

Human rights and counter-terrorism: UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to Sri Lanka

Preliminary findings of the visit to Sri Lanka

Colombo (14 July 2017). The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr. Ben Emmerson, visited Sri Lanka from 10 July to 14 July 2017. He thanks the Government of Sri Lanka for having extended an invitation to visit the country. The purpose of the visit was to assess the progress Sri Lanka has achieved in its law, policies and practice in the fight against terrorism since the end of its internal armed conflict, as measured against international human rights law, particularly since progress in these areas is key to its efforts in ensuring reconciliation, accountability and lasting peace in the country.

The Special Rapporteur commends the transparency and the largely courteous, constructive and co-operative way in which the Government initiated and facilitated this official visit, which allowed a frank and open dialogue. The Special Rapporteur is particularly grateful to the heads of all governmental institutions that he met and to the United Nations Country Team and its Resident Coordinator for the support extended during the visit. He had the opportunity for a constructive and informative exchange of views with the Prime Minister, the Secretary to the President, the Secretary to the Ministry of Defence, the Minister of Foreign Affairs, the Minister of Law and Order and Southern Development, the Minister of Prison Reforms, Rehabilitation, Resettlement and Hindu Religious Affairs. He also met, amongst others, the Armed Forces Chief of Staff, the Commanders of the Navy, of the Army and of the Air Force, or their representatives, the Chief of National Intelligence, the Chairman of the National Police Commission, the Inspector General of Police, the Chief of the Special Task Force Division, the Chief of the Criminal Investigation Department, the Chief of the Terrorist Investigation Division and the Commissioner General of Rehabilitation. He also met the Minister of Justice.

The Special Rapporteur and his team had discussions with the Attorney General, the Chief Justice, and High Court judges in Colombo, Anuradhapura and Vavuniya. He visited New Magazine Prison in Colombo and the prison in Anuradhapura, and was given an opportunity to meet privately with detainees accused under the Prevention of Terrorism Act, as well as to observe the impoverished conditions in which some of them were detained. He also met with their lawyers and with their families, as well as with other individuals affected by the operation of counter-terrorism legislation and policies in Sri Lanka. Finally, he met with the Chair and one of the Commissioners of the National Human Rights Commission, as well as representatives of civil society.

The Special Rapporteur is fully cognisant of Sri Lanka's long and complex history of ethnic tensions, and the tremendous security challenges this has generated. For almost 26 years, Sri Lanka dealt with violent acts of terrorism committed by the Liberation Tigers of Tamils Eelam (LTTE), including suicide bombings and political assassinations, which culminated in a prolonged armed conflict that came to an end only in 2009.

In 2015, Sri Lanka transitioned to a coalition government, which brought hope of reform, inclusiveness, justice and respect for human rights to all of the people of Sri Lanka. This momentum led to the establishment of a framework for promoting reconciliation, accountability and human rights in Sri Lanka, adopted by the UN Human Rights Council in Resolution 30/1, which was co-sponsored by the Government of Sri Lanka. This Resolution represents and reflects the commitment of the Government to taking a series of specific steps aimed confronting the past, ending the culture impunity for crimes committed by public officials, ensuring accountability, peace and justice, achieving durable reconciliation, and preventing the recurrence of the human rights violations committed by both sides to the conflict in the past.

Yet, two years on, and already four months into a two-year extension granted to the Government by the Human Rights Council, progress in achieving the key goals set out in the Resolution is not only slow, but seems to have ground to a virtual halt. None of the measures so far adopted to fulfil Sri Lanka's transitional justice commitments are adequate to ensure real progress, and there is little evidence that perpetrators of war crimes committed by members of the Sri Lankan armed forces are being brought to justice.

The Special Rapporteur was given a personal assurance by the Prime Minister that once the current process of counter-terrorism reform had been completed, the Government would pass legislation paving the way for a Truth and Reconciliation Commission to be established, and set up an Office of the Special Prosecutor to bring criminal charges against those involved in the most serious atrocities committed on both sides of the conflict. These are, of course, steps which the Government promised to the international community that it would have delivered in full by now.

