General

Counter-Terrorism and Legal Certainty

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1. INTRODUCTION

We often take for granted a country's need for special legislation to counter 'terrorism'. A conversation on whether such a need exists is often a non-starter; most rights practitioners and legal scholars simply concede the 'need' for counter-terrorism legislation, and confine their engagement to improving the content of such legislation. This article attempts to interrogate a more fundamental question: does the very idea of special counter-terrorism legislation undermine legal certainty – one of the basic precepts of a society governed by the rule of law? The article examines the Sri Lankan government's recent proposals on a draft Counter-Terrorism Act (CTA), and presents a case for abandoning such proposals in favour of legal certainty. It concludes that the imprecise and complex definition for the term 'terrorism' gives non-judicial state authorities inordinate discretion in determining the application of a special procedural regime to individuals. Such discretion, as seen in the Sri Lankan context, leads to arbitrariness, and the collapse of legal certainty.

This article is presented in three sections. The first section briefly discusses the concept of legal certainty and its central place in a society based on the rule of law. The section then explains the relationship between definitions, arbitrariness and legal certainty. The second section examines Sri Lanka's CTA proposals in terms of the concept of legal certainty. It argues that definitional imprecision and complexity, and wide discretionary

powers afforded to law enforcement agents make these proposals inconsistent with legal certainty. The final section presents a case for abandoning special counter-terrorism legislation (i.e. laws with separate procedural regimes), and subsuming the 'mischief' of 'terrorism' within ordinary criminal law. It argues that a clear, precise, and predictable procedural regime, which guarantees to all individuals identical safeguards from the outset, is crucial to upholding the rule of law.

2. DEFINITIONS, ARBITRARINESS AND LEGAL CERTAINTY

The concept of legal certainty concerns the 'clear, equal, and foreseeable rules of law which enable those who are subject to them to order their behaviour in such a manner as to avoid legal conflict or to make clear predictions of their chances in litigation.'[1] Gustav Radbruch, one of the main philosophical proponents of legal certainty, claims that it is one of the central pillars of law.[2] Paul Heinrich Neuhaus accordingly points to the 'public interest' in maintaining 'firm standards that help to avoid confusion and arbitrary actions.'[3]

The normative requirement of legal certainty is most often reflected in the prohibition of the retroactive application of criminal law[4] – an idea that has taken root in Sri Lanka's constitutional and criminal justice frameworks.[5] Yet legal certainty not only concerns the prospective application of law. According to James R. Maxeiner, it is also about ensuring a 'legal system that… guides those subject to the law [and] permits those subject to the law to plan their lives with less uncertainty.'[6] Crucially, legal certainty 'protects those subject to the law from arbitrary use of state power.'[7] Thus it essentially serves two functions as far as individuals are concerned. First, 'it guides them in complying with the law.'[8] Second, it protects them against arbitrary government action by controlling the use of the power to make and apply law.'[9] In this context, legal certainty has become a general principle of law recognised by most legal systems. For instance, European legal systems require 'that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.'[10]

Thus definitional precision and simplicity is central to the idea of legal certainty and the avoidance of arbitrariness. If legal rules are to be predictable, their definitional scope must be relatively unambiguous. When definitions of key terms are imprecise or overly complex, the authority mandated to apply legal rules that flow from such terms become empowered to act arbitrarily.

The term 'terrorism' is notoriously subject to definitional imprecision and complexity. A violent attack that is indiscriminate and meant to intimidate a population or to compel a state to do or to refrain from doing something can be termed an act of 'terrorism'. Yet the term 'terrorist' is used in a variety of contexts – from the description of heinous acts of violence by groups such as *Boko Haram* and the Islamic State to the depiction of deposed political actors such as Mohamed Nasheed. The use of the term 'terrorist' itself has become indiscriminate, and is often meant to intimidate or compel the bearer of the label. 'Terrorism' has therefore become a classification which application and usage are monopolised by the state.

