PROVISIONAL COMMENTS ON SRI LANKA'S DRAFT COUNTER TERRORISM ACT AND COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS NORMS

18 April 2017

INTRODUCTION

1. The Foundation for Human Rights ('FHR') and the University of Pretoria's Institute for International and Comparative Law in Africa ('ICLA') are collaborating on the production of a joint paper reviewing the emerging draft of the *'Policy and legal framework of the proposed Sri Lankan Counter Terrorism Act'* ('PLFCTA'). The authors of the joint paper (and the authors of this document) are Prof Christof Heyns, Director of ICLA and former UN Special Rapporteur on extra-judicial, summary or arbitrary executions; and Toby Fisher, barrister, and consultant to the ICLA.[1]

2. The latest draft of the PLFCTA was published online on 6 April 2017. It follows several revised versions of the initial draft ('the 2016 Draft') that first became available in Sri Lankan media in October 2016 and was later formally acknowledged by the Government. The 2016 draft was the subject of widespread criticism by Sri Lankan advocates and others for its failure to comply with international human rights norms. It is understood that the new draft has responded to comments and advice on the 2016 Draft received from a team of international experts as well as from Sri Lankan experts. Consequently, the new draft contains some positive developments, most notably in relation to: the definition of terrorism; provisions relating to access to, and conditions of, places of detention; and the use of confession evidence.

3. However, a preliminary review of the new draft reveals a number of continuing problems with the PLFCTA which must be addressed if the Sri Lankan government is to adopt a legal framework for counter-terrorism that is compliant with international standards. This document is prepared as a brief, high level summary of the key concerns identified on an initial appraisal of the PLFCTA. A fuller report will be produced when there is more certainty about the final text, hopefully by the end of May 2017.

[1] On our request, senior advocate Kishali Pinto-Jayawardena provided an expert Sri Lankan perspective in relation to a number of the issues dealt with in this paper.

CONTEXT

4. During the long civil war in Sri Lanka, a range of legislative measures were used to deal with the threat of terrorism. The key instruments were: i) the Public Security Ordinance No. 25 of 1947 ('PSO'); ii) Emergency Regulations promulgated under the PSO; and iii) the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 ('PTA'). Over time, these instruments were perceived to have been operated in a discriminatory manner and were seen to facilitate human rights abuses, including arbitrary arrest and torture of detainees, by the Sri Lankan police and security services. In 2011, the almost continuous state of emergency that had been in existence in Sri Lanka since 1971 expired, bringing to an end the State's ability to exercise powers under the PSO and the Emergency Regulations, leaving the PTA as the operative legislative instrument.

5. Since then, a range of international organisations, including the UN Human Rights Committee,[2] the UN Human Rights Council[3] and the European Union,[4] have encouraged the repeal of the PTA. In 2015, the newly elected Government of Sri Lanka, led by President Maithripala Sirisena, committed to repeal the PTA and to replace it with an enactment that could empower the executive to protect the country from terrorism while paying due respect to human rights. As noted above, a draft of the replacement legislation first emerged in October 2016.

6. Notwithstanding the end of the war, and a stated intention to repeal the PTA, the mistreatment of detainees held under the PTA has continued. The UN Committee Against Torture in its concluding observations on the 5th periodic report of Sri Lanka adopted on November 30, 2016[5] noted with concern that the administrative detention regime established under the PTA was still in force and that PTA suspects have been held for as long as 15 years without having been indicted, and even those who have been charged, have remained in detention without a verdict for as long as 14 years. The UN CAT was also concerned over the large number of documented allegations of torture of former and current PTA detainees, who had also alleged

[2]UN Human Rights Committee (HRC), Concluding observations on the fifth periodic report of Sri Lanka, 27 October 2014, para 11
[3]A/HRC/RES/30/1
[4]http://www.dailymirror.lk/article/eu-urges-govt-to-repeal-pta-95589.html
[5]UN Committee Against Torture (CAT), Concluding observations on the fifth periodic report of Sri Lanka, 30 November 2016

violations of their due process rights during detention, in particular restrictions on access to lawyers.[6]