It is fair to say that there are some very slight indications of positive movement in this direction. During the Special Rapporteur's visit, the Chief of the Army, Mahesh Senanayake, made a public commitment to ensuring that members of the armed forces who had committed crimes would be brought to justice; a senior Naval Commander was arrested for his alleged involvement in the disappearance of 11 people during the closing stages of the conflict, and the Special Rapporteur was assured by the Attorney General that if and when criminal allegations against the military finally reach his office, they will be prosecuted with the full force of the law. The Attorney General recognised that if Sri Lanka was to achieve lasting peace, then its law enforcement institutions must gain the confidence of all sectors of society, including the Tamil and Muslim minorities.

But these indications fall far short of Sri Lanka's international commitment to achieve a lasting and just solution to its underlying problems, for the benefit of all of its communities, to establish a meaningful system of transitional justice that is governed by the principles of equality and accountability, and to put in place essential and urgently needed reform of the security sector.

Whilst an initial programme of amnesties was put in place, with individuals allegedly involved with LTTE being diverted to a substantial rehabilitation scheme, many have been put through the operation of the deeply flawed Prevention of Terrorism Act or PTA

as it is known. This legislation was temporarily enacted as an emergency measure in 1979. It was then made permanent in 1982, and remains on the statute book today. Through exceptional provisions that admit the use of uncorroborated confessions made to police officers as the sole basis for convictions, it has fostered the endemic and systematic use of torture. Entire communities have been stigmatised and targeted for harassment and arbitrary arrest and detention, and any person suspected of association, however indirect, with the LTTE remains at immediate risk of detention and torture.

The Special Rapporteur is encouraged by the Government's recent adoption of a 'zero tolerance policy' towards the use of torture; and by the appointment in July 2016 of a Committee to Eradicate Torture by the Police. In Sri Lanka, however, such practices are very deeply ingrained in the security sector and all of the evidence points to the conclusion that the use of torture has been, and remains today, endemic and routine, for those arrested and detained on national security grounds. Since the authorities use this legislation disproportionately against members of the Tamil community, it is this community that has borne the brunt of the State's well-oiled torture apparatus.

In this context, the Special Rapporteur was extremely concerned to learn that 80 per cent of those most recently arrested under the PTA in late 2016 complained of torture and physical ill-treatment following their arrest, in cases which were later dealt with under ordinary criminal law. The Human Rights Commission emphasised that torture in custody formed a major priority in its work, and remains a pressing human rights concern. The most senior judge responsible for PTA cases in Colombo informed the Special Rapporteur that in over 90 per cent of the cases he had dealt with so far in 2017, he had been forced to exclude the essential confession evidence because it had not been given voluntarily – that is that it had been obtained through the use or threat of force.

During his interviews with current and former PTA detainees, the Special Rapporteur himself heard distressing stories of extremely brutal methods of torture, including beatings with sticks, the use of stress positions, asphyxiation using plastic bags drenched in kerosene, the pulling out of fingernails, the insertion of needles beneath the fingernails, the use of various forms of water torture, the suspension of individuals for several hours by their thumbs, and the mutilation of genitals. In a number of instances brought to the attention of the Special Rapporteur, these allegations had either been supported by independent medical evidence, or accepted by the judiciary as the basis for excluding a confession at trial.

Despite the shocking prevalence of the practice of torture in Sri Lanka, the Special Rapporteur notes the lack of effective investigations into such allegations. In response to a request for the most recent official statistics, he was informed that only 71 police officers had been proceeded against for torturing suspects since available records began. He notes that the Human Rights Commission is now routinely informed when an individual is detained under the PTA and has unfettered access to all places of detention. However, in a system that is premised on obtaining convictions by confessions, this, and other safeguards, have proved entirely insufficient to protect suspects against this most cowardly of international crimes.