There is no agreed definition of 'terrorism' in international law. Legal scholars such as Ben Saul argue that an international legal definition for 'terrorism' should be introduced to avoid abuse. He observes: 'If the law is to admit the term…it is not sufficient to leave definition to the unilateral interpretations of States.'[11] In this context, the closest we have come to such a definition is the one offered in the draft Comprehensive Convention on International Terrorism. The United Nations General Assembly has been negotiating this draft since 2000, and in 2016, it decided to establish a working group with a view to finalising the draft convention.[12] Article 2(1) of the draft convention offers the following definition of the crime of 'terrorism':

> Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:
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> a) Death or serious bodily injury to any person; or
>
> b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the

environment; or

c) Damage to property, places, facilities or systems referred to in paragraph 1(b) of the present article resulting or likely to result in major economic loss;

when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

This definition appears to be reasonably clear. Yet it remains highly complex and contingent on the presence of multiple factual and motivational factors that cannot be ascertained without further inquiry. Thus even where a precise definition for 'terrorism' is possible, it is hard to avoid complexity.

The overarching challenge in defining 'terrorism' has serious implications for legal certainty. The application of counter-terrorism legislation depends on the definitional scope of 'terrorism'. Thus imprecision and complexity in the definition of 'terrorism' in counter-terrorism legislation risks the arbitrary application of such legislation, and ultimately, the abuse of authority. This risk is reflected in the recent conviction of former Maldivian president Mohamed Nasheed under counter-terrorism legislation. He was accused of ordering the illegal arrest of a judge; and yet, remarkably, his actions were brought under the 'terrorism' rubric. United Nations High Commissioner for Human Rights Zeid Ra'ad Al Hussein observed that the trial was marked by 'flagrant irregularities.'[13] Amnesty International meanwhile described Nasheed's trial and conviction as 'deeply flawed and politically motivated.'[14] In Sri Lanka, journalist J.S. Tissainayagam was convicted under the Prevention of Terrorism Act, No. 48 of 1979 (PTA) for writing an article accusing the Sri Lankan government of war crimes. The definitional scope of the offence he was accused of under section 2(1)(h) of the PTA does not appear to reflect the features of the definition of 'terrorism' under the draft convention discussed above. Under the PTA, the offence does not need 'to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.' Instead, the offence reads much like a colonial-era criminal offence concerning the incitement of violence and injury of religious sentiments.[15] Section 2(1)(h) reads:

> [Any person who] by words either spoken or intended to be read or by signs or by visible representations or otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups [shall be guilty of an offence under this Act].

According to Kishali Pinto-Jayawardena *et al*, '[t]he fundamental contention of the prosecution was that an article written by [Tissainayagam] a Tamil journalist accusing a predominantly Sinhalese Army [of war crimes against Tamil civilians] would incite the commission of acts of violence by Sinhalese readers against Tamils, or lead to racial or communal disharmony.'[16] Tissainayagam was sentenced to twenty years rigorous imprisonment.[17] The journalist subsequently fled the country after being granted bail pending appeal.

What, one might ask, makes counter-terrorism legislation so prone to abuse? The two cases referenced above reveal two types of abuse. The first type relates to the tendency for such legislation to be misapplied to opponents of the state. Nasheed's case reflects this tendency. It is very difficult to argue that the ordering of an arrest of a judge bears the features of 'terrorism' as commonly understood. The application of the PTA to Tissainayagam for accusing the government of war crimes may also be critiqued on this basis. This type of abuse could be avoided through the adoption of a strict and precise statutory definition of the offence of 'terrorism', and by sustaining an independent judiciary that is capable of interpreting the statute. Offences such as incitement under section 2(1)(h) of the PTA would not feature in such a statute, but instead would remain within the confines of ordinary criminal law.

The second type of abuse is procedural in nature, and relates more closely to the question of legal certainty. Counter-terrorism legislation tends to have exceptional procedural regimes, which can be extremely problematic from the perspective of legal certainty. Procedural rules cease to be 'clear, equal,

and foreseeable' if they can be invoked selectively. Moreover, the definitional complexity of 'terrorism' affords executive authorities incredible discretion to apply an exceptional procedural regime to a given suspect. Such discretion can easily be exercised in a manner that targets the ethno-religious or political profile of the suspect concerned – with little or no scope for challenge. For instance, the mere suspicion that a Tamil suspect is a member of a proscribed organisation such as the Liberation Tigers of Tamil Eelam (LTTE) can justify the application of procedures under special counter-terrorism legislation (as opposed to ordinary law) in a given case. In the case of ***Edward Sivalingam***, the possession of an LTTE-issued civilian travel pass was considered adequate to given rise to a 'reasonable suspicion' that the suspect was a member of the proscribed organisation.[18]

