



Sri Lanka Draft Counter Terrorism Act of 2018

Human Rights Watch Submission to Parliament

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Summary

The draft Counter Terrorism Act of 2018 (CTA)¹ represents a significant improvement over previous proposals to replace the Prevention of Terrorism Act (PTA),² although several problematic provisions remain. The bill narrows definitions of terrorism acts, strengthens protections against custodial torture and coerced confessions, reduces pre-charge and pre-trial detention periods, and increases access by suspects to legal counsel and family members.

Critically, the drafters resisted proposals to restore capital punishment, which had been removed from the PTA three decades ago. More broadly, the proposed expansion of powers of magistrates and the Human Rights Commission of Sri Lanka may serve as important checks on the abusive conduct by law enforcement that characterized arrests and detentions under the PTA.³

Nevertheless, the bill's list of terrorism acts should be narrowed further. Detention Orders – directives that place suspects in police custody – cannot be challenged for at least 14

¹ Proposed Counter Terrorism Act of 2018 (CTA), Bill No. 268, *Gazette of the Democratic Socialist Republic of Sri Lanka*, September 17, 2018, http://www.documents.gov.lk/files/bill/2018/10/532-2018_E.pdf.

² Prevention of Terrorism (Temporary Provision) Act, No. 48 of 1979, http://www.satp.org/satporgtp/countries/shrilanka/document/actsandordinance/prevention_of_terrorism.htm.

³ Human Rights Watch, *Locked Up Without Evidence: Abuses under Sri Lanka's Prevention of Terrorism Act*, January 2018, <https://www.hrw.org/report/2018/01/29/locked-without-evidence/abuses-under-sri-lankas-prevention-terrorism-act>, pp. 21-40.

days and may be extended to eight weeks total, an inordinate period absent exceptional circumstances. Suspects may be jailed for up to one year without charge in contravention of international human rights law prohibitions on detention without charge.

Sri Lankan media have reported that changes to the bill are being considered by Parliament with no opportunity for meaningful public scrutiny. Human Rights Watch is particularly concerned about efforts to restore provisions that flout international due process standards such as the admission of confessions to the police.⁴ We are also concerned by the bill's lack of a sunset clause and review mechanisms.

Definition of Terrorism

The draft CTA substantially reduces the list of acts considered to be terrorist offenses. In contrast to a previously circulated proposal, the draft law no longer criminalizes “words either spoken or intended to be read that threaten the unity of Sri Lanka,” an offense that would violate freedom of expression under article 19 of the International Covenant on Civil and Political Rights (ICCPR).⁵

However, Part I of the proposed CTA still includes several overbroad definitions of terrorism offenses, such as “intimidating a population” (sections 3(a) and 6). Intimidation does not per se rise to the level of an act that would reasonably be considered terrorism. Human Rights Watch recommends that this phrase be removed.

The CTA also criminalizes as terrorism the act of “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” (section 3(b)). The word “wrongfully” is dangerously vague and could capture legitimate protests against government policies.

The CTA further criminalizes dissemination of material with the intent to incite terrorism, “notwithstanding that such conduct does not expressly advocate such offence” (section 6

⁴ “Counter-Terrorism Bill: Major break from draconian PTA,” *Sunday Observer*, September 16, 2018, <http://www.sundayobserver.lk/2018/09/16/news-features/counter-terrorism-bill-major-break-draconian-pta>.

⁵ International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

(g)). This language creates the potential for an overbroad interpretation of incitement, which should be criminalized under the CTA only when it is a direct call to terrorist action. International law provides that freedom of expression extends not only to information or ideas that are favorably received, but also to those that are “deeply offensive.”⁶

To be terrorist under the draft law definitions, the abovementioned acts must be coupled with one of several separately listed offenses. Of great concern is the inclusion in these separate lists of “theft, in respect of State or private property” (section 3(2)(e)) and of “theft or mischief or other damage to property of the State... associated with any essential service” (section 7 (c)).

Under these provisions, a protester who carries out an act of mischief such as spray-painting graffiti or placing billboards on the wall of a public hospital or other government building that provides an essential service could be charged with terrorism. Similarly, a protester could be charged with terrorism for stealing a blanket while protesting against austerity measures imposed by the International Monetary Fund or the World Bank—a criminal act, but hardly one intended to create a state of mass panic and cause death or serious physical harm for ideological, political or political ends.