7. The UN CAT took note of the 2016 Draft but regretted the lack of clarity on the scope of terrorism-related offences, the safeguards against arbitrary arrest and the judicial oversight of detention. In the absence of these the UN CAT took the view that there would be a real risk of torture and therefore it would be contrary to the UN Torture Convention.[7] UN CAT recommended that prompt legislative measures be taken to repeal the PTA **a**nd abolish the regime of administrative detention, which confines individuals outside the criminal justice system and makes them vulnerable to abuse. It also noted that in the meantime Sri Lanka should guarantee that magistrates promptly review all detention orders under the PTA, and that detainees who are designated for potential prosecution are charged and tried as soon as possible and those who are not charged or tried are immediately released.[8]

8. The UN CAT's concerns were echoed at the end of 2016 in the report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment in his country visit report to the Human Rights Council.[9] According to the report he interviewed current and former suspects detained under the PTA and received well-documented accounts of extremely brutal methods of torture, including burns; beatings with sticks or wires on the soles of the feet (falanga); stress positions, including suspension for hours while handcuffed; asphyxiation using plastic bags drenched in kerosene and hanging of the person upside down; application of chili powder to the face and eyes; and sexual torture, including rape and sexual molestation, and mutilation of the genital area and rubbing of chili paste or onions on the genital area. In some cases, these practices occurred over a period of days or even weeks, starting upon arrest and continuing throughout the investigation.[10] The Special Rapporteur concluded that the use of torture and ill-treatment to obtain a confession from detainees under the PTA remained a routine practice.[11] He maintained that the Government should immediately repeal the PTA and noted that the Act violates article 155 (2) of the Sri Lanka Constitution, which does not allow for derogation from constitutional rights, except for the restrictions

[6] *Ibid*, para 21
[7] *Ibid*
[8] *Ibid*, para. 22
[9] A/HRC/34/54/Add.,22 December 2016
[10] *Ibid,* para 26
[11] *Ibid.*

foreseen in Article 15. He reiterated that all counter-terrorism legislation needs to be in full compliance with the country's international human rights obligations.[12]

9. The need for a replacement to the PTA is, therefore, clear. The Government of Sri Lanka has publicly committed to delivering that replacement and has committed to ensuring that it complies with international human rights standards. The introduction of human rights compliant legislation is a key condition of Sri Lanka's readmission to the EU's General System of Preferences Plus ('GSP +') scheme.

10. It is in that context that we publish this short paper, to offer a provisional and independent assessment of the very recently published draft. This paper should not be read as a comprehensive review of the PLFCTA which we intend to publish separately in May 2017. It does, however, demonstrate that recent amendments to the PLFCTA – while welcome - do not go far enough to ensure that it complies with the international standards it purports to meet.

HEADLINE CONCERNS

(1) Lack of public information and consultation

11. We note that the PLFCTA has been prepared in private. Whilst we acknowledge the input of some external parties, we are concerned that there has not been a transparent process or adequate consultation with civil society and stakeholders within Sri Lanka and possibly with other international actors. Given the historic context in which the CTA is to be made, we consider that this is a missed opportunity that should be remedied before the CTA is put before Parliament.

12. We also consider it important that both local and international consultees who made comments on the earlier drafts are given the opportunity to make further comments on the more recent draft and that those comments are made publicly available.

(2) Definition of terrorist related offence

13. We are concerned that while improvements have been made from the 2016 Draft in relation to the definition of the offence of terrorism, the definition of 'terrorism-related offences' remains unreasonably wide and gives rise to the risk of abuse of the powers conferred by the PLFCTA.

[12] *Ibid*, para 36

14. The purpose of counter terrorism legislation is to confer on the executive extraordinary powers not available under the ordinary criminal law or procedure. Those extraordinary powers might otherwise be seen as oppressive but are conferred, exceptionally, through legislation because they are considered strictly necessary to protect the public in the specific and unique context of terrorism. They are not conferred to widen the executive's general powers of maintaining law and order and it is therefore crucial that the powers conferred through counter terrorism legislation are applicable only in relation to genuine acts of 'terrorism'.

15. The PLFCTA as it currently reads confers a range of powers on the government of Sri Lanka, including the ability to arrest; to subject suspects to lengthy pre-charge administrative detention; to seize and confiscate assets; to impose curfews and travel bans; and to proscribe organisations. All are potentially oppressive measures that interfere with fundamental rights.

16. Part II, section (e) of the PLFCTA states that the extraordinary powers conferred by the Act are available where *"an offence contained in this Act is committed…".* There are three types of offences set out in Part III of the Act: i) the offence of terrorism; ii) terrorism related offences; and iii) associated offences.