The relevant standard to apply in determining the legality of an arrest relates to the concept of 'reasonable suspicion'. A law enforcement officer is permitted to arrest a person under the law if he holds a reasonable suspicion that the person has committed an offence. In public security and counter-terrorism cases, Sri Lankan courts have tended to defer to executive authorities on the question of whether the reasonable suspicion test has been met.[19] Thus, apart from outlier cases such as ***Dhammika Siriyalatha v. Baskaralingam***,[20] courts in Sri Lanka are unlikely to apply an objective test to determine whether a reasonable suspicion was justified. In any event, the test becomes superfluous in the context of a complex definition that incorporates motivational factors. A law enforcement official could not possibly know the motives of a person to intimidate a population or compel a government to do or abstain from doing something, except by establishing and proving relevant facts. Given the definitional imprecision and complexity of the term 'terrorism', the application of a exceptional procedural regime on the grounds of reasonable suspicion of 'terrorism' cannot be justified.

In Tissainayagam's case, procedures under the PTA were applied to the suspect purely as a result of an executive decision to consider him a 'terrorist' suspect as opposed to an ordinary criminal suspect. The suspect was deemed to fall within the scope of the PTA. An exceptional procedural regime under the PTA, as opposed to the Code of Criminal Procedure Act, No.15 of 1979 (CCPA), became applicable to him. This procedural selectivity has serious implications for legal certainty, mainly due to certain procedural features of the PTA that are not reflected in the CCPA. First, section 16 of the PTA provides that statements made by a suspect to an officer not below the rank of Assistant Superintendent of Police may be admissible as evidence against the suspect. This provision has come to be severely abused by law enforcement officials. On the one hand, it has incentivised torture, as a statement to a police officer can be used as evidence to prosecute the suspect. On the other, it has prompted a trend in convictions solely on the basis of confessions. Tissainayagam's conviction was based solely on a confession he claimed was doctored.[21] A similar example is the case of *Nallaratnam Singarasa*, who was also convicted solely on the basis of a confession he claimed was obtained under duress.[22] Second, section 9 of the PTA sets out a framework within which a person could be held in administrative detention for up to eighteen months. Such detention severely curtails the suspect's ability to access legal counsel and mount a sound defence during his trial. Moreover, further procedural impediments that are built into the PTA, such as denial of access to legal counsel, make challenging the detention extremely difficult. The suspect's ability to seek judicial intervention to opt out of the PTA is governed by the PTA's procedural regime, leading to a peculiar paradox. Thus, from the onset, PTA suspects are placed at a disadvantage simply by virtue of an arbitrary decision to apply the PTA to the case rather than the CCPA. It is noted that PTA suspects are burdened with such disadvantage right up until the conclusion of the trial. Such disadvantage amounts to an abuse of process, which has been described by English courts in the following terms:

> It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable.[23]

The Supreme Court of Sri Lanka has meanwhile permitted law enforcement authorities to arrest, detain

and investigate under the PTA, only to later frame charges under the Penal Code, No. 2 of 1883, thereby inflicting an extraordinary procedural injustice on suspects. In fact, in ***De Vaas Gunawardena & others v. The Attorney-General***,[24] the Court upheld the legality of such procedural manipulation. The suspects in the case were accused of abduction and murder, but were arrested and detained under the PTA, only to be later indicted under the Penal Code. Yet the Court, presided over by the then Chief Justice Mohan Peiris, found that the indictment was 'devoid of any illegality or vices'. Thus in practice, the PTA has facilitated the arbitrary application of special procedure, thereby severely undermining legal certainty. Meanwhile, there are reported examples of persons accused under the PTA being in custody for fifteen years, only to be eventually acquitted.[25] Thus the legal uncertainty that flows from the arbitrary application of special counter-terrorism procedures can have very real and often irreversible consequences for litigants.

3. SRI LANKA'S NEW COUNTER-TERRORISM PROPOSALS

In September 2015, Sri Lanka promised the international community that it would review, repeal and replace the PTA. In a historic co-sponsored resolution,[26] it assured the United Nations Human Rights Council that it would replace the PTA with counter-terrorism legislation that complies with international best practices. In April 2017, the Cabinet of Ministers approved a document entitled 'Policy and Legal Framework for the Proposed Counter Terrorism Act of Sri Lanka' (CTA proposals).[27] The proposed framework inherits a number of serious procedural problems from the PTA, including the denial of prompt access to legal counsel, and the admissibility of confessions made to police officers. This section discusses the definitional scope of offences under the CTA proposals, and their deleterious impact on legal certainty.