The significance of the systemic use of torture to obtain confessions needs to be seen against the deplorable delays that are built into the framework for the handling of cases under the PTA. Through a combination of extended executive detention, and grossly protracted criminal proceedings, suspects arrested under the PTA have commonly been held in detention, in conditions that amount to inhuman and degrading treatment, for many years without ever having been found guilty of anything, and without any effective judicial review of their detention.

Under the system still currently in operation in Sri Lanka, the Attorney General, who is the chief prosecutor, has the right of veto over any application for bail. He has almost inevitably refused to grant consent in the past in PTA cases, although that practice has very recently begun to change. The result has been that the hands of the judiciary have been tied by the executive in a manner that is wholly incompatible with the rule of law, or basic precepts of democratic justice.

The Special Rapporteur met a significant cross section of individuals detained under the PTA whose length of detention ran into double figures. On requesting official figures for those currently charged with offences under the PTA, he was given statistics from which it is apparent that out of 81 prisoners currently in the judicial phase of their pre-trial detention, 70 had been in detention without trial for over five years and 12 had been in detention without trial for over 10 years. These staggering figures are a stain on Sri Lanka's international reputation. Steps should be taken to release these individuals on bail immediately, or bring them to trial within weeks or months, not years or decades. This entire PTA system, as it has operated until now, and continues to operate in those current cases to which it applies, amounts to a flagrant denial of justice.

The Special Rapporteur calls for the Government of Sri Lanka immediately to provide for effective judicial review of the legality of the detention of those still behind bars, and to submit individuals charged under the PTA to a fair trial with all guarantees of due process. He also calls on the Government to establish an effective mechanism for investigating all allegations of torture by the police, and for reviewing the safety of all past PTA convictions in which evidence of a confession to the police was central to the prosecution case.

What then is the response of the Government and its officials? The Attorney General informed the Special Rapporteur that in an effort to reduce this industrial scale injustice his office has spent two years reviewing the cases of all those in PTA detention, and making executive decisions to consent to bail, to divert individuals into rehabilitation programmes, or to reduce or drop criminal charges where appropriate. This initiative, which was intended to, and has, reduced some of the backlog of inertia in the system, is obviously to be welcomed. However, it is no satisfactory answer to the fact that there are people still in custody after 12 years, on the basis of a dubious confession, who have not been brought to justice.

The Minister for Law and Order informed the Special Rapporteur that steps were underway to avoid any new arrests under the PTA, and to use the regular criminal law wherever possible. That too, is to be welcomed, not least because under the general criminal law confessions made to a police officer are inadmissible, precisely because of

the endemic risk that they may have been obtained by torture. The Special Rapporteur is satisfied that there has been a steep decline in the use of the PTA over recent months, but has nonetheless been made aware of recent cases in the Northern Province, in which individuals have been reportedly arrested under the legislation. The PTA itself remains fully on the statute book, pending the current review of counter-terrorism legislation and proposals for reform. Moreover, steps to reduce the use of the PTA in new cases provide no remedy to those currently languishing in appalling conditions, for years on end without trial.

As for the excruciatingly slow process of justice in the existing PTA cases, a number of State interlocutors tried to suggest that this was primarily due to slow progress by the defence. This entirely unconvincing, and inadequate, explanation was exploded for the obvious myth that it is by a senior official in the Office of the Attorney General, who acknowledged that the present court and prosecution resources were under such strain that the situation that has become, in his words, “unmanageable”. The Special Rapporteur notes that while two Special High Courts have been set up to deal exclusively with PTA cases, these appear to be under-resourced and under-staffed, given that there are still, according to the most recent figures obtained, 108 individuals held under the PTA both pre- and post- indictment.

Through Human Rights Council resolution 30/1, adopted in 2015, the Government of Sri Lanka committed to repeal the PTA and to replace it with anti-terrorism legislation in accordance with contemporary international best practices. The Policy and legal framework of the proposed Counter-Terrorism Act of Sri Lanka, which has been approved by the Cabinet of Ministers, was shared with the Special Rapporteur prior to the commencement of his mission.