Another concern is the offense of “interference with any automated or electronic or computerized system” (section 3(2)(g)). Coupled with the aim of “wrongfully compelling a government to act,” this provision could result in a whistleblower being charged with terrorism for exposing a government abuse.

Commendably, the draft CTA contains certain exemptions for “good faith” acts. Section 10(l), for example, exempts the publication of material “in good faith with due diligence for the benefit of the public or in national interest.” However, “good faith” clauses are not a substitution for more narrower and clearer definitions of terrorist acts.

Arrests

Part II of the draft CTA improves protections during arrests and police custody. Significantly, the police must present a detained suspect to a magistrate within 48 hours

⁶ ICCPR, art. 19; UN Human Rights Committee, General Comment No. 34: Article 19 (Freedom of Opinion and Expression), CCPR/C/GC/34, July 29, 2011, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>, para. 11.

(section 21), reduced from 72 hours under the PTA. That two-day maximum period complies with article 9 of the ICCPR, which requires that anyone arrested on a criminal charge be brought before a judge “promptly.”⁷ The draft law directs the police to take “every possible measure” to ensure that the arrest of a female suspect is carried out by or in the presence of a female arresting officer, and requires any searches of women and girls to be carried out by a female arresting officer (sections 22-23). A family member must be notified within 24 hours of a suspect’s arrest (section 25), as well as where the suspect is being detained and the name of the arresting officer.

In contrast to the PTA, which limited arrest powers to the police, members of the armed forces or the Coast Guard may also make such arrests. Outside of an armed conflict situation, armed forces personnel typically do not have law enforcement training. Permitting them to carry out arrests facilitates arbitrary arrests and mistreatment in custody, which undermine counterterrorism efforts.

Police Detention

The draft CTA limits Detention Orders by reducing the period that suspects can be held in police custody to eight weeks total: four periods of 14 days, with extensions beyond the first 14-day period requiring a magistrate’s approval (section 31). A magistrate may reject any requested extensions and instead send a suspect to judicial custody after the initial 14-day period. That provision would significantly reduce the excessive police detention periods under the PTA, which authorized three months of detention, renewable five times for a total of 18 months. Risk of torture in Sri Lanka is highest during the initial period of arrest and police custody.⁸

To reduce the possibility of ill-treatment in detention, the draft CTA also requires a magistrate to interview a suspect in private, without the arresting police present, during police detention (section 28). The magistrate also has unrestricted access to the suspect, without providing advance notice, during the police detention period (section 32).

⁷ The UN Human Rights Committee, the international expert body that interprets the ICCPR, considers “promptly” to mean within 48 hours absent “absolutely exceptional” circumstances. See Human Rights Committee, General Comment No. 35, CCPR/C/GC/35, December 14, 2014, https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/GC/35&Lang=en, para. 33.

⁸ UN Human Rights Council, Report of the Special Rapporteur on Torture and Other Inhuman, Cruel or Degrading Treatment or Punishment on His Trip to Sri Lanka, A/HRC/34/54/Add.2, December 22, 2016, http://ap.ohchr.org/documents/page_e.aspx?si=A/HRC/34/54/Add.2, paras. 24-27, 31.

However, Human Rights Watch remains concerned that the initial 14-day police detention period cannot be overturned by a magistrate. Furthermore, appeals of Detention Order extensions can take up to three weeks (section 38).

Pre-Charge Judicial Detention and Bail

Part III of the draft CTA significantly shortens pre-charge judicial custody to six months with a second, six-month extension upon an application by the attorney general approved by a High Court judge (section 30). Magistrates must grant bail after six months or, in the case of an extension, 12 months, if no indictments are filed by that time, unless they believe that defense counsel is unduly prolonging the proceedings. Under the PTA, suspects were routinely held for several years without charge or trial, and the attorney general had a right of veto over the granting of bail.⁹

While an improvement over past practice under the PTA, holding a suspect without formal charge for 12 months is excessive and contrary to article 9 of the ICCPR.¹⁰ In another concern, bail can only be granted during the 6-to-12-month pre-charge period of judicial detention as an exceptional measure, on the order of a High Court judge (section 29). The ICCPR provides that a suspect “shall be entitled to trial within a reasonable time or to release.” It directs that detaining suspects awaiting trial “shall not be the general rule,” although release may be subject to guarantees to appear for trial or other stages of judicial proceedings.¹¹