Clause III(A)(a) of the CTA proposals sets out the scope of the offence of 'terrorism'. It lists out several acts, including killing, damage to property, theft, and interference with essential services or supplies. These acts constitute the offence of 'terrorism' only:

> When the purpose of such conduct, by its nature or context, is to intimidate a population, or to wrongfully or unlawfully compel the Government of Sri Lanka or any other Government or an international organization to do or to abstain from doing any act or prevent the State from functioning or to cause harm to the unity, territorial integrity or sovereignty of Sri Lanka or any other sovereign State.

Yet the structure of the clause enables an extremely broad range of acts to fall within the scope of 'terrorism'. For instance, interference with any critical logistics facility associated with essential supplies, when committed for the purpose of harming 'unity', can constitute the offence of 'terrorism'. Hence a non-violent protest by employees of the National Water Supply and Drainage Board could constitute 'terrorism' if the executive authority believes that it was carried out for the purpose of harming the 'unity' of Sri Lanka. The definitional imprecision of terms such as 'interference', 'harm' and 'unity' affords the executive authority inordinate discretion in such cases. The authority receives virtual *carte blanche* to determine whether or not a suspect falls within the scope of the counter-terrorism law or under ordinary criminal law. A person engaging in the above mentioned non-violent protest is simply unable to foresee the legal consequences of his or her actions. Prosecutorial discretion to try a person for one offence instead of another is not uncommon in criminal law. What makes the definitional scheme of the CTA proposals particularly problematic is the discretion afforded to law enforcement agents to apply an exceptional procedural regime to the suspect based on an assumed motivation; yet such motivation can only be properly established through a factual inquiry at trial.

Clause III(B)(a) sets out 'specified terrorist offences' and once again lists out ordinary acts such as causing death, abduction, theft and causing damage to property. These acts constitute 'specified terrorist offences' when 'committed for [*inter alia*] the purpose of or having the knowledge or reasonable grounds to believe that it would have the effect of adversely affecting the unity…of Sri Lanka.' Moreover, clause III(B)(e)(iii) provides *inter alia* that a person who 'by words spoken or intended to be read… instigates the committing of acts of violence or ethnic, religious, racial or communal disharmony, or feelings of ill-will or hostility between different communities or other groups so as to affect

the unity… of Sri Lanka', commits an offence. Once again, the applicability of these offences would turn on motivational factors that are not cognizable at the outset. Thus the definitional scope of these offences provides incredible discretion to the executive authority to arbitrarily choose to apply the counter-terrorism law or not. Such wide discretion invariably undermines legal certainty, and facilitates the abuse of power.

The procedural regime under the CTA proposals is an improvement on the PTA. For instance, clause XI(j) provides for judicial review of any decision or action purported to have been taken under the Act. Yet two major procedural features of the CTA proposals sets it apart from the ordinary law on criminal procedure as set out under the CCPA, Evidence Ordinance, No. 14 of 1895, and the Bail Act, No. 30 of 1997. First, clause IX provides that confessional statements made to a superintendent of police in the presence of an attorney-at-law are admissible. By contrast, section 25(1) of the Evidence Ordinance provides: 'No confession made to a police officer shall be proved as against a person accused of any offence.' Second, clause IV(xxv) denies the magistrate any discretion in terms of remanding, granting bail to or discharging a suspect against whom no detention order has been issued. The clause instead makes it mandatory for the magistrate to select one of three options based on the application of the Officer-in-Charge of the relevant police station. The magistrate's power to conclude on the reasonableness of the application to remand a suspect becomes superfluous, due to the use of the term 'shall'. Even where the magistrate concludes that the application to place the suspect in remand custody is not reasonable, the clause makes a magisterial decision to grant bail contingent on the agreement of the Officer-in-Charge. The CCPA and Bail Act clearly provide for magisterial discretion with respect to granting bail for offences that are 'non-bailable'. For instance, a magistrate would have discretionary power under ordinary criminal law to grant bail to a person suspected of theft.[28] Yet, if the proposed CTA were applied to such person, the magistrate's power to grant bail would be subject to the concurrence of the Officer-in-Charge of the relevant police station.