Many of those who spoke to the Special Rapporteur expressed dismay at the lack of ministerial, parliamentary or public consultation over the proposals. Indeed, even the Human Rights Commission has not been informed or consulted on the draft framework. Nonetheless, the present draft makes some significant improvements. Notably, it allows the Human Rights Commission unfettered access to individuals in detention and it abolishes the Attorney-General’s right of veto over the grant of bail. It creates an improved framework for administrative and pre-trial detention, with greater scope for independent judicial review.

However, there are a number of central flaws in the current framework draft which, if enacted, would guarantee the continued violation of the human rights of terrorism suspects. Foremost amongst these is a provision preserving the admissibility of confessions made to a police officer in custody. In a country with such a grave and widespread problem of torture and ill-treatment in custody, the only means by which counter-terrorism legislation could conform to international human rights standards would be the prohibition altogether of the use of confessions made to the police. That is the position under the general law in Sri Lanka, for good reason, and it should certainly be the position under counter-terrorism legislation, where the risk of torture is at its greatest. There are problems too with the breadth of the definition of terrorism, which poses a real risk that the legislation could be used in circumstances very far removed from

acts of real terrorism, or against minorities or human rights defenders in a discriminatory and sectarian manner. There are also serious problems with a number of the provisions of the framework draft directed at the gathering of evidence.

There are also important respects in which the draft legislation is under-inclusive and fails to deal with modern terrorism phenomena such as the prevalence of Foreign Terrorist Fighters in this part of the world.

The progress of this legislation to date has been painfully slow, and this has, in turn, delayed the wider package of transitional justice measures that Sri Lanka committed to deliver two years ago. It is difficult to resist the conclusion that this inertia reflects the continuing influence of certain vested interests in the security sector, who are resistant to change, and above all, to accountability.

I am pleased to be able to announce today that the Government has undertaken to engage in a process of constructive dialogue with my mandate in an effort to improve the draft legislation before it is placed before Parliament. There is still time to get this legislation right, and for it to become the cornerstone of a new order in Sri Lanka. The Ministry of Foreign Affairs has undertaken to consult with my team in Geneva within the next two weeks. The aim of this dialogue is to identify the flaws in the current draft, and to seek solutions for putting them right.

To conclude, then, it is necessary to stand back and look at the picture as a whole. There have been many statements of good intention, but so far little in the way of effective action to bring about a lasting and just settlement to the conflict; one which commands the confidence of all sections of the community. It seems that some small steps are now, at last being taken, in that direction. My plea to the Government and the people of Sri Lanka is to let these be the right steps, and not to allow the process to be diverted by retrograde elements in the security establishment and their allies in Government.

When the two sides of the accountability equation are viewed side by side, the resulting picture is stark: The Government has thus far done almost nothing to hold to account those members of the armed forces and security services who committed gross human rights violations during and since the conflict. At the same time, it has, until now, continued to operate the cruel and unjust PTA system, a system that has overwhelmingly impacted on the Tamil minority. These are precisely the conditions likely to produce festering grievances, to foster unrest and even to reignite conflict.

As the United Nations High Commissioner said in his opening statement to the 35th session of the Human Rights Council,

Counter-terrorism must be prosecuted intelligently: that is, while preserving the human rights of all. Please remember this: for every citizen wrongfully detained under a vague anti-terrorism law, and humiliated, abused, or tortured, it is not simply one individual who then nurses a grievance against the authorities, but most of their family too. Send one innocent person to prison, and you may deliver

six or seven family members into the hands of those who oppose the government, with a few who may even go further than that. The cost of a wrongful detention dramatically outweighs whatever benefit it is perceived to accrue. To counter violent extremism, we must stand firm and insist on its opposite: peaceful inclusion.

ENDS

Mr. Ben Emmerson (United Kingdom) is the [Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism](#). On 1 August 2011, he took up his functions on the mandate that was created in 2005 by the former UN Commission on Human Rights, renewed by the UN Human Rights Council for a three-year period in December 2007, in September 2010 and again in March 2013.

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Check the [UN 2006 Global Counter-Terrorism Strategy](#)

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