Torture

The draft CTA contains strong provisions to protect against torture, which the United Nations and nongovernmental organizations, including Human Rights Watch, have found to be widely practiced against PTA detainees, particularly during police detention.¹²

⁹ See UN Human Rights Council, Report of the Working Group on Arbitrary Detention on its visit to Sri Lanka, A/HRC/39/45/Add.2, July 23, 2018, <http://undocs.org/A/HRC/39/45/Add.2>, paras. 21-22, 35-36; Human Rights Watch, *Locked Up Without Evidence*, p. 43.

¹⁰ ICCPR, art. 9(b).

¹¹ ICCPR, art. 9(c).

¹² See Human Rights Watch, *Locked Up Without Evidence*, pp. 2-4, 22-42; see also UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, Mission to Sri Lanka, A/HRC/40/XX/Add.3, July 23, 2018, https://www.ohchr.org/Documents/Countries/LK/Sri_LankaReportJuly2018.PDF, paras. 8, 17-20, 24-27; Report of the Special Rapporteur on Torture and Other Inhuman, Cruel or Degrading Treatment or Punishment on His Trip to Sri Lanka, A/HRC/34/54/Add.2, December 22, 2016, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC

As previously noted, Section II provides that magistrates must interview a suspect in private when he or she is first brought to court. If magistrates suspect torture, they may order a forensic examination and medical treatment and may bar the police officer overseeing custody from further access to the suspect (section 28). A magistrate is required to order an investigation if the medical examination concludes torture was probable. However, if torture is suspected, the magistrate should be required to order a forensic examination, and to separate possible torturers and their colleagues from the suspect as a protective measure.

The draft law requires magistrates to make unannounced visits to places of detention to check on and interview suspects. Magistrates who see evidence of torture must order a forensic examination. Should those examinations show torture, they must also order criminal proceedings against the alleged torturers (section 32).

To be admissible as evidence, confessions must be made to a magistrate. This is a significant improvement from the PTA, which allowed the use of police confessions despite widespread evidence that they were obtained through torture and other ill-treatment. Furthermore, immediately prior or after making a confession, the suspect must be examined by a forensic expert and a forensic report produced. Under the CTA, the burden of proving the confession was voluntary lies with the prosecuting authority (section 8o).

Rights to Counsel

The draft CTA provides terrorism suspects with access to legal counsel while in police custody (Part II, section 44), including prior to any interview by the police (Part III, section 54). It also requires that police interviews are held and recorded in a language that the suspects understand (section 54). UN reports have long expressed concern over the lack of access to legal counsel under the PTA.¹³

/34/54/Add.2, paras. 24-27, 31; and Report of the Working Group on Arbitrary Detention on its visit to Sri Lanka, A/HRC/39/45/Add.2, July 23, 2018, para. 25.

¹³ See, for example, UN Human Rights Council, Report of the Working Group on Arbitrary Detention on its visit to Sri Lanka, A/HRC/39/45/Add.2, July 23, 2018, paras. 32-33.

For the most part, these draft provisions adhere to fundamental rights under the ICCPR.¹⁴ However, the proposed law does not clarify whether a suspect’s lawyer may be present during questioning. Moreover, a member of the armed forces or the Coast Guard may hold a suspect for a full day before handing over the detainee to the police, effectively delaying access to a lawyer for up to 24 hours (sections 17-18). Parliament should ensure that suspects have access to a lawyer during police questioning as well as during any detention or questioning by the military or Coast Guard.

Penalties

In keeping with Sri Lanka’s de facto moratorium on the death penalty, an inherently cruel form of punishment, Part I of the draft CTA sets life imprisonment as the maximum penalty for a terrorism-related offense. The Cabinet of Ministers rejected calls for restoring capital punishment for the worst terrorism offenses, including those resulting in death. Of concern, however, are the CTA’s overbroad definitions of terrorism, which create the potential for prison sentences of up to 15 years for people who have committed less serious crimes that do not constitute terrorism (sections 11-12).