17. The offence of terrorism is defined as follows:

> *"A person commits the offence of terrorism if that person, by any means, unlawfully and intentionally causes:*
>
> *(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 properly places facilities or systems referred to in paragraph (b) of this section 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 wrongly compel a Government or an international organization to do or to abstain from doing any act, or to cause harm to the territorial integrity of Sri Lanka or any other sovereign state"*

18. That definition is closely aligned with the definition contained in the Draft Comprehensive Convention on International Terrorism. So far as international norms are concerned, it is a reasonable definition to adopt in the proposed CTA.

19. By contrast, the definition of 'terrorism-related offences' is unreasonably wide. It is defined as:

"Committing any of the following offences with the intention to or object of, or having the knowledge or reasonable grounds to believe that it would have the effect of adversely affecting the territorial integrity, sovereignty of Sri Lanka, or the national security or defense of Sri Lanka, or the security of the people of Sri Lanka"

20. The definition is then followed by a series of specified offences including, inter alia:

"(vi) committing criminal intimidation of any person.

(xii) committing mischief to the property of the state.

(xiv) committing any harm, damage or destruction in any manner whatsoever of any state owned, controlled or regulated critical automated system, digital database or processes.

(xv) Committing harm damage or destruction of state owned controlled or regulated critical infrastructure or logistical network associated with any service (cf. main definition of Terrorism).

(xvi) without lawful authority, importing exporting, manufacturing, collecting, obtaining, supplying, trafficking, possessing or using firearms, offensive weapons, ammunition, explosive or combustible or corrosive substances or any biological, chemical, electric or electronic or nuclear weapon.

(xvii) with the intention of causing harm to the territorial integrity or sovereignty of SL or the peaceful coexistence of the people of Sri Lanka by words either spoken or intended to be read or by signs or by visible representations or otherwise, causes or intends to cause, the commission of acts of violence between different communities or racial or religious groups.

(xviii) by words either spoken or intended to be read or by signs or by visible representations or otherwise, causes or intends to cause the commission of terrorism or any other offence contained in this act or otherwise incites the committing of physical attacks or threatens the territorial integrity, security or sovereignty of Sri Lanka."

21. The list continues (at xxvii to xxxiii) to include committing the offence of human trafficking, or an offence under the Computer Crimes Act, Payment Systems and Devices Act, Exchange Control Act, Poisons Opium and Dangerous Drugs Ordinance, and Immigrants and Emigrants Act.

22. The effect of this definition is to confer extraordinary terrorism powers on the executive in relation to conduct that falls outside the definition of terrorism as understood by international norms. Notably, in the PLFCTA the intent of the conduct for a 'terrorism-related offence' is not aligned with the intent of the conduct for 'the offence of terrorism'; note *"adversely affect the territorial integrity, sovereignty of Sri Lanka or the national security or defence of Sri Lanka, or the security of the people of Sri Lanka"* (terrorism-related offence) as compared to "*intimidate a population or to wrongfully compel a government or an international organization to do or abstain from doing any act, or to cause harm to the territorial integrity of Sri Lanka or any*

other sovereign state" (the offence of terrorism). There is no apparent justification for the difference.

23. Conduct that adversely affects national security or defence interests, or conduct that affects the security of the people of a country may well amount to a criminal act, but it does not necessarily amount to terrorism. For example:

    a. (xii) and (xiv) of the definition of terrorism related offences cited above confer on the executive all the powers of the Act to deal with a person who interferes with the property or critical automated system, digital database or processes of the state in <u>any</u> way (cf. "serious damage" in the definition of the offence of terrorism) if he had reasonable grounds to believe that it would have the effect of adversely affecting the national security or defence of Sri Lanka (cf. with the purpose of intimidating a population or wrongly compelling the Government to do or to abstain from doing any act, or to cause harm to the territorial integrity of Sri Lanka).

    b. Similarly, (xvi) above confers on the executive all the powers of the Act to deal with a person in possession of a firearm, without lawful authority, where the person had reasonable grounds to believe that such possession would have the effect of adversely affecting the security of the people of Sri Lanka.

    c. Similarly, (xvii) and (xviii) above confer on the executive all the powers of the Act to deal with a person who has committed hate speech that he reasonably knows might adversely affect the security of the people of Sri Lanka (as hate speech is very likely to do).