Thus the extraordinary discretion afforded to executive authorities to determine the application of the CTA to a given suspect severely undermines legal certainty. The mere belief that a suspect has a particular motivation – for example, to 'harm the unity of Sri Lanka' – empowers the executive authority to apply an exceptional procedural regime to the suspect. Reversing such a decision through judicial review may be difficult in practice, particularly where the suspect is placed in detention and has scarce access to legal counsel. The proposed CTA, much like its predecessor, is thus likely to enable arbitrariness and abuse of power. The question remains as to whether legal uncertainty is a solvable problem confined to particular counter-terrorism laws such as the PTA and proposed CTA, or whether legal uncertainty is an inherent feature of all counter-terrorism laws.

4. ABANDONING SPECIAL COUNTER-TERRORISM LEGISLATION

Proponents of special counter-terrorism legislation may argue that problematic counter-terrorism laws, such as the PTA and proposed CTA, are merely outliers. They may argue that the proper application of counter-terrorism laws to *real* 'terrorists' is both necessary and justified. Yet the current deadlock in the negotiations on the draft convention reveals a deeper problem inherent in all counter-terrorism laws. The deadlock is sustained due to opposing views on whether the definition of 'terrorism' should include the actions of the armed forces of a state and to self-determination movements. Such disagreement reveals the underlying politics behind the application and use of the terminology of 'terrorism' as essentially an 'anti-state' activity. Thus, in practice, states are likely to devise their own approaches to defining 'terrorism' regardless of an international definition. Rumyana Grozdanova accordingly observes that resolving the 'definitional vacuum' concerning 'terrorism' in international law cannot 'guarantee that states would comply with it both in times of normalcy and emergency.'[29] She contends that instead of spending time trying to solve this 'definitional paradox', more efforts should be invested in 'understanding and preventing the root causes of terrorism.'[30]

This line of reasoning may be extended to justify the complete abandonment of *special* counter-terrorism legislation. To do so, however, each apparent justification for the continued recognition of 'terrorism' as a legal class of criminal activity warranting special procedures must be overcome. These justifications

are loosely based on the definition offered by scholars, such as Tamar Meisels, that 'terrorism' is violence against 'defenceless non-combatants, with the intent of instilling fear of mortal danger amidst a civilian population as a strategy designed to advance political ends.'[31] Three such justifications may be considered in this regard.

First, 'terrorists' use human life instrumentally. Proponents of special counter-terrorism laws may distinguish 'terrorism' from ordinary crime based on this essential feature. The 'terrorist' does not target a particular individual when perpetrating an act of 'terrorism'. Instead, he targets a particular society or state as 'recipients' of the news that a certain act has been committed. The nature of the act makes the identity of the victims less relevant except for their profile as members of the targeted society or supporters of the targeted state. This unique feature, proponents may argue, warrants a unique terminology and legislative response. However, this feature is not unfamiliar to criminal law. For instance, acts of hostage taking and kidnappings for ransom have a similar instrumental objective – targeting the recipient of the news rather than the victim. In hostage taking, law enforcement authorities are forced to refrain from intervening to arrest the suspects due to the risk of harm to hostages. In a kidnapping for ransom, the parents of the child are compelled to pay the suspects a ransom to secure the release of the child. In both cases, the victim is reduced to a mere object utilised for a particular purpose. Yet we do not automatically classify these acts as acts of 'terrorism'.

Second, 'terrorists' promote a particular political cause that seeks to displace or disrupt power structures. A number of groups seeking political autonomy engage in acts of violence, which are characterised as 'terrorism'. It is this unique motive that perhaps distinguishes 'terrorism' from other instrumental forms of violence. In criminal law, motive is only relevant insofar as it establishes intent to commit an offence. For example, a motive to exact revenge on the victim helps the prosecution to establish its case against a person accused of murder. However, the motive of revenge does not change the nature of the offence. We do not distinguish between murder based on revenge and murder based on other motives. What is important to the prosecution is simply proving premeditation. Hence the motive of the 'terrorist' should likewise have no bearing on the actual characterisation of the offence. If the 'terrorist' kills a person or a group of persons to further his political cause, it is simply murder based on a political motive.