Human Rights Commission

Sections II and III of the draft CTA substantially strengthen the powers of the Human Rights Commission of Sri Lanka to protect terrorism suspects from human rights violations. Among other measures, the commission must be notified within 24 hours of a suspect’s detention and be granted “prompt” access to the detainee (section 25). The authorities must also maintain a database for terrorism-related cases, including details on ill-treatment, and provide the commission with access to the data (section 26).

Significantly, a Human Rights Commission representative may interview detainees and inspect their case files with no advance notice (section 34). The commission must be notified of detainees’ transfers and release (sections 42-43). The commission, as well as the magistrate, have authority to register a complaint about conditions of police or prison detention (section 48), and the inspector general of police or superintendent of prisons is required to take all feasible steps to ensure humane treatment.

¹⁴ ICCPR article 14(3) provides that suspects are entitled to legal counsel and that they must be informed of the charges against them in a language that they understand.

Police Investigative Powers

Section IV of the draft CTA significantly expands judicial control over police investigative powers. It requires the police to obtain a judicial order to access information in a suspect's bank accounts and other financial institutions (section 63), to obtain data from service providers (section 64), to freeze a suspect's assets or bar them from travel (section 66), or to monitor, record or intercept phone, mail and electronic communications (section 67). As with other expansions of magistrates' powers, such reforms will depend on the independence and impartiality of the Sri Lankan judiciary.

Ministerial Orders

Part IX of the proposed CTA opens the door to arbitrary closures of civil society groups by allowing the Sri Lankan minister of law and order to ban an organization for one year, with indefinite extensions, on "reasonable suspicion" of committing an offense in the draft law or of "acting in a manner prejudicial to the national security of Sri Lanka" (section 81). Although the measure includes the right of appeal, neither the initial proscription nor the renewal requires judicial review.

In an improvement from the PTA, the draft law substantially limits the minister's virtually unfettered powers to issue Restriction Orders – limitations on the movements of suspects not placed under formal arrest (section 82). It provides that a minister can only request a Restriction Order upon the recommendation of the inspector general of police, and that the High Court approve the request. It also allows suspects to appeal the orders, specifies that the restrictions must be necessary and proportionate, and limits the period of restrictions to 6 months total with monthly reviews, compared to 18 months under the PTA. However, the limitations that the draft CTA allows can be severe, such as bans on domestic and foreign travel as well as communication or association with specified individuals. Given the overly broad grounds for placing a person under a Restriction Order, the potential remains for disproportionate curtailment of the rights to freedom of movement and association.

Recommendations

Human Rights Watch urges the Sri Lankan Parliament to promptly repeal the PTA. If replacing the PTA with the CTA, the Parliament should finalize the draft CTA in a transparent and participatory process that brings the law into full compliance with international human rights standards.

Specifically, Parliament should include the following reforms in the CTA:

- **Definitions:** Narrow the definition of terrorism offenses to exclude acts such as “mischief,” “intimidating a population,” and dissemination of material without a clear element of intent to kill or cause serious physical harm for ideological, religious, or political purposes.
- **Arrests:** Restrict warrantless arrests, including by the Coast Guard and military, to urgent situations such as averting an imminent threat.
- **Detention Orders:** Require judicial review for initial Detention Orders, not just for extensions of the initial order.
- **Bail:** Authorize pre-trial bail as general practice, absent clear evidence of potential harm from granting a suspect conditional release.
- **Torture:** Require magistrates to order a forensic examination, and to separate the potential torturer from the suspect, in all cases in which they suspect torture.
- **Legal Counsel:** Clarify that a suspect’s lawyer may be present during as well as prior to questioning, and that all efforts should be made to provide access to counsel within 24 hours even in cases in which the military or Coast Guard make the arrest.
- **Penalties:** Reject attempts to restore the death penalty for terrorism offenses.
- **Human Rights Commission:** Ensure that the Human Rights Commission has adequate resources to apply its expanded powers under the CTA, and that it can act without political interference.
- **Ministerial Orders:** Narrow and clarify the legal basis for banning an organization. Require judicial adjudication with a right to appeal of all government orders to proscribe organizations.
- **Sunset Clause:** Provide that the CTA will automatically lapse after two years. Condition renewal on an independent review of the law’s impact on human rights.
- **PTA accountability:** Call on the Attorney General to review all PTA cases, and appropriately prosecute law enforcement and other government officials implicated in the torture and other ill-treatment of suspects under the PTA.