24. As these examples show (and they are only examples; others could be given), the broad definition of 'terrorism-related offences' gives rise to a real risk of abuse of power. Given that the PLFCTA defines the offence of terrorism as including related offences of aiding, abetting, inciting, conspiring and attempting, it is not clear to us that a list of 'terrorism-related offences' is necessary in the PLFCTA at all. But if the Government of Sri Lanka considers that such a list is required, the definition should align far more closely with an internationally accepted definition of terrorism.

(3) Pre-charge detention

Administrative detention

25. The PLFCTA confers powers to subject suspects to administrative detention, by way of Detention Orders ('DOs'), for a period of up to 4 months without charge. That is, on any assessment, problematic from a human rights perspective. We note that the UN CAT recommended that the government of Sri Lanka abolish the scheme of administrative detention. The PLFCTA fails to do that. Further exacerbating that problem are the following matters:

    a. First, the PLFCTA fails to set a satisfactory threshold to be met before a DO can be made. The only tests to be met are (Part IV (xxx)):
        (i) that the Deputy Inspector General of Police is satisfied that there are reasonable grounds to believe that the suspect has committed or has been concerned in the committing of an offence contained in the Act. That is the same test to be met for arrest, so will be met in the vast majority of cases.
        (ii) the DO is made for the purpose of (a) obtaining investigative material and potential evidence relating to the committing of an offence; or (b) questioning the suspect while in detention; or (c) preserving evidence pertaining to the committing of an offence contained in the Act. There is no requirement that the suspect's detention in administrative detention, rather than in remand custody, is <u>necessary</u> for those purposes. In the vast majority of cases, the steps set out in (a) – (c) above will be possible if a suspect is remanded in custody, but the absence of any test of <u>necessity</u> gives rise to the risk that DOs will be made by default and administrative detention will be the norm, rather than exception, for those suspected of terrorist offences.[13]

    b. Secondly, oversight of administrative detention is muddled and inadequate:
        (i) There is no immediate judicial oversight of administrative detention.
        (ii) Administrative review by a Board of Review is possible within two weeks of administrative detention (see Part IV (xli)) but there is no statutory test to be applied by the Board of Review in determining whether to maintain detention, giving rise to a real risk of arbitrary decision making.

[13]See also Part IV (xlii) which suggests that transfer out of remand custody and into administrative detention will be the default when someone in remand custody is subsequently suspected of having been involved in terrorism offences.

(iii) A review of detention by magistrates is only possible after 8 weeks (Part IV (xxxvi)). At that stage, the suspect is not entitled to know the case against him and the hearing is held in camera. Moreover, the PLFCTA does not prescribe a statutory test to be applied by a magistrate in deciding whether to maintain a DO after 8 weeks, thereby perpetuating the risk of arbitrary decision making.

(iv) There is a general right to judicial review of a DO, in accordance with the law (xlii). However, once again, there is no statutory test of necessity to be applied by the reviewing court to determine whether the DO is lawful or should continue.

26. For those reasons, the provisions relating to administrative detention fail to meet international human rights standards and amount to a breach of, in particular, Article 9 ICCPR.

Remand custody

27. The PLFCTA permits suspects to be held for up to two years in remand custody prior to any charge being laid. There is only one point of judicial oversight after 12 months of pre-charge detention (Part IV (xxviii)). Two years in detention prior to the laying of a charge is an unjustifiably long period and, in the circumstances, a single point of judicial oversight of the detention is inadequate.

28. Moreover, on first being produced before a magistrate after arrest, the PLFCTA does not permit the magistrate to grant bail to a suspect if the officer-in-charge of the relevant police station makes an application for the remand of the suspect. The only power to grant bail arises if the officer in charge requests bail: see Part IV (xxiii). That may be a drafting error[14] but it amounts to a fundamental restriction of the protections offered by a magistrate on first production. If the magistrate is required to remand a suspect if an application is made for remand, then – de facto – the PLFCTA permits the executive to detain suspects in remand for 12 months with no effective judicial oversight and no effective review of whether there is reasonable cause.

[14] However, it is consistent with footnote 2 on p.18 of the PLFCTA which confers no discretion on the magistrate to grant bail: see number (3) *"shall direct… that the suspect be transferred to remand custody"*

29. For those reasons, and bearing in mind the recent comments of the UN CAT, the provisions relating to remand custody fail to meet international human rights standards. It amounts to a breach of, in particular, Article 9 ICCPR and may also give rise to an unacceptable risk of torture.