Third, 'terrorists' commit violence with the intention of causing fear or 'terror'. This etymological approach to defining 'terrorism' often forms the emotive foundation for the usage of the term 'terrorism'. Proponents justify the usage based on the unique intention of the 'terrorist' to 'terrorise' ordinary civilians. The randomness and unpredictability of the violence typifies the characterisation of 'terrorism'. Moreover, the 'terrorist' is invariably depicted as an 'other' bent on destroying 'us'. This characterisation itself causes fear and paranoia in society. The very usage of the term 'terrorism' may cause as much 'terror' as the person described as a 'terrorist'. Yet the intention to cause fear as a motive for violence is not completely uncommon in ordinary criminal law. Drug cartels are notorious for carrying out horrific reprisal killings to warn rival groups and intimidate communities. Yet these cartels are not classified as 'terrorists', and are dealt with under ordinary criminal law.

The individual features of 'terrorism' are certainly not beyond the scope of ordinary criminal law. Criminal law already deals with a variety of acts that display very similar characteristics. However, 'terrorism' is still the only phenomenon that displays all these features at the same time; it retains some distinctiveness as a result. Therefore, the decision to abandon special counter-terrorism laws must be based on the *harm* attached to their continued use. As demonstrated in cases such as Tissainayagam and in legislation such as the PTA and proposed CTA, offering the option of applying a separate procedural regime to a suspect invariably leads to an abuse of power. The terminology of 'terrorism', by its very pejorative nature, lends itself to such abuse. Any legislation that enables executive authorities to pick and choose the applicable procedure severely weakens certainty within a legal system; such legislation cannot survive scrutiny *vis-à-vis* the rule of law.

There are two possible alternatives to special counter-terrorism legislation worth reflecting on. The more radical alternative is to abandon the terminology of 'terrorism' altogether. Violent movements such as the

Islamic State stand to benefit from the rhetoric of fear. By describing them as 'terrorists', states seek to delegitimise them and prompt international cooperation in curtailing their funding and capturing their agents. Yet these objectives are lost on organisations that operate on different paradigms altogether. The famous cliché coined by Gerald Seymour[32] in 1975 in fact greatly benefits and legitimises such groups: 'one man's terrorist is another man's freedom fighter'. As Jonah Goldberg points out in his book, the *Tyranny of Clichés*, such statements are often confusing and unhelpful.[33] Yet they point to another important feature of 'terrorism' – it almost always relates to the actions of individuals and groups who enjoy the support of some segment of the civilian population. This is perhaps the one feature that states neglect to confront when using the terminology of 'terrorism'. The cliché then becomes *part* of the rhetoric of a violent organisation that needs the support of its followers to further its cause. One approach to dealing with this challenge is, as pointed out by Grozdanova, to deal with the 'root causes'. However, not all root causes are within reason. Should, for instance, states constructively engage with an organisation that seeks to capture territory in order to establish an Islamic caliphate? Engagement alone cannot possibly be adequate to quell violence motivated on such lines. Ideological campaigns against such groups are also necessary. And it is in this space that the current use of terminology ought to be revisited. Groups currently termed 'terrorists' need to be re-classified simply as suspected *criminals* – and, in some contexts, *war criminals*. The cliché 'one man's war criminal is another man's freedom fighter' is harder to digest.

In the context of an armed conflict, the re-characterisation of 'terrorists' as 'war criminals' has a sound legal basis. Jean Pictet's commentaries on the 1949 Geneva Conventions – particularly common article 3 of the Conventions – offer some guidance in defining such non-international armed conflicts.[34] He observes that a dispute between a state and a non-state actor with an organised military force who exercises *de facto* control over a part of the population may be classified as a non-international armed conflict. The crises in Syria and Nigeria clearly fall within this framework. A more stringent definition of non-international armed conflicts is found in article 1(1) of Protocol II to the Geneva Conventions. Under this Protocol, the dissident or organised armed group must be under a responsible command, and exercise control over territory in order for a dispute to be classified as a non-international armed conflict. Even under this test, groups such as the Islamic State, *Boko Haram*, and the LTTE may be described as belligerents in a non-international armed conflict. Crucially, these groups are then bound by the laws of war. Their acts of indiscriminate violence against civilians then become violations of international humanitarian law rather than acts of 'terrorism'. Under international criminal law, they are more appropriately described as suspected 'war criminals' rather than as suspected 'terrorists'.

