request the President for a revocation or file a complaint to the judiciary. Given that terrorism and national security related issues generally are granted deferential treatment by the judiciary, there is a risk that no effective independent review of the decision would be granted to affected individuals.

Second, the President is granted the power to declare any place "prohibited" on a recommendation of the IGP or the Commander, respectively of, Army, Navy or Air Force or the Director General of Coast Guard, which can include prohibitions on the entry and on taking photographs or video recordings and making sketches of the places concerned (section 85). There is no time limit on the period for which a place can continue to be declared a prohibited place and after such an order is made, the officer in charge or 'any other person having lawful authority and control over the prohibited place' has the power to specify the categories of persons who are authorised to enter and remain in such place, as well as impose conditions on entry (section 85, subsection 5). Any person who 'wilfully contravenes an Order made under subsection (1) could be convicted to imprisonment up to three years and to a fine (section 85, subsection 6). The provision under section 85, subsection 7 of the ATA would entail the criminalisation of journalists and activists reporting on human rights violations in designated prohibited places. The President is also granted broad powers to declare curfews in the totality or parts of the territory of Sri Lanka (section 84). These provisions can entail broad restrictions on the freedom of movement, as well as on the freedom of expression and peaceful assembly, and no adequate oversight over the exercise of the executive powers granted appear to be foreseen in the law.