(4) Mitigating the risk of torture

30. In response to criticisms made by the UN CAT and the UN Special Rapporteur on torture in late 2016, improvements have been made to the draft of the PLFCTA in relation to mitigating the risk of torture to detainees. In that context, Part IV (xxiv) – (xxvi) of the PLFCTA contains a footnote with an alternative formulation. That alternative formulation is clearly preferable and responds more appropriately to the criticisms made the UN CAT and the Special Rapporteur. Further improvements should be made, including:
    a. When the suspect is first produced before a magistrate, providing the magistrate with the JMO report produced pursuant to Part IV (xii);
    b. Requiring the magistrate to inform the Human Rights Commission whenever he directs the Inspector General to conduct an investigation;
    c. Prescribing a time limit in Part IV (xl) prohibiting a police officer from taking a suspect out of remand custody for more than 6 hours and requiring the approval of the officer in charge of the relevant police station;
    d. Removing the current provision at Part IX (iv) permitting the admissibility of confessions to a police officer in relation to co-accused.

31. In addition, as the Human Rights Commission is given an important role in monitoring places of detention and the welfare of detainees, it is vital that the Human Rights Commission is properly resourced to carry out its task.

(5) Police powers

32. Part V and Parts VI (i), (ii) and (iii) contain a wide range of police powers that appear to overlap substantially with powers that already exist under the ordinary law but in many cases, avoid the need for judicial approval for the exercise of such powers. For example, the powers include the power without showing reasonable cause or the need for judicial approval:
    a. to compel a physical investigation of any person (Part V (vii)(8));
    b. to compel any person to give their fingerprints (Part V (vii)(9));
    c. to enter and search any premises or vehicle (Part V(x));

d. to take any vehicle into custody (Part V(xiii)); and
e. to require a bank, service provider, or government institution to provide personal information relating to any person (Part V(xviii), (xix), (xx)).

33. These are all oppressive measures for which powers, in many cases with appropriate safeguards, already exist under the ordinary law. Parts V and VI should be reviewed to determine which powers can already be exercised, with appropriate safeguards, under the ordinary law. Where extraordinary powers are required they should be subject to the test of necessity and, where appropriate, judicial oversight.

(6) Access to independent legal counsel

34. The PLFCTA states that a person arrested shall have the right of access to an Attorney-at-Law in the same way as provided in the Code of Criminal Procedure Act (CCP Act)/ Criminal Procedure Special Provisions Act. However, we are informed that a proposed amendment to the CCP Act provides that an attorney-at-law shall, if he so requests, be allowed to have access to the person in custody, *"unless such access is prejudicial to the investigation being conducted."* We understand that the proposed amendment further states that lawyers shall be entitled to have access to the police station in which the suspect is being held to meet the officer in charge but that right too is stipulated not to be *'allowed to affect the investigations that may be conducted.*' We note that these clauses have been subjected to detailed criticism within Sri Lanka as they effectively empower the OIC with unwarranted discretion in deciding if the fundamental right of a suspect's access to legal counsel should be afforded or not.[15] Consequently the PLFCTA's referencing of the CCP Act in this regard is problematic. Having regard to the recent recommendations of the UN Special Rapporteur on Torture, we consider that the PLFCTA should guarantee that a suspect has unlimited right of access to independent legal counsel.

[15] http://hrcsl.lk/english/wp-content/uploads/2017/03/IMG.pdf; http://www.sundaytimes.lk/170319/columns/yet-another-imaginative-proposal-to-privilege-the-police-233309.html

CONCLUSION

35. Whilst the amendments made to the 2016 Draft are to be welcomed, the current PLFCTA contains a number of features that are inconsistent with the international human rights standards to which the Government of Sri Lanka has committed. Accordingly, prior to the tabling of legislation in Parliament, further consultation should take place, in a transparent and public manner, and further amendments should be made to transform the PLFCTA into a human rights compliant framework for countering terrorism.

PROF CHRISTOF HEYNS

TOBY FISHER

FOUNDATION FOR HUMAN RIGHTS

INSTITUTE FOR INTERNATIONAL AND COMPARATIVE LAW IN AFRICA