A radical reconfiguration of terminology warrants a deeper interrogation than what the scope of the present article permits. A less ambitious alternative may simply be to subsume the offence of 'terrorism' within ordinary criminal law whereby general criminal procedure would apply. In Sri Lanka's case, the offences relating to 'terrorism' would be governed by the same procedural regime as all other offences. Individuals could then only be found guilty of 'terrorism' once they are tried and the constituent elements of the offence are established beyond reasonable doubt. In the meantime, they would be entitled to all the procedural safeguards that any criminal suspect is entitled to. They would be entitled to access legal counsel, and their confessions to police officers would be inadmissible in a court of law. Moreover, preventative detention of 'terrorism' suspects would not be permitted through administrative orders, but only through the judicial denial of bail. Thus legal uncertainty in countering 'terrorism' may be overcome only through harmonising procedures and removing opportunities for arbitrariness.

5. CONCLUSION

This article attempted to grapple with the fundamental question of whether a legal system requires special counter-terrorism legislation. Few could argue that civilians must be protected from the deplorable phenomenon we have come to call 'terrorism'. Yet that need must not be confused with the need to adopt special legislation with special procedural regimes at the cost of legal certainty. That cost, to a society that values the rule of law, is far greater than the dictates of national security. In this context, the need for special counter-terrorism legislation must not be accepted uncritically; it must be carefully interrogated and contested. This article has accordingly sought to contest

that need by pointing to the irreversible damage that special counter-terrorism legislation can cause to legal certainty. Such legislation invariably affords executive authorities extraordinary discretion to determine the procedural fate of a suspect, thereby leading to selectivity and arbitrariness. Citizens confronted with such laws would find it virtually impossible to foresee consequences, and regulate their conduct accordingly.

Sri Lanka's PTA and proposed CTA exemplify the problem with special counter-terrorism legislation. The incredible abuse that has taken place under the PTA, and the abuse that the CTA will invariably inflict on future generations, thus warrant some introspection. Such introspection is likely to uncover an uncomfortable truth: gratuitous violence against unarmed civilians has not ceased in any way as a result of the so-called global war on terror, or the national use of special counter-terrorism legislation. Instead, we are left with an increasingly polarised world characterised by incredible uncertainty and apprehension. Perhaps it is time to reclaim from this milieu a basic tenet of any civilised society; legal certainty.

(Endnotes)

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1 Paul Heinrich Neuhaus, 'Legal Certainty versus Equity in the Conflict of Laws' (1963) 28(4) *Law and Contemporary Problems* 795-807, at 795.

2 See Heather Leawoods, 'Gustav Radbruch: An Extraordinary Legal Philosopher' (2000) 2 *Washington University Journal of Law and Policy* 489 for an in-depth discussion of Radbruch's work.

3 Neuhaus, *op. cit.* at 803.

4 See Paul Craig, *EU Administrative Law* (Oxford University Press: 2012), at 550.

5 See article 13(6) of the Sri Lankan Constitution, which provides: 'No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.' Also see V. Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press, 2009) for a useful discussion on legal certainty within constitutional frameworks. It is also noted that legal certainty is a principle of administrative law, and underlies the principle of legitimate expectation.

6 James R. Maxeiner, 'Some Realism about Legal Certainty in the Globalization of the Rule of Law' (2008) 31(1) *Houston Journal of International Law* 27-46, at 30.

7 *Ibid*.

8 James R. Maxeiner, *Policy and Methods in German and American Antitrust Law: A Comparative Study* (Praeger: 1986), at 10-11.

9 *Ibid.*

10 See *Korchuganova v. Russia*, No. 75039/01, Judgment of the European Court of Human Rights, 8 June 2006, at para.47. Also see James R. Maxeiner, 'Legal Certainty: A European Alternative to American Legal Indeterminacy?' (2007) 15 *Tulane Journal of International & Comparative Law* 541-607, at 553-554.

11 Ben Saul, 'Defining 'Terrorism' to Protect Human Rights' in D. Staines (ed.), *Interrogating the War on Terror: Interdisciplinary Perspective* (Cambridge Scholars Publishing: 2007), at 190-210.

12 United Nations General Assembly, *Measures to eliminate international terrorism*, Resolution 71/151 adopted by the General Assembly on 13 December 2016, A/RES/71/151.

13 Amnesty International, *Maldives: 13 year sentence for former president 'a travesty of justice'*, at 13 March 2015, https://www.amnesty.org/en/latest/news/2015/03/maldives-mohamed-nasheed-convicted-terrorism/ [last retrieved 13 November 2017].

14 'Maldives ex-president's trial was flawed: U.N. rights chief', *Reuters*, 18 March 2015, https://www.reuters.com/article/us-maldives-trial-un/maldives-ex-presidents-trial-was-flawed-u-n-rights-chief-idUSKBN0ME1RU20150318 [last retrieved 13 November 2017].

15 For example, section 120 of the Penal Code, No. 2 of 1883 provides: 'Whoever by words, either spoken or intended to be read, or by signs, or by visible representations, or otherwise, excites or attempts to excite feelings of disaffection to the State, or excites or attempts to excite hatred to or contempt of the administration of justice, or excites or attempts to excite the People of Sri Lanka to procure, otherwise than by lawful means, the alteration of any matter by law established, or attempts to raise discontent or disaffection amongst the People of Sri Lanka, or to promote feelings of ill-will and hostility between different classes of such People, shall be punished with simple imprisonment for a term which may extend to two years.'

16 See Kishali Pinto-Jayawardena, Jayantha de Almeida Gunaratne & Gehan Gunatilleke, The Judicial Mind: Responding to the Protection of Minority Rights (Law & Society Trust: 2014), at 243-244.

17 *The Democratic Socialist Republic of Sri Lanka v. J.S. Tissainayagam*, H.C. 4425/2008, judgment of Deepali Wijesundara J.

18 *Edward Sivalingam v. Jayasekara*, S.C. (F.R.) Application No. 326/2008, decided on 10 November 2010. Also see

International Commission of Jurists, *Authority without Accountability: The Crisis of Impunity in Sri Lanka* (2012), at 164.

19 See *Hirdaramani v. Ratnavale* (1971) 75 NLR 67; *Gunesekera v. De Fonseka* (1972) 75 NLR 246; *Gunesekera v. Ratnavale* (1972) 76 NLR 316; *Visuvalingam v. Liyanage* [1983] 2 Sri.L.R. 311; and *Susila de Silva v. Weerasinghe* [1987] 1 Sri L.R. 88.

20 C.A. (H.C.) 7/88, Court of Appeal Minutes, 7 July 1988. Also see *Weerawansa v. The Attorney-General* [2000] 1 Sri.L.R. 387.

21 Pinto-Jayawardena *et al*, *op. cit.* at 243.

22 *Ibid*. at 239. See *Nallaratnam Singarasa v. The Attorney-General* S.C. Spl. (LA) No. 182/99, decided on 15 September 2006.

23 *Reg. v. Derby Crown Court, Ex parte Brooks* (1984) 80 Cr.App.R. 164.

24 SC. TAB 01A/2014-01F/2014, judgment of 29 October 2014.

25 See Ruki Fernando, 'Court acquits Tamil mother after 15 years of detention under PTA', *Groundviews*, 10 May 2015, at http://groundviews.org/2015/10/05/court-acquits-tamil-mother-after-15-years-of-detention-under-pta/ [last retrieved 15 November 2017]; 'Colombo High Court acquits PTA suspect', *The Colombo Post*, 28 October 2017, http://www.thecolombopost.net/en/suspect-pta-acquitted-colombo-high-court [last retrieved 15 November 2017].

26 UN Human Rights Council Resolution 30/1, *Promoting reconciliation, accountability and human rights in Sri Lanka*, 29 September 2015, A/HRC/30/L.29.

27 An earlier version of the document was leaked to the press in October 2016. See 'Espionage, several new offences in new Counter Terrorism Act', *The Sunday Times*, 16 October 2016, http://www.sundaytimes.lk/161016/news/espionage-several-new-offences-in-new-counter-terrorism-act-212797.html [last retrieved 15 November 2017]. The Cabinet of Ministers approved a subsequent version dated 24 April 2017.

28 See First Schedule to the CCPA, read with section 5 of the Bail Act, No. 30 of 1997.

29 Rumyana Grozdanova, 'Terrorism' – Too Elusive a Term for an International Legal Definition? (2014) 61(3) *Netherlands International Law Review* 305-334, at 334.

30 *Ibid.*

31 Tamar Meisels, 'The Trouble with Terror: The Apologetics of Terrorism – a Refutation (2006) 18(3) *Terrorism and Political Violence* 465-483, at 480.

32 Gerald Seymour, *Harry's Game* (Random House: 1975).

33 Jonah Goldberg, *The Tyranny of Clichés: How Liberals Cheat in the War of Ideas* (Sentinel: 2013).

34 Jean Pictet, *Commentary: The Geneva Conventions of 12 August 1949* (Four Volumes) (ICRC: